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Family Law Applicable to Egyptian Christians After the 2014 Constitution

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المجلد ٢ ، العدد ٢ ، ٢٠٢١

قانون الأحوال الشخصية واجب التطبيق على المسيحيين المصريين بعد دستور ٢٠١٤

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نسق توثيق المقالة: أسامة أبو الحسن مجاهد ، قانون الأحوال الشخصية واجب التطبيق على المسيحيين المصريين بعد دستور ٢٠١٤ ، المجلة الدولية للفقہ والقضاء و التشريع ، المجلد ٢ ، العدد ٢ ، ٢٠٢١ ، صفحات (٥١١ - ٥٣٤)

Abstract

This article discusses the recent development regarding the family law applied to Egyptian Christians after the new 2014 constitution, which its article 3 stipulates that "the principles of Egyptian Christians and Jews laws are the main source of legislation regulating their family law..."..The research of this issue requires identifying the situation in Egyptian law before this text, especially since 1955, when Egyptian legislator repealed family law religious courts , but maintained the multiplicity of family laws according to religion. Then we discuss the situation after this new constitutional text through the discussion of the term "principles of Egyptian Christians and Jews laws " ,the idea of the principles or substance of Christian law and the possibility of direct application of this new text .Finally , we will explain impact of this new text on the multiplicity of family laws according to the multiplicity of religions.

Keywords: Applied family law, Christians, Egyptian Constitution.

الملخص

يناقش هذا البحث التطور الحديث بشأن قانون الأحوال الشخصية واجب التطبيق على المسيحيين المصريين بعد دستور 2014 الجديد ، الذي نصت مادته الثالثة على أن " مبادئ شرائع المصريين المسيحيين واليهود هي المصدر الرئيسي للتشريعات المنظمة لأحوالهم الشخصية، وشؤونهم الدينية ، واختيار قياداتهم الروحية". فقد استحدث هذا النص غير المسبوق للمرة الأولى سندا دستوريا صريحا لتعدد قوانين الأحوال الشخصية تبعا للدين، والذي كان مقررا من قبل، ولكن بنصوص صادرة من المشرع العادي وليس من المشرع الدستوري. ويقتضي البحث في هذا الموضوع التعرف على الوضع في القانون المصري قبل سن هذا النص الدستوري المستحدث ، وبصفة خاصة منذ عام 1955، عندما ألغى المشرع المصري تعدد جهات التقاضي وفقا للدين، ولكن مع الاحتفاظ بالتعدد التشريعي لقوانين الأحوال الشخصية تبعا للدين، وهو الوضع الذي استقر لسنوات طويلة، والذي حاولت المحكمة الدستورية العليا التضييق من عيوبه عندما أرست اتجاهها جديدا مضمونه أن الأصل هو المساواة بين المواطنين أمام القانون، وأن الاستثناء هو تعدد قوانين الأحوال الشخصية في الحالات المتعلقة بجوهر العقيدة المسيحية.

ثم ناقش الوضع بعد الدستور الجديد من خلال مناقشة مصطلح " مبادئ شرائع المصريين المسيحيين و اليهود " ، وفكرة مبادئ أو جوهر العقيدة المسيحية ، ومدى قابلية النص الجديد للتطبيق المباشر. وأخيرا سوف نوضح أثر هذا النص الجديد على تعدد قوانين الأحوال الشخصية تبعا لتعدد الأديان .

الكلمات المفتاحية: قانون الأسرة واجب التطبيق ، المسيحيين ، الدستور المصري.

1- Introduction

The general rule in the current era is that all residents of the state - patriots and foreigners - are subject to the law of this state and its courts, with some exceptions that do not currently represent any diminution of the state's sovereignty, as long as these exceptions depend on some considerations of logic and relevance and the requirements of cooperation between states, and as long as it is subject to the rule of reciprocity between states, such as foreigners family law and diplomatic immunity.⁽¹⁾

For Egyptians, the situation for them in family law was out of the ordinary in contemporary societies, where the legislative and judicial pluralism existed for them, in accordance with the various religious legislations (Islam, Christianity, Judaism) which are applied by different judicial authorities, (religious courts).⁽²⁾

Thus, each of these religious courts settles the dispute according to the law of each religion, and more than that, for Christians, for example, each of their sects had its own religious council that settle disputes according to the law of this sect and not other sects, and this situation was anomalous, as it involved an attack on the country's national sovereignty.⁽³⁾

In 1955, the Egyptian legislator repealed the numerous family law courts, but maintained the multiplicity of family laws according to religion.

The article 3 of the 2014 new Constitution stipulated that "the principles of Egyptian Christians and Jewslaws are the main source of legislation regulating their family law...".

The aim of this research is to discuss the impact of the new Article 3 of the 2014 constitution on the family law applied to Egyptian Christians, and on the idea of multiplicity family law according to the religion setted in Egyptian law for a long time

2. The situation before the 2014 Constitution

2.1. Unifying the Competent courts in family law

The Egyptian legislator repealed the numerous family law courts, by Law No. 461 of 1955, which its first article stipulated that: "State courts are competent all disputes in civil

⁽¹⁾For more details : Muhammad Labib Shanab, Introduction to the study of law, University course for students of the Faculty of Law, Helwan University 1995, p. 217 - Noman Jumaa : introduction to legal studies, Arab Renaissance House 1977 p. 231, Nazih Sadiq al-Mahdi - Introduction to the study of law- part one - theory of law Arab Renaissance House, 1992 p.187, Jalal Ibrahim - Introduction to Law Study - Theory of Law, Arab Renaissance House 1996, p. 433.

⁽²⁾Tawfiq Faraj - Provisions of Family law for Non-Muslims Egyptians - Third Edition, Monshaat Al-Maaref, 1969, p. 10.

⁽³⁾Hossam Al-Ahwany - The Principles of Egyptian Christians Family Law, University course for students of the Faculty of Law, Ain Shams University 1993, p. 8.

and commercial matters, Family law , ...and all crimes except what is excluded by a special provision.”

Law No. 462 of 1955 also stipulated in its first article that “ Religious courts are repealed from January 1, 1956 ...”, and its article 3 stipulated that: “ National courts are competent cases that were within the jurisdiction of religious courts .”

The issuance of laws 461 and 462 of 1955, the national courts achieved full authority over all disputes of family law between all Egyptians, Muslims and non-Muslims .

2.2. Despite the unification of Family law courts , legislative diversity continues

Despite the unification of the family law courts, however, Article 6 of Law 462 of 1955 stipulated that “judgments in family law ..., are issued in accordance Article 280 of the regulation of the Islamic law courts. As for family disputes of non-Muslim Egyptians, affiliated the same doctrine and the same religious sect, who had organized religious court at the time of this law’s issuance, judgments are issued - considering public order - according to their own law “ .

Article 280 of the regulation of the Islamic law courts stipulated that “Judgments are issued in accordance with this regulation, and Islamic family legislations, if not , in accordance with the most likely opinion in Abu Hanifa doctrine “ .

Then , Law No.1 of 2000 - regulating the procedures for litigation in family law disputes - repealed the laws of 1955, and the regulation of the Islamic law courts , but it also kept the previous situation. The third article of Law No.1 of 2000 stipulated that “Judgments are issued in accordance with Islamic family legislations, if not , in accordance with the most likely opinion in Abu Hanifa doctrine . However, family disputes of non-Muslim Egyptians, affiliated the same doctrine and the same religious sect, who had organized religious court until December 31, 1955, judgments are issued - considering public order - according to their own law “ .

Thus, in the absence of a unified legislative text applied to all Egyptians, Islamic law is applied to family law disputes for Egyptian Muslims. As for non-Muslims, their sectarian laws applied to them if the conditions mentioned in the aforementioned text are met. If a condition of them fails, Islamic law is applied to them. Thus, there are multiple family laws according to the multiplicity of beliefs in Egypt, the legal rule does not apply to citizens as only Egyptians, but as belonging to a particular religion, doctrine or sect, a situation which is widely criticized .⁽⁴⁾

⁽⁴⁾For more details : Jamil al-Sharqawi–Family law of Non-Muslims Arab Renaissance House, 1973, p. 15-16, Ahmad

2.3. Conditions for applying Christian Family law

Three conditions are required for the application of Christian Family law (Article 3/2 of Law No. 1 of 2000 , Article 6/2 of Law 462 of 1955 , previously) .

- 1- The spouses must belong to the same religion, doctrine , and sect.⁽⁵⁾
- 2- The sect must have an organized religious court at the time of Law 462 of 1955.
- 3- The applied rule should not violate the public order in Egypt .

If one of these conditions fails, Islamic law will be applied to Christians just like Muslims .

An important problem has arisen as a result of the application of these rules, which is the problem of changing the applicable law according to changing the religious belief. One of the spouses may change his belief after the marriage contract and consequently the applicable law . The spouses may be belonged to the same doctrine and sect at the time of marriage, which means the application of Christian law to them. Then one of them changes his belief and joins another sect, and consequently Islamic law will be applied to Christians just like Muslims .

However, the application of Islamic law to Christians may sometimes clash with a fundamental rule of the Christian religion, therefore the legislator stipulated a case in which Islamic law is not applied to Christian spouses despite the difference of doctrine or sect, which is: “ There is no divorce for Catholics “ .(Article 17/3 of Law No. 1 of 2000 , Article 99/7 of the regulation of the Islamic law courts, previously)

The Cassation Court also created two cases in which Islamic law cannot be applied to the Christian spouses even if they differed in doctrine or sect, First :Polygamy is not permitted for a Christian husband, Second: The necessity of religious form of Christians marriage contract .

2.4. The modern trend of the Supreme Constitutional Court : The basic principle is equality of citizens before law , The exception is the multiplicity of family law in cases that relate to the substance of the Christian belief

The matter remained so until the Supreme Constitutional Court issued its famous

Salama, Family law of Non-Muslim Patriots and Foreigners, Arab Thought House, Second Edition 1962, p. 13, Al-Ahwany, supra note 3 at 18 .

⁽⁵⁾Definitions : 1- Religion is the message that is revealed from heaven to earth as Islam, Christianity and Judaism. 2- Doctrine is a particular way of understanding the provisions of religion such as Catholic, Orthodox, and Protestant. 3- Sect is a group of people who are united by a certain relation such as gender, language, or customs, and who hold the same religion and Doctrine such as the Orthodox Copts, the Greek Orthodox, or the Maronite Catholics of Egypt.Al-Ahwany, *ibid.*, p. 70 .

judgment on 1/3/1997 . (Official Gazette No. 11 on 3/13/1997).⁽⁶⁾

In this judgment, the court ruled unconstitutional the article 139 of Family Regulation of the Orthodox Copts, because it specifies the age of mother custody of Coptic Orthodox children by seven . As long as the custody age does not relate to the substance of the Christian belief, and therefore it is not a case allowing the multiplicity of family law, as a result of respect for the principle of citizens equality before the law. Thus the Orthodox Copts became subject to the general rule regarding the age of custody to which Muslims are subject.⁽⁷⁾

The judgment also considered the 1938 family regulation of Orthodox Copts and the regulations of the other Christian sects , such as legislation that is subject to the supervision of the Supreme Constitutional Court as long as the legislator has referred to these regulations in matters of family law .

In its next judgments , the Supreme Constitutional Court has settled on this principle, which is that the Christian family rules are legal rules therefore subject to constitutional control as long as the legislator has referred to these rules, and that these rules are considered contrary to the constitution if they are not related the substance of the Christian belief .⁽⁸⁾

3. The situation after 2014 Constitution

For the first time, the 2012 constitution created a constitutional basis for legislative pluralism in Christians family law , Article 3 of it stipulated that “ the principles of Egyptian Christians and Jews laws are the main source of legislation regulating their family law , religious affairs, and the choice of their religious leaders”.

The Egyptian constitution, issued in 2012, was almost not applied in practice, and was replaced by the 2014 constitution. The text of Article Three remains unchanged.

Thus, Article 3 of the 2014 Constitution included explicit recognition in this regard, and then the legislative plurality in family law according to religion is no longer based only on ordinary legislative text, but rather on an explicit constitutional text.

This new text raises several issues., 1- Discussion of the term “principles of Egyptian Christians and Jewslaws “ . 2-Idea of the principles or substance of Christian law and its applications in the Egyptian judiciary and the Coptic Orthodox Church.3- The possibility of

⁽⁶⁾For more details : Ossama Abol-Hassan Mojahid, a new perspective in the 1938 regulation of the Orthodox Copts, Journal of Legal and Economic Sciences, first issue - January 1998 - year 40, also published by the Legal Books House 1998.

⁽⁷⁾Article 20/1 of Law No. 25 of 1929 as amended by Law No. 100 of 1985 and Law No. 4 of 2005 which states that the right to custody of women ends at fifteen years old then judge asks the child if he/she wants to live with custodian's until he/she reaches adulthood .

⁽⁸⁾For more details : Ossama Abol-Hassan Mojahid, Non-Muslims Family law, Arab Renaissance House 2009 , p. 199.

direct application of this new constitutional text .

Before the details, we notice that the family law disputes for Jews no longer exist in practice in Egypt, therefore we will use mostly the term “principles of Christian law”, on the understanding that the constitutional text includes both Christian and Jewish laws.

3-1- Discussion of the term “principles of Christian Law”

3-1-2. Meaning of the term “principles of Christian law”

We did not find - as we know - an explicit judicial precedent regarding the meaning of the term “ Christian law principles“ , therefore we must search the Interpretation of this term .

Article 227 of 2014 constitution included a very important provision regarding the interpretation of its texts, as it stipulated that “the constitution constitutes in its preamble and all its texts an interdependent fabric, an indivisible whole, and its provisions are integrated into a coherent membership unit.”

The constitution preamble included the following text : “We write a constitution that confirms that the principles of Islamic law are the main source of legislation, and that the reference in their interpretation is the total judgments of the Constitutional Court in that regard.”

I repeat that I did not find an explicit judicial precedent regarding the meaning of the term “ principles of Christian law “, but I certainly found judicial precedents regarding the meaning of the phrase “principles of Islamic law” which was included in the text of Article 2 of 1971 Constitution (replaced by Article 2 of 2012 Constitution and then Article 2 of 2014 Constitution).

Therefore, and by analogy, we can use judicial precedents - in particular the Supreme Constitutional Court judgments- about the interpretation of the meaning of “ principles of Islamic law” , to arrive at an interpretation of the meaning of “ principles of Christian law “.

The term “principles of Islamic law” is mentioned in two basic texts of Egyptian law .

Article 2 of 2014 constitution states that “Islam is the religion of the state, Arabic is its official language, and the principles of Islamic law are the main source of legislation.” (Identical to the text of Article 2 of 1971 and 2012 Constitutions).

Also , the article 1/2 of the Egyptian Civil Code stipulates that : “ If there is no legislative text that can be applied, the judge ruled according to the custom. If it does not exist, then it is in accordance with the principles of Islamic law , If it does not exist, it is in accordance

with the principles of natural law and the rules of justice “.

According to the civil law preparatory works , the phrase “principles of Islamic law” means “the Fundamentalist principles which all Islamic doctrines are unanimous”.

It is clear from the text of the constitution and the text of the civil law, that the legislator has used the term “principles of Islamic law”, and has not used the term “Islamic law”, at first glance it may seem that there is no difference between the two terms, but the use of the word “principles” includes an important concept that cannot be overlooked .

This use refers to the distinction between fixed peremptory rules in all Islamic doctrines, and the changing jurisprudential rules . Thus legislation must respect only the first type, and it may violate the second type without being considered in violation of the constitution, this distinction can not be reached if the legislator only used the term “Islamic law” .⁽⁹⁾

We can adopt the same solution with regard to the principles of Christian law, and define them as : “the general principles that are not in dispute between all Christian doctrines and sects”.

Thus, the meaning of “principles of Christian law” is distinctly different from the meaning of the “Christian law” that the courts applied before The 2014 constitution .

3.1.2. The difference between “Christian Law” and “principles of Christian Law”

It is clear from the text of Article 3/2 of Law No. 1 of 2000 (Article 6/2 of Law No. 462 of 1955 abrogated) that Christian law is applied if the conditions for its application are met.

The dispute arose if the Christian law concerned only the Bible or also the sources that arose after its descent.⁽¹⁰⁾

This problem has arisen regarding to cases of divorce in the Christian law, as the Bible does not permit divorce except because of adultery, while some other sources allow divorce for other reasons .

Some courts ruled that the Bible is the only source of Christian law .⁽¹¹⁾

The Coptic Orthodox Church officially adopted this trend, The Papal Resolution No.7 on

⁽⁹⁾See : Ossama Abol-Hassan Mojahid : The second article of the constitution between the cassation court and the high constitutional court - Judges Magazine - third year, the fifth and sixth issues May/ June 1988 p. 41 .

⁽¹⁰⁾For more details , Salama , supra note 4 at 135, Al-Ahwani, supra note 3 at 198 .

⁽¹¹⁾See: Judgment of Alexandria Court of Appeal on 21/5/1956 in: Saleh Hanafi - The reference in family law jurisdiction of Egyptian Muslims and non-Muslims –Abdin Press , first edition 1956 - p. 288, also judgment of Qena First Instance tribunal on 21/2/1956 – ibid. , p. 289.

18/11/1971, stated that the Church does not recognize any divorce for a reason other than adultery, so that marriage remains despite the divorce judgment . Also Papal Resolution No. 8 on 12/18/1971 prohibited priests from contracting the marriage of divorced person.⁽¹²⁾

Other courts ruled that Christian law does not only mean the Bible, but it also includes what the clergy approved in their spiritual opinions and their religious and judicial councils that have become custom, and therefore it is permissible to divorce in the Coptic Orthodox law for reasons other than adultery, and so ruled the religious councils before its was repealing in 1955 .

The Court of Cassation adopted the second opinion , as it ruled that “ the term Christian law does not mean only the Bible, but everything applied by the religious councils before their abrogation, such as the Orthodox Copts Family Law Regulation issued by the Orthodox Copts General Council in 1938 “.⁽¹³⁾

Thus, the most important sources of Christian law are :⁽¹⁴⁾

(A) Common sources for all Christian sects :

- 1- The Bible.
- 2- Apostles Writings .
- 3- Decisions of Universal and local Holy Synods .
- 4- Clergy decrees .
- 5- Custom .

(B) Specific sources for the main Egyptian Christian sects :

We mean the sects regulations that have been drafted Similar to contemporary legislations of family law as follow:

- 1- Collection of laws of the Eastern Catholic Churches issued by Vatican Pope on October 1, 1991.
- 2- In 1902 the Egyptian government adopted a family law for the Evangelical sect .⁽¹⁵⁾
- 3- On May 9, 1938, the General Council of the Coptic Orthodox approved the Family

⁽¹²⁾Hossam Al-Ahwany - The legal results of the papal resolutions in matters of Orthodox Copts family law - Journal of Government Cases Administration , year 24 p. 20, year 25 p. 5 and in particular p. 23.

⁽¹³⁾See its judgment issued on 26/1/1977 in case No. 39 of the year 45 - Cassation court judgments collection of the year 28 p. 302, and its judgment issued on 6/6/1973 in case No. 3 of the year 42 - Cassation court judgments collection of the year 24 p. 870, and also its judgment issued on 23/1/1990 in Case No. 16 of the year 58, Cassation court judgments collection, year 41, p. 216.

⁽¹⁴⁾Tawfiq Faraj , supra note 2 at 135 , Al-Ahwany , supra note 3 at 208.

⁽¹⁵⁾Ahmad Safwat, Family law Judiciary for the Religious Sects, Abdullah Wahba Library Second Edition 1948, p. 84, Tawfiq Farag , supra note 2 at 158 .

Law Regulation for this sect. It is noted that this regulation is not issued by the Holy Synod, and that this Council is not competent to set legislative rules.⁽¹⁶⁾

However, this regulation has gained great practical importance as the religious Councils settled on its application until the abrogation of these Councils in 1955, as a binding custom that applies in the absence of a legislative text in accordance of Article 1 of the Civil Code.⁽¹⁷⁾

Thus the Court of Cassation ruled that : The contested judgment did not err in enforcing the law when decided to divorce in accordance the Article 56 of Orthodox Copts Family Law Regulation approved by the Orthodox Copts General Council in 1938 , that religious Councils had applied till the abrogation of these councils in 1955 .⁽¹⁸⁾

Thus it is clear that there is a fundamental difference between the meaning of the principles of Christian law and the meaning of Islamic law. The meaning of Christian law permits a wide difference in the rules applied to each Christian sect . As for the principles of Christian law are defined as : “the general principles that are not in dispute between all Christian doctrines and sects”.

Thus it becomes clear that the meaning of the principles of Christian law is similar to the idea of ” the substance of Christian law “ established by the Court of Cassation and the Supreme Constitutional Court, which we will address below.

3.2. Idea of principles or substance of Christian law and its applications in the Egyptian judiciary and the Coptic Orthodox Church.

3.2.1. Idea of principles or substance of Christian law in cassation court judiciary

We have already mentioned that three conditions are required for the application of Christian law (Article 3/2 of Law No. 1 of 2000 , Article 6/2 of Law 462 of 1955 , previously) :

- 1- The spouses must belong to the same religion, doctrine , and sect .
- 2- The sect must have an organized religious court at the time of Law 462 of 1955.
- 3- The applied rule should not violate the public order in Egypt .

If one of these conditions fails ,Islamic law will be applied to Christians just like Muslims .

However, the application of Islamic law to Christians may sometimes clash with a

⁽¹⁶⁾Ehab Ismail: Marriage dissolution in Orthodox Copts family law , PhD thesis, Cairo 1959, p. 41.

⁽¹⁷⁾Al-Ahwany , supra note 3 at 218.

⁽¹⁸⁾See its judgment issued on 6/6/1973 in case No. 3 of the year 42 - Cassation court judgments collection of the year 24 p. 870 , and also its judgment issued On January 23/1/1990 in Case No. 16 of the year 58, Cassation court judgments collection , year 41, p. 216.

substantial rule of the Christian religion, therefore the legislator stipulated a case in which Islamic law is not applied to Christian spouses despite the difference of doctrine or sect, which is : “ There is no divorce for Catholics “ .(Article 17/3 of Law No. 1 of 2000 , Article 99/7 of the regulation of the Islamic law courts, previously)

The Cassation Court also created two cases in which Islamic law cannot be applied to the Christian spouses even if they differed in doctrine or sect when Islamic law clashes with a substantial rule of the Christian religion , First : Polygamy is not permitted for a Christian husband , Second : The necessity of religious form of Christians marriage contract .

3.2.1.1. First : Polygamy is not permitted for a Christian husband

The Cassation Court ruled that “Islamic law is the general law, which is applicable in family law disputes between the Christian spouses if a doctrine or sect differs, but it does not apply if it clashes with one of the substantial principles of the Christian belief , that Christian are considered to be outside of his religion if he violates it, such as principle of polygamy prohibition , as it is one of the characteristics of Christian marriage that it is an individual relationship, can only arise between one man and one woman, which is one of the principles that prevailed in Christianity throughout the past twenty centuries, and it was not at all a matter of dispute despite the division of the church into Orthodox, Catholic and Protestant, which means that this principle is one of the original rules in any Christian doctrine or sect related to the core of religious belief and must be respected, so that the second marriage held in the event of the first marriage is null and void . Since the contested judgment violated this principle and allowed polygamy for the Christian husband, it would be against the law.⁽¹⁹⁾

3.2.1.2. Second : The necessity of religious form of Christians marriage contract

The Cassation Court ruled that “Islamic law is the general law, which is applicable in family law disputes between the Christian spouses if a doctrine or sect differs, but it does not apply if it clashes with one of the substantial principles of the Christian belief , that Christian are considered to be outside of his religion if he violates it. Thus It is one of the basic foundations in the Christian religion that marriage is a religious system that must take place in public according to the religious rituals and after crown prayer, otherwise marriage

⁽¹⁹⁾See its judgment issued on 17/1/1979 in cases No. 16 and No. 26 of the year 48 - Cassation court judgments collection of the year 30 p. 276 , also its judgment issued on 22/4/1986 in case No. 62 of the year 54 - Cassation court judgments collection of the year 37 p. 457 , and also its judgment issued on 20/10/2003 in Case No. 405 of the year 71 , collection of modern judgments of Cassation court, year 2004, p. 64.and also its judgment issued on 20/2/2006 in Case No. 898 of the year 73, collection of modern judgments of Cassation court , year 2006, p. 21.

is null and void like all other Christian laws in Egypt “.⁽²⁰⁾

So, it is not permissible to apply Islamic Law if it violates the religious form of marriage in Christian law even if the Christian spouses belong to different doctrine or sect . This has two consequences:

1- According to Islamic law, marriage is held when spouses accept it and in presence of two witnesses, without need for religious form. Even if the spouses were different Christians in doctrine or sect , their marriage can not take place in this manner, but the religious form is necessary.

2- If the religious form of marriage is fulfilled in Christian law, the rules for Witness testimony to marriage in Islamic law will not apply to this marriage which is valid accordance to Christian law.

Thus, the Court of Cassation requires two conditions in a rule in order to be related to the substance of the Christian belief.

1- The rule must be one of basics rules of Christianity so that Christian are considered to be outside of his religion if he violates it .

2- The rule must be one of basics rules which are not in dispute between all Christian doctrines and sects.

Thus - according to Cassation Court jurisdiction - the idea of principles or substance of Christian law can be defined as : “ The basics rules which are not in dispute between all Christian doctrines and sects , so that Christian are considered to be outside of his religion when he violates them .“

3.2.2. Idea of principles or substance of Christian law in Supreme Constitutional Court judiciary

Starting in 1997, the Supreme Constitutional Court began to narrow the scope for legislative pluralism in family law . In its famous judgment on 1/3/1997 . (Official Gazette No. 11 on 3/13/1997)⁽²¹⁾ , the court ruled unconstitutional the article 139 of Family Regulation of the Orthodox Copts, because it specifies the age of mother custody of Coptic Orthodox children by seven . As long as the custody age does not relate to the substance of the Christian

⁽²⁰⁾See its judgment issued on 8/1/1996 in case No. 89 of the year 62, also its judgment issued on 20/10/2003 in Case No. 405 of the year 71 , collection of modern judgments of Cassation court , year 2004, p. 64.and also its judgment issued on 20/2/2006 in Case No. 898 of the year 73, collection of modern judgments of Cassation court , year 2006, p. 22.

⁽²¹⁾For more details : Mojahid, supra note 6 at 8 .

belief, and therefore it is not a case allowing the multiplicity of family law, in respect of the principle of citizens equality before the law. Thus the Orthodox Copts became subject to the general rule regarding the age of custody to which Muslims are subject.⁽²²⁾

In this judgment , the court ruled that : “ The determination of age of custody - in accordance with Egyptian Muslims law - relates to the interest of the child upon the divorce of his parents, and does not relate to the basics and substance of the Christian belief, therefore it is not permissible for the legislator in this matter to distinguish between Egyptians according to their religion, because the principle is that they are equal before the law according to the constitution. “

Thus, the Supreme Constitutional Court has reconciled the two considerations that always arise in this matter, namely the principle of equality between citizens before law and the principle of respecting religious belief freedom .

The court used a specific criterion , which is the substance of Christian belief . Whenever the issue relates to the substance of Christian belief, it is permissible to have multiple laws in this matter, and Christians have the right to their own rule respecting for freedom of belief, but if the issue does not relate to the substance of Christian belief , the rule must be unified considering the principle of equality before law guaranteed by the constitution .⁽²³⁾

3.2.3. The idea of principles or substance of Christian law in the Coptic Orthodox Church.

The Coptic Orthodox Church was represented in the aforementioned constitutional case , and on 18/6/1996 the Beatitude of Shenouda III, the Patriarch of the Coptic Orthodox, deposited a memorandum indicated the following:⁽²⁴⁾

1- There are decisive texts in the Holy Bible govern the Orthodox Copts in matters of family law, among them Polygamy is not permitted, and no divorce except for the reason of adultery.

2- Marriage does not take place without crown prayer (religious rituals) - in the church and under its control .

3- The texts of the Bible and marriage contract terms are not subject to controversy even from church leaders .

⁽²²⁾Article 20/1 of Law No. 25 of 1929 as amended by Law No. 100 of 1985 and Law No. 4 of 2005 which states that the right to custody of women ends at fifteen years old then judge asks the child if he/she wants to live with custodian's until he/she reaches adulthood .

⁽²³⁾Ossama Abol-Hassan Mojahid , supra note 6 at 70 .

⁽²⁴⁾See : Its judgment on 1/3/1997 , Official Gazette No. 11 on 3/13/1997 .

4- Regarding the age of custody in Article 139 of 1938 Regulation, His Beatitude indicated the following:

First: There is no text in the Holy Bible that regulates this matter.

Second: The age of child custody is a matter governed by the conditions of society.

Third: The of unificationthe age of custody for all children of the same country, something closer to reality, and consistent with scientific and practical considerations, in addition to that it does not violate a sacred text .

Fourth: The Coptic Orthodox Church has no objection to unifying the age of custody of all Egyptian children, affirming the rule of equality between them.

The bottom line is that the principles of Christian law in the Coptic Orthodox Church are the rules based on decisive sacred texts, and in particular :

- 1- Polygamy is not permitted.
- 2- The necessity of religious form of marriage contract.
- 3- No divorce except for the reason of adultery.

3.2.4. Determination of principles or substance of Christian belief

We will be committed to define the issues related to the principles or substance of the Christian belief in accordance with the concept defined by both the Supreme Constitutional Court and the Court of Cassation. An issue is related to the principles or substance of the Christian belief when two conditions are met :

- 1- The rule must be one of basics rules of Christianity .
- 2- The rule must be one of basics rules which are not in dispute between all Christian doctrines and sects .

Based on the foregoing, there is no dispute between all Christian doctrines and sects regarding two principles of Christian law, namely the prohibition of polygamy and the necessity of religious form of Christians marriage contract, therefore we do not see a reason to discuss them .⁽²⁵⁾

We will discuss only four issues to see whether they are related the principles or substance of Christian law :

- First : No divorce for Catholics .
- Second : No divorce except for the reason of adultery.

Third : No divorce by the sole will of the husband .

Fourth : The Compulsory divorce at the request of wife (Alkhole).

3.2.4.1. First : Is the rule « No divorce for Catholics», of the principles or substance of Christian law ?

We have already mentioned that Egyptian law has approved this rule with an explicit legislative text (Article 17/3 of Law No. 1 of 2000 , Article 99/7 of the regulation of the Islamic law courts, previously).⁽²⁵⁾

I consider this text unconstitutional because it infringes on a constitutional right that is the right to marry and form a family, but there is no need to discuss it in detail in this research.⁽²⁶⁾

I also see that this rule is not related the substance of Christian belief , as it does not meet - at least - the second condition , which is that the rule must not be in dispute between all Christian doctrines and sects .

Christian doctrines and sects differed profoundly regarding the absolute prohibition of divorce. Thus , Christian doctrines - except Catholicism - recognize divorce in some cases so , it cannot be said that this prohibition is related to the substance of the Christian belief .

Moreover, the Catholic doctrine itself permits the dissolution of marriage in certain cases

1- Paul's privilege:

That is, if the spouses are non-Christians and one of them embraces the Catholicism, and the other spouse refuses to convert to Catholicism, the catholic one can marry, here the first marriage is dissolved by force of law . (Article 854/1 of Collection of laws of the Eastern Catholic Churches).

2- Dissolution of incomplete marriage by Pope decision:

Article 862 of the Collection of laws of the Eastern Catholic Churches states that “the Pope may dissolve an incomplete marriage for a valid reason upon the request of both parties or one of them .(Incomplete marriage : Before sexual relationship between spouses).

Although the Catholics law uses in both cases the term dissolution of marriage and not the term divorce, I see that this dissolution is only a kind of divorce in exceptional cases, which means departing from the rule of the absolute prohibition of divorce in Catholicism.

Thus we can say that the principle of “ No divorce for Catholics “ is not one of the

⁽²⁵⁾For more details : Mojahid, supra note 8 at 258.

⁽²⁶⁾For more details Salama , supra note 4 at 381 , Mojahid, supra note 8 at 225.

principles or substance of the Christian law because Christian doctrines do not agree on this principle, especially since Catholicism itself allows it in some cases as an exception, thus legislator is not obligated to respect this rule in Christians family legislation regarding Article 3 of 2014 constitution .

3.2.4.2. Second : Is the rule “ No divorce except for the reason of adultery “, of the principles or substance of Christian law ?

If the Christian spouses differ in doctrine or sect, Islamic law is applicable, then the Christian husband can divorce by his own will like the Muslim husband, and the Christian wife may take advantage of divorce cases in Islamic law, moreover the 1938 Copts Family Law Regulation permitted divorce in nine Cases, before being modified in 2008.⁽²⁷⁾

The Papal Resolution of Coptic Orthodox Church No.7 on 18/11/1971, stated that the Church does not recognize any divorce for a reason other than adultery, so that marriage remains despite the divorce judgment . Also Papal Resolution No. 8 on 12/18/1971 prohibited priests from contracting the marriage of divorced person.⁽²⁸⁾

So, Is the rule “ No divorce except for the reason of adultery”, of the principles or substance of Christian law ?

To answer this question, we will clarify the extent to which Christian doctrines agree on this rule :⁽²⁹⁾

1- The Catholic Church: Divorce is not permitted for any reason, even for adultery.

2-The Eastern Churches that represent the Orthodox doctrine: Divorce permitted for many reasons and not only in the case of adultery, in particular, the Coptic Orthodox Church, thus the jurist Coptic Orthodox Ibn al-Assal permitted the divorce widely, in his opinion, the dissolution of marriage became permissible in principle.⁽³⁰⁾

3-Protestant Church: It permits divorce in only two cases: adultery and deviation from the Christian faith.

⁽²⁷⁾For more details : Mojahid, supra note 6 at 58.

⁽²⁸⁾On 20/5/2008, The General Council of the Coptic Orthodox amended The 1938 Copts Family Law Regulation, (Official Gazette No. 26 on June 2, 2008) and deleted divorce cases other than the cases of adultery and deviation from the Christian religion. For more details: Osama Abol-Hassan Mojahid: The Family Court and Recent Amendments of Copts Family Law Regulation, research presented to Conference of “ modern perspectives in the judicial organization “ , Faculty of Law, Alexandria University, 10-11 March 2010.

⁽²⁹⁾FAL-Ahwany–supra note 12 at 5 and in particular p. 23.

⁽³⁰⁾For more details :Ehab Ismail: Marriage dissolution in Orthodox Copts family law , PhD thesis, Cairo 1959, p. 83.

Thus we can say that the principle of “No divorce except for the reason of adultery “ is not one of the principles or substance of the Christian law because Christian doctrines do not agree on this principle, especially that the history of the Coptic Orthodox Church itself confirms allowing divorce in cases other than adultery, thus legislator is not obligated to respect this rule in Christians family legislation regarding Article 3 of 2014 constitution .

3.2.4.3. Third : Is the rule “ No divorce by the sole will of the husband “, of the principles or substance of Christian law ?

In Islamic law, a husband can dissolve marriage by a single will without the interference of the court. Christian law does not recognize this, as it is not permissible for one of the spouses to end marriage with single will, also it is not permissible for spouses to agree to end marriage, and this is agreed by all Christian doctrines and sects, so the judicial authority must always enter even if there is a reason for divorce. This rule came from an early date in the history of canon law. When church permitted the dissolution of marriage, it stipulated that this be done by virtue of ecclesiastical authority.⁽³¹⁾ This was settled by the Dome Council in 691, also known as the Second Council of Constantinople.⁽³²⁾

In Egyptian law, there is no problem if the spouses unite in doctrine and sect, as Christian law will be applied which requires that divorce must be by virtue of the court. But the problem occurs if the Christian couple differ in the doctrine or sect because Islamic law is applicable to the dispute. Is it permissible here that the Christian husband divorces his wife by his sole will according to Islamic law?

The Cassation Court ruled: When the Christian couple differ in the doctrine or sect , Christian husband can divorces his wife by his sole will according to Islamic law.⁽³³⁾

Many Egyptian jurists criticized this opinion of Cassation Court because it is legally difficult to say that a Christian husband can divorce his wife with a sole will .⁽³⁴⁾

I see that the opinion of Cassation Court is the one that conforms to law provisions . As long as Islamic law governs the conflict, the husband has the same rights as the Muslim husband . Nevertheless, I do not agree it because all Christian doctrines and sects do not

⁽³¹⁾For more details : Dauvillier and De Clerck, Marriage in Eastern Canon Law (In French) Paris : RecueilSirey 1936, p. 84-85 and 107 .

⁽³²⁾Tawfiq Faraj , supra note 2 at809-810 .

⁽³³⁾Dauvillier and De Clerck, supra note31 at 90.

⁽³⁴⁾See its judgment issued on 30/3/1966 in case No. 29 of the year 34 - Cassation court judgments collection of the year 17 p. 792, and its judgment issued on 31/1/1968 in case No. 2 of the year 37 - Cassation court judgments collection of the year 19 p. 179, and also its judgment issued on 20/12/1972 in Case No. 16 of the year 41, Cassation court judgments collection , year 23, p. 1442.

accept divorce by a single will .

Thus I see that the principle of “ No divorce by the sole will of the husband “ is one of the principles or substance of the Christian law because all Christian doctrines and sects agree this principle, , thus legislator is obligated to respect this rule in Christians family legislation regarding Article 3 of 2014 constitution .

3.2.4.4. Fourth : Is the compulsory divorce at the request of wife (Alkhole) inconsistent with the principles or substance of Christian law⁽³⁵⁾

Law No. 1 of 2000 introduced the provisions of the compulsory divorce at the request of wife (Alkhole) in Egyptian law. Thus , article 20 stipulated that: “The spouses may agree to (Alkhole), if there is no agreement , the wife can proceed (Alkhole) lawsuit and waives all of her financial rights, and the court must decide divorce by a non-appealable ruling.”

Then the question arises about of applying these provisions to Christians and whether they are inconsistent with the principles or substance of Christian law or not?

The Egyptian Cassation Court expressed its opinion on this issue in two judgments :

First judgment : issued on 28/5/2005 in case No. 487 of the year 73 , in this judgment it ruled that :

1- (Alkhole) is a form of divorce .

2- There is no objection to apply Law No. 1 of 2000 regarding (Alkhole) to Christian Coptic Orthodox spouses.

Second judgment : issued on 18/6/2007 in case No. 592 of the year 74 , in this judgment it ruled that :

1- Law No. 1 of 2000 is applied to all residents of Egypt, whether they are citizens or foreigners, Muslim or non-Muslim, without distinction between them.

2- (Alkhole) is a form of divorce .

3- Therefore, Only the Catholic doctrine to which (Alkhole) is not applied , in application of the rule of “ No divorce for Catholics “.

Thus, the Cassation Court considers that there is no objection to apply (Alkhole) to Christian Egyptians except Catholics, and that does not violate the substance of Christian law except for Catholics.

We have seen that (Alkhole) is a type of divorce by the wife’s unilateral will, as long as

⁽³⁵⁾For more details :Al-Ahwany , supra note 3 at 253 .

the ruling on divorce ultimately depends on the wife's will, and as long as the court must ultimately respond to the wife's will and as long as it is not permissible to appeal the court's ruling in any way of appealing .

As long as we consider (Alkhole) a kind of divorce by the wife's sole will, even if issued by the court's ruling, we see that it contradicts the substance of the Christian law such as divorce by the husband's sole will .

Thus I see that (Alkhole) is against the principles or substance of the Christian law because all Christian doctrines and sects do not recognize it , therefore legislator is obligated to take that in consideration in Christians family legislation regarding Article 3 of 2014 constitution , by stipulating that the provisions of (Alkhole) is not applied to Christians.

3.3. The possibility of direct application of this new constitutional text

We repeat that Article 3 of 2014 constitution stipulated that “ the principles of Egyptian Christians and Jews laws are the main source of legislation regulating their family law , religious affairs, and the choice of their religious leaders.”

The phrase “the main source of legislation regulating their family law” raises a question about the possibility of direct application of this new constitutional text.

The question here is: Is this new text directly applicable, in the sense that the courts are obligated to apply the principles of Christian law by the power of the new constitution ? Or the speech of this text is oriented to the legislator to respect it while enacting the Christians' family law ?

The answer is clear: the text used the phrase “ the main source of legislation governing their family law ” . It goes without saying that legislations are enacted by the Parliament (House of Representatives) . Therefore the principles of Christian law are the source of legislations enacting by the legislator .

Since the rules of Christians Family Law applied until the 2014 constitution are not issued by the legislative authority, it is self-evident that we understand that the text of the constitution is binding on the legislator when he creates a new Christians family legislation because the rules applied to Christians before the issuance of this constitution are not legislations issued by the Egyptian legislator .

Moreover, the article 224 of the constitution stipulated that “ all provisions determined by laws and regulations before the constitution is issued, shall remain in force, and they may not be modified, nor repealed except in accordance with the rules and procedures established

in the constitution. The state is obligated to issue laws implementing the provisions of this constitution.”

So, Article 224 of the constitution is explicit : the laws in force at the time of the constitution’s promulgation are applied until they are amended according to the new constitution . Thus, the rules of Christians Family Law remain in force as they are until they are repealed or amended by new legislation.

Despite the frankness of the text of Article 224 of the new constitution, we will support this view with the jurisdiction of the Court of Cassation and the Supreme Constitutional Court . I repeat the question : Is this new text directly applicable, in the sense that the courts is obligated to apply the principles of Christian law by the power of the new constitution ? Or the speech of this text is oriented to the legislator to respect it while enacting the Christians family law ?

The Cassation Court has already answered this question regarding the application of the principles of Islamic law in accordance to the new text of article 2 of the 1971 constitution, after its amendment in 1980, that states that “the principles of Islamic law are the main source of legislation “.

The cassation court ruled that “the text of the second article of the constitution that stipulates that the principles of Islamic law are the main source of legislation is not applicable in itself, but rather is an invitation to the legislator to establish Islamic law as a main source of laws he enacted, and therefore the provisions of that Islamic law are not applicable, unless if The legislator has respected this invitation , and has drafted these principles in applicable legislative texts”⁽³⁶⁾.

The High Constitutional Court also answered this question regarding the application of Article 2 of 1971 Constitution, and ruled that: “The legislator’s commitment that the principles of Islamic law be the main source of legislation applies only to new legislations issued after amending the constitution, so that if they violate the principles of Islamic law they will be Unconstitutional, as for legislations prior to the date of the amendment, the new text does not apply to them , but this does not mean relieving the legislator of political responsibility for amending previous legislations in order to conform to the principles of Islamic law “.⁽³⁷⁾

⁽³⁶⁾For more details :Mojahid, supra note 8 at 262 .

⁽³⁷⁾See its judgment issued on 28/3/1982 in case No. 856 of the year 52 - Cassation court judgments collection of the year 33 p. 413. For more details :Mojahid : supra note 9 at 42 .

⁽³⁸⁾ See its judgment issued on 4/4/1987 in case No. 70 of the year 6,Ministry of Justice Newsletter, April - June 1987, p. 87 , also its judgment in case No. 46 of the year 7 ,Ministry of Justice Newsletter, April - June 1987, p. 93 &its judgment

4. Conclusion:

4.1. The impact of Article 3 of the 2014 constitution on the multiplicity of family laws according to the multiplicity of Christian doctrines and sects

At first glance, it appears that the Article 3 of the 2014 constitution confirms the principle of the multiplicity of family laws according to religion by a constitutional text for the first time, but the matter - in our view - is exactly the opposite, which is that this new text narrows the scope of the multiplicity of family laws according to religion.

In my opinion , the new text did not allow the multiplication of Christians family law according to their doctrines or sects, but rather obligated the legislator to enact a unified family law for Christians, by making the principles of Christian law the main source of the family law for Christians.

We explained that the principles of Christian law are “the general principles that are not in dispute between all Christian doctrines and sects”. Hence, the new text obliges the legislator that Christians have unified legislation for family law, only in matters that are not disputed between all Christian doctrines and sects. As for the issues which are disputed , there is no obligation for the legislator to enact in this future legislation.

Hence, this new constitutional situation is considered a step towards unification not towards pluralism, as the situation prior to the 2014 constitution allows the application of all family laws of Christian sects that had their own religious court in 1955, even if these laws contain rules that do not come under meaning of the principles of Christian law, but rather just rules set by this sect to be its own family law.

Moreover, this new text allows - in my opinion - a more progressive step, which is enacting a unified family legislation for all Egyptians, regardless of their religion, provided that it includes the application of the principles of Christian law to Christians only, while the other rules of family are applied to all Egyptians, regardless of their religion.

4.2. Results:

1-There is a very important recent development regarding the family law applied to Egyptian Christians after the new 2014 constitution, which its article 3 stipulates that “the principles of Egyptian Christians and Jewslaws are the main source of legislation regulating their family law...?”

in case No. 125 of the year 6, Ministry of Justice Newsletter, April - June 1987, p. 131 & its judgment in case No. 2 of the year 8, Ministry of Justice Newsletter, April - June 1987, p. 135 . For more details : Osama Abol-Hassan Mojahid : supra note 9 at 43 .

2- The Supreme Constitutional Court ruled that the basic principle is equality of citizens before law , The exception is the multiplicity of family law in cases that relate to the substance of the Christian belief .

3- There is an important difference between “Christian law” and “principles of Christian law“.

4- About the determination of principles of Christian law I see that :

(A) Polygamy is not permitted for a Christian husband .

(B) The necessity of religious form of Christians marriage contract .

(C)The principle of “ No divorce for Catholics “ is not one of the principles of the Christian law.

(D)The principle of “ No divorce by the sole will of the husband “ is one of the principles of the Christian law

(E) The compulsory divorce at the request of wife (Alkhole) is inconsistent with the principles of Christian law .

5- I see that the new constitutional text is a step towards unification not towards pluralism regarding the Family law applicable to Egyptian Christians .

4.3. Recommendations:

1- This new constitutional text is not directly applicable : that is to say : the courts are not obligated to apply the principles of Christian law by the power of the new constitution because the speech of this text is oriented to the legislator to respect it while enacting the Christians family law .

2-There will be no solution to the problem of multiple family law in Egypt without the enactment of a unified family law for all Egyptians, or at least for Egyptian Christians.

3-In respect of the new constitutional text, the unified family law must respect the principles of Christian law, namely :

(A) Polygamy is not permitted for a Christian husband .

(B) The necessity of religious form of Christians marriage contract .

(C)The principle of “ No divorce for Catholics “ is not one of the principles of the Christian law.

(D) The principle of “ No divorce by the sole will of the husband “ is one of the principles of the Christian law .

(E) The compulsory divorce at the request of wife (Alkhole) is inconsistent with the principles of Christian law.

4-In respect of the new constitutional text,the legislator must make some amendments to the current family laws, in particular the rule included that Islamic law must be applied to Christians just like Muslims, in case of the absence of the required conditions for applying Christians Family law.