Family law in Syria: a plurality of laws, norms, and legal practices

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PART I

THE PLURAL LEGAL LANDSCAPE: FAMILY LAWS IN SYRIA

1 Law, Politics and Religion in Syria: Past and Present

Introduction

Syria's legal system is a mix of Ottoman, French, Egyptian, and religious law; the latter is predominantly found in the field of family law. The different religious communities have long since enjoyed the right to regulate and administer their family relations according to their respective religious laws. Consequently, family relations in Syria are governed by a multiplicity of religious-based personal status (or family) laws. This chapter will examine how this system of legal plurality, in particular with regard to personal status law, came about. Starting from the Ottoman time, I will concentrate on important historical and legal developments in Syria in general, as well as on developments relevant to Syria's legal system, especially those in the area of (religious) family law. For the sake of completeness and clarity, it should be mentioned that chapter 2 and 3 will elaborate in detail on the developments in the field of personal status law from the 1950s until recent times.

As Syrian family law is, for the most part, based on religious law, it is important to take into account how the position of religion, especially Islam, in relation to the central state authority developed over time. Some key moments in history that had a long-lasting effect on the relationship between *sharī'a*, Islam and the state, in addition to events or episodes that affected the position of non-Muslim minorities vis-à-vis the Muslim majority in area the personal status law, will be discussed. The final sections of this chapter are devoted to an analysis of the contemporary relationship between Islam and the state, including the Constitution and the position of the President. This chapter will conclude with a discussion of contemporary state's policies concerning (religious) legal plurality in personal status law, in particular in relation to its non-Muslim minorities.

1.1 Syria in the Ottoman era

The country that is today's Syria became part of the Ottoman Empire in the 1516, when the Ottoman Turks defeated the Mamluk Sultanate and conquered Syria. The

Ottoman Empire had started to gain ground from the early fourteenth century onwards; at the height of its reign (16th-17th century), the empire stretched from North Africa to Persia, deep into Europe and all the way down to the Gulf of Aden. Ottoman rule over Syria lasted until 1918, when the Ottoman Empire ceased to exist.[16]

From the start, Ottoman rule from Istanbul was challenged from outside and inside the empire. Istanbul's control over its provinces was never all-encompassing, yet its attempts to centralise and control the administration of its territories, including taxation, education, and the legal system, proved seminal. The Ottoman political and legal heritage is significant to all contemporary countries in the Middle East, including Syria. Syria's legal system is similar to those found in other former Ottoman provinces, i.e. Egypt, Lebanon, Iraq, and Jordan.

The Ottoman legacy is not only evident in the legal system in general but also in the field of family law. The reason that the Hanafi school of law is the preferred doctrine in matters of personal status in Syria today is that the official rite of the Empire was the Hanafi school of law. Consequently, the Hanafi doctrine spread throughout the Empire, oftentimes superseding other schools of law in the conquered areas.[17] Customary law, sultan's law (*qānūn*), and *sharī'a* were all recognised sources of law in the Ottoman state. Over the course of time, however, sultan's or state law became the dominant force; *sharī'a* and the traditional *sharī'a* (or *qāḍī*) courts, who had general jurisdiction to adjudicate in all civil and criminal disputes, eventually lost out to the reform policies of the Ottomans which were put in place from the mid nineteenth century onwards (Findley 1991a, İnalcık 1978).

1.1.1 Non-Muslims under Ottoman rule: the *millet*-system

Like Syria today, the Ottoman Empire was also multi-religious; in addition to its Muslim subjects, the Empire had a significant number of non-Muslim subjects, i.e. *dhimmī*s – a *dhimmī* is a non-Muslim living under Islamic rule. From early Islamic

[16] Apart from a short intermission in 1831-33, when the Egyptian viceroy, Muhammad 'Ali Pasha, conquered Syria, together with Palestine and Lebanon (Cleveland 2000: 72).

[17] There are four established Sunni schools of law, namely the Hanafi, Maliki, Shafi'i and the Hanbali school of law.

history, non-Muslims living in conquered Islamic lands were offered a contract of protection (*dhimma*) in exchange for acceptance to live under Islamic rule (Longva 2012: 49). Due to this protected status, Christian and Jewish subjects were guaranteed certain privileges.

Under Ottoman rule, non-Muslims were were guaranteed these privileges under the so-called *millet*-system.[18] The religious or confessional communities (*millet*s) enjoyed the right to retain to and apply their own religious laws, in liturgy and church affairs but also in matters related to a person's status, such as marriage and inheritance. However, this protected position came with certain conditions, meaning that *dhimmī*s had to pay the poll-tax (*jizya*), they were prohibited to carry arms, they had to live in segregated areas, and they were required to dress in distinctive style. In addition, *dhimmī*s could not testify against Muslims in court and they were excluded from high public offices (Longva 2012: 49).

The recognised *millet*s had their own *milla* courts, where they applied their own religious family laws, most importantly in matters of marriage and divorce. That being said, various studies on Ottoman history have demonstrated that non-Muslims frequently appealed to *qāḍī* courts instead of to their own communal courts, also in matters concerning marriage, divorce, and inheritance (cf. Al-Qattan 1999; Jennings 1978; Masters 2001; amongst many others). Al-Qattan explains in a study on the legal status of *dhimmī*s in Muslim courts that the Ottoman records (*sijill*s) of the 18th and 19th centuries reveal that Jews and Christians in Damascus regularly made their appearance at the Muslim courts: either because they were obliged to, for example in case of an inter-communal dispute, capital crime, or cases which threatened public order and security; or voluntary, for example to record their property and commercial transactions. The latter can be explained by the fact that the *qāḍī* courts, being the general 'state' courts, were the only official courts with the authority of enforcement (Al-Qattan 1999: 429). Nevertheless, *dhimmī*s also came to the *qāḍī* courts because they preferred these courts over their own communal courts, because the former were considered more efficient and had stronger enforcement powers, or because *dhimmī* litigants believed that their

[18] For an analysis of the concept 'millet' (including the *millet*-system), see Van den Boogert (2012).

'personal and financial interests were better served by shari'a law' (1999: 433). Al-Qattan provides examples of Christians who went to *qāḍī* courts to get their marriage validated or notarised in conformity with *sharī'a* rules to secure matrimonial financial rights or to obtain a divorce, or because of more favourable *sharī'a* inheritance law regulations (1999: 433-35).

1.1.2 Ottoman reforms: *Tanẓīmāt* and the *millet*-system

In the nineteenth century the sultans of Istanbul, under European influence, introduced a series of far-reaching administrative, military, economic, and legal reforms to meet the challenges of a rapidly changing society. The *Tanẓīmāt* period (1839-1876) started with the proclamation of the Edict of Gülhane in 1839 by Sultan Abdulmecid. The Edict of Gülhane emphasised the equal rights for Muslims and non-Muslims alike. The Edict of Humāyūn, issued in 1856, took it a step further and stated that all Ottoman citizens were regarded equal before the law, in taxes, government positions, and military service, regardless of their religion, and with that the *millet*-regime was formally abolished (Davidson 2000; Grafton 2003: 75). The restrictions imposed on non-Muslim Ottomans were officially lifted; they could now be admitted to political and military posts. In addition, the poll-tax, the distinction between Muslim and non-Muslim testimony in court were abolished (Longva 2012: 50; Grafton 2003: 74-75).

Thus, the Ottoman state introduced the concept of citizenship. However, the separate status of Muslims and non-Muslims in family law matters continued to exist, for the Edict of Humāyūn reaffirmed that the privileges granted to all the non-Muslim communities would be maintained (Van den Boogert 2012: 35). This meant that they could continue to apply their own religious laws in personal status matters. This plurality in legal status or national citizenship, on the one hand, and denominational membership as the decisive feature in personal status matters, on the other hand, created a complexity in the legal system – a complexity which not only Syrians but also Egyptians and Jordanians continue to grapple with today.

The 1856 Edict, however, also required each denomination to reach consensus on inheritance law: if they failed to do so, then this area of law would fall under the state's jurisdiction, i.e. the *qāḍī* courts. Since many of them failed to reach such a

consensus, the patriarchs and rabbis lost this part of their jurisdiction to the state, as a result of which Christians (and Jews) were governed by the Islamic inheritance rules (Van den Boogert 2012: 39; Tadros 2009: 115). As a matter of fact, Christian denominations in contemporary Syria were governed by *sharī'a* inheritance law until 2010: it was only then that Christian communities regained this lost jurisdiction. In chapter 3, this recent change in the field of inheritance law will be discussed in greater detail.

The *Tanẓīmāt* reforms were not accepted and implemented in all parts of the Empire; a large segment of the Sunni Muslim majority did not welcome the reforms (Longva 2010: 51; Grafton 2003: 77). In combination with a general deteriorating economic situation, the newly obtained rights of, in particular, Christians stirred up violent sectarian clashes in Mount Lebanon (1840 and 1860), Aleppo (1850), and Damascus (1860). Massacres of Christians at the hands of Muslims in Aleppo and Damascus followed from Muslim resentment against the reforms, particularly because they were perceived as the outcome of European interference for the benefit and protection of the Christian populations (Longva 2012: 52-53).

In spite of the official abolishment of the *dhimmī* status and, perhaps because of, the emotionally charged responses, the *millet*-system was never completely erased in all parts of the Empire. Remnants of the Ottoman *millet*-system can still be found in varying degrees in Egypt, Lebanon, Israel, and Syria today, as will become evident in the subsequent sections and chapters.

1.1.3 Ottoman codifications of Islamic (family) law

The Western-inspired *Tanẓīmāt* reforms not only overhauled the legal system but also fundamentally altered the status of *sharī'a* and of its authorised interpreters, i.e. the religious scholars (*'ulamā'*). The Ottoman Sultans introduced European-styled law codes[19] which were presented as additional to *sharī'a* law, but, in fact, these (secular) laws came to dominate *sharī'a* law in the nineteenth century (Thompson

[19] The new laws were primarily based on European, especially French, models, such as the 1850 Commercial Code, the 1858 Penal Code and the 1861 Code of Commercial Procedure.

2000: 114). This meant that Islamic law now had to compete with these new laws and saw its scope reduced to the domain of family law.

Before the *Tanẓīmāt* reforms, the *qāḍī* courts had general jurisdiction over all matters of civil, criminal, commercial, and other areas of law. From the 1860s, the Ottoman government set up 'regular' (*niẓāmiyya*) courts to apply the new legislation. This meant that the jurisdiction of the already existing *qāḍī* courts became limited to matters related to Islamic endowment (*waqf*), and, what was now called, personal status matters, viz., most importantly, matters of marriage, divorce, and inheritance (Rubin 2007: 279-80). This created a dichotomy in the legal system: *qāḍī* courts applying *sharī'a*-based personal status law on the one hand, and 'regular' or European-styled courts[20] applying European-based law codes on the other. This dichotomy remains a typical feature of today's legal systems of the former Ottoman provinces.

Another significant reform of the *Tanẓīmāt* project was the codification of *sharī'a* law in the Ottoman Civil Code, the *Mecelle* (1869-1876). For the first time in history an Islamic state codified *sharī'a* rules and principles in a statutory law code (Findley 1991b). This process of codification was an apparent break with the Islamic legal tradition, a process in which scholars and traditional judges gradually lost their legal authority to the state.[21]

The *Mecelle* was arranged as a Western-styled law code and was a codification of Hanafi opinions on matters of contract, tort and civil procedures, combined with general established principles of law (Anderson 1957: 24). It did, however, not contain rules and regulations pertaining to family matters, such as marriage, divorce and inheritance (Nadolski 1977: 524). Its enactment was a break with Islamic legal tradition for it abandoned the doctrine of *taqlīd*, i.e. the practice to follow the authoritative opinions of one's school of law. The *Mecelle* was

[20] The *niẓāmiyya* courts were modelled after the French judiciary structure: a three-tier court system was introduced, including first instance courts, courts of appeal, and a Court of Cassation in Istanbul. The courts were divided into commercial, criminal and civil sectors. The codes of procedure which dictated the judicial proceedings at these courts were largely a direct translation of French law codes (Rubin 2007: 283-84).

[21] Some scholars argue that the whole process of codification and legislation itself are completely alien to classical Islamic legal theory, see for example Layish (2004).

compiled differently; it consisted of an eclectic selection of opinions (*takhayyur*) of Hanafi jurists.

The *Mecelle* was enacted between 1870 and 1877.[22] The civil code applied to both Muslim and non-Muslims subjects of the Ottoman Empire. It was intended to be applied in the *niẓāmiyya* courts as well as in the *qāḍī* courts (Findley 1991b) but in the end only the judges of the *niẓāmiyya* courts resorted to the *Mecelle* in civil law cases. The judges in the *qāḍī* courts, on the other hand, continued to resort to the various *fiqh* books for personal status matters and Islamic *waqf* (Anderson 1957: 24).

In the early twentieth century, the Ottoman authorities again took it a step further and drafted a law code that was composed of a variety of legal rules and juristic opinions, modelled on Western-styled law code. In 1917, the Ottoman Law of Family Rights (hereafter OLFR) was enacted; governing the family relations of Muslims and it also included special sections for Jews and Christians (Anderson 1957: 27). The OLFR contained not only Islamic legal provisions derived from the Hanafi tradition but it also drew on rules from other schools of law. Furthermore, in addition to *sharī'a* provisions, the OLFR included European notions of marriage and family (Stowasser and Abul-Magd 2008: 41). The OLFR was the first state-promulgated codification of Muslim family law (Welchman 2000: 10). After the collapse of the Ottoman Empire, the OLFR remained in place in several Middle Eastern countries, for example in Jordan until 1951 and in Syria until 1953.[23] The personal status laws of many modern Arab states, promulgated from the 1920s onwards, were commonly based on the Ottoman civil code, the *Mecelle*, and the OLFR of 1917 (Stowasser and Abul-Magd 2008: 41).

Amira Sonbol argues that from the late nineteenth century the Ottomans, in addition to several other Middle Eastern states (in particular Egypt), incorporated European patriarchal notions into their personal status and nationality laws (2003, 2007). Consequently, 'personal status laws handling gender-specific issues or

[22] In Turkey, the *Mecelle* was abrogated in 1926 and replaced for the (translated to Turkish) Swiss Civil Code. In Syria, the *Mecelle* remained applicable during the French Mandate period until it was replaced by the Syrian Civil Code in 1949 (Findley 1991b).
[23] The OLFR was replaced by the 1953 Syrian Law of Personal Status.

family relations confined the social structure within the parameters of patriarchal power.' It is thus important to recognise, Sonbol continues,

> 'that the personal status laws of today are the result of modern laws introduced by the modern state. The outlook and parameters of these laws may stem form the Shari'ah, but the formulation, codification, and the laws themselves are, in part, borrowed from European codes of the late nineteenth and early twentieth centuries.' (2007: 75)

1.2 Decline of the Ottoman Empire and the Arab Kingdom of Syria

In the early twentieth century the Ottoman government sought to restrict the role of religious authorities. The introduction of European-styled law codes, the *Mecelle*, the OLFR, and the newly created *niẓāmiyya* courts had already affected the position of the religious scholars (*'ulamā'*) and the *qāḍī* courts. In 1917, the *qāḍī* courts were placed under the authority of the Ministry of Justice and a special section for *sharī'a* cases was created in the Court of Cassation in Istanbul.[24] Eventually, the *qāḍī* courts disappeared altogether in the new state of Turkey, which abolished them in 1924 (Findley 1991a).

Although the Ottomans undertook serious efforts to reform the Empire to keep up with the increasing the economic and technical advancement of Europe, its fate was doomed. In November 1914, the already crumbling Ottoman Empire allied with Germany and Austria-Hungary against the Allied forces, i.e. Great Britain, France, and Russia. Around the same time, an independent group of Arabs had sided with the Allied forces and fought with them against the Ottomans. The Arab Revolt was supported by Great Britain; the Brits had promised the Arabs that their leader, *Sharīf* Husayn of Mecca, would get his own Arab state with Damascus as its capital, once the Ottomans were defeated. From 1916 till 1918, Arab forces under the command of *Amīr* Faysal, the son of *Sharīf* Husayn, assisted by the British officer T.E. Lawrence (also known as Lawrence of Arabia), fought a guerrilla war

[24] In addition, a law on *sharī'a* court procedure was issued in 1917 (Findley 1991a).

against the Ottomans. They were successful in their campaign: in October 1918 *Amīr* Faysal and his troops paraded into the city of Damascus.

The fragile independent Arab state headed by *Amīr* Faysal lasted from October 1918 until July 1920. On 8 March 1920, the Syrian National Congress proclaimed *Amīr* Faysal as their king of Greater Syria (*bilād ash-shām*[25]), the new independent Syrian Arab Kingdom.[26] His reign as king only lasted four months as French troops occupied Damascus and unseated Faysal's government in July 1920. King Faysal was expelled from the country and was later made king of the new country Iraq (r. 1921-33) by Great Britain. During the short existence of the Arab state of Syria, King Faysal initiated and implemented some substantial legal and judicial reform policies, including the establishment of a Law Faculty and a Syrian Court of Cassation in Damascus in 1919 (Botiveau 1983: 130, 133).

In 1916, France and Great Britain had already divided the Ottoman Empire into zones of permanent influence according to the Sykes-Picot Agreement. Consequently, in 1919, after the end of the First World War, it was decided, as stipulated in the Treaty of Versailles, that 'the Arab countries formerly under Ottoman rule could be provisionally recognised as independent, subject to the rendering of assistance and advice by a state charged with the 'mandate' for them.' (Hourani 1991: 318) The secret agreement of 1916 between France and Britain was reaffirmed at the San Remo Conference in April 1920. As a result, France received the mandate for Syria and Lebanon, i.e. Greater Lebanon; it was placed under the authority of High Commissioner Henri Gourand in 1921. In 1922, the League of Nations officially awarded the Mandate over Greater Lebanon to France.

1.3 Syria under the French Mandate

The French administration policy over Greater Lebanon was based on a policy of divide and rule, which emphasised and reinforced the already existing religious, ethnic, and regional differences in Syria and Lebanon. France and Great Britain re-

[25] Comprising modern-day Lebanon, Syria, Jordan, and part of Palestine.
[26] However, its radius of authority never really extended beyond the cities of Damascus, Aleppo, Hama, and Homs (Khoury 1987: 19).

drew the borders of the former Ottoman provinces and the new countries Syria and Lebanon were established, adding some of Syria's land to Lebanon, which created political claims and tensions that continue to exist today.

In an attempt to repress the rise of nationalistic aspirations in Syria, the French implemented several geographical policies. For instance, they allowed the 'Alawis in the mountains at the Mediterranean coast and the Druze community in the South to create their own state in 1922. Except for a short intermission from 1936 to 1939, these two states or territories were able to retain their independent status until 1942 (Khoury 1987: 58-59). French mandatory policy, however, was met with strong resistance: Syrians organised several nation-wide revolts against the French in the years 1925-1927, initiated by the Druze in July 1925 (1987: 152 ff.). At the same time, several national movements were formed, united in one central political organisation: the National Bloc (established 1931). The majority of the founders and leaders of the National Bloc belonged to the Sunni urban and landowning elites and many of them had gone to Istanbul or Europe for their higher education (Khoury 1987: 248-51). The French authorities cooperated with the National Bloc, hoping that it would temper further nationalistic aspirations. The leaders of the National Bloc, in turn, hoped to take over the country's administration, as soon as the French would leave.

France considered itself as the protector of the Christians of the Levant, particularly the Catholics, but also of other minorities, such as the 'Alawi's and the Druze. The French tried to emancipate the various religious minorities and 'to denigrate the influence of Islam by relegating it to the status of one religion among many.' (Khoury 1987: 300) The Sunni religious establishment saw its authority and influence decline under the French and for that reason the Muslim leaders supported nationalist resistance to French rule (1987: 300).

In 1928, elections were held for a Constituent Assembly, whose task it was to draw up a constitution. The Assembly, comprised of predominantly deputies of the Nationalist Bloc, drafted a constitution that was inspired by European democratic principles. It included a provision which reaffirmed 'the equality of all citizens of all religious persuasions' but it also stipulated that the executive power was to be vested in a Muslim President (1987: 340). According to Khoury, the

nationalists included the latter provision to safeguard the support of the religious establishment and the Muslim Syrian masses, 'who were still very much attached to and guided by their religious beliefs and practices and who regarded the nationalists as defenders of the faith and guardians of culture.' (1987: 340) The French administration opposed to the draft because it assigned far-reaching powers to the Syrian President and thus contravened the international accords of the mandate. A year later, the French enacted a different constitution, in which the French Mandate was firmly secured (1987: 340-41, 348).

In 1922, in addition to the establishment of separate Druze and ʿAlawi states, the French administration authorised the establishment of separate courts for both communities. Hence, whereas the Ottomans had made no judicial divisions between different Muslim groups, i.e. all Muslims fell under the competence of the Ottoman *qāḍī* courts, the French did make such a distinction. According to Botiveau, the French also made efforts to grant the Shiʿite, Yazidi, and Ismaʿili communities legal autonomy in matters of personal status, but apparently these plans never materialised (1983: 129).

Under Ottoman rule the Druze and ʿAlawi communities were generally governed by the rules of the Hanafi school of law; the judges of the newly established ʿAlawi courts were expected to rule in accordance with the Twelver Shiʿi (i.e. Jaʿfari) school of law in matters of personal status.[27] According to Kramer, this school of law 'was as remote from Alawi custom as any other' (1987: 240). In Syria, there were no ʿAlawi religious scholars available who were versed in Jaʿfari jurisprudence and therefore Shiʿi judges had to come from Lebanon to serve in the courts. By time, ʿAlawi shaykhs accustomed themselves with Jaʿfari *fiqh* books and these religious men were soon appointed as judges to the ʿAlawi courts (1987: 240). After Syrian independence, the ʿAlawi courts were abolished and ʿAlawis were brought back into the realm of the general personal status (i.e. *sharʿiyya*) courts (Kramer 1987: 243-44).

[27] The judicial position of the Druze community is discussed in more detail in chapter 2, as one of the various, separate jurisdictions in the field of personal status in present-day Syria.

1.3.1 French-initiated personal status law reforms: religious and secular protests

The 1922 Mandate Charter divided the legal authority 'between state's jurisdiction over civil law and religious patriarchs' supervision of religious law' (Thompson 2000: 113), and thus limited the administration's authority over religious affairs. However, not on all levels, for the High Commissioner assumed control of the *awqāf* (Islamic endowments), which was a remarkable development, or as Grafton writes: '[t]he fact that a non-Muslim was in control of a primary Muslim institution was unprecedented' (2003: 94).

The Charter explicitly required the French authorities to respect the laws of personal status, including the religious authorities responsible for the implementation and reforms of these laws (Thompson 2000: 114). The religious clergy thereby regained some of the authority they had lost under the Ottoman rule. The French did not, unlike the Ottomans, promote unification but diversification (Botiveau 1983: 131). Consequently, this plurality in the legal system, in which various religious laws and courts operated next to the general state laws and courts, continued to exist; first created by the Ottomans and now reinforced and expanded by the French authorities.[28]

According to Thompson, this duality in the legal system 'posed religious patriarchs as autonomous legal authorities in competition with the state', which caused particular problems in the more ambiguous legal areas over which the state and religious leaders competed for jurisdiction (2000: 115). Members of the emerging nationalist movement opposed to the mere existence of religious laws and courts, which ran counter to their ideal of creating a secular, national and republican community. The Islamic populists, on the other hand, favoured the elimination of all forms of civil law and, alternatively, re-introduce Islamic law as the common law for the entire community (Thompson 2000: 115). Although the two groups differed significantly in their views on religion and its role in the state, they joined forces in their opposition against French rule (Khoury 1987: 340), as will be discussed below.

[28] In contrast to Turkey, where the first President of the new republic (est. 1923), Mustafa Kemal Atatürk, abolished Islamic laws and religious courts altogether (Thompson 2000: 114).

The French administration sought to replace the Ottoman *millet*-system and the various independent communal laws with a secular civil structure (Grafton 2003: 96). Stemming from a desire to equalise the status of Muslims and non-Muslims, the French proposed some reforms with regard to personal status affairs. Christian authorities had called upon the French to uniform, in particular, marriage laws but also requested that the Christian communities would be safeguarded from the influence of Islamic law in matters such as inheritance (Thompson 2000: 152). In response to these requests, the French High Commissioner, Damien de Martel, enacted Law no. 60/L.R. (*Lois et Réglements*, hereafter L.R.) on 13 March 1936. This law gave the seventeen recognised religious communities the right to 'devise their own family laws and to establish religious sectarian courts to adjudicate matters of family law' (Joseph 2000:130), meaning that everyone was expected to follow the law of his or her own community. However, the central government retained the final say in the ratification of all personal status laws (Grafton 2003: 97).

Muslims opposed the Law because it placed them on an equal footing with non-Muslims, in other words, they would lose their privileged position. To meet the objections of the Muslim opposition, a new law was enacted by the then new High Commissioner, Gabriel Puaux, namely Law no. 146/L.R. of 18 November 1938. This law required citizens to follow civil law in cases not explicitly regulated by the applicable religious law of one's community, i.e. 'it proposed the standardization of citizens' civil rights that were heretofore so varied under differing religious laws and even permitted, for the first time, citizens to claim their status solely under civil law.' (Thompson 2000: 152) In effect, it meant an abolition of Islamic law as the common law of the land (2000: 152).

Muslims all over Syria and Lebanon fiercely opposed the two issued laws, claiming their issuance was an illegal intervention into religious affairs (Thompson 2000: 152-53). In February 1939, leading Syrian religious scholars (*'ulamā'*) from Homs and Damascus took collective action against the laws. In a petition addressed to, respectively, the Prime Minister and the Minister of Interior, they articulated their objections to specific provisions, which included, most importantly, the provision which allowed an adult Muslim to change his or her religion and the fact that it would be made possible for a Muslim woman to marry a non-Muslim man (White 2010: 11). The National Bloc sided with the protesters

and the Prime Minister resigned as an act of solidarity. In the end, the French acknowledged the personal status reforms were bound to fall through. Consequently, the 1938 Law was retracted by High Commissioner Puaux in March 1939 (Thompson 2000: 153). However, Legislative Decree No. 60/1936, which defines the recognised religious communities with (partial) legislative and judicial authority in personal status matters continued to stay in force, up until today (El-Hakim 1995: 148).

Since no new laws on civil law or family affairs had been enacted, the Ottoman civil code, the *Mecelle* (1870-77), and the 1917 Ottoman Law of Family Rights remained in force during the French Mandate, until they were replaced by, respectively, the 1949 Syrian Civil Code and the 1953 Syrian Law of Personal Status.

Syria (and Lebanon) gained independence from France on April 12, 1946. Although Syria was now independent, it had little knowledge or experience in how to govern a country. Due to the French policy of direct rule, Syria's new leaders were not equipped to rule the country; the French had left behind a divided and unstable country (Cleveland 2000: 212-13).

1.4 Post-independence: military dictatorships (1949-54) and the United Arab Republic (1958-61)

Following the independence from France, Syria was subjected to a string of military coups, starting with the coup of Colonel Husni al-Za'im in March 1949. Colonel Al-Za'im was a great admirer of the secular achievements of the Turkish statesman Mustafa Kemal Atatürk. He found inspiration in Atatürk's separation between religion and state, such as the reform of the *waqf* and the introduction of secular legislation, recorded in the new Turkish civil code (1926) modelled after the Swiss civil code. Seeking to follow his example, Al-Za'im allegedly planned to introduce 'a new personal status law to replace the *shari'a*' (Roded 2006: 861). However, there was little opportunity for him to execute his secular policies since his rule only lasted four months. Nevertheless, during his short rule, three secular codes were promulgated: a Civil Code, a Penal Code, and a Commercial Code,

which are, with amendments, still in force today. Also in 1949, private and family Islamic endowments (*waqf*, pl. *awqāf*) were prohibited, all existing *awqāf* of this nature could therefore be liquidated (Anderson 1971: 12).

During the rule of Colonel Al-Za'im in 1949, Syria enacted its first self-written civil code. Actually, that does not hold true completely, because the 1949 Civil Code was a 'rather faithful copy' of the 1948 Egyptian Civil Code, which was a mix of *sharī'a* principles and Western legal concepts (Saleh 1993: 162-63). The Explanatory Memorandum to the Syrian Civil Code explains why the Egyptian Code served as a model, it is because 'the common traditions, similar customs and closely related social conditions prevailing in both countries, thus permitting the application of the Egyptian code in Syria.'[29]

Egypt served as an example to other Arab states in its introduction of legal reforms, starting from the late 1940s. In fact, the famous Egyptian jurist, Abd al-Razzaq al-Sanhuri (1895-1971), responsible for the Egyptian version, drafted or assisted in the drafting process of the civil codes of Syria (1949), Iraq (1951), Jordan (1952, replaced in 1976), Libya (1953), Yemen (1979), and Kuwait (1981) (Bechor 2007: 57). The adoption of Egyptian laws by other Arab states was also explained in light of the then popular Arab nationalist ideology. The Explanatory Memorandum of the Syrian Civil Code continues by stating that:

> 'the modelling of the Syrian Code along the pattern of the Egyptian Code fulfils an important purpose aimed at by the Arabs at present, i.e. the unification of the laws of the Arab countries. Arab lawyers have been trying hard to reach this goal, and the present Code is indeed a practical step forward on the way to legal unity among the Arab countries.'[30]

In August 1949, Al-Za'im's rule ended by a counter-coup of Colonel Hannawi, followed by another counter-coup in December by another officer, Adib Shishakli. Shishakli's rule ended in February 1954, due to a successful military revolt which forced him into exile to Brazil (Landis 1998: 369). During his rule, the Code of Penal Procedure (1950), the Nationality Law (1951), and the Code of Civil Procedure

[29] English translation taken from Badr (1956: 302).
[30] Badr 1956: 302.

(1953) were promulgated, as well as the law that is of great importance to this study, i.e. the 1953 Syrian Law of Personal Status (SLPS), which will be discussed in chapter 2. In this period of successive military regimes many laws were promulgated, which are, for the largest part, still in force today.

The years following the subsequent military dictatorships were characterised by nationalist approachment and Arab unity, notably manifested in the union between Egypt and Syria. On 1 February 1958, Syria and Egypt established the United Arab Republic (UAR), under leadership of the charismatic Egyptian President, Gamal Abdul Nasser. Syria and Egypt became, respectively, the 'northern region' and 'southern region' of the UAR. The UAR was the materialisation of the nationalist dream of Arab unity and social equality for all. However, the Syrian-Egyptian marriage only lasted three and a half years. Syrians, especially members of the socialist Ba'th party (discussed below), were disappointed with the union, mostly because of Egypt's political dominance in the UAR. On 18 September 1961, a group of army officers staged a coup d'état, which led to Syria's secession from the UAR and the Syrian Arab Republic was reinstated. However, it did not take long before Syria was, again, subjected to a string of coups.

1.5 Ba'th Party rule

The Arab socialist *Ba'th* (i.e. 'resurrection') movement was an intellectual movement, founded by two Syrians in the early 1940s: Michel 'Aflaq, a Greek Orthodox Christian, and Salahadin al-Bitar, a Sunni Muslim.[31] The movement advocated a social revolution which would lead to one Arab nation, free from Western imperialism, in which Arab and social values would be guaranteed. As pan-Arab nationalism and socialism were the dominant ideologies, any form of religious, sectarian, regional or tribal factionalism had to be resisted for the sake of national unity (Van Dam 2011: 15). Although the Ba'th ideology was secular, its founding father, Michel 'Aflaq, maintained that 'the Arab movement was inseparably connected with Islam and that Muhammad's life was a perfect picture

[31] 'Aflaq and Al-Bitar belonged to the Damascene middle-class, they were both school teacher and graduates from Sorbonne University in Paris, where they studied in the early 1930s (Van Dam 2011: 15).

and symbol of "the nature of the Arab soul and its rich possibilities."' Moreover, God had revealed the Islamic faith to the Arabs and therefore Arabs 'had a universal duty to create an "Arab humanism"' (Khoury 1987: 605-06). According to Ba'thist doctrine, Arab nationalism could therefore not be completely separated from Islam (i.e. Islam as an 'Arab' or 'humanist' ideology (Khatib 2011: 24), as opposed to the European ideal of separation of church and state (Khoury 1987: 606).

The Ba'th movement attracted young followers from the middle and lower classes, rural minority groups in particular, such as 'Alawis from the mountainous coastal area. In the 1950s, after the overthrow of General Shishakli, the Ba'thists gradually gained ground in the political arena. However, it took until 1963 before the Arab Socialist Ba'th Party actually came to power. A month after the Ba'th party had come to power in Iraq, a group of Ba'thist officers seized power in Syria on 8 March 1963 (Seale 1990: 76-77).

The first few years in power, the Ba'th party struggled with internal contesting forces, including early Ba'thists versus the new generation, civilians versus the military, Ba'thists versus Nasserists. These conflicts were partly settled by a bloody intra-party coup by a group of army officers, led by Salah Jadid and Hafez Al-Asad on 23 February 1966, which forced the party's founding fathers and civilian Ba'thists to leave the country. Salah Jadid became the effective new ruler and Hafez Al-Asad was appointed Minister of Defence of the new government (Abd-Allah 1983: 53-54). Following Syria's defeat against Israel in the Six-Day War of 1967, a power struggle between 'Alawi generals Jadid and Al-Asad eventually led to a final intra-party coup (referred to as 'the corrective movement') led by Al-Asad on 16 November 1970. Hafez Al-Asad took over the presidency, arrested his former comrade Salah Jadid and incarcerated him in Mezze prison in Damascus, where he died in 1993 (Cooke 2007: 7).

1.5.1 Syria under Hafez Al-Asad

With Hafez Al-Asad's ascension to power, Syria entered a period of relative political stability. The new regime established itself as a strong authoritarian power, it controlled the country by creating a strong state apparatus dominated by

Ba'th party members, aided by a vast omnipresent secret police force. The rule of Al-Asad family, past and present, is often described as being based on a system of patronage, formed by tribal (or familial), regional and sectarian loyalties (cf. Hinnebusch, Van Dam). Furthermore, from its inception, the Islamic legitimacy of the 'Alawi dominated Ba'th regime was questioned and challenged by the country's Sunni Muslim majority.

In the 1970s and 1980s, Sunni Muslim opposition groups mounted a violent struggle against the Ba'th regime. The Syrian government responded by ruthlessly suppressing any opposition to its rule, either Islamic or secular opposition. Thousands of people were arrested, imprisoned or disappeared, especially those who were associated with the Muslim Brotherhood. The Brotherhood was the state's number one enemy and for that reason membership of the Brotherhood was punishable by death by Law no. 49/1980 (Abd-Allah 1983: 17). The climax of the regime's confrontation with the Brotherhood was the bloody suppression of the insurrection in the city of Hama, which was considered a traditional stronghold of the Muslim Brothers, in February 1982. It remains unclear how many people died in the Hama massacre; numbers vary from 5,000 to 25,000 and more (Van Dam 2011: 111; Seale 1990: 334; Wedeen 1999: 33)

Following 'the Events' of the late 1970s-early 1980s, the regime changed its policy towards Islam, what is more, the President 'started to cultivate a public air of Sunni religiosity' (Rabo 2012a: 131). For example, on major Muslim religious holidays he, together with other high-ranking members of the government and the Ba'th party, would pray in the Umayyad mosque in Damascus. Besides, the 'Islamic character of public space', particularly in cities like Aleppo and Damascus, increased over the last few decades, most notably epitomised by an increase in female veiling (2012a: 131). It should be noted that veiling was a sensitive issue in Syria. Before the 1990s, veiling was officially forbidden in many public places; there had been incidents where veiled women were attacked (i.e. unveiled) by Ba'thi youth groups (Rabo 1996: 168-69). According to Rabo, 'veiling may be regarded as a clear political demonstration against the state and the Ba'th party' (1996: 170; Khatib 2011: 02).

The Ba'th ideology became a dominant force in Syrian society: it constituted an integral part of the curriculum in all Syrian schools and universities; numerous popular organisations, such as trade unions, youth, student and women organisations were administered by the Party. For many years, membership to the Party was a requirement for employment in most state sectors (Rabo 1996: 161).

More importantly, the Ba'th ideology was institutionalised in the Constitution of 1973, which was in force until February 2012, when a new Constitution was adopted. The 1973 Constitution firmly consolidated the leading political role of the Ba'th party in the Syrian society and the state. The Explanatory Memorandum of the Constitution stated that the Arab socialist Ba'th party advocated and aspired unity and freedom for all (Arab) people, which includes equality of all its citizens before the law (Art. 25.3) and equality between men and women (Art. 45).

In line with the aspirations laid down in the Constitution, the government, in the early Al-Asad years, worked to improve the status of Syrian women; also in the field of family law. According to Rabo, '[t]he Ba'th Party leadership intermittently tried to put forward a secular personal status law (..). Such a law would (..) make polygamy illegal and give equal inheritance to men and women. However, opposition to such reforms has been strong, even within the Ba'th Party.' (1996: 170) Nevertheless, some significant amendments to the Law of Personal Status were adopted in 1975 but the core of the SLPS has basically remained intact since its promulgation in 1953, as will be explained in chapters 2 and 3.

1.5.2. Syria under Bashar Al-Asad

After 30 years in power, Hafez Al-Asad died on 10 June 2000. A month later he was succeeded by his son Bashar Al-Asad,[32] who was elected President by referendum with 97.20 per cent of the votes (Van Dam 2011: 133); in 2007 his presidency was renewed for seven years. When Bashar Al-Asad came to power, he promised to implement political and democratic reforms. There was hope that the country would change under Bashar. Until 1994 he had worked as a British-trained ophthalmologist in London, when he was called back, after the death of his brother

[32] The Constitution was amended to lower the minimum age allowing for a president to take office, from the age of forty to thirty-four (Van Dam 2011: 132-33).

Basil (the heir apparent), to be prepared for the presidency. Many hoped that with his efforts to reform the economy, curb corruption, the introduction of the internet, changes in the Ba'th Party hierarchy, and the release of hundreds of political prisoners, Bashar's promises to reform would materialise. Unfortunately, that was not the case.

During the so-called 'Damascus Spring' of 2000 various civil society and opposition groups emerged and publicly debated on a wide range of political and social topics but the spring turned out to be short-lived. In the autumn of 2001, the regime tightened the authoritarian strings again and the 'Damascus Winter' followed (Cooke 2007: 160-61).[33] However, not all social initiatives were wiped out completely. Women activists were able to keep women's issues on the public agenda, one of which eventually led to a minor reform in the general personal status law in 2003. In addition, different laws in relation to family law issues were drafted during the last decade, for the most part coming from reformed-minded groups but also some more controversial proposals issued by religious conservative groups were put to the fore. In chapter 3 these developments with regard to draft law projects and amendments concerning personal status law will be discussed in more detail.

1.5.3 Syrian Revolution 2011

Mid-March 2011, inspired by the popular protests in other Arab countries and the subsequent overthrow of presidents in Tunisia and Egypt, the 'Arab Spring' gained ground in Syria. Demonstrations sprang up in different parts of the country, most notably in Deraa in the South, Baniyas and Lattakia at the coast, Hama and Homs in the central west, Idlib and Jisr al-Shaghour in the north, and in several Damascus suburbs. In the succeeding months, the protests spread and grew in size and strength, as did the regime's brutal suppression of the uprising. As the uprising became more widespread, both sides also became more violent. At the

[33] Following the assassination of the Lebanese Prime Minister Rafiq Hariri and Syria's subsequent withdrawal of Syrian armed troops from Lebanon in 2005, several Syrian opposition figures and groups, including human rights advocates, Communists, Kurdish Nationalists, and the Muslim Brotherhood, issued a joint document, i.e. 'Damascus Declaration for Democratic and National Change' (October 2005), establishing a united platform for democratic change (Pace and Landis 2009: 128 ff.). In the years that followed, a number of signatories were arrested and sentenced to imprisonment (Pace and Landis 2009: 137).

moment of writing (spring 2013), we are two years into the Syrian Revolution and the situation does not look promising. There is no way of telling what the Syrian Revolution entails for the future of Syria: the country, its people, the role of religion, the composition of the government and the executive branch or the legal system.

Bearing in mind the disturbing events taking place in Syria today and not knowing what the future will hold for Syria, I will continue with the subject at hand, i.e. the development of the position of religious family law but also more generally, the position of *sharī'a* and Islam in relation to the state. It is necessary to examine the relation between Islam and the state, and the effects this changing and contested relationship has on family law, in order to understand the role of religion in Syrian society at large.

1.6 Islam and the state

1.6.1 Islam and the Constitution

Article 1 of the 2012 Constitution reads as follows:

> 'The Syrian Arab Republic is a democratic state with full sovereignty, indivisible, and may not waive any part of its territory, and is part of the Arab homeland; The people of Syria are part of the Arab nation.'[34]

This brand-new constitution was approved by a constitutional referendum on 26 February 2012 with 89.4 per cent of the votes;[35] the Constitution came into effect on 27 February by order of Presidential Decree No. 94.[36]

Whereas the preceding Constitution, promulgated in 1973, assigned and firmly consolidated the leading political role of the Ba'th party in the Syrian society

[34] Translation taken from the Syrian Arab News Agency (SANA) website: http://www.sana.sy/eng/361/2012/02/27/401178.htm, accessed 14 March 2012.
[35] See for example: http://www.reuters.com/article/2012/02/27/us-syria-referendum-idUSTRE81Q1CZ20120227, accessed 14 March 2012.
[36] Syrian Arab News Agency Presidential (SANA) website: http://www.sana.sy/eng/21/2012/02/28/403103.htm, accessed on 14 March 2012.

and the state, in the present Constitution the contested article has been omitted. Apart from this significant change, most of the content of the Constitution remained the same, including the articles related to religion.

The Republic prides itself in being a secular nation where the various religious communities co-exist peacefully. The major Muslim and Christian holidays, such as *'īd al-aḍḥā* (Sacrifice Feast), Birthday of the Prophet Muhammad, Easter (both Catholic and Orthodox), and Christmas are officially observed.

Syria is, officially, a secular state and therefore has no state religion. That said, Islam remains the prevailing religion and maintains the upper hand in all strata of society, including the Constitution. Article 3 paragraph 1 of the 2012 Constitution states that: 'the religion of the president of the republic is Islam', the following paragraph of the same article reads 'the Islamic jurisprudence (*fiqh*) is a main source of law'.[37] At present, Islamic legal principles are most obviously and predominantly present in the 1953 Syrian Law of Personal Status. Traces of Islamic law can also be found in other statutory laws, for example in the 1949 Civil Code, as demonstrated by the wording of its Explanatory Memorandum, which states that Islamic law is 'a fundamental and flexible source from which an important part of any deficiency which may exist in the Code may be supplied.' [38]

Paragraph three of article 3 of the 2012 Constitution stipulates that 'the state respects all religions and it guarantees the freedom to hold any religious rites, provided they do not disturb the public order.'[39] The last paragraph (Art. 3.4) is 'new', i.e. no similar provision existed in the 1973 Constitution,[40] and it states that 'the personal status of the religious groups shall be protected and respected'.

1.6.2 Religion of the President is Islam

Since the 1930s, all constitutions included a provision stipulating that the religion of the head of state had to be Islam (Seale 1990: 173). Traditionally, during the

[37] Earlier constitutions stated that *fiqh* was *the* main source of legislation (Khatib 2011: 19).
[38] English translation taken from Amin (1985: 359).
[39] This third paragraph is a contraction of the two paragraphs of article 35 of the 1973 Constitution; the English translation (of the 1973 Constitution) is taken from the International Constitutional Law (ICL) Project, available at: http://www.servat.unibe.ch/icl/sy00000_.html, accessed on 15 March 2012.
[40] However, a similar provision was included in the Constitution of 1950, 1953, and 1962 (Berger 1997: 117 n. 6).

Ottoman Era and before, political power belonged to the Sunni urban establishment. In 1971, Hafez al-Asad became the first non-Sunni President; he belonged to the ʿAlawi community, a heterodox Shiʿi sect founded in Iraq in the ninth century. It is important to note that many Sunnis do not regard ʿAlawis as Muslims 'because of the particularities of the ʿAlawi religious doctrine' (Böttcher 2002: 15). Because of their esoteric and other dissenting beliefs, ʿAlawis (also referred to as Nusayris) were often denounced by Sunni scholars as infidels and heretics. In the past, they were regularly oppressed and prosecuted: that is why they had retreated to the rugged, mountain areas of the Mediterranean coast (Seale 1990: 8-11).

In January 1973, the government put forward a new constitution; this document omitted to stipulate a provision that the President of the Syrian Republic should to be a Muslim. This omission was not well-received by many Sunni Muslims and led to protests in different parts of the country, especially in Hama (Seale 1990: 173). The problem was ironed out by adopting an amendment which re-introduced the desired clause into the Constitution. Nonetheless, another issue was also still on the table, i.e. the claim that the President should be a Sunni Muslim. To solve this problem President Al-Asad turned to Imam Musa al-Sadr, director of Supreme Shiʿi Council in Lebanon. Imam Musa issued a *fatwā* in 1973 stating that ʿAlawis and Twelver Shiʿa were brothers in faith and that both sects follow the Jaʿfari school of law (Kramer 1987: 247-48). Despite the fact that some groups still demanded that Islam should be acknowledged as the state religion – a demand that was never acknowledged – the Constitution was adopted by popular referendum on 12 March 1973 (Seale 1990: 173).

1.6.3 'Official Islam'

From the late 1970s, the Syrian regime started to develop its own version of Islam (Böttcher 2002: 5), and with that moved away from its original promotion of secularism (Khatib 2011: 88 ff.). Syria's 'official Islam' is a Sufi Islam, according to Böttcher; Sufi *shaykh*s were considered attractive cooperation partners for the regime in its attempt to polish its Islamic image (2002: 7). For example, both the late Grand Mufti, *Shaykh* Ahmad Kaftaru (d. 2004), and the present Grand Mufti *Shaykh* Ahmad Hassun belong to the Naqshbandi Sufi order (Böttcher 2002: 7;

Pinto 2011: 193). Furthermore, Sunni Kurds dominated the Sunni official Islam, according to Böttcher, this decision was made by Hafez al-Asad 'in response to the refusal on the part of the *'ulamâ* to cooperate with the authorities. Asad favored a "confessional minority, that is Sufis over Salafis, and an ethnic minority, the Kurds, over the Arabs."' (2002: 15) As will be discussed in chapter 3, political co-optation with the religious establishment of particular minority groups (e.g. Kurdish religious elite, but also church leaders) was part and parcel of Syria's domestic politics under the Al-Asads.

Despite the regime's efforts to establish an 'official Islam' or 'societal Islam' (Manea 2011: 182-83), Islam in Syria was never fully institutionalised or, at least, to a lesser degree when compared to, for example, Egypt. The regime never tried to educate or appoint their own brand of religious scholars; instead, they preferred to manage the Sunni establishment by co-optation of personalities with a genuine social base for support (Pierret 2009: 74).[41] Pinto argues that with the appointment of *Shaykh* Ahmad Kaftaru as the Grand Mufti of Syria in 1964, the regime was able, with his help, to 'consolidate its control over the Sunni Muslim religious establishment.' (2011: 192) In addition to Grand Mufti Kaftaru, certain religious key figures, like (late) *Shaykh* Muhammad Sa'id al-Buti, independent member of Parliament Dr. Muhammad Habash,[42] and the current Grand Mufti Ahmad Hassun, who preach a moderate Islam, were given easy access to the media and were allowed to set up Islamic schools, educational and charitable institutions (2011: 193; Khatib 2011: 90 ff.).

The recognition of religion or Islam started under Hafez al-Asad but became more apparent in the political discourse under his son Bashar. Since his ascension to the presidency, the regime 'increased its use of Islamic symbols and vocabulary in an attempt to gain legitimacy and popularity among pious Sunni Muslims.' (Pinto 2011: 191) Islamic references were fused with nationalistic discourse; the use of

[41] In addition, the Grand Mufti or other recognised Islamic authority rarely issues *fatwā*'s on social or political issues (Pierret 2009: 78-9).

[42] The National Progressive Front (est. in 1972), headed by the President of Syria, is guaranteed two-third of the 250 seats in the People's Assembly. The Front is a coalition of the Ba'th party and a number of smaller left-wing political parties. Since 1990, the remaining seats are open to independent pro-government candidates, including prominent Islamic figures (Khatib 2011: 93, 117-18).

Islamic symbols and discourse 'allowed for the expression of a multiplicity of meanings and claims by the various social actors who dialogued, disputed and negotiated through them.' (2011: 194) Pinto states that this 'use of Islam as a cultural idiom' allows for the expression of different cultural understandings and dynamics (2011: 191), for example, power struggles over religious identity and influence. A good example of the use of Islam as a cultural idiom by different actors, including the state, are the efforts made to reform Syrian family law and debates around it, as will be discussed in detail in chapter 3.

1.7 State-sponsored religious legal plurality

Syria's legal system, similar to most Middle Eastern states, can not be characterised as entirely civil or secular. Following independence from France in 1946, the successive Syrian governments of the late 1940s until the late 1960s, in line with the then popular ideologies of secularism and nationalism, sought to uplift and unify the nation and eradicate all remnants of the feudal and colonial past. The wish for unification also affected the field of family law but this ideal was never fully achieved, as became evident earlier in this chapter.

From the late 1940s onwards, a series of statutory laws were promulgated, including Syria's first codified Law of Personal Status, the 1953 SLPS, which will be discussed in greater detail in chapter 2. An important goal of the promulgation of this law was the government's wish to subsume all Syrian nationals under one law. Before 1953, religious scholars and clergymen were authorised to determine which laws applied in matters of personal status to their respective communities. With this uniform or 'standardised' law, the state took control over the legal system and thus, the religious men essentially lost their interpretive authority in matters of religious law to the state. Botiveau, when writing on similar legal reforms in Egypt, states that 'this 'standardization' was facilitated by the fact that the legal culture of the religious groups differed less than is often claimed, if one admits that they were influenced more by 'patriarchal' than 'religious' solidarity.' (1998: 118)

However, the religious men did not lose their judicial authority completely; the SLPS stipulates in article 306 that the law applies to *all Syrians* but it also stipulates that, following the subsequent two articles, the Druze community,

the various Christian communities, and the Jewish community are exempted from several provisions of the law and are allowed to apply their own laws.[43] Hence, these latter three articles of the SLPS undo the aim of unification by allowing a continuation of separate, though limited, jurisdictions for the three singled-out communities.

It is evident that in the field of personal status law the Syrian government has adopted or maintained a plurality of laws and jurisdictions. However, this state-sponsored legal plurality does not entail equality between the different religious communities. Rather, it is an imbalanced plurality – imbalanced because of the supremacy of the SLPS and the *shar'iyya* courts (cf. Berger 2005, Georges 2012, Tadros 2009).[44] This affects especially the non-Muslim minorities, whose status as a minority in the legal system is accentuated by the above-mentioned stipulations of the SLPS. Examples of complex legal realities that arise from this intersection of jurisdictions in relation to the supremacy of the SLPS will be described in the next chapter.

Thus, on the one hand, the post-independence Syrian governments sought to unify the legal system inspired by principles of nationalism and citizenship but on the other hand they preserved the *millet*-system, or an adapted version thereof. Mainly due to conservative religious opposition, both Muslim and Christian, religious legal plurality in personal status matters was maintained until the present time (Botiveau 1998).[45]

Rabo states that plurality in family law may be intended to protect religious 'minorities' and respect the differences between religious groups, 'but also perpetuates the legal distinction between Muslims and Christians' (2011: 80). Maktabi argues along the same lines and states that:

> 'Legal pluralism within family law serves not only as a means of maintaining and regulating the internal affairs of religious groups. Family

[43] For a similar situation in Egypt, see Berger (2005: 27 ff.). In Morocco, Algeria, and Tunisia, on the other hand, this plurality in the legal system was abrogated (Mayer 1995: 433).
[44] For a similar situation with regard to (Islamic) education in Syria, i.e. the dominance of Sunni Islamic orthodoxy in Syria's education system, see Landis 2007.
[45] Botiveau calls this an 'imperfect citizenship'; in Egypt's and Syria's case this means that citizenship is not only linked to a territory but also to religion (1998: 122-23).

> law also defines the dividing lines *between* the different religious groups, with state authorities as gatekeepers who maintain and monitor intra-group boundaries through the state's personal status registries.' (2010: 568)

Father Antoun Mouslih, a senior Catholic judge and the driving force behind the new Catholic law of 2006 (see below), admitted that this legal plurality constitutes a structural problem and divides Syrian citizens (Maktabi 2010: 565). He was therefore in favour of the promulgation of a more unified family law, especially since all the different communities share so many similarities, for example the financial and social hardship that women and children face in the event of a troublesome marriage. A more unified law, in particular more cohesive administrative procedures, based on civil law, could improve the status of women and children, and decrease the current religious inequality between the Muslim majority and other religious minorities (2010: 565).[46]

According to Rowe, the secular policies of the post-colonial governments did not gain mainstream acceptance, which led to 'the development of parallel institutions and regulations for religious minorities that accept the secular system so long as they can retain a measure of internal autonomy.' He describes this situation as a 'neo-millet system' (2007: 331). In this modernised version of the Ottoman *millet*-system, the state and the Churches entered into a neo-*millet* partnership:

> 'Churches thereby provide support and legitimization to the state and the state confers importance and legitimacy to the church. But these systems are challenged when the regime liberalizes, differentiates from a communitarian focus, or the civil society presents challenges to the received wisdom of identity politics.' (Rowe 2007: 331)

The church leaders[47] and Christian communities in Syria are generally perceived as loyal to the Al-Asad regime; for it is alleged that the 'secular', minority government offers the best possible protection for religious minorities against

[46] In addition, it might also decrease the chance that a conflict of jurisdictions between the different personal status courts will arise, as explained in chapter 2.
[47] Damascus is home to three patriarchates (see chapter 2).

Sunni dominance. Since the start of the uprising in 2011, the regime continued to propagate this discourse, enforcing the assumption 'that the authoritarian status quo was preferable to democratic uncertainties.' (McCallum 2012: 121-22) Correspondingly, a modernised version of the *millet*-system remained in place due to the partnership between the religious communities and the state.

In the recent past, the foundations of Syria's religious legal plural system were put to the test, partly due to legislative developments in the Christian communities. As this dissertational research shows, Christian clergy, in particular, strongly adhere to their specified areas of legislative and judicial autonomy, especially being a minority in a Muslim majority country. In this context, Tadros' article on non-Muslims in Egypt's framework of personal status law is interesting. She argues in her article that '[t]he political context in which legislation is mediated is crucial', especially in countries with sectarian tensions, like Egypt and Syria. When a religious minority feels it is facing pressure from the religious majority, it is more likely 'to first, cling on to the idea of its religious distinctiveness, and the personal status law is one manifestation thereof.' (2009: 119) Tadros refers here to the Coptic Orthodox Church in Egypt, more specifically to the power struggle between the government and the Church, which was played out in family law arena. The same holds true for Syria, where tensions between the different Christian groups emerged when the Catholics managed to obtain a new independent personal status law in 2006, by which they had placed themselves outside the scope of the SLPS and with that also outside the jurisdiction of the *shar'iyya* courts. This exceptional position of the Catholics created ill-feelings between non-Catholic and Catholic Christian groups, for the former did not attain full jurisdiction over all their personal status affairs. The government had to respond to this precarious situation and did so by accepting an amendment to the SLPS in 2010, which equalised the inheritance rights of all Christians and abrogated a large part of the Catholic personal status law. The above-mentioned changes in the respective personal status laws will be addressed in more detail in chapter 3.

1.8 Conclusion

This chapter described the historical development of the position of religion, most importantly Islam and Islamic (family) law in relation to the central state authority in Syria's past and present. Significant historical developments concerning this relationship took place in the Ottoman time, during the French Mandate, the early years of Independence, and in more recent times under the Al-Asad rule.

The Ottomans developed the so-called *millet*-system in which non-Muslim communities, i.e. Jews and Christians, enjoyed the right to retain to and apply their own religious laws, particularly with regard to matters of personal status. The legal plurality that stemmed from the *millet*-system created a plural legal system, in which civil and various religious laws and courts operated simultaneously. This legal plurality in family law never ceased to exist. It not only survived the Ottomans, the French, and the secular Al-Asad regime but it was, in fact, reinforced time and again, often dictated by political motives.

Changes or reforms in the domain of personal status law were generally (and still are) controversial. This chapter described examples of such controversial reforms undertaken during the Ottoman and the French administrations. In the post-Independence period the relationship between the Syrian state and religion, i.e. Islam, turned increasingly problematic. In particular the Al-Asad regime, which has been in power since the 1970s, has always had a difficult relationship with Islam. Syria is officially a secular, socialist state and has no state religion. The state recognises all religions and guarantees freedom of religion, which also comprises the guarantee to respect non-Muslim communities' legal and judicial autonomy in personal status. That being said, Islam nevertheless remains the prevailing religion and retains the upper hand in all strata of society, including the Constitution and perhaps even more so in the plurality of Syria's personal status law.