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

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### Citation

Eijk, E. van. (2013, September 19). *Family law in Syria: a plurality of laws, norms, and legal practices*. Retrieved from <https://hdl.handle.net/1887/21765>

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

**Issue Date:** 2013-09-19

## 2 Mapping the Plurality of Jurisdictions: The Laws of Personal Status

### Introduction

Various personal status laws can be found in Syria, but the major law regulating family relations is the 1953 Syrian Law of Personal Status (SLPS). The SLPS is predominately based on Islamic jurisprudence, yet is applicable to all Syrian citizens, Muslims and non-Muslims alike. The previous chapter outlined the historical development of the position of Syria's family law in the legal system. It explained why legal plurality in family law, as elaborated by the Ottomans and expanded by the French, continued to exist in Syria today. This plurality in family law entails that specific religious communities retained their legislative and judicial autonomy in the field of family law, parallel to the general state law on family relations, i.e. the 1953 SLPS. The difference in position of personal status for Muslims and non-Muslims remained in place and continues to create legal difficulties for non-Muslim minorities. This latter phenomenon will be addressed in more detail in the final section of this chapter.

The state-supported plurality of laws and jurisdictions does not, however, entail equality between the different religious communities. The SLPS is considered the general law and the various Christian laws are considered special laws, as exemptions to the general law. The organisation of personal status law in Syria is similar to Egypt. Berger speaks about 'interreligious duality or bi-polarity' when referring to the plurality of personal status laws in Egypt, meaning that a distinction is made between Islamic law, on the one hand, and the collective of non-Muslims laws on the other (2005: 46). Another similarity between Syria and Egypt is the position of the Muslim personal status law vis-à-vis non-Muslim laws, for the Egyptian personal status law 'enjoys the status of *primus inter pares* by being the general law' (Berger 2005: 46). The same applies to the SLPS, which is upheld as the general, overriding law in matters of personal status.

The purpose of this chapter is to present the mosaic of the laws of personal status that we find in Syria today. Once the legal map is outlined, it will help us to

understand some of the complexities that arise from this legal plurality. I will first map out the different effective family laws and courts that operate in Syria's contemporary legal system. The first part of this chapter is devoted to an analysis of the development, contents, and the scope of application of the SLPS. Following a general discussion of the SLPS, I will consider the personal status courts and its judiciary, most importantly the *shar'īyya* judges. The SLPS is analysed in more detail than the other personal status laws, because of its particular position vis-à-vis the other laws, i.e. those pertaining to the Druze community and the different Christian communities, which are addressed in the second part of this chapter. I will, however, leave the religious regulations regarding matters of personal status of the Jewish community aside, since the number of Jewish families in Syria is almost nil.<sup>48</sup> As mentioned earlier, in the final section, I will address the issue of competing jurisdictions. Which jurisdiction applies in an interreligious marriage? Or what if a Christian man converts to Islam, who will get paternal authority over the children when the Christian mother adheres to her original faith? These latter questions and issues will be addressed in the final section of this chapter.

### 2.1 The 1953 Syrian Law of Personal Status

In the 1950s, many 'new', i.e. post-independence, Arab governments, like Jordan (1951), Tunisia (1956), Morocco (1958), and Iraq (1959) issued their first national codifications of Muslim family law (Welchman 2007: 13). On 17 September 1953, the Shishakli regime promulgated the Law of Personal Status (*qānūn al-aḥwāl al-shakhṣiyya*) as legislative decree number 59. It came into force on the first of November in the same year, and was considered one of the most progressive family law codes in the Middle East at the time (Anderson 1955: 34). The Jordanian government had promulgated a personal status code two years earlier, in 1951, which served as an example to the drafting committee of the SLPS (1955: 35).<sup>49</sup> The Syrian legislators, for their part, took it a step further and introduced some bold, unprecedented reforms to the corpus of Arab personal status law.

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<sup>48</sup> Central Intelligence Agency, *The World Fact Book* 2013; *International Religious Freedom Report* 2012 (above n. 1). In addition, I have not been able to obtain any information on the Yazidi community in Syria; I assume they fall under the general jurisdiction of the SLPS and the *shar'īyya* courts.

<sup>49</sup> In his analysis of the SLPS, Anderson compares the SLPS with the 1917 Ottoman Law of Family Rights, Egyptian laws, and the Jordanian Personal Status Law of 1951.

The Explanatory Memorandum to the SLPS elaborates on the motives and reasoning behind the text. According to the Explanatory Memorandum, there was a need in Syria for a single comprehensive law code containing the *shari'a* regulations regarding matters of personal status. The SLPS is 'based on an eclectic choice of those juristic opinions which most closely accord with local custom and modern needs' (Anderson 1955: 35).<sup>50</sup>

As explained chapter 1, the codification of personal status law was initiated by the Ottoman government, which eventually led to the promulgation of the Ottoman Law of Family Rights (OLFR) in 1917. The OLFR contained not only provisions derived from the Hanafi *fiqh*, but it also drew on rules from other schools of law. This method of lawmaking, known as *takhayyur* (eclectic selection) or *talfiq* (lit. 'amalgation'),<sup>51</sup> was continued by the drafters of the various Arab personal status codes of the 1950s. In the Explanatory Memorandum, the Syrian lawmakers regularly refer to principles that are taken from Maliki, Shafi'i, or Hanbali *fiqh*, so as to explain why certain provisions deviate from established Hanafi jurisprudence or to provide an explanation to an 'innovation' which has no direct ground in established Sunni doctrine.<sup>52</sup> The divergence from traditional Hanafi *fiqh* is most obvious in the expansion of divorce grounds (mainly taken from Maliki doctrine) and the possibility to include various stipulations in the marriage contract (inspired by Hanbali doctrine).

A specially appointed committee drafted the code, based on five different sources:

- (i) the 1917 Ottoman Law of Family Rights (OLFR), which had been in force and to which the people and the courts had already become accustomed;
- (ii) Egyptian legislation, with some amendments, in accordance with local needs (*al-maṣlaḥat al-maḥallī*);
- (iii) the unofficial, i.e. never formally enacted, personal status code compiled by the Egyptian jurist Qadri Pasha;

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<sup>50</sup> In Arabic: *yakhtāru min al-aqwāl aktharihā mawāfaqat li-l-'urf wa-mu'ābiqat li-l-maṣlaḥat al-zamāniyya* ('Atari 2006: 6).

<sup>51</sup> For an explanation of the various legal devices used by twentieth century law-makers, see Hallaq (2009: 447-49).

<sup>52</sup> An example of a provision which has, according to Anderson, a base in Ja'fari *fiqh*, i.e. the Twelver Shi'i school of law, is article 90, which deals with a repudiation pronounced intended only as a threat, to induce some action, or as an oath (1955: 39 n. 3). This type of repudiation is subject to nullification, see Appendix (xii).

- (iv) non-Hanafi opinions and provisions which the committee considered 'not contrary to *sharī'a* regulations'; and
- (v) a draft code written by a Damascus judge, Al-Shaykh 'Ali al-Tantawi.<sup>53</sup>

According to Anderson, the inclusion of the phrase 'not contrary to *sharī'a* regulations' (*lā tunāfi al-hukm al-shar'i*) is significant, because it opened 'the door extremely wide' (1955: 35). He marked this as a perfect example of how the legal reformers of the mid-twentieth century sought to combine the demands of modern life with the wish to ground their legal interpretations in religious authority. He stated that "[t]here can be no manner of doubt, (...) that the motive behind these reforms was the pressure of modern life, social change, and social conscience; that the inspiration was, in origin, Western; and that only the form was Islamic." (1957: 31; 1955: 34–5). To some scholars, the legal-religious foundations of some of the innovations in the personal status laws were rather narrow. According to Layish, drafters of statutory legislation in countries such as Egypt and Syria founded such innovations by referring to the principle of *maṣlaḥa* ('public interest'), to the extent that 'social need became a source of law in its own right'. (1978: 270; and 2004: 93) Indeed, the Explanatory Memorandum does refer to the *maṣlaḥa*-principle a number of times. For example in its introduction to the section pertaining to 'divorce' (*ṭalāq*), it states that *sharī'a* itself opens the 'door of grace' (*bāb al-raḥma*) through the principle of *siyāsa shar'iyya*,<sup>54</sup> to return to the origins of the rules of divorce, which also include opinions other than the four (Sunni) schools of law, as long as they conduce to the public interest (*maṣlaḥa 'amma*) ('Atari 2006: 8).

A concrete example of how the *maṣlaḥa*-principle was invoked to legitimise an innovative provision can be found in the explanation on article 117 SLPS. This article stipulates that a woman can claim a payment of compensation (*ta'wīḍ*) to be paid by her husband when he has misused his unilateral divorce rights and divorced her arbitrarily and she suffered hardship as a result. Syria was the first Arab country to introduce this possibility for a woman to seek compensation from her former husband in case of an arbitrary divorce (Welchman 2000: 337; 2007:

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<sup>53</sup> See Explanatory Memorandum to the SLPS.

<sup>54</sup> The principle of *siyāsa shar'iyya* refers to the discretionary authority of the ruler to promulgate legislation as long as it is in accordance with and supplements *sharī'a* (Hallaq 2009: 200 ff.).

126).<sup>55</sup> The Explanatory Memorandum explains that when a ruler regulates to comply with something that is recommended (*mandūb*) or permitted (*mubāḥ*), it becomes binding (*wājib*), according to the Hanafi doctrine, provided that there is a benefit, i.e. in accordance with *sharī'a* (*maṣlaḥa shar'īyya*), in it ('Atari 2006: 10; Layish 1978: 270). Anderson and Layish both call this, respectively, a bold (1955: 41) or revolutionary (1978: 271) innovation for which the legislator provided only general *sharī'a* principles as a base, such as the prohibition to cause damage (Layish 1978: 271).<sup>56</sup> Yet while the SLPS was considered progressive or revolutionary in the Arab world in the early 1950s, this no longer holds true today, especially when compared to the current family laws of - for example - Egypt, Morocco and Tunisia.

The SLPS is schematically organised as a classical *fiqh* treatise<sup>57</sup> (Ghazzal 2007a: 653); it consists of 308 articles, divided into six books. The first book deals with marriage, more specifically: betrothal, the marriage contract, types of marriage, and the legal effects of marriage. Book Two covers the dissolution of marriage, in which different types of divorce and their legal effects are discussed. Book Three deals with paternity, nursing, suckling and the maintenance of relatives. Book Four concerns legal capacity and legal representation, or more specifically: legal guardianship, custodianship, and curatorship. Book Five provides the regulations regarding bequests. The final book deals with the rules governing inheritance. The final four provisions (Arts. 305-308) are part of the latter book, but are not exclusively related to 'inheritance'. They are in fact applicable to the SLPS as a whole.

Article 305 states that for matters that are not specified in the SLPS, one shall resort to the most authoritative doctrine of the Hanafi school. The Hanafi doctrine thus remains not only the point of departure of the SLPS, but also the final resort.

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<sup>55</sup> A good number of countries followed suit and included a similar provision in their personal status laws, including Morocco (1958), Iraq (1959), Jordan (1976), Egypt (1985), and Yemen (1992) (Welchman 2007: 217 n. 92).

<sup>56</sup> The Explanatory Memorandum refers to works of the Hanafi jurists Ibn Najim and Ibn 'Abidin as sources of reference for article 117 ('Atari 2006: 10).

<sup>57</sup> The SLPS classifies the major topics in books (sg. *kitāb*), sub-topics in chapters (sg. *bāb*), which are, in turn, broken down into 'sections' (sg. *faṣl*).

Similar provisions, incidentally, can be found in other Muslim personal status laws, including Egypt, Jordan, Kuwait, Mauritania, Morocco, Somalia, and Qatar (Welchman 2007: 45-46). According to Carlisle, this article is regularly quoted in court rulings of by *shar'iyya* judges in Damascus, but not explained. Carlisle notes that the inclusion of article 305 in a ruling seems in part to serve a legitimising function (Carlisle 2007c: 68).

For the practical application of this provision, judges and lawyers today still consult and refer to the Personal Status Code compiled by the Egyptian jurist Muhammad Qadri Pasha in 1875.<sup>58</sup> The edition of the SLPS issued by the Syrian Bar Association, for example, consists of two parts: first the substantive text itself, followed by the complete text of the Qadri Pasha code (647 articles). In comparison, in the Gaza strip (Palestine) *shar'iyya* courts also rely on the Qadri Pasha Code, in addition to the 1954 Law of Family Rights issued by the Egyptian Governor-General for the Gaza strip (Welchman 2000: 13; Shehada 2009a: 30 and 46 n. 15).<sup>59</sup> Shehada asserts that Gaza judges are more reliant on the Qadri Pasha Code for their rulings since the Law of Family Rights provides fewer details than the Qadri Pasha Code (Shehada 2009c: 250). Similarly, in Syria, the provisions of the SLPS are not narrowly defined and are not exhaustive in their treatment of issues, which provides ample room for application of sources other than the SLPS, such as the Qadri Pasha Code. In fact, with article 305, the Syrian legislator facilitated resort to references outside the SLPS. This inherent flexibility of the SLPS and its open norms or lacunae allows judges broad discretion in deciding personal status cases (cf. Shehada 2009c; Voorhoeve 2011). In chapter 5, I will elaborate in more detail on how judges and other legal practitioners work with(in) this flexibility of the Syrian law.

The final three articles (Arts. 306-308) set out the exceptions for the Druze, Christians, and the Jewish communities, which will be discussed in 2.1.2.

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<sup>58</sup> In Arabic: *kitāb al-aḥkām al-shar'īyyat fī al-aḥwāl al-shakhṣīyyat 'alā madhhab al-imām abī ḥanīfa al-nu'mān* (Book of Legal Rulings in Personal Status according to the School of Imam Abi Hanifa).

<sup>59</sup> Likewise, Dupret asserts that Egyptian judges make use of the Qadri Pasha Code (2006: 150).

### 2.1.1 Amendments to the SLPS

In 1953, the SLPS was considered one of the most comprehensive law codes in scope, content and application, including some innovations that had not been incorporated in any other family code in the Middle East (Anderson 1955: 34).<sup>60</sup> Other countries followed suit and proceeded with the introduction of more sweeping reforms in family law. The personal status code promulgated by the Tunisian President Habib Bourguiba in 1956 is generally considered the most progressive family law code, both in Tunisia and outside (Voorhoeve 2011: 199). The Tunisian law introduced some important, unprecedented reforms, such as the prohibition of polygamy and legislation of adoption (cf. Voorhoeve). The Tunisian law was considered a shining example to many Syrian women activists, with whom I interacted during my fieldwork. Several activists seeking to change the SLPS oftentimes referred to the Tunisian law as a guiding paradigm for family law reform.

Syria never took it as far as Tunisia, but since the promulgation in 1953, some amendments were made to the SLPS, i.e. in 1975, 2003, and 2010. In 1975, the regime introduced a series of amendments by Law no. 34/1975, intended to improve the position of women. With the amendment the provisions related to polygamy, dower, maintenance, divorce, nursing, legal guardianship, and custodianship were changed.<sup>61</sup> After the changes of 1975, it took until 2003 before any further changes in the SLPS were implemented and it was not more than a minor amendment. Following a petition action by a collection of women's groups, the nursing rights of divorced mothers were slightly improved. The most recent change dates back to September 2010, when an amendment was made to article 308 SLPS. With this latter amendment the special jurisdiction of the Christian and Jewish communities over personal status matters was extended to include inheritance and bequests. The events and circumstances leading up to the 2003 and

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<sup>60</sup> For example, Syria was the first post-independent Arab country to restrict polygamous marriages. The text of the 1953 SLPS stipulated that a husband has to prove he can support more than one wife, before a judge can give permission to a second marriage.

<sup>61</sup> Interestingly, Syrian and Tunisian legal experts were involved in the South Yemeni family law drafting process in the early 1970s. The South Yemeni law, promulgated in 1974, included some progressive provisions that were clearly inspired by the personal status laws of Tunisia and Syria (Molyneux 1995: 421-22).

2010 amendments will be discussed in chapter 3 in more detail; in addition to other amendments and draft law projects related to family law.

### 2.1.2 Articles 306-308: Application of the SLPS

Article 306 provides that '[t]he provisions of this law apply to all Syrians except for what is stated in the following two articles', i.e. articles 307 and 308. Pursuant to article 306, the SLPS is considered the general law (*qānūn 'āmm*), the Jewish law and the various Christian laws are special laws (*qawānīn khāṣṣa*) (Shaqfa 1998: 19); or in Latin, the SLPS is the *lex generalis* and the Jewish and Christian laws the *leges speciales*. This supremacy of the SLPS over other personal status laws can lead to situations of intersection of jurisdictions. This already complex situation becomes even more complicated in cases of interdenominational or interreligious relations or when one of the spouses converts to another religion, as will be discussed in the latter sections of this chapter.

Article 307 provides that the Druze community is explicitly exempted from those provisions that run counter to their beliefs.<sup>62</sup> Article 308 provides that Christians and Jews will apply their own religious regulations in matters of betrothal, conditions of marriage, marriage conclusion, wife's obedience, wife's and children's maintenance, annulment and dissolution of marriage, the bride's dowry (*dūtṭa* or *bā'ina*), nursing, and, since 2010, inheritance and bequests. Interestingly, depending on which edition of the SLPS you obtain, the text of article 308 varies. The edition published by publishing house Al-Nuri ('Atari 2006) omitted the Jewish communities from the text. I consulted other, recently published, editions of the SLPS, which, likewise, made no reference to the Jewish communities. On the other hand, the edition published by the Damascus Bar Association, which is generally used by lawyers, does include the Jewish communities (*al-ṭawā'if al-yahūdiyya*) in article 308 (Damascus Bar Association 2006). One can only guess at the reason why the Jewish communities are omitted in some editions of the SLPS; one possible explanation could be that the phrase was omitted due to censorship.

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<sup>62</sup> According to Layish, the SLPS is, at least in theory, also applicable to matrimonial matters in the Druze court on the Israeli-occupied Golan Heights (Layish 1982: 12).

Because Syria has been at war with Israel since 1948, the relationship between the two states is sensitive, to say the least. During my time in Damascus, I noticed that Syrians were generally very negative about Israel and anything Jewish. It is possible that the Al-Nūrī edition at sale in the bookshop, which can be considered as the public SLPS edition, omitted the reference to the Jewish communities for that reason, owing to state censorship.

Articles 307 and 308 and its implication on, respectively, the Druze and Christian communities will be discussed in more detail later.

It is important to note that the SLPS does not make a distinction between Sunni (est. 74 per cent of the population), and Twelver Shi‘i, Isma‘ili or ‘Alawi (together est. 13 per cent) Muslims. Interestingly, the situation is different in Lebanon, where such distinction is made. In Lebanon, each religious group has its own personal status law and courts, including the different Muslim communities, such as Sunni, Shi‘a, and ‘Alawi. There is no ‘general’ personal status law applicable to all Lebanese, as in Syria. In other words, in Lebanon each religious community is equal to the other, and the personal status law for Sunni Muslims is just one of the fourteen laws (Tadros 2009: 114).

Finally, the SLPS also applies when one of the spouses has Syrian nationality (Art. 15 Civil Code) and it applies to non-Syrian Muslims who are subjected to Islamic personal status laws in their home country (Berger 1997: 126; Feller 1996: 36).

## 2.2 Personal status courts

In Egypt, unification of the legal system in 1955 led to the abolition of the different religious (Muslim, Christian, Jewish) courts and the establishment of national courts with designated family sections (Berger 2005: 28-29). During the United Arab Republic period (1958-61), the Egyptians tried to get Syria to adopt the Egyptian judicial reforms of 1955, but to no avail (Botiveau 1998: 119 n. 14). In Syria, the Christian, Jewish, and Druze communities retained their respective jurisdictions in family affairs. Due to pressure of Sunni ‘*ulamā*’, the government did not push for a comprehensive unification of the judicial system or an abolition of the religious courts (Ghazzal 2007a: 652).

The Judicial Authority Law (*qānūn al-sultat al-qaḍā'iyya*), Law no. 98/1961 with amendments, regulates the judicial system, which consists of civil and criminal courts, state security courts, and personal status courts. The general personal status courts, those that apply the SLPS, are the *shar'iyya* courts.

Article 306 SLPS states that its provisions apply to all Syrians, which implies that the *shar'iyya* courts have general jurisdiction in all matters of personal status. However, this is not the case. Article 33 of the Judicial Authority Law states that the courts that have jurisdiction on matters of personal status are the following:

- (1) the *shar'iyya* courts;
- (2) a doctrinal court (*al-maḥkama al-madhhabīyya*) for the Druze community;
- (3) the denominational courts (*al-maḥākīm al-rūḥīyya*) for the various recognised Christian and Jewish communities.

The Druze doctrinal court and the various Christian denominational courts will be addressed in section 2.3, in this and the following section I will focus on the *shar'iyya* courts.

In Syria there are twenty-four *shar'iyya* courts in total, the majority of which are in Damascus proper, i.e. six courts (Cardinal 2010: 213-14). *Shar'iyya* courts are first instance courts, presided over by a single judge (Art. 34.1 Judicial Authority Law). There are no *shar'iyya* courts of appeal; SLPS appeals cases are heard by the *shar'iyya* chamber of the Court of Cassation (Art. 48 Judicial Authority Law). Cases of conflicts of competence between the different personal status courts are heard by the civil chamber of the Court of Cassation (Art. 46.3 Judicial Authority Law).

Articles 535-547 of the Law of Judicial Procedures (*qānūn uṣūl al-maḥākīmāt*), Law no. 84/1953 with amendments, sets out the jurisdiction of the *shar'iyya* courts. Article 535 stipulates that the *shar'iyya* courts have exclusive jurisdiction (*ḥukm niḥā'iyyan*) in matters involving:

- (1) legal guardianship (*wilāya*), trusteeship (*wiṣāya*), and legal representation (*niyāba shar'iyya*);
- (2) registration of deaths;

- (3) interdiction (*hajr*) and legal capacity/mental maturity (*rushd*);
- (4) missing persons;
- (5) descent (*nasab*); and
- (6) maintenance of relatives.

The exclusive jurisdiction of the *shar'iyya* courts in matters of inheritance and bequests involving non-Muslims changed with the amendment of September 2010; jurisdiction in these matters now rests with the communities themselves. That being said, any Syrian, regardless of his/her religion, still has to refer to a *shar'iyya* court for matters related to, for example, the determination of paternity and legal guardianship (*wilāya*).

The *shar'iyya* courts have full jurisdiction over all personal status cases involving Muslims, including marriage, dissolution of marriage, dower and trousseau, nursing, fosterage, maintenance of spouses and children, and judgements concerning charitable endowments (*al-waqf al-khayrī*) (Art. 536).<sup>63</sup> According to article 542 of the Law of Judicial Procedures, *shar'iyya* courts have no jurisdiction over foreigners who are subjected to civil law in their home country.<sup>64</sup>

### 2.2.1 The judiciary

Similar to Egypt, the Syrian government sought to place the laws, jurisdictions, and the judiciary of the different religious groups under state control. Judges serving in the *shar'iyya* courts are appointed, transferred and dismissed by the High Judicial Council, under the supervision of the Minister of Justice (Art. 66 Judicial Authority Law). The judicial appointments of the Christian denominational courts, on the other hand, are made by the church authorities, in conjunction with article 36 Judicial Authority Law, but do require retroactive government approval (Cardinal 2010: 201 n. 40).

The traditional religious scholars and judges lost their authority to the state because they were no longer in the position to base their rulings on classical *fiqh*

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<sup>63</sup> See also Berger 1997: 121.

<sup>64</sup> Moreover, if one or both parties is/are Muslim, the case ought to be referred to a civil court (Berger 1997: 126).

texts. The state now decided according to which regulations personal status matters were to be adjudicated, by codification of Islamic substantive law, as laid down in the SLPS. In addition, the judges responsible for its implementation could no longer be traditional legal scholars. On the contrary, they were required to attend state law schools, controlled by the Ministry of Justice. Since 1947, judges working in the *sharʿiyya* courts have to be graduates from the regular faculties of law (Cardinal 2005: 229 n. 10), who like all law students receive a legal training in all areas of law. There are no programmes for specific fields of law and for that reason every law graduate can work in any field, be it criminal, civil or personal status. Hence, graduates from the *sharīʿa* faculties of the universities of Damascus and Aleppo cannot work as judges in the *sharʿiyya* courts. They share the same fate as women and non-Sunni Muslims, who are also excluded from the office of *sharʿiyya* judge (Cardinal 2010: 186-87, 206). There is no explicit legislation or official directive which prohibits women being appointed as *sharʿiyya* judges. Cardinal conducted interviews with judges and other legal professionals in Syria about this issue. She writes that the majority of respondents quoted article 24 SLPS as the reason why women cannot become *sharʿiyya* judges. The article stipulates that a (*sharʿiyya*) judge will act as the guardian of whoever has no guardian, and based on this provision the respondents argued: '[s]ince a woman cannot serve as the guardian of a minor or as a marriage guardian, she cannot exercise the functions of a *sharīʿa* court judge.' (Cardinal 2010: 189-90)<sup>65</sup>

*Sharʿiyya* judges are not religiously trained; they do not receive specific *sharīʿa* or *fiqh* training. The law school curricula include a course on personal status law, which is commonly taught by professors from the *sharīʿa* faculties.<sup>66</sup> The classes only focus on the contents of the SLPS and not on the historical sources on which this law is based (Rabo 2012: 84). Even though they administer, for the most part, *sharīʿa*-based law, *sharʿiyya* judges function as civil law judges (Botiveau 1993: 180-81). Whereas the Judicial Authority Law states that the judge of the Druze court (see below) has to belong to the Druze community (Art. 35), it is silent on the religious background of *sharʿiyya* judges. However, this does not exclude the fact

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<sup>65</sup> For an elaborate analysis of this line of reasoning, see Cardinal 2010.

<sup>66</sup> Cardinal notes that the identical university textbook on personal status law is used at the Faculty of Law and the Faculty of *Sharīʿa* of Damascus University (2010: 193 n. 20).

that most *shar‘iyya* judges appeared, in my observation, to be faithful Muslims. Cardinal writes that ‘piety and circumspect behaviour are qualities demanded of a *shar‘iyya* court judge’ in Syria (2010: 206). For example, just like Cardinal’s experience in the *shar‘iyya* courts, the judges I met in the Damascus courts would not shake my hand in greeting. Cardinal sums up the qualities a *shar‘iyya* judge should have as follows:

‘it takes a special type of person to be a judge in the special courts of the shari‘a jurisdiction. In the eyes of the public and the legal community, a shari‘a court judge must be a pious man who respects religious norms and values in order to live up to the high moral standards expected of him as a judge. He must also refer to the classical Islamic treaties whenever the odd case requires him to do so (...). Religious and judicial duties come together in the person of the shari‘a court judge.’ (2010: 207)

Whereas the *shar‘iyya* judges are considered civil servants, working full time in the courts, the judges in the Christian courts are not, they are clergymen. This is also how they view themselves, as for example minister (*qassīs*) and judge of the Protestant court of Damascus, Boutrus Za‘our, put it ‘First I am a priest, second a judge!’<sup>67</sup> Holding the position of judge in an ecclesiastical court is for a clerical judge merely a secondary job, in addition to, for example, instruction and guidance in matters of faith and the administration of the sacraments, such as the Eucharist, baptism and marriage.

To my knowledge, Syrian law students are only trained in the SLPS, the other personal status laws are not part of the university law curricula. Cardinal asserts in her article on Syrian *shar‘iyya* court judges that law school students study the Muslim, Christian and Jewish personal status laws (2010: 205). However, during the frequent interactions I had with various junior lawyers (trainees), I noticed that their knowledge of Christian (and Druze) family law was very limited, and

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<sup>67</sup> Interview 26 March 2009, Damascus.

oftentimes almost non-existent.<sup>68</sup> My observation was confirmed by a statement of the senior lawyer 'Ali Mulhim that law students are only trained in the SLPS.<sup>69</sup> For that reason, Mr. Mulhim asked his only Christian trainee and me to give a series of mini-lectures on Christian family law, based on visits we made to the Greek Orthodox and Catholic courts. He considered it essential for his trainees to gain knowledge on the other (i.e. not SLPS) family laws and their procedures, and the Christian community in general.<sup>70</sup> He acknowledged that many Muslims were ignorant about the beliefs and practices of their fellow Christian citizens. During the first mini-lecture one of the trainees asked a question which seemed to confirm Mr. Mulhim's statement. The trainee asked his Christian colleague whether it was true that Christians baptise their babies in wine. According to the Christian trainee this was a widespread misconception in Syria. Next to Mr. 'Ali's wish for mutual understanding between Muslims and Christians, he pressed his trainees to educate themselves in the Christian court procedures. He did not want them to have to turn down a potential client just because they did not have any knowledge on Christian family law. Therefore, they had to embrace this opportunity to learn.

In the end, we only gave two mini-lectures on a Monday morning; on the two occasions (6 and 16 April 2009) there were about 5-8 trainees present. We focused on the Catholic personal status law and the Catholic court procedures. Mr. Mulhim commented and drew comparisons with the SLPS on various topics, such as the duty on the wife to be obedient to her husband. The Catholic personal status law, analogous to the provisions of the SLPS, stipulates that a woman who is disobedient to her husband, for example by leaving the house on her own accord, loses her right to maintenance (see chapter 5 and 6).

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<sup>68</sup> More than that, in my observation, several senior lawyers also had limited knowledge on other personal status laws. For example, one of the senior lawyers working in Mr. Mulhim's office claimed that there was no such thing as a separate Druze personal status (visit 1 April 2008).

<sup>69</sup> Interview with 'Ali Mulhim, lawyer and member of the Board of the Damascus Bar Association, Damascus, 13 April 2009.

<sup>70</sup> Mr. Mulhim's law office numbered six senior lawyers, including himself, who were responsible for the training of around twenty lawyer trainees (visit 6 April 2009).

## 2.3 Other Personal Status Laws and Courts

### 2.3.1 The Druze community

According to estimates, about 400,000 to 500,000 Druze live in Syria, which is the lion's share of the entire Druze population worldwide (estimated one million).<sup>71</sup> They live predominantly in the rugged, mountainous region of Jabal al-Druz, in the southern governorate of Suwayda.

The Druze call themselves 'unitarians' (*muwāḥḥidūn*), meaning they believe in the unity of God. The Druze religion originated from Isma'ili Shi'i faith and was founded in the eleventh century in Egypt (Hodgson 1965). Druzism is generally considered a blend of various beliefs and rituals, influenced by particularly Isma'ilism, Neo-Platonic philosophy, Sufism, and Gnosticism. For that reason, many Syrian Muslims do not consider the Druze to be part of the Muslim faith (Landis 2007: 188).<sup>72</sup> Their religious beliefs and practices are shrouded in mystery, even to the majority of the Druze people. Only a small group of initiates (*al-'uqqāl*, 'the knowledgeable ones'), either men or women, has access to the secret texts and are fully initiated into the Druze doctrine. The vast majority of the Druze community, the uninitiated (*al-juhhāl*, 'the ignorant ones'), are not trained in the religious teachings, and only know what is handed down to them through tradition.

Article 307 SLPS states that the Druze community is explicitly exempted from those provisions that run counter to their beliefs. The article excludes the application of the SLPS for the Druze community on nine points, most importantly: impediments to marriage, dissolution of marriage, return of the dower or trousseau, intestate and testate succession. The most salient feature of the Druze

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<sup>71</sup> Estimates of the number of Druze residing in Syria vary greatly, the number mentioned here is based on figures presented on the website of the American Druze Heritage, which lists various numbers and sources, without claiming to know the exact number of Druze worldwide (see <http://americandruze.com/Druze%20Population.html>, last accessed 16 May 2012). There are also considerable communities in Lebanon, Israel, and Jordan.

<sup>72</sup> It remained unclear to me whether they regard or present themselves as Muslims, by means of *taqiyya* ('simulation'). My interactions with members of the Druze community were limited and, furthermore, I did not investigate the matter closely.

stance towards Islamic law is the prohibition of polygamy, outlined in article 307 paragraph b.

The Druze generally follow the Hanafi school of law, however not in matters which are distinctively regulated by the Druze law and customs, such as matters related to marriage, divorce, and bequests (Layish 1982: 376). The Druze community has its own law of personal status (*qānūn al-aḥwāl al-shakhṣiyyat li-l-tā'ifat al-druziyya*). The Druze personal status law was issued in Lebanon on 24 February 1948, and amended on 2 July 1959, again in Lebanon. This law applies, for the most part, to Druze communities in Syria, Lebanon, and Israel (Anderson 1955: 35; Layish 1997: 143).

The Ottomans did not recognise the Druze as a religious community, for personal status matters they had to refer to the 'general' courts handling such matters, i.e. *shar'īyya* courts (Layish 1997: 139). However, the French granted the Druze their own denominational court (*al-maḥkama al-madhhabīyya*) in Suwayda. After Syria's independence in 1946, the Syrian government officially recognised the court in 1948 (Landis 2007: 188).

The Druze first instance court is housed in the general court building of Suwayda, next door to the *shar'īyya* court. Since there is only one Druze court with a single judge in the entire country, there is only one Druze judge presiding over all Druze personal status affairs. In case of appeal, parties have to refer to the *shar'īyya*-chamber of the Court of Cassation in Damascus. There once was a special court of appeal for the Druze, which consisted of a group of shaykhs, but this court was abolished in the 1950s.<sup>73</sup>

In May 2009, I travelled to Suwayda. I visited the Druze court and talked to the then Druze judge, Ma'moun Barjas Al-'Afif. According to judge Al-'Afif, the majority of the cases presented to the court involved legal validation of bequests (*tathbīt al-wiṣāya*). The Druze have a different stance on testate succession than the Hanafi school of law, i.e. the Druze recognise absolute freedom in testation, without any restriction, whereas the Hanafi doctrine does not accept exclusion of

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<sup>73</sup> Interview with judge of the Druze court, Ma'moun Barjas Al-'Afif, 19 May 2009, Suwayda. In addition, article 35.3 Judicial Authority Law makes note of this abolished appeal court.

legal heirs by a bequest (Layish 1982: 287). Other cases that were presented to the Druze court concerned mostly divorce cases. The divorce rate among the Druze, similar to other communities (see chapters 5 and 6), increased rapidly in recent times. Although, according to judge Al-‘Afif, divorce cases constituted only five percent of all the court cases, mostly judicial divorce (*tafriq*) cases.<sup>74</sup>

### 2.3.2 Christian communities in Syria

During the first centuries of Christianity five cities emerged as important centres of Christianity, namely: Jerusalem, Antioch, Alexandria, Constantinople, and Rome. These five rites essentially form the stem from which the abundance of present-day churches derive. The first four rites are clustered together under the banner of ‘Eastern Christianity’. In plain words one could say that each ‘Eastern’ rite has an Orthodox Church and a Catholic counterpart. For example, in Syria we find a Syriac<sup>75</sup> Catholic Church and Syriac Orthodox Church. Generally, the Orthodox churches are not united under a single authority; they have their own synods and bishops. The Eastern Catholic Churches, on the other hand, are united in communion with the Bishop of Rome, which means they acknowledge the Pope’s authority.

Understanding Christianity in the Middle East, especially understanding the history, divisions and relations between the Eastern churches, is an arduous task. For the historical schisms, doctrinal and organisational differences and varieties of the Eastern Christian denominations, I refer to the numerous publications on Eastern Christianity (cf. O’Mahony 2008; O’Mahony and Loosley 2010; Parry 2007). Following the division made by the Middle East Council of Churches, we see that the Eastern churches can be divided into four ‘families’, namely the Oriental Orthodox (non-Chalcedonian) Churches, the Eastern Orthodox (Chalcedonian) Churches, the Catholic Churches, and the Evangelical (or

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<sup>74</sup> During my visit to the court, an employee of the court registry presented the court’s registry book (*daftar*). He counted a total of 30 divorce cases in April 2009; 257 in 2006, 259 in 2007, and 312 in 2008, which included the three types of divorces recognised by the SLPS (i.e. *talāq*, *mukhāla’a*, and *tafriq*), see chapter 4.

<sup>75</sup> The adjective ‘Syriac’ refers to the liturgical language used in these churches, namely classical Syriac, a Eastern Aramaic language, the language of the early Christians (Brock 2006: 20).

Protestant) Churches.<sup>76</sup> The Assyrian Church of the East can be considered a fifth 'family'; however, it is not listed as such by the Middle East Council of Churches. It would be beyond the scope and topic of this dissertation to try to summarise or explain how these 'families' differ from one another or how they relate to one another. I will therefore only deal with the churches that are found in Syria, particularly the churches and courts I was able to include in my research.

Syria is part of the cradle of early Christianity and continues to house the earliest churches until this day. In addition, as a result of the Crusades campaigns in the Levant, the settlement of Christian missionaries, and of, more recent date, Iraqi refugees and foreign domestic workers in Syria, various Western, mainly Protestant, churches emerged in the country. Allegedly, the various Christians denominations make up around 10 per cent of Syria's estimated 22 million population.<sup>77</sup> Since there are no official statistics available on religion in Syria, one can only guess how many Christians citizens there really are. It has been reported that the number of Christians has dropped to 8 per cent, due to immigration following the nationalisation projects of the Syrian economy and education system in the 1960s (Moussalli 1998: 287).<sup>78</sup> On the other hand, since the American invasion of Iraq in 2003, Syria took in about 1,5 million Iraqi refugees, many of which were Christians. Most Christians live in urban areas in and around the cities of Damascus, Homs, Hama, Aleppo, Lattakia, and in the far north-east governorate of Hassaka.

### *I & II. The Orthodox Churches (Oriental and Eastern Orthodox)*

The largest group of Christians belongs to the Greek Orthodox (*rūm urthūdhuks*)<sup>79</sup> church, the number is estimated at 503,000 souls (Courbage & Fargues 1998: 209).<sup>80</sup>

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<sup>76</sup> See the Middle East Council of Churches (MECC), at [www.mec-churches.org/member\\_churches/member\\_churches.htm](http://www.mec-churches.org/member_churches/member_churches.htm), accessed 17 May 2012.

<sup>77</sup> Central Intelligence Agency, *The World Fact Book* 2013; *International Religious Freedom Report* 2012 (above n. 1).

<sup>78</sup> Central Intelligence Agency, *The World Fact Book* 2013; *International Religious Freedom Report* 2012 (above n. 1).

<sup>79</sup> These churches follow the so-called Byzantine rite, which originates in the Greek city of Antioch and later developed in Byzantium or Constantinople. The adjective 'Greek' (in Arabic: *rūm*) refers to the Byzantine rite and has no reference to the Hellenic ethnicity or nationality.

The Patriarch of Antioch and All the East, His Beatitude John X (Yazigi), is their spiritual leader and has its seat in Damascus since 1342. Other Orthodox churches are the Armenian Orthodox (est. 111,800 members) and the Syriac Orthodox (est. 89,400 members). The Patriarch of the Syriac Orthodox Church, His Holiness Ignatius Zakka I 'Iwas, has his seat in Damascus since 1959.<sup>81</sup>

### *III. The Catholic Churches*

In Syria there are six Catholic denominations that recognise the authority of the Pope, i.e. Melkite Greek (est. 111,800 members), Maronite (est. 28,000), Armenian Catholic (est. 24,600), Syriac Catholic (est. 22,400), Latin<sup>82</sup> (est. 11,100), and Chaldean Catholic (est. 6,700). The Patriarch of the Melkite Greek Catholic church, His Beatitude George III Laham, has his seat in Damascus.

### *IV. The Evangelical or Protestant Churches*

The third recognised Christian 'group' are the Evangelical communities or Protestants, in Arabic commonly referred to as *injili*, in total estimated at 20,100 adherents. The Evangelical churches include Baptist, Presbyterian, Alliance Church, Church of Nazarene, Reformed, Episcopal (i.e. Anglican)<sup>83</sup>, and Armenian Evangelicals. Most churches are associated with the National Evangelical Synod of Syria and Lebanon, which has its headquarters in Beirut.

### *V. The Assyrian Church of the East*

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<sup>80</sup> All the figures related to Christians cited in this chapter date back to 1995 and are cited in Courbage & Fargues (1998).

<sup>81</sup> For centuries the Patriarch of Antioch resided in South-East Turkey, due to the political situation in the first half of the twentieth century the Patriarchal See was forced to move, first to Homs in 1933, later to Damascus in 1959 (Murre-Van den Berg 2007: 259).

<sup>82</sup> The Latins are also designated as Roman Catholics, meaning they follow the Western rite.

<sup>83</sup> According to the minister and judge of the Damascus Evangelical court, Boutrus Za'our, a relatively new group in Syria, originally from Sudan (interview 26 March 2009, Damascus).

From an historically perspective, one could group the Assyrian Church of the East (est. 16,800)<sup>84</sup> and the Chaldean Catholics together into a 'fifth' family group of Eastern Christian churches (O'Mahony 2008: 12). I have no information on the legal situation of the Assyrian Church of the East, but I assume its members are governed by a separate personal status code as they are recognised as a religious community with legislative and judicial autonomy in the field of personal status (see below). The Chaldean Catholics are the Catholic counterpart of the Assyrian Church; because the Chaldean Catholics recognise the authority of the Bishop of Rome, they are considered to be part of the Catholic 'family group' (see above).

### 2.3.2.1 Christian personal status laws & courts

Article 36 of the Judicial Authority Law stipulates that the denominational courts (*al-mahākim al-rūḥiyya*) remain the competent courts for the non-Muslim denominations, as defined in Law no. 60/L.R. enacted by the French High Commissioner de Martel on 13 March 1936. The 1936 Resolution lists the following communities: Maronite, Greek Orthodox, Greek Catholic Melkite, Armenian Orthodox, Armenian Catholic, Syriac Orthodox, Syriac Catholic, Assyrian Chaldean, Chaldean (Catholic), Latin, Protestant.<sup>85</sup> Only these officially recognised religious communities are permitted to draft and apply their legislation internally, however, within in the national legal framework, meaning that they still require official government approval by law if they wish to change their legislation (Berger 1997: 119).<sup>86</sup> The most recent example is the promulgation of a new personal status law for the Catholic communities in 2006, which was authorised by Presidential Decree. In chapter 3 the circumstances surrounding the issuance of this new law will be discussed in more detail.

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<sup>84</sup> The Catholicos-Patriarch of the Assyrian Church of the East, Mar Dinkha IV, remains in exile in Chicago (Murre-Van den Berg 2007: 260).

<sup>85</sup> See Damascus Bar Association website at:

<http://www.damascusbar.org/AlMuntada/showthread.php?t=12413>, last assessed 17 May 2012.

<sup>86</sup> Interestingly, according to Rose, it is only in the Muslim-dominated countries that Christians have consciously developed and codified their own community laws (1982: 160, 174).

*Orthodox Laws of Personal Status & courts*

The three Orthodox churches each have their own recognised Orthodox law of personal status, which are the Greek Orthodox Personal Status Law (Law no. 23, 27 June 2004), the Syriac Orthodox Personal Status Law (Law no. 10, 6 April 2004), and Armenian Orthodox Personal Status Law (number and date unknown). The Syriac as well as the Armenian Orthodox laws are applicable to the respective communities in Syria *and* Lebanon (see Al-Zawahira 2004). During my time in Syria, various sources hinted that the Orthodox churches recently attempted to draft new personal status laws, but as far as I know none of these drafts were ever submitted to Parliament.

There is an Orthodox denominational (*rūḥiyya*) court in every diocese, which includes Damascus, Homs, Hama, Lattakia, and Aleppo. Cardinal writes that, since 2004, lay judges, in other words non-clergy, have the right to preside over Greek Orthodox courts. What is more, contrary to the *shar'iyya* courts, women can serve as a judge in the Greek Orthodox courts (2010: 201).

*Catholic Law of Personal Status & courts*

On 13 June 2006, the People's Assembly (*majlis ash-sha'b*) approved a new law for the Catholic communities in Syria, the Catholic Law of Personal Status (hereafter CLPS); on 18 June 2006 it was promulgated by Presidential Decree as Law no. 31.<sup>87</sup> The CLPS is, for the most part, based on the Code of Canons of the Eastern Churches, issued by late Pope John Paul II in 1990. In addition to the CLPS, the Catholic courts also resort to Chapter VII 'Marriage' of the Code of Canons of the Eastern Churches in its entirety, i.e. Canons 776-866. These canons are added as a supplement (in Arabic) to the CLPS and have direct legal effect.

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<sup>87</sup> The Catholics in Lebanon, for example, are also governed by Eastern canon law, but in Lebanon the Catholic law never reached the official status of statutory law. In 1951, Christian and Jewish national laws were issued, but they were never ratified by the Lebanese government, they thus operate as 'quasi law' (interview with judge Fr. Antoun of the Catholic court in Damascus, 25 April 2008; Lamia Shehadeh 2010: 211).

The Catholics have a first instance court in every diocese, and, in addition, Damascus has a court of appeal. Besides, the Vatican 'Rota' court can, in special circumstances, hear appeals from decisions of the Catholic courts (El-Hakim 1995: 149).

### *Evangelical Law of Personal Status & courts*

The Evangelical Law of Personal Status was drafted by the National Evangelical Synod of Syria and Lebanon, which has its headquarters in Beirut, Lebanon, and dates back to 1949. The Syrian government accepted the Law in 1952, subsequently amended in 1962.<sup>88</sup> In the spring of 2009, I was told that a new draft law was pending before the government waiting for approval. However, as far as I know, it was never approved.

The Evangelical personal status courts can hear cases of the following four denominations: Baptist, Presbyterian, Alliance Church, and Church of Nazarene. In total there are four denominational courts, namely in Damascus, Homs, Lattakia, and Aleppo.<sup>89</sup>

### **2.3.3 The Jewish community**

Following Syria's longstanding state of war with Israel, the Jewish communities in Syria diminished. From 1947 until 1992, Jews were restricted to travel, both in and outside the country, until President Hafez al-Asad lifted the travel restrictions in 1992. As a result, in the 1990s, thousands of Jews left the country and immigrated to the United States, Brazil, and Mexico. Today, fewer than 100 Jews remain in the cities of Damascus, Aleppo, and Qamishli (Klingman 2010; Tuttle 2005).

The Jewish community is governed by the Jewish Book of Rulings concerning Personal Status (*kitāb al-aḥkām al-sharʿiyyat fī al-aḥwāl al-shakhṣiyyat li-l-mūsawiyyīn*). If, how and by whom the law is applied is unknown; because of the

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<sup>88</sup> Interview with minister and judge of the Damascus Evangelical court, Boutrus Za'our, 26 March 2009, Damascus.

<sup>89</sup> Interview with minister and judge of the Damascus Evangelical court, Boutrus Za'our, 26 March 2009, Damascus.

sensitivity of anything to do with the Jewish community in Syria, I did not make any inquiries to the position of the Jewish community during my fieldwork.

## 2.4 Other applicable laws

The Law of Judicial Procedures and the Judicial Authority Law were already mentioned earlier. These national laws set out the organisation of the judiciary and the basic judicial proceedings to be followed by all courts, including the various personal status courts.<sup>90</sup> Furthermore, the courts are required to follow the rules of evidence as prescribed by the Law of Evidence (*qānūn al-bayyināt*), Law no. 359/1947. The law is inspired from Egyptian law, which, in turn, is inspired by French law and contains a few rules inherited from *sharī'a* (El-Hakim 1990: 282). However, the SLPS diverts from the Law of Evidence when it comes to rules regarding testimonies and oaths. The SLPS differentiates between men and women, for example: women need to testify and pronounce an oath in unison, pursuant to article 12 concerning marriage witnesses.<sup>91</sup> The Law of Evidence, on the other hand, does not make a distinction between a man's and a woman's testimony; their individual testimonies are equally valid in a civil or criminal court (Cardinal 2010: 191). All personal status courts are also bound by the procedures laid down in the Civil Status Law (*qānūn al-aḥwāl al-madaniyya*), law no. 26/2007, amended in 2011.<sup>92</sup> The law stipulates that all marriages, divorces, children, and deaths have to be registered at the Civil Registry (El-Hakim 2007: 280).

## 2.5 Complex realities of the intersection of jurisdictions

Religion (*dīn*) or denomination (*tā'ifiyya*) is the determining feature in choosing which personal status law applies. The religion into which one is born determines which jurisdiction in matter of personal status applies. A person's religious identity is not registered on one's identity card<sup>93</sup> but has to be registered in the

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<sup>90</sup> See also Berger's article, in which he refers to examples of Court of Cassation rulings in this regard (1997: 120).

<sup>91</sup> This gender disparity only exists in personal status cases, in civil and criminal law a woman's testimony is equal to that of a man (Taha 2010: 312 n. 47).

<sup>92</sup> See: [http://www.syrianlaw.com/?page=news\\_read&threadid=593](http://www.syrianlaw.com/?page=news_read&threadid=593), accessed 16 July 2012.

<sup>93</sup> This requirement was abolished in 1949, under the rule of colonel Al-Za'im (Botiveau 1998: 115).

Civil Registries (Maktabi 2010: 560). It is not possible to have ‘no religion’; atheists do not exist in Syria, at least not according to the Civil Registry. For that reason it is not possible, for example, to contract a civil marriage; one has to marry either according to the provisions of the SLPS or one of the canonical laws. But what happens when persons belonging to different religions or denominations want to get married or divorced? Which jurisdiction applies when one of the parties (or both) seeks to exercise his or her rights or when a legal dispute arises?

To call to mind what was described earlier, in line with Berger’s study on Egyptian family law, one could say that there are two legal systems in the field of family law, i.e. one for Muslims and one for non-Muslims (cf. Berger 2005, Tadros 2009).<sup>94</sup> This duality or legal plurality does not, however, entail equality between the different religious communities, but rather an imbalanced or asymmetrical plurality, because the SLPS and the courts that apply the law, i.e. the *shar‘iyya* courts, clearly have the upper hand, as will be demonstrated below.

The supremacy of the SLPS and the *shar‘iyya* courts is explained by the concept of public order (*al-niẓām al-‘āmm*) (Berger 1997: 122).<sup>95</sup> The SLPS is the general law in matters of personal status and only exempts Druze and non-Muslims in specified cases. As we saw earlier, this asymmetric duality is reinforced by various laws, such as the SLPS (Arts. 306-308), the Law of Judicial Procedures (Arts. 535-547), and the Judicial Authority Law (Arts. 33-36).

### 2.5.1 Mixed marriages and conversions

The supremacy of the SLPS becomes especially apparent when the jurisdictions of different religions intersect.<sup>96</sup> When a non-Muslim woman marries a Muslim man, the SLPS will be applicable; when a Druze woman marries a Sunni Muslim man, the SLPS will also be applicable.<sup>97</sup> A Christian or Jewish woman, i.e. a woman who belongs to the *ahl al-kitāb* (the recognised monotheistic religions), can marry a Muslim man, but it is not possible for a non-Muslim man to marry a Muslim

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<sup>94</sup> See chapter 1, section 1.7.

<sup>95</sup> Interview with lawyer Hala Barbara, Damascus, 25 March 2008.

<sup>96</sup> Berger uses the term ‘interreligious law’ to refer to the situation when more than one religious family law applies to a single case (2005: 102).

<sup>97</sup> In chapter 5 I will describe a case of a marriage between a Druze woman and a Sunni Muslim man.

woman, for article 48.2 SLPS states that a marriage between a Muslim woman and a non-Muslim man is considered invalid (*bāṭil*). If a non-Muslim man wants to marry a Muslim woman, he needs to convert to Islam. A Christian or Jewish woman who marries a Muslim man is not required to change her religion, but the children will be automatically Muslim and the wife cannot inherit from her husband, for article 264 sub b SLPS states that a non-Muslim cannot inherit from a Muslim. However, when a woman converts to Islam and the husband does not, the marriage will be considered invalid and will be dissolved due to article 48 paragraph two. Interestingly, in Lebanon, following the equality in personal status laws, mixed marriages across all religions and denomination is legally possible, and thus the non-Muslim Lebanese man can marry a Lebanese Muslim woman (Weber 2008: 28).<sup>98</sup>

Various studies, both historically and contemporary, on legal practices in the Middle East demonstrated that non-Muslims frequently took their case to a *shar'īyya* court (cf. Al-Qattan 1999; Hasan 2003; Rose 182; Shaham 1995, 2006). Either because they had to, for example because it concerned a mixed religion case (e.g. Muslim vs. non-Muslim) or they resorted to a Muslim court, instead of turning to their own denominational court, in order to obtain a more favourable ruling (Al-Qattan 1999: 429-30; see § 1.1.1). In the present time, Christians in Muslim-majority countries, such as Egypt and Syria, occasionally still turn to *shar'īyya* or family state courts because they believe their personal or financial interests are better served by personal status laws that apply to Muslims. The most common reason, however, is to obtain a divorce under the SLPS.

For Christians it is very difficult to divorce and therefore men and women sometimes refer to drastic measures, such as converting to Islam in order to obtain a divorce. Maktabi maintains that these 'conversions of convenience' by Christian men occur with the intention to avoid the long divorce proceedings of the Christian courts, and because the Islamic divorce rules 'are more lenient' (2010: 562). The judges of the Christian courts are aware that this can happen. As a result, according to one of my interviewees, Christian court rulings can sometimes intentionally be more favourable to the husband; for example, by awarding the

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<sup>98</sup> The Egyptian and Jordanian personal status laws, for example, also contain a similar provision to article 48.2 SLPS (Weber 2008: 28).

wife only a small amount of alimony after dissolution (or nullification) of the marriage. When a wife objects to such a ruling, the judges commonly tell her accept the ruling because otherwise she runs the risk that her ex-husband converts to Islam and takes the children from her.<sup>99</sup>

Through my contacts with lawyers and other legal practitioners, I learned of some of these conversion cases. When I enquired further with some, mostly Christian, legal professionals, the response was generally cautious; most of them nervously dismissed the issue. The reactions to my enquiries made it very clear it was a highly sensitive subject, particularly among Christians. During my time in the Catholic court of Damascus, it happened a few times that a case was presented to the court which involved a spouse, usually the wife, who filed a petition for nullification of the marriage because the other spouse had converted to Islam. Because even if the marriage is dissolved by a *shar'iyya* court, it does not mean that the marriage is thereby also considered dissolved by a Christian court. The Christian courts will not recognise the 'Muslim' divorce, for the marriage will continue to exist according to Christian doctrine. The 'divorced' Christian spouse will need to resort to his or her denomination court to ask for a separation or nullification of the marriage according to his/her canonical law, if he/she wants to remarry.<sup>100</sup>

What is important here is that, in case of conversion to Islam, the SLPS becomes the applicable law and the *shar'iyya* courts are considered the competent courts (Berger 1997: 124-125). In this context, an interesting Court of Cassation ruling of 1998 cited by Georges in his study on the rights of Christians in the Middle East is worth mentioning. It concerned a case in which two brothers of a Muslim wife who was married (out of court) to a Christian man, had stated in a *shar'iyya* court that they witnessed the husband's pronouncement of the *shahāda*, i.e. the Muslim declaration of faith. The brothers' testimony was accepted by the court and the man was considered Muslim, despite the fact that the husband denied he converted to Islam; he claimed he never pronounced the *shahāda*. The

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<sup>99</sup> Personal communication with a senior Christian lawyer, November 2008, Damascus.

<sup>100</sup> In chapter 4 and 6 the status of a Christian, sacramental marriage and the indissolubility thereof will be discussed in more detail.

husband appealed to the Court of Cassation, but it denied his claim and confirmed the ruling of the *shar'īyya* court. The man was considered Muslim even though he considered himself Christian (Georges 2012: 294).

### 2.5.2 Children and interreligious marriages

Conversion also affects the issue of child custody. When one of the parents converts to Islam, the SLPS can also be invoked by the converted parent in order to claim full child custody. In order to understand the complexities that arise from claims over child custody in an interreligious marriage or parenthood, the different aspects of child custody as regulated by the SLPS need to be elaborated upon and analysed in more detail.

Child custody can be divided into legal guardianship (*wilāya*) and nursing (*ḥaḍāna*). The parents have shared custody over their children, but the father will always have sole legal guardianship (*wilāya*) over his children until they reach the age of eighteen years (Art. 162 SLPS), also when the parents divorce. Guardianship is divided into two categories: guardianship over the person (*al-wilāya al-naḥsiyya*) and guardianship over the minor's property (*al-wilāyat 'alā al-māl*). Guardianship over the person implies authority over education, medical treatment, instruction, careers guidance, consent to marriage, and any other affairs concerning a minor's interests (Art. 170.3). Both types of guardianship devolve upon the father or the paternal grandfather (Art. 172). In absence of a father or paternal grandfather, the second paragraph of the latter provision refers to article 21, which deals with guardianship in marriage (*al-wilāyat fī al-zawāj*). Guardianship over the minor's person, and not guardianship over the minor's property, can be awarded to a male agnate, in the order of inheritance, provided that he is in a degree of consanguinity precluding marriage (*maḥram*) (article 170.2 in conjunction with article 21). Furthermore, the court can appoint a female, for example the mother, as a custodian (*waṣī*) to manage the minor's property (Art. 173). However, a mother cannot act as a guardian of her minor son/daughter's person, which means that she cannot, for example, act as his or her guardian in marriage (Cardinal 2010: 191).

The other component of child custody, besides legal guardianship (*wilāya*), is physical custody or nursing (*ḥaḍāna*). The right to nurse a child is the prerogative

of the mother (Art. 139). In the event of divorce, the mother may ask for the court to give her the right to nurse her children until the age of 15 for girls and 13 for boys (Art. 146). However, article 138 stipulates that a woman loses her nursing right when she (re)marries someone outside the child's immediate family, i.e. to a non-*mahram* man.

It is important to bear in mind that the SLPS rules pertaining to legal guardianship (*wilāya*) are applicable to Muslims as well as non-Muslims (Art. 535 Law of Judicial Procedures). Physical custody (*ḥaḍāna*), on the other hand, is one of the matters in which Christian and Jewish communities are competent to apply their own laws (Art. 308 SLPS). This intersection of different jurisdictional aspects of child custody can lead to complicated and oftentimes distressing situations.

### 2.5.3 'Islam is the better religion'

Some of my informants told me about cases where Christian men had converted to Islam and subsequently went to a *shar'īyya* court to demand full custody over their children, i.e. physical custody in addition to legal guardianship. I heard of at least three court rulings, one of which I read myself, in which a *shar'īyya* judge had awarded the father the exclusive nursing right. In this particular case the father had obtained the nursing right over his children, who were still in the age of *ḥaḍāna*, as he was considered more suitable because he was a Muslim. The ruling said in so many words that his religion, i.e. Islam, is the better religion and for that reason he should raise the children (*dīnuhu huwa al-dīn al-aṣlaḥ li-tarbiyyat al-awlād*). In other words, the Muslim father was given preference over the non-Muslim mother.<sup>101</sup>

In another case, a Christian married man had begotten a child by another woman, a Muslim woman. The woman wanted the father to recognise the child as his own, which he did. However, legal guardianship over his child was taken from him because he was a Christian and the mother insisted on raising the child as a Muslim. I do not know, however, who was appointed as the legal guardian of this child, instead of the father. According to article 170.1 SLPS, the paternal

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<sup>101</sup> See Tadros for a similar situation in Egypt (2009: 126 ff.); Georges observes similar legislative and legal practices in most Arab countries, with the exception of Lebanon (2012: 289-92).

grandfather would have been the first in line to be appointed as the legal guardian, but since he, most likely, was a Christian too, it is more likely that one of the mother's male relatives was appointed legal guardian.

The SLPS remains silent on the issue of custody and the upbringing of children of an interreligious marriage. Georges explains that the judiciary of several Arab countries, including Syria (in line with article 305 SLPS), therefore refer to the work of Qadri Pasha (2012: 289). The argumentation that the Muslim parent belongs to the better religion refers to article 381 of the Qadri Pasha Code. This article states that a non-Muslim parent, holding the nursing right, can take care of the child until he or she can understand religion (*ḥattā ya'qila dīnan*), but this right can be taken from the non-Muslim parent if the court establishes that he/she has a negative influence on the child's religion, i.e. Islam.<sup>102</sup>

Another article that is of importance here is article 129 of the Qadri Pasha Code. This provision states that when a non-Muslim spouse converts to Islam, the children born (and not yet born), i.e. minors, from this marriage will follow the religion of the Muslim parent.<sup>103</sup> The Court of Cassation, however, ruled on 12 February 1970 that a child may return to the Christian faith when he/she has reached the age of discernment (*rushd*), if he/she chooses not to recognise Islam as his/her religion (Feller 1996: 216). Interestingly, Berger refers to another Court of Cassation ruling, dated 23 May 1970, which concerned a case in which this right was not recognised by the highest court of Syria. In the latter case, a father had converted to Islam when his son was still a minor. When the son attained the age of majority he wanted to return to his original faith, i.e. Christianity, but the Court of Cassation ruled that 'it could not interfere in the freedom and competence of the Civil Registrar', who had refused to register this change in religion (1997: 125). Georges, on the other hand, describes a case of a Christian son who, at the age of 23, discovered that his father, before marrying his mother, converted to Islam in order to divorce his first wife. The 'Muslim' father remarried another Christian woman and the children born from this marriage were registered as Muslims by

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<sup>102</sup> The Syrian Court of Cassation ruled in 1981 that, based on article 381 Qadri Pasha, a *shar'īyya* judge can investigate allegations of negative influence of a non-Muslim parent on the child's religion (Georges 2012: 289).

<sup>103</sup> It should be added that this provision only concerns children who reside in a Muslim country, i.e. outside the 'house of Islam' (*dār al-islam*).

the Civil Registry, because, after all, children follow the religion of the father, in this case, Islam. For the sake of completeness, it should be mentioned that a converted adult cannot return to his or her original faith (Georges 2011: 118). The now adult son was raised a Christian by his parents and for that reason the court accepted the son's request to be registered as a Christian in the Civil Registry. Nevertheless, the difference in religion between this father and his children exclude the latter from inheritance of their father, who was considered Muslim (2011: 118-19).

Finally, some people contract an interfaith marriage, even though it is legally invalid. What happens to these types of marriages and, more importantly, what about the status of the children born of these marriages? An invalid interfaith marriage can lead to sad legal realities for all family members, both spouses and children, as the following example demonstrates. In his study on the rights of Christian minorities in the Middle East *Le droit des minorités*, Georges cites a case in which, although legally impossible following article 48.2, a Muslim woman had married a Christian man.<sup>104</sup> When they wanted to register their two children at the Civil Registry, they were told they could not because the children were born of an invalid marriage. Georges maintains:

‘Sur le conseil d’un juge, la femme a porté plainte devant le tribunal << charié >> en prétendant que l’époux lui avait menti sur sa vraie religion. Le tribunal avait declare leur mariage corrompu et il a reconnu les deux enfants comme appartenant à leur père. Le tribunal a ordonné en outre la separation immediate entre le couple et l’inscription des enfants en tant que musulmans car c’est la logique de suivre << la religion la plus honnête des parents >>’. (2012: 294)

Hence, the couple was forced to divorce because the SLPS did not recognise their union. Furthermore, they were forced to disguise the truth in order to obtain proof

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<sup>104</sup> Georges does not give any further information on where or how the marriage was contracted, I suspect it was a so-called ‘*urfi*’ marriage (see chapter 5 § 5.6, for a detailed discussion of these types of marriages).

of paternity. Here too, the children followed the Muslim parent, in this case the mother, because Islam was considered the righteous religion.

The examples described above demonstrate how the Muslim faith is given preference over other faiths. When a non-Muslim father or mother converts to Islam, the religious identity of the converted parent automatically devolves upon the children. Here we see that, using Tadros' words, 'the application of the content of the Muslim Personal Status Law is not gender specific, rather religion-specific.' (2009: 130) The supremacy of the Islam is particularly evident when a non-Muslim woman converts to Islam. Because whereas the provisions of the SLPS, similar to Egypt's personal status law, normally privilege men over women, in the event of conversion of the wife or mother, the husband or father loses out to his Muslim (former) spouse. Thus, as an exception to the rule, when a non-Muslim woman converts to Islam, the woman is privileged over the man. Here we see how the 'laws of patriarchy' are superseded by 'the laws of religious affiliation' (Tadros 2009: 132), in this case to the advantage of Islam and the SLPS.

## 2.6 Conclusion

This chapter presented the mosaic of personal status laws and courts that are found in Syria today. The most important law of personal status, the SLPS, enjoys the status of being the general, overriding law, which applies to all Syrians, regardless of their religion or denomination. That being said, the Druze, Jewish, and various Christian communities are exempted from certain provisions of the SLPS and are allowed to apply their own laws within the framework of the national legal system. Still, the SLPS and the courts applying the SLPS, i.e. the *shar'iyya* courts, clearly hold a privileged position in the field of personal status. This creates an asymmetrical duality in Syria's family law, where the SLPS and the *shar'iyya* courts enjoy the upper hand over the other laws and courts.

Consequently, because the SLPS is primarily based on Islamic jurisprudence, non-Muslims sometimes find themselves in a position where Islamic law is applicable to them too. The supremacy of the SLPS thus also has significant implications on non-Muslims, especially when different jurisdictions intersect, for example, in

cases of interdenominational or interreligious relations or when one of the spouses converts to another religion. The asymmetrical duality in Syria's family law becomes especially apparent in interreligious relations, which can have detrimental effects on spousal as well as parent-child relationships, as a converted Muslim spouse or parent is generally privileged over the non-Muslim spouse or parent. The privileged position of Muslim affiliation over non-Muslim can lead to, for example, a forced dissolution of the marriage, due to the provisions of the SLPS, or child custody being taken from the non-Muslim parent in favour of the Muslim parent.