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FILLING GAPS IN LEGISLATION

The Use of *Fiqh* by Contemporary Courts (Morocco, Egypt, and Indonesia)*

B. Dupret, A. Bouhya, M. Lindbekk, A.U. Yakin

1) Introduction

Most Muslim-majority countries have, to a greater or lesser extent, codified family laws (sometimes called personal status laws). Whether they are scattered legislations or integrated codes, these laws stipulate matters relating to marriage, divorce, filiation, and inheritance. Most of these legislative texts claim to be the codified translations of the provisions of one of the many Islamic doctrinal schools (*madhhab*, pl. *madhāhib*), although they often combine these provisions through the techniques of “pragmatic eclectism” (Ibrahim, 2015), e.g. *talfīq* and *takhayyur*. Such is the case, from West to East, for Morocco, Egypt, and Indonesia. Each of these three countries has a long legal history of its own, but they share certain features relating to the form of the law, the ways in which it is practiced, and its relationship, in the family domain, to the Islamic normative legacy.

In this article we shall address the methods used by judges to fill what is often called ‘the silences of the law’, that is, gaps in legislation, in the domain of family law, in three different countries, namely, Morocco, Egypt, and Indonesia. To date, little scholarly research has been devoted to the use of *fiqh* by contemporary judges. Instead, the scholarly literature tends to

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posit that *fiqh*, as found in traditional legal manuals, continues to be applied in these domains legislated by the states. This assumption underestimates the social and intellectual diversity of contemporary Muslim societies and overlooks fundamental changes brought about by the importation of a civil law model and its influence on the inner dynamics of legal reasoning (see Avin, 2011: 87 sq.). In this article we explore the role and place of uncodified *fiqh* in contemporary legislation and adjudication in the field of personal status law.

Jurisprudence is concerned, among other things, with the nature of the interpretive work performed by judges. Nineteenth-century ideas regarding the function of judges as, following Montesquieu's expression, the mouthpiece of the law, have been replaced by the contention that judges actually create the law by interpreting statutes and precedents. According to Hans Kelsen, for instance, a legal norm corresponds to the meaning of an act of will (e.g., a statute or a ruling). It is up to judges to attribute such meaning and thereby 'make' the norm (Kelsen, 1967 [1934-1960]: I/4, p. 4ff.). In this respect, Kelsen's position is very close to that taken by American realists who contend that the meaning of statutes is solely determined by judges (see Troper, 1994: 83).

Judicial discretion is even greater when there is no explicit provision in the law that can serve to guide a judge's work. A judge who is not constrained by existing statutes or precedents seems to be free to create law at his or her discretion. Generally, however, one finds statutory provisions that stipulate not the content of the law itself (which is supposed to be discovered by judges), but the procedure to be followed to discover it. For instance, Article 1 of the Swiss Civil Code stipulates:

1. The law applies according to its wording or interpretation to all legal questions for which it contains a provision. 2. In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in

accordance with the rule that it would make as legislator. 3. In doing so, the court shall follow established doctrine and case law.

Accordingly, the power of judges to create the law is constrained in three ways: Firstly, by the need to justify the principles on which their reasoning is grounded in a manner that preserves the logical appearance of their deductions. Secondly, by precedent rulings in similar situations. It is only with the first occurrence of an unprecedented case that the law can be said to be discovered. In subsequent cases – and even if it has long been established that the work of identifying a case as one of a specific type is already the result of interpretive reasoning – judges only follow the direction indicated by the precedent. Thirdly, judges are constrained by informal interpretive devices, often issued by ministries or higher courts, that do not have any obvious legal status. These devices may correspond to informal practices that are followed in certain areas but not in others, with certain judges and not with others. These devices establish standards, patterns, and templates, but do not constitute rules *stricto sensu*: no ruling can be officially overturned on the grounds that it contradicts these devices.

These three constraints on adjudication in cases in which legislation is silent render the discretionary power of judges to create law much weaker than it might appear to be at first glance. They reflect a trend toward the standardization of judicial work, as we shall observe in Morocco, Egypt, and Indonesia in relation to the question of marriage authentication. In these countries, explicit or implicit rules stipulate that judges are compelled to adjudicate and must refer to the prevalent opinions of a specific doctrinal school in the event of the silence of the law. This means that judges must turn to what legislation designates as *fiqh* in order to find the provisions suitable for the case at hand. However, legislation is never specific in terms of either what the judge must do in order to find the relevant solution to the case at hand or what is meant by the ‘prevalent opinions’ of *fiqh* schools (*madhhabs*). It is up to the judges

themselves to interpret the law and to locate the relevant provision. In this process, judges use new interpretive techniques and modes of reasoning.

At the present time, *fiqh* is understood in a legally positivist manner in the judicial setting of Muslim-majority countries. While there is a continuum between classical *fiqh* and national laws at the substantive level, mainly in the domain of the family, a profound division has developed in terms of methodology and epistemology. This is the heart of our argument. The issue of marriage authentication, a domain in which formal legislation is often silent, provides us with a perspicuous lens through which we examine how what we call ‘legal cognition’ has been transformed in a radical way.

The article proceeds in four steps. First, we address the institutional and legal transformations affecting law, especially family law, in Morocco, Egypt, and Indonesia, focusing on what may be termed a legal revolution that made it possible to speak of law in terms of codes and to classify *fiqh* as a subsidiary source when legislation is silent. Second, we turn to the specific domain of family law, briefly discussing statute law, case law, and legal practice in each of the three countries. Third, on the basis of marriage authentication cases (*ithbāt al-zawāj*, *ithbāt al-nikāḥ*), we examine how, practically speaking, judges seek a solution in the body of *fiqh*. Finally, we develop an argument about the nature of judicial work in the management of “references to Islam¹” within the framework of positive, codified, and standardized law. We argue that the practice surrounding marriage authentication is informed by local social and legal contexts in which the interpretation of *fiqh* has been influenced by the combined forces of legal homogenization, standardization, and positivization, on the one hand, and the positivistic legal training of judges, on the other. While there is a degree of continuity at the level of substantive rules, the methodology and epistemology adopted by contemporary judges, the legal material upon which they draw, and

the means by which they refer to this material have fundamentally altered the nature of legal cognition (the ways in which people think legally) and thus of law itself.

2) Institutional and legal transformations in Morocco, Egypt, and Indonesia

Beginning in the nineteenth century, Muslim-majority countries underwent a major transformation in their political, judicial, and legal administrations. The encounter with the West, mostly colonial, was certainly a major factor in these developments, which led to the creation of nation states, the formulation of positive legal systems, and the establishment of multi-layered judiciaries.

Prior to the establishment of the French and Spanish protectorates in 1912, there were two types of jurisdictions in **Morocco**: *Shra'*² courts and *Makhzen* courts. Judges in the *Shra'* courts applied Islamic *fiqh*. These judges were generally graduates of the Qarawiyyīn in Fes, were appointed by Sultan decree (*Dahir*, *ṣahīr*), and followed Maliki doctrine.³ The *Makhzen* courts, on the other hand, which initially were confined to penal matters, progressively gained jurisdiction over civil and commercial matters. In this type of court, judgments were issued by administrative governors, *bāshās* (in towns) and *qā'ids* (in rural areas).

With the beginning of the French and Spanish protectorate,⁴ modern courts were established, although the *Makhzen* and *Shra'* courts were maintained. Under the French protectorate, the major and most significant 'reform' of the Moroccan judicial system was achieved through the *Dahir* of 7 July 1914, followed by the *Dahir* of 16 May 1930, which transferred jurisdiction over the majority of 'Berber' tribes to customary courts, thus removing them from the jurisdiction of *Shra'* courts. The so-called 'Berber *Dahir*' of 1930 triggered a great deal of opposition and may be considered a turning point in the history of the Moroccan national movement.

After Morocco gained independence in 1956, both *Makhzen* and customary courts were abolished, leaving the ‘modern courts’ established by the Protectorate as the core of the judiciary. The main reform introduced after independence was the law of 26 January 1965, called the law of “Unification, Moroccanization, and Arabization of Moroccan justice”. By virtue of Article 3 of this law, *Shra‘* courts were established as specialized circuits of first instance and appellate courts. Another significant development was the creation, in 2004, together with the new family code, of family circuits within first instance courts.

Following the formation of the **Egyptian** state in the nineteenth century, a centralized and hierarchical legal system was developed with the parallel promulgation of law codes inspired by the French *Code Napoléon*. Political and legal elites argued that efficient government necessitated a departure from the doctrinal uncertainty that allegedly arose when judges adjudicated on the basis of classical Islamic *fiqh* (Hasso 2010; Lombardi 2006; Messick 1993, 54; Shaham 2010). This process of legal rationalization began under the Ottomans, but gained momentum in the nineteenth-century colonial context (Brown 1997; Lombardi 2006; Shaham, 2010: 104; Vikør, 2005: 228). By the end of the century, Egypt had “transplanted” (Watson, 1974) European civil, commercial, and penal law codes (Brown, 1997: 10). As for the judicial system, French-style hierarchical courts were introduced to ensure that judges applied the codified laws consistently. These courts were staffed by judges trained in western-style law schools.

Simultaneously, the jurisdiction of the shari‘a courts was restricted to the domain of family law. This does not mean that this jurisdiction was outside the control of the state. Among other things, an 1856 procedural law stipulated that Hanafi rules be applied exclusively in the courts in order to render the application of the law more predictable and uniform. The state also intervened through legislation that required written documentation by a state official for the validation of marriage. The Egyptian state also began to collect statistics on marriages and

divorces (Cuno 2015; Hasso, 2010; Vikør, 2005). In 1875, Muḥammad Qadrī (d. 1888) published *al-Aḥkām al-Sharʿiyya fī al-Aḥwāl al-Shakhṣiyya*, which, although never promulgated, was the first full-fledged codification of Hanafi provisions regarding the family (Qadrī, 2006). Shariʿa became ‘personal status law’ (*Qānūn al-Aḥwāl al-Shakhṣiyya*), a distinct sphere of civil law covering marriage, divorce, affiliation, and inheritance (Cuno, 2015: 78; Vikør, 2005: 236). This conception of law contrasted with the corpus of classical *fiqh*, which, as Peters has observed, is “discursive and include[s] various, often, conflicting opinions”; it is made of “open texts in the sense that they do not offer final solutions” (Peters, 2002: 84). With the introduction of an appellate system and a new emphasis on documents in judicial procedure, *sharīʿa* courts became more bureaucratic.

Another important development took place in 1955, when the state abolished *sharīʿa* courts and transferred their jurisdiction to national courts. At present, the Egyptian judicial system is divided into three branches: an administrative judicial system headed by the State Council; a constitutional judicial system, at the top of which is the Supreme Constitutional Court; and the ordinary judiciary, which has jurisdiction over civil, criminal, and personal status matters (Bernard-Maugiron, 2008: 6). Hence, Egyptian personal status law is currently implemented by judges who are trained in positive, codified law, and not in traditional *fiqh*.

Prior to French, British, and Dutch colonization, the region that comprises the modern state of **Indonesia** was religiously and politically diverse. The Muslim inhabitants of the region generally followed the Shafiʿi *madhhab*, and Shafiʿi *fiqh* was partly applied in some Indonesian sultanates (Ibn Batūtah, 1854, vol. 4: 30, 35). Matters not governed by Islamic *fiqh* were subject to local customary practices that varied greatly across the region. During the nineteenth century, Dutch colonization transformed the legal landscape. The Dutch introduced a hierarchically organized system of courts (Lev, 2000: 16, 39) and implemented a number of

Dutch codes.⁵ Dutch legal policy subjected an important number of matters to custom, and in the process transformed those customs into judicially enforceable ‘law’, called *adatrecht*, which later became *hukum adat* (customary law) (see van Vollenhoven, 1928).

Upon gaining independence in 1945, Indonesia, unlike many Muslim-majority countries, did not adopt Islam as the state religion and did not make Islamic normativity the source of its law. In a compromise measure designed to avoid alienating non-Muslim groups, the drafters of the Constitution adopted *Pancasila* (five pillars),⁶ stipulating the belief in one unique God (see Bonneff *et al.*, 1980). In the decades following independence, the national government gradually replaced most of the Dutch colonial legal legacy with national legislation. Although shari‘a is not mentioned in the Constitution, the state has accommodated Muslim aspirations to apply Islamic law in a number of civil matters by incorporating elements of *fiqh* into legislation. In 1974, Indonesia enacted a Marriage Law (Law no. 1/1974) prescribing marriage and divorce rules compatible with shari‘a and *fiqh*; these rules apply to all citizens, regardless of religion. In 1989, the state formally recognized the country’s Religious Courts with the promulgation of Law no. 7/1989 (followed by Law no. 3/2006 and Law no. 50/2009). In addition, laws passed in 2001 and 2006 grant authority to the Province of Nangroe Aceh Darussalam to enact legislation to fully implement shari‘a (Law no. 44/1999, no. 18/2001, and no. 11/2006).⁷

3) Statutes and legislative gaps in family law: marriage authentication

The domain of the family, arguably the last bastion of *fiqh*, was deeply transformed and re-organized under the influence of positive legislation and state-controlled adjudication. Statutes or full-fledged codes were adopted and judicial institutions were unified, while legal curricula were created to train jurists, lawyers and judges in one and the same law for all within the borders of the new nation states. The resulting legal upheaval took a very different

form in each of the three countries under study for reasons related to their respective pre-colonial, colonial, and post-colonial history, in addition to the models on which they shaped their legal and judicial systems.

Since the promulgation of the 1957 Personal Status Code (PSC), family law in **Morocco** has been characterized by its combination of *fiqh*-inspired and codified law. Drafted by a panel of ten scholars, six of whom were judges, the PSC was intended to be a codification of Maliki doctrine, to which it refers at the end of four of its six books. In 1993, amendments were introduced to the PSC, which were seen by modernists as a breach in the wall. After a long process, the competition between ‘modernists’ and ‘conservatives’ led to a royal arbitration that gave rise to the 2004 code, which attempted to address the feminist movement’s claims without jeopardizing the Islamic tradition.

While taking Maliki doctrine as the main source of its provisions, the 2004 Family Code draws on other *madhhab* doctrines. For example, Article 40 follows Hanbali doctrine regarding the prohibition of polygamy when a wife stipulates in the marriage contract that her husband cannot marry another woman; and Article 124 follows Shafī‘i doctrine regarding the obligation to register *raj‘a* (the husband’s taking back of his wife after a revocable divorce) (Abū ‘Awād, 2011:50 sq.). As for cases that are not regulated by a legal provision of the code, Article 400 of the 2004 Family Code states: “For all issues not addressed by a text in the present code, reference may be made to the Maliki *madhhab* and to *ijtihād*, which seeks to implement Islamic values, in [the domains of] justice, equality and appropriate coexistence.”

Regarding marriage authentication, Article 16 of the 2004 Family Code, designed to put an end to unregistered marriages, states:

If, for reasons of *force majeure* or act of God, the marriage contract was not officially registered on time, the court may take into consideration all legal

evidence and expertise. During its enquiry the court shall take into consideration the existence of children or a pregnancy following the conjugal relationship, and whether the petition was brought during the couple's lifetimes.

Initially, petitions for marriage recognition were admissible within a period not to exceed five years from the date upon which the law came into effect. However, the fact that this period was extended twice, first in 2009 and again in 2014, suggests that the goal behind Article 16 had not yet been reached.

According to Law no. 03.73 of 3 February 2004, amending Article 2 of the Judicial Organization Law, family circuits adjudicate in matters of personal status, civil status, notary and minor affairs, child tutelage (*kafāla*), and all matters relating to the care and protection of the family. The same article adds that any chamber of the court can rule on any case brought before it, except on matters relating to the family and to community justice. However, there is no specific way to select and train judges sitting in these circuits.

With regard to the selection and training of judges, Article 1 of Decision no. 2357.06 of 23 October 2006, which establishes the conditions of entry into the judiciary, states that the entrance examination is open to anyone who holds either a Bachelor's Degree in Private Law or a diploma in shari'a issued by the Shari'a Faculty of the Qarawiyyīn University after four years of study⁸. The first Institute of the Judiciary, called "National Institute of Judicial Studies", was created in 1970. Today, the institution authorized to train future judges is the Supreme Institute of the Judiciary,⁹ which offers trainees a two-year course in all legal subjects, combining theoretical courses and practical internships. Only two specialized classes in family justice were offered in 2004 and 2005.

In **Egypt**, the process of codification extended to the field of family law with the adoption of a series of legislative enactments, starting in the 1920s. These enactments adopted

doctrines from different schools, using the techniques of *takhayyur* and *talfīq*.¹⁰ Substantive personal status law reforms were issued again in 1985 and 2000.¹¹ Reforms in the field of Muslim personal status have proceeded gradually and in a piecemeal manner. Significant parts of the law remain uncoded. When there are gaps, Article 3 of Law no. 1 of 2000 refers judges to the predominant opinion of the Hanafi school.¹² The reforms adopted in Egypt in these domains have been mainly procedural rather than substantial. For example, Egyptian law does not include a provision that defines the marriage contract and its conditions. Hence, the fundamental conditions relating to the validity of marriage are governed by Hanafi doctrine, according to which a marriage does not have to be registered with state authorities to be valid. However, Egypt has precluded courts from hearing disputes arising out of marriages for which an official certificate has not been obtained. Egypt has also discouraged the practice of early marriage by denying judicial relief in cases in which a spouse was not old enough to receive an official marriage certificate (Article 17 of Law no. 1 of 2000).

However, the authority of the state and its ability to regulate marriage continues to be undermined by the survival of the so-called customary marriage (*zawāj 'urfī*), which is unregistered. Although such a marriage is valid from a religious perspective, no rights or duties arising from it can be enforced in the courts. However, Law no. 1 of 2000 introduced an important change in this regard by allowing a woman to petition the court for a divorce, on the condition that she provides written evidence of her marriage (Dupret 2007b; Berger and Sonneveld 2010: 74; Lindbekk 2013: 91).

Claims of marriage authentication (*ithbāt al-zawāj*) are often filed when the marriage contract was not registered, or in cases in which one party denies the existence of marriage. An analysis of court records indicates that lawsuits over the authentication of marriage are frequently accompanied by a request to establish paternity for children. This finding suggests that the two case types are closely intertwined (see also Ahmed 2012).

In 2004, family courts were established to facilitate the handling of personal status law disputes and to help to resolve disputes amicably. In the wake of the new law, court personnel were provided with computers, with the stated purpose of rationalizing legal practice by making it more uniform. A remarkable feature of contemporary court practice is the widespread use of judgment templates. These templates are not drafted by the Ministry of Justice; rather, they are the product of an informal dialogue within the judiciary on the basis of which family court judges model their rulings on the judgments of other judicial panels. Judges who were interviewed said that when they were initially appointed to family courts, they spent a great deal of time reading their colleagues' decisions for guidance on how to do their jobs correctly. Consequently, they developed eighteen or so different templates based on the abstract descriptions of cases and rules provided by lawyers at the time of filing law suits, such as marriage authentication (Lindbekk, 2016). Offering model judgments, such templates facilitate the application of law by helping judges manage their case loads more efficiently. The use of these templates has created a high degree of uniformity in family courts practices, despite the discretionary power exercised by judges.

Another factor that contributes to judicial predictability in decisions relating to family matters is the legal education and training of judges. Contemporary legal education developed in the nineteenth century in response to the adoption of legal codes and the restructuring of courts (Berger and Sonneveld 2010, 53–54; Wood 2016). However, although the education of law students largely reflects civil law sentiments, Islamic law and Islamic legal theory are still taught at al-Azhar's Faculty of Shari'a and Law and at other state universities, albeit in a highly circumscribed fashion (Cardinal 2005, 227). In 2006, 32,000 law students were enrolled in Cairo University's Faculty of Law. The faculty is made up of three sections: Arabic, French, and English. The tuition fees paid by students enrolled in the French and English sections are higher than those paid by students enrolled in the Arabic section.

Students trained in the English and French sections are more likely to join the judiciary or corporate law firms. The same curriculum, however, is offered in all three sections and addresses matters unrelated to the shari‘a. Faculty offer courses in public and private law, combined with four compulsory classes in ‘Islamic shari‘a’ that focus on the codified rules of marriage, divorce, and inheritance (Shalakani 2006: 851-52). Hence, Egyptian personal status law today is implemented by judges who are largely trained in positive, codified law, not in traditional Islamic *fiqh*.

During the sultanate period (thirteenth to eighteenth centuries), marriage among Muslims in the **Indonesian** archipelago was regulated by the *qadi*, mainly applying Shafi‘i *fiqh*, but also local customs and traditional norms.¹³ After the beginning of European colonization, in the late 18th century, there was a shift toward a European-style legal system. With regard to the regulation of marriage, the Dutch Civil Code was applied to Europeans, Japanese, and Chinese from the first half of the nineteenth century, while ‘Orientals’ (Arabs, Indians, and Pakistanis, as well as Southeast Asians) were subject to the customary laws of their respective countries of origin (Bedner and van Huis, 2010: 177). Whereas Indonesian Christians were subject to Dutch government regulation, Indonesian Muslims were subject to Islamic law or customary law (*hukum adat*).

These regulations were replaced by Law no. 32 of 1954, which applied to all Muslims in Indonesia. The Ministry of Religious Affairs designated thirteen *fiqh* books to be used as references by religious courts to promote uniformity in decision-making.¹⁴ Until the end of Soekarno’s “Old Order” in 1966, the situation remained unaltered, and the registration of marriages, divorces, and reconciliations took place under a pluralistic legal system governing the family. During the “New Order” of Soeharto (1966-1998), Marriage Act no. 1/1974 replaced all earlier regulations. ‘Shari‘a-compliant’ family law became state law, applying to all citizens regardless of religion, ethnicity, and race. The Marriage Act was supplemented

and elaborated upon in Government Regulation no. 9/1975 on marriage and the Compilation of Islamic Law (KHI) no. 1/1991.¹⁵

Under these laws, the registration of marriage is obligatory. Article 2(2) of the 1974 Marriage Act states: “All marriages shall be registered in accordance with applicable regulations.” With regard to marriages that are not registered, Article 49(2), paragraph 22, of Religious Judicature Act no. 7/1989 provides that a “religious court may legalize a marriage that was concluded before the Marriage Act no. 1/1974.” As for marriages that occurred after 1974, Article 7(3) of the KHI of 1991 authorizes parties to apply to the court for marriage authentication (*itsbat nikah*, in Indonesian; *ithbāt al-nikāh*, in Arabic), but limits the availability of an authentication to five circumstances: “(a) to make a formal divorce possible; (b) the marriage certificate is lost; (c) the legality of the marriage is in doubt; (d) the marriage was concluded before the 1974 Marriage Law; or (e) the marriage was concluded by a couple who were permitted to marry according to the Law of Marriage no. 1/1974”.

The Indonesian Supreme Court is responsible for selecting judges. In 2017, the Supreme Court recruited 1,484 judges: 907 for the civil courts, 543 for the religious courts, and 34 for the administrative courts. To become a judge, a candidate must pass a three-step exam: (1) administrative selection; (2) basic competency test (general knowledge, a scholastic test, and a personality test); and (3) special competency test (legal knowledge, interview, and psychology test). A candidate must be at least twenty-two years of age and thirty-two at the most. Any candidate who wants to become a religious court judge must be: (1) a Muslim; (2) pious (*takwa*) towards the Unique God; (3) loyal to the *Pancasila* and to the Indonesian Constitution; (4) in possession of a Bachelor’s Degree in Islamic law or a Bachelor’s Degree in Law with a deep understanding of Islamic law; and (5) able to read and understand *kitab kuning* (Arabic *fiqh* books). All successful candidates must undergo a two-year period of

judicial training and education. If they are successful, candidates are appointed as judges and posted throughout Indonesia. The majority of Indonesian religious court judges graduated from one of the Faculties of Sharia of the fifty-three State Islamic Universities/State Institutes in Islamic Studies. Today, there are approximately 3,700 judges, of whom 20-25% are women, in 359 Religious Courts of First Instance and 29 Religious Courts of Appeal.

In sum, Morocco, Egypt, and Indonesia have all constructed a legal and judicial system that codifies *fiqh* in particular ways and specifies the rules judges must apply in the cases referred to them. These systems have also defined the path to be followed in cases in which legislation is silent. They have done so in different ways, according to the specificities of their respective legal histories. However, they share a converging dynamics that results in a common pattern of legal standardization.

4) Marriage authentication: How do judges manage the reference to *fiqh*?

We now turn to judicial practice in the field of family law when no legislation provides guidelines for the decision-making process. This is the case, to varying degrees, for marriage authentication, which is not subject to any—or only to limited—legislative regulations in the three countries under consideration. In the face of statutory silence, judges are instructed, again to a varying extent, to seek the applicable *fiqh* provisions. We will examine how they do so, i.e., which methods they use to identify the applicable rules and to legally characterize the facts of the case.

Before the 1912 Treaty of Fes, *Shra'* judges in **Morocco** based their judgments on Maliki *fiqh* and *fatwā* books. These included *al-Mukhtaṣar* of Sheikh Khalīl, *al-Tuḥfa* of Ibn 'Āṣim, *Lāmiyat al-Zaqāq* of Abū al-Ḥasan 'Alī b. Qāsim, *Tabṣirat al-Ḥukkām fī Uṣūl al-Aqḍiya wa'l-Aḥkām* of Ibn Farḥūn, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* of Ibn Rushd, *al-Qawānīn al-Fiqhiyya* of Ibn Juzayy, *al-Risāla* of Abū Zayd al-Qayrawānī, *Manẓūmat al-*

‘*Amal al-Fāsī*’ of ‘Abd al-Raḥmān al-Fāsī. As for the *fatwā* compilations, the most famous are the *Mi‘yār* of al-Wansharīsī, the *Nawāzil* of al-Mahdī al-Wazzānī, and the *Nawāzil* of al-Sharīf al-‘Alamī (Ghmīja, 2000: 12-13).

In his *al-Abḥāth al-Sāmiya fī al-Maḥākīm al-Islāmiyya*, first printed during the Spanish protectorate, Sheikh Muḥammad al-Murīr al-Tiṭwānī (2011: 246) proposed that Islamic law should be codified within the framework of a plan to reform the *Shra‘* courts. Some modern textbooks are used by judges in family disputes and in matters relating to non-registered real property. In this regard, we might cite the *Qāmūs Mudawwanat al-Aḥwāl al-Shakhṣiyya* by Khālīd Binnīs, *al-Aḥwāl al-Shakhṣiyya wa’l-Mīrāth fī al-Fiqh al-Mālīkī* by Muḥammad al-‘Alawī al-‘Ābidī, and *al-Dalīl al-‘Amālī li’l-‘Aqqār ghayr al-Muḥaffaẓ*, written by seven judges assigned to the appellate court of Fes. In these books, the authors cite from the abovementioned Maliki books, which they relate to the respective provisions of codified laws.

We will now consider two cases that are representative of the actions performed by judges to fill gaps in the legislation:

- (1) The first is Case no. 217/07 of 20 September 2007, from the Court of First Instance of Abi Lja‘d. In this case, two spouses filed a petition to authenticate a nine-year marriage from which two children were born. Following an initial administrative inquiry, the court heard the testimony of three witnesses who testified that the two spouses had been “continuously married” for nine years. In its ruling, the court first cited the exception stipulated in Article 16 of the 2004 Family Code—see above: “If, for reasons of *force majeure* or act of God, the marriage contract was not officially registered in due time, the court may take into consideration all legal evidence and expertise.” This exception is based on Maliki *fiqh*, to which judges refer in application of Article 400 of the same code. The *fiqh* provides that a couple may not have conjugal

relations before the conclusion of the marriage contract. However, in the absence of a contract, the marriage is not void, as specified in a *fatwā* by Ibn Lubb (d. 782/1382) cited by al-Tasūlī (d. 1258/1842), in explanation of Ibn ‘Āṣim’s (d. 482/1089) statement: “Before marriage consummation, testimony is imperative. It completes the establishment [of marriage]” (*wa fī’l-dukhūl al-ḥatam fī’l-ishhād wa huwa mukammil fī’l-in‘iqād*).¹⁶ Accordingly, a wedding celebration, with the knowledge of the woman’s legal guardian and both spouses, is sufficient to validate the marriage, even in the absence of witness testimony. Therefore, if the marriage and its consummation have been publicized, there should be no punishment for illegitimate sexual intercourse (*ḥadd al-zinā*), and the marriage is established, in order to protect the couple’s conjugal relations and the legitimacy of their children. According to Sheikh Khalīl, a marriage may be established even by hearsay testimony (*bayyināt al-samā’*). His opinion was also the basis for Article 16 of the Family Code. In this case, *fiqh* was used to justify the acceptance of a petition for marriage recognition as an exception to the normal requirement of registration. The Court of Cassation confirmed this opinion when explaining what is meant by the “exceptional situation” (*al-ḥāla al-istithnā’iyya*) or “state of exception” (*ḥālat al-istithnā’*) required under the 1957 PSC.¹⁷

On 13 June 1983, the Court of Cassation confirmed a ruling issued by the Court of Appeal of Casablanca recognizing a marriage concluded in Casablanca by recalling that the appellate court had properly justified the ‘state of exception’, that is, legally explained the exception to the rule of marriage registration, by citing to scholars, including Ibn Lubb and Sheikh Khalīl, on the celebration and consummation of marriages, when the spouses and legal guardian are known, and the subsequent birth of children (Ghmīja, 2000: 81). We should note that *fiqh* was used in the same way before and after the adoption of the 2004 Family Code to justify a ‘state of exception’, *force*

majeure, or an act of God, which it defined as a special material or legal situation normally not subject to the general legal provisions that, by definition, are applicable in any circumstances.

- (2) In a second case, no. 348/2/1/2007, dated 5 November 2008,¹⁸ the wife filed a petition before the Ben Slimane Court of First Instance to authenticate a non-registered marriage, claiming that she had been married to the defendant since 1996 and that the marriage had resulted in the birth of a child. In this case, the issue was related to the legal quorum of witnesses, with regard to which Maliki doctrine accepts a particular mode of evidence called *lafīf*, that is, the conventional testimony of a group of witnesses (*shahādat al-lafīf*). After hearing the testimonies of six witnesses, the court rejected the petition. Subsequently, however, the Court of Appeal annulled the first instance judgment and authenticated the marriage of the plaintiff. At the subsequent cassation level, the cassation petitioner held that the quorum of witnesses had not been reached, as only six of the twelve *lafīf* witnesses were present. In its ruling, annulling the appellate decision, the Court of Cassation stated: “Though Article 16 of the Family Code allows, as an interim measure, marriage recognition, it is nevertheless required that testimony reach the legal quorum represented in two righteous witnesses (*shāhidān ‘ādilān*) or a *lafīf* of twelve witnesses, as established in the well-known and common ‘amal custom (*al-mashhūr wa mā jarā bihi al-‘amal*). Although the Court of Cassation did not cite any source, it is reported in al-Mahdī al-Wazzānī’s *Nawāzil* that Abū ‘Abdallāh b. al-Ḥajj, judge of Chefchaouen, said that “the testimony of ordinary witnesses through *lafīf* is admissible and current in judicial practice. The minimum number required in *lafīf* is twelve, on the condition that the person against whom the testimony is addressed has no proof of incapacity against them.”¹⁹ An earlier judgment of the Court of Cassation, dated 18 July 2006, stated: “The legal quorum for testimony

is two righteous witnesses or a *lafif* of twelve witnesses, as established in the well-known provisions of Maliki doctrine. The [appellate] court breached *fiqh* rules when it based its judgment for marriage recognition on the testimony of only three non-righteous witnesses (*shuhūd ghayr ‘adūl*).’’

These two rulings, issued under Article 16 of the 2004 Family Code, reiterated a judgment dated 19 May 1975, which stipulated: ‘‘Though the state of exception is proved, marriage cannot be established unless attested by a *lafif* of twelve witnesses.’’ However, it is remarkable that, in the legislative and socio-political context of Article 16, the reference to these *fiqh* provisions was presented as a means to put an end to non-registered marriages.²⁰ Since the entry into force of the 2004 Family Code, many judges have granted marriage recognition based on the testimonies of at least two witnesses in cases in which both spouses consent. Practically speaking, we may assume that the *fiqh* provisions referred to in the ruling of the Court of Cassation are applicable only in contentious cases, i.e., when one of the two spouses contests the marriage. Nevertheless, the preference in Court of Cassation case law is to adhere to Maliki doctrine, which it considers to be protective of the marriage institution, while Article 400 of the 2004 Family Code offers the possibility of a more flexible interpretation. The Court of Cassation might have referred, for example, to Hanafi doctrine to introduce a wider margin of action for the trial judge; in this regard, other criteria, such as the presence of witnesses at the conclusion of the contract or hearing the exchange of consent and other contract conditions, might have been used to evaluate the testimony.

Marriage authentication constitutes one of the main domains in which **Egyptian** judges invoke *fiqh* in the absence of formal legislation. Since Egyptian law does not instruct judges on how to identify the proper *fiqh* rule, courts exercise considerable discretion. In that respect, templates offer a relatively secure guide for issuing the proper solution. Once a judge has made a decision about the legal category to which a case belongs, he or she needs only fill in

a few details pertaining to names and dates to produce a ruling. In the case of marriage authentication, a template has been adopted by several judicial panels in different family courts.²¹ The following two cases exemplify how Egyptian family court judges use this template:

- (1) In the first lawsuit, a female plaintiff filed a petition before the family court of al-Zaytun on 28 July 2011, requesting the authentication of her marriage with the male defendant, based on a customary marriage contract (*'aqd zawāj 'urfī*). The court stated:

According to Article 17 of Law no. 1 from 2000, the court is not allowed to hear claims arising from a marriage if the wife is less than sixteen years old and the husband less than eighteen at the time of filing the case. [...] It is widely accepted that marriage is a contract that unites (*'aqd al-inḍimām*) and couples (*izdiwāj*) a man and a woman. The dower (*al-mahr*) is a condition regulating its conclusion, but not a pillar [viz., a requirement]. *Al-shar'* stipulates that marriage is a contract that allows a man and a woman to [sexually] enjoy (*istimtā'*) each other (*The Shari'a-Ordained Rules of Personal Status*, by Aḥmad Ibrāhīm and Wasal 'Alā al-Dīn, p. 65).

The validity of the marriage contract is determined by the following conditions:

- 1) The offer and acceptance by competent parties within the same sitting;
- 2) The contracting parties must be able to hear and understand what is said;
- 3) The acceptance of the offer is specified or implied.

The following conditions are also required for the marriage contract to be valid:

- A) There should be no temporary or permanent impediments [to marriage];

B) Two male Muslim witnesses who have reached puberty and are of sound mind should be present. They should be two men, or two women and one man. The Court of Cassation considers any marriage concluded without witnesses to be invalid in accordance with the Hanafi *madhhab* (Court of Cassation, Case no. 73, judicial year 1957, 23 May 1989). The witnesses should be Muslim if the spouses are Muslim. However, they may be Christian or Jewish if a Muslim marries one of the People of the Book, in accordance with the opinions of Abū Ḥanīfa and Abū Yūsuf.

Both parties to the marriage contract should be free, beyond puberty and of sound mind. If a woman is adult and sound of mind, she may marry herself without a guardian (*walī*). The marriage is considered valid and comes into effect on the condition that the groom is of the same social standing (*kafā'a*) and the dower compatible (*mahr al-mithl*) or larger. In practice, the Court of Cassation has established that the marriage of an adult woman is considered valid (whether or not she is a virgin) (Court of Cassation, Case no. 194, judicial year 1963, 19 October 1998) and it is binding for the guardian (*walī*) so long as she is married with a dower that is suitable or larger.²²

- (2) The judicial panel begins this judgment by citing a legislative provision regarding the impossibility of hearing cases in which the spouses are below the ages of sixteen and eighteen, respectively. Subsequently, the panel quotes a definition of marriage from a contemporary legal commentary on personal status law. Turning to the conditions of a valid marriage contract, the judicial panel states that the validity of a marriage is determined by the offer and acceptance of competent parties. According to these requirements, a marriage is a verbal contract that does not have to be registered with state authorities in order to be valid. Furthermore, the parties to the marriage contract

must have reached puberty and be of sound mind. The court then proceeds to list the necessity of the presence of mentally sound and adult witnesses to the contract, citing the leading scholars of the Hanafi school, Abū Ḥanīfa and Abū Yūsuf. Finally, the judge refers to the opinion of the Court of Cassation that invokes traditional Hanafi doctrine regarding the competence of an adult woman to conclude a marriage. An adult woman's right to marry without her guardian's agreement is a question much debated among Hanafi scholars and there is no consensus among jurists as to the most appropriate view (Cuno, 2015; Peters, 2002). Instead of laying out the plurality of interpretations regarding consent within the Hanafi school, contemporary family court judges – in line with the Court of Cassation – appear to hold that an adult woman has the right to be married without the involvement of a guardian. However, the position adopted by most judges is not unambiguous. Although the preponderant Hanafi view acknowledges the right of an adult, mentally sound woman to conclude her own marriage, judges restrict her legal capacity by referring to another Hanafi rule that makes the validity of the marriage contingent on the groom's suitability and ability to provide her with a dower compatible with her social status. Because the female plaintiff had submitted a customary contract signed in the presence of two witnesses and which fulfilled the conditions for a valid marriage contract, the court decided to authenticate it. The template selected by the judicial panel in this case resembles the one used by another family court four years earlier, in 2008, shortly after the courts were equipped with computers.²³

Marriage authentication requests are usually submitted by women, sometimes within days of the marriage. However, they are occasionally lodged by men. In the following case, a man lodged a lawsuit before the family court of Ain Shams requesting the authentication of his marriage to the female defendant based on a customary marriage

contract concluded on 10 January 2003. During the course of the proceedings, he attended in person with a lawyer and presented a portfolio of documents that included the customary marriage contract. According to this contract, he had married the female defendant in the presence of two male witnesses and presented her with a dower of 5001 Egyptian pounds, 5000 of which were deferred. At this point, the court decided to adopt the template described in the previous paragraph. As in the former case, the court upheld the suit because the male plaintiff had established the facts of the case to the court's satisfaction.

These two cases illustrate how the predominant Hanafi opinions embedded in the templates are integrated into judgments according to the details of the case at hand. It is thus possible to trace continuities between substantive Hanafi rules and contemporary judicial reasoning in Egyptian family courts. Although judges present their reasoning as falling within the parameters of mainstream Hanafi *fiqh*, the sources and methodology they use differ considerably from it. While some judges are more erudite than others, court records reveal that family court judges rarely seek guidance in the authoritative collections of classical Muslim scholars (*fuqahā*). Nor do court rulings defer to Qadri Pasha's codification of Hanafi doctrine, which was frequently referenced by Egyptian judges in personal status matters until the end of the last century (Dupret 2007a). Instead, they generally refer to Hanafi *fiqh* through the medium of the Court of Cassation and a body of contemporary works of jurisprudence. These works, which are clearly embedded in the civil law tradition, are divided into chapters that follow the sequence of articles in the personal status legislations in chronological order. Thus, while judges deploy a vocabulary connected to traditional *fiqh*, the grammar of their legal reasoning is of that of civil law. The widespread use of templates thus tends to reduce the heterogeneity and open-endedness of *fiqh* so as to make it available to judges trained in civil law.

In **Indonesia**, Article 7 of the Law of Marriage no. 1/1974 provides judges with very little guidance on how to handle marriage authentication cases. However, this does not mean that judges refuse to accept requests for *itsbat nikah*. Under Indonesian law, all courts, including religious courts, are compelled to hear a case even in the absence of legislation governing the matter (Article 10 of Judicial Authorities Act no. 49/2009). When confronted by an issue about which the law is either silent or ambiguous, judges in Indonesia's religious courts have two templates to which they may refer: (1) the SIADPA template (*Sistem Informasi Administrasi Perkara Pengadilan Agama*, Administration and Information Systems of Religious Court Cases); and (2) the SIPP template (*Sistem Informasi Penelusuran Perkara*, Information System for Case Searching).²⁴ Alternatively, they may use the Unofficial Compilation of Shafi'i *Fiqh* Texts (UCSFT).²⁵ It should be noted that Supreme Court regulations require religious court judges to use the standardized template.²⁶

When issuing decisions on marriage authentication, Indonesian religious judges refer to one or more of the statutes and regulations in force.²⁷ In almost every decision issued by Indonesian religious judges, each sentence begins and ends with identical language. These formulas are taken from the SIADPA/SIPP template. Below are three representative examples.

- (1) Case no. 57/Pdt.P/2016/PA.Mj from Majene, West Sulawesi was filed by a couple who were married in a religious ceremony in 2005. They appeared before the court in 2016 because they needed a marriage certificate in order to obtain birth certificates for their three children. In this case, the court used only the SIADPA/SIPP template:

Considering that, based on the facts mentioned above, the marriage was [carried out in] compliance with Article 2(1) of the Marriage Law no. 1/1974 plus Article 10(2) of the Government Regulation plus Articles 14 to 44 of the KHI. There are

no legal impediments to the couple marrying under Law no. 1/1974. Similarly, the case satisfies the requirements stated in Article 7(3-E) of the KHI.²⁸

Here, the court simply applied the KHI without any reference to *fiqh*. After hearing the testimony of two male witnesses and examining the documentary evidence, the judges listed provisions to be followed for a marriage to be valid. They directly copied the template's formula and pasted it in their decision.

- (2) Case no. 110/Pdt.P/2014/PA.Pdlg relates to a petition for a marriage certificate filed in the Religious Court of Pandeglang (Banten) in 2014. The petitioners married in 1981 and had six children. They did not have a marriage certificate because the marriage registrar failed to record their marriage in the Office of Religious Affairs. In this case, the court used both the SIADPA/SIPP system and the UCSFT compilation.

After verifying the evidence and receiving the testimony of two witnesses, the judges rendered their decision, based on Article 49(2) of Religious Judicature Act no. 7/1989, Article 2(2) of Marriage Act no. 1/1974, and Article 7(3-E) of the KHI. The judges reproduced the template, as illustrated by the following excerpts from two decisions, which conform exactly to the SIADPA/SIPP template.

After the enactment of (Religious Judicature) Act no. 7/1989, the procedure for marriage authentication is based on Article 49(2). The jurisdiction of religious courts over marriage under Law no. 1/1974 includes the authentication of marriages concluded before 1974. The same explanation is found in Law no. 3/2006 amending Law no. 7/1989. Based on these regulations, the law governing the authentication of marriage remains the same and marriage authentication is for marriages concluded before 1974.²⁹

Based on the aforementioned explanation, there is no legal basis for marriage authentication for marriages concluded after 1974. Under Law no. 1/1974, they [viz., such marriages] are not legally authorized. However, Article 7(3) of the KHI introduces a minor modification that allows [the courts] to accept a petition for a marriage authentication. It states that marriage authentication can be requested by anyone, provided there are no legal impediments to the marriage according to Law no. 1/1974.³⁰

As the marriage was concluded after 1974, it could not be authenticated. The judges noted that there is a lack of clarity in the text. To clarify this issue, they referred to the objectives of the shari'a and, in particular, to the notion of the protection of progeny (*hifz al-nasl*), which legitimates a marriage authentication in order to protect the rights of children. The judges copied the arguments of their rulings from the SIADPA/SIPP template system:

Considering that, in addition to the above considerations and explanations, there are sufficient reasons to consider the request of the applicants carefully, even though the marriage they contracted occurred after 1974: In fact, it [viz. granting marriage authentication] is consistent with the purpose of marriage itself in the framework of protecting progeny (*hifz al-nasl*), in addition to protecting the wife. In addition, social reality demonstrates that many children and wives are neglected in various ways when the legal relationship between the children and their father or between husband and wife is not clear. In the same way, this [viz. marriage authentication] has already reached the level of necessity (*daruriyyat*), which makes it imperative. If the marriage is not registered and thus not officially documented, it harms (*madarat*) the interests of the wife and children. If an unregistered marriage is not authenticated (*itsbat nikah*), a wife cannot sue her

husband to demand her rights [if a contention arises], and the children will not have birth certificates and other civil administration documents, in addition to facing other problems.³¹

In the last step, the judges supported their decision by citing to the UCSFT:

Considering that judges need to draw on the opinion of a Muslim jurisconsult as the basis of their argumentation: This opinion is contained in the *kitab I'anatut Thalibin*, vol. IV p. 254³²: *wa fī al-da 'wā bi-nikāḥ 'alā imra'a dhikr ṣiḥḥatihi wa shurūtihi min naḥwa walī wa shāhidayn 'adūl* (in petitions regarding marriage with a woman, its validity and conditions must be mentioned by a guardian and two just witnesses). Based on the aforementioned considerations, the request of the applicants is based on sufficient reasons and is therefore granted.³³

Based upon this Shafi'i *fiqh* text, the judges authenticated the marriage on the grounds that, as confirmed by written evidence and two male witnesses, it had been celebrated by the *imam*, authorized by the *walī* (the father), witnessed by two males, and attended by a large public. In this case, the judges used the SIAPDA/SIPP template with a reference to *maqāsid al-sharī'a* and to the USFTC.

- (3) Case no. 0103/Pdt.P/2016/PA.Klk is from Kolaka, Southeast Sulawesi. The couple contracted a marriage that fully conformed to the requirements of *fiqh*. In 2016, they petitioned the court to authenticate their marriage in order to obtain a certificate that made it possible for them to acquire birth certificates for their five children. In this case, the court used both the SIADPA/SIPP template and the UCSFT. After verifying the documentary evidence and hearing the testimonies of two female witnesses, the judges cited the applicable statutes: Article 49 of Religious Judicature Act no. 7/1989, as amended by Law no. 3/2006 ("a religious court may legalize a marriage that was

concluded before the Marriage Act no. 1/1974”); Article 2 of Marriage Act no. 1/1974 (“all marriages shall be registered in accordance with applicable regulations”); and Article 7 of the KHI (“parties may apply to the court for marriage authentication”). The judges borrowed directly from the SIAPDA/SIPP template. They copied its formula and pasted it in the decision.

However, the court considered the statutory texts to be unclear. Thus, it turned to the UCSFT and included a verbatim quotation in the decision to bolster its argument:

Whereas the petition of applicant I and applicant II are in accordance with the arguments contained in the *kitab*:

1) *I‘anatut Thalibin*, juz IV, p. 253-254³⁴: *wa fī al-da‘wā bi-nikāḥ ‘alā imra’a dhikr ṣiḥḥatihi wa shurūtihi min naḥwa walī wa shāhidayn ‘adūl* (in petitions regarding marriage with a woman, its validity and its conditions must be mentioned by a guardian and two just witnesses);

2) *Tuhfa*, juz IV, p. 132³⁵: *wa yuqbalu iqrār al-bāligha al-‘āqila bi-l-nikāḥ* (the acknowledgment made by a woman who has attained puberty and is in possession of her mental faculties is accepted).

Based on these two Shafi‘i *fiqh* texts, the judges authenticated the marriage. In this case, they used the *fiqh* and its methods as exposed in the UCSFT.³⁶ The judges asked the petitioners to prove that the marriage was concluded in the presence of the legal guardian and witnessed by two males. The petitioners brought two female witnesses who confirmed that the marriage had been celebrated by the imam of the mosque, after the authorization of the *walī* (the father) who was present at the time of the marriage, witnessed by two males, and attended by a large audience.

In family matters, Indonesian Muslim judges base their decisions on positive and codified law. In practice, they use different templates. When the legislation is silent, they also use an uncoded Islamic compilation. As a result, adjudication is standardized, reducing legal uncertainty and transforming the nature of rules and procedures.

5) Conclusion: the legal positivization of Islamic normativity

Reflecting a new conception of family public order, Article 400 of the **Moroccan** Family Code established a large scope for *ijtihād* without giving judges any guidance regarding the criteria for selecting the relevant sources, thus granting them a quasi-legislative role with respect to all issues not addressed by the code. In the absence of criteria standardizing this new *ijtihād*, judges bypass or fill gaps in legislation in the same way as they did under the 1957 Personal Status Code, namely, by citing to the same sources of Maliki *fiqh*.³⁷ However, contemporary judges, who are graduates of law faculties, do not have the same jurisprudential and epistemological background as graduates of the Qarawiyyīn University had in the past. In this situation, the Court of Cassation plays a major role in harmonizing interpretation and providing guidance for trial judges. The case-law guidelines it publishes are easily available, providing judges with excerpts and citations from Maliki scholars in matters of non-codified family law. The Supreme Institute of the Judiciary plays a similar role, at the level of both initial training and continuing education, thereby contributing to the standardization, harmonization, and updating of judges' work.

In **Egypt**, despite considerable continuity with traditional Hanafi doctrine, the sources and methodology followed by judges differ from those of classical *fiqh*. Rather than citing to classical works of Hanafi *fiqh*, the Court of Cassation's precedents and contemporary compendia of case law provide judges with vast array of legal solutions. Contextual factors also play a major role. Judicial training, coupled with time constraints and the influence of

computer technology, account for these changes. In particular, the introduction of computers, which makes it possible to reproduce the same formulas repeatedly through the medium of templates, has dramatically reduced the open-ended nature of legal debates in classical *fiqh*.

In **Indonesia**, the three cases presented here point to the standardization of decision-making in the practice of religious courts. The presentation and form of court decisions follow the standard through the SIAPDA/SIPP template and the reference to UCSFT, enabling judges to do their work quickly and efficiently. Judges choose the template appropriate for the case and, to produce their decision, need only complete a form provided on the website of the SIAPDA/SIPP. To fill a gap in the legislation or to clarify an equivocal legal text, judges refer to the non-official compilation of Shafi'i *fiqh* texts to support their decisions. The UCSFT is composed of citations from Shafi'i *fiqh* that help judges with a heavy caseload to substantiate their decisions quickly. Consequently, the challenge they face is to find a citation from the UCSFT on which they can base their decision. This citation is then pasted into the draft of the ruling.

In Morocco, Egypt, and Indonesia it is not so much the reference to substantive rules of Islamic *fiqh* that has disappeared from law as it is the mode of reference to these rules that has substantially changed. As Dupret stated, in his study of Egyptian practice:

The reference to Islam is occasional; moreover, it is always *mediated through the use of Egyptian law's primary sources*, that is, legislation and case-law.

Henceforth, this reference takes place in the banality and the routine of judge's activity, which consists mainly in legally characterizing the facts submitted to him. By so doing, the judge is obviously more interested in manifesting his ability to judge correctly—*according to the standards of his profession, the formal constraints that apply to its exercise, the legal sources on which he relies and the*

norms of the interpretive work his activity supposes—than he is to reiterate the Islamic primacy of the law he implements. (Dupret, 2007a; our italics)

Note the emphasis on the fact that judicial work proceeds through the mediation of present-day Egyptian legal cognition and practice, which is not primarily ‘Islamic’ but ‘national’ and ‘positivist’. Does this change have any effect on what is called ‘Islamic law’? In his *Pragmatism in Islamic Law* (2015), which is partly an interrogation of shari‘a and the trajectory leading it into modernity, Ahmed Fekry Ibrahim contends that there is room in Islam for a process of legal reform that preserves authenticity through an engagement with scriptural sources. He criticizes scholars like Wael Hallaq and Nathan Brown who consider contemporary legal reform as unauthentic, based on the fact, for example, that it does not preserve “the organic connection with traditional law and society” (Ibrahim, 2015: 6). According to Hallaq (2004), the traditional rules one finds in the laws of nation states are unauthentic remnants that are disconnected from the substance and methodology of classical *fiqh*. Ibrahim takes a different position: The question of law must be framed in terms of continuity, not rupture, despite the legal dynamics created by codification and some major transformations (e.g., a new class of lawyers, the transformation of jurisconsult-made law into legislative-made law). Interestingly, Ibrahim shows that the changes that took place during the process of legal modernization are related to the emphasis placed on the content of rules rather than on the methodology of their identification. In this view, what is called today a ‘return to shari‘a’ is in fact a reinstatement of substantive Islamic law (*id.*: 222).

Ibrahim’s thesis raises some conceptual problems. While insisting on the upheaval created by codification and on the transformation of processual law into substantive law, Ibrahim might have considered the extent to which this transformation of law constitutes a legal revolution. He fails to do so because this line of thinking would undermine his argument for continuity. In fact, however, his argument is inverted: it is not present-day Islamic law that

finds its roots in *fiqh*, but *fiqh* that finds an extension in present-day substantive law. In other words, if there is a continuity, it is not that of the concept of law but rather of the substance of rules, which previously were part of *fiqh* but have been transformed into positive law. The question is obviously not, as Hallaq and Brown (1997: 359) suggest, one of authenticity – authenticity is not an essential property of things but an attribute that is ascribed to them – but rather of a revolution in the normative sphere. This is what Ibrahim’s ‘purists’ understood when considering codification as an instance of secularization. Another flaw in Ibrahim’s argument is his tendency to concentrate on people who are marginal to the evolution of Egyptian family law, i.e. the *fuqahā*, despite the fact that the law-making process is currently in the hands of the legislative power. To sum up, *pace* Ibrahim, it is not Islamic law that changed in nature but Islamic *fiqh* that was transformed into positive law.

This transformation is not specific to *shari‘a*, *fiqh*, or Islamic law. By the end of the eighteenth century, what we call ‘law’ had undergone a major conceptual transformation: from a means of subjugation to a means of governance. Law was intended to become a ‘science’, which, like other contemporary sciences, aspired to be all-encompassing, systematic, regular, and mechanical. Enlightenment and Benthamite utilitarianism paved the way for positive law. Linked to a form of social planning, codification served to construct a new order and became the epitome of legal rationalization (Halpérin, 2014: 35). In this regard, codification diverges substantially from compilation, which does not seek to achieve a new and complete legal order. Although claiming to be continuous with a normative and doctrinal past, new legal codes enacted in the early nineteenth century led to the “substitution of an old legal order by a new one” (*id.*: 44). A parallel may be drawn between these features of systematization in civil law countries and the evolution, in common-law systems, of the rule of precedents and the publication of law reports (*id.*: 56). Beyond the systematization of legal rules, judicial institutions were reformed, legal professions were re-organized, and legal

education was re-instituted under the monopoly of a new figure: the state. This process accelerated with the growing accessibility of print technology (Rubin, 2011: 89), and, at the end of the twentieth century, with the digitization of judicial work, which greatly contributed to the homogenization of judicial resources.

Within the framework of codes, rules have the explicit function of providing legal stability. Arguments for rule-based decision-making traditionally focus on the capacity of rules to foster the interrelated virtues of reliance, predictability, and certainty (Schauer, 1991: 137). However,

rules are not the only device by which people predict and thus rely on the actions of others. Consequently, the ability of rules to foster more predictability and more justified reliance turns on the simplifying properties of rule-based decision-making, on the way in which the commonality of classification and outcome that make reliance possible are more likely present with fewer possible outcomes and fewer and larger classificatory categories. Rules assist reliance by providing this simplification, and also by providing a public categorical designation, such that the likelihood of divergent categorization by enforcer and addressee diminishes when both are looking at the same rule (Schauer, 1991: 139).

This is a process of double standardization: standardization of rule formulation and standardization of rule interpretation. At the level of rule formulation, the standardization process consists of the insertion of rules into a normative system whose hierarchy is both static – it seeks conformity in terms of content of inferior rules vis-à-vis superior ones – and dynamic – it seeks procedural conformity in the adoption of rules (Troper, 1991: 194). In positivist theory, rules are part of a system in which their validity depends on other superior substantial and procedural rules. In other words, both form and content are constrained. At the

level of rule interpretation, the standardization process consists of generating a similar understanding in different circumstances. It is also shaped by constraints exerted on the range of possible candidates for alternative meaning. Rules have an ‘open texture’, which, according to Herbert Hart (1961), means that one can never specify in advance all the possible instances of the application of a rule. However, rules are most often unobtrusive, “doing much of their work without inducing conscious interpretive doubt in their addressees” (Schauer, 1991: 207). Rule interpretation is generally a matter of routine. Wittgenstein (1967) speaks of following them ‘blindly’. It is even more so the case that rule formulation follows the pattern indicated above: conformity in content and procedure leads to conformity in interpretation. It is only exceptionally, in what jurisprudence calls ‘hard cases,’ that rules require any real interpretation. In the case of standardized written rule formulation, there are core meanings from which one does not depart, despite the existence of penumbral cases (Hart, 1961).

Rules have passed through a process of standardization. For the most part, rules are formulated and interpreted in a standardized manner. Whenever legislation is silent, rule formulation and interpretation are constrained in different ways, e.g., through the precedents of supreme jurisdictions and formal or informal digests of quotations and templates.³⁸ They all refer to Islamic *fiqh*, but in a manner that has little to do with the classical method. Does that mean that this is not Islamic law? We contend, in fact, that this question is irrelevant. Islamic law is not what scholars decide it should be, but what protagonists identify as such (Dupret, 2007a). There is little doubt that most judges in Morocco, Egypt, and Indonesia hold that the use of templates and precedents does not make the law ‘un-Islamic’ but, to the contrary, contributes to the tailoring of *fiqh* to legal modernity. We should reformulate the question: Rather than asking whether something is an instance of Islamic law, we should describe what actual protagonists refer to as Islamic law and how they do so. We need a detailed description of actual practices. Here, it appears that under the cover of similar

concepts and designations, the transformation law underwent was radical. *Fiqh* is now understood through non-*fiqhi* legal cognition. Through its standardization, it has been positivized.

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¹ We use the expression ‘reference to Islam’ to signify all the situations in which texts point to words and concepts related to Islam as a religion, an identity, a normative system, or an affiliation.

² *Shra* ‘ is a Moroccan colloquial word referring to *shar* ‘.

³ In the appointment Zāhīr of Aḥmad b. Tālīb b. Sūda as judge of Tangier in 1293 AH/ CE by Sultan al-Hasan I, we read: “We grant him permission thereby to view the acts and adjudicate between parties and issuing judgments according to the Maliki doctrine” (Ghmīja, 2000: 13).

⁴ By 1912, Morocco was divided into three zones, the French protectorate in the middle part, the Spanish protectorate in the north and the very south, and Tangier in the northwest, which was an international zone.

⁵ The Indonesian civil code is based on *Burgerlijk Wetboek voor Indonesie* (1847), commercial law is based on *Wetboek van Koophandel* 1847, and criminal law is based on the *Wetboek van Strafrecht voor inlander en daarmede gelijkgestelden* 1872.

⁶ *Pancasila* are: (1) ‘Belief in One Supreme God (with the obligation to carry out/implement Sharia for adherents of Islam)’; (2) ‘Just Humanitarianism’; (3) ‘Unity of Indonesia’; (4) ‘Democracy guided by Consultation’; and (5) Social Justice.

⁷ Aceh issued several ‘*qanuns*’ (legislations), for instance: a prohibition on the sale of liquor (*khamar*) regulated by Qanun no. 12/2003; a prohibition on gambling (*maysir*) by Qanun no. 13/2003; and a prohibition on gender promiscuity (*khalwa*) by Qanun no. 14/2003, and on the implementation of *jināya* (Islamic criminal penalties) by Qanun no. 6/2014.

⁸ We do not have any statistics on the training of judges, but we can say that the large majority of judges today hold a Bachelor’s Degree in Law.

⁹ Created by Law no.1.02.240 dated 3/10/2002.

¹⁰ “Process in which the doctrines of the four Sunnī schools were drawn upon to select the least stringent juristic opinion (known in the primary sources as *tatabbu’ al-rukhaṣ* or *takhayyur*), or where two juristic opinions were combined in the same legal transaction (known in the primary sources as *taḥfīq*)” (Ibrahim, 2015: 2-3).

¹¹ With regard to the substantive law applied in Egypt, the legislative rules currently governing marriage and divorce are found in Law no. 25 from 1929, Law no. 25 from 1929, Law no. 100 from 1985, and Law no. 1 from 2000.

¹² Article 3 was preceded by Article 280 of Law no. 78 from 1931 (Shaham, 1997: 12-13). Article 1 of the civil code of 1947 also requires judge to fill gaps and lacunae in the civil code by citing to the principles of Hanafi *fiqh*.

¹³ See for instance Yakin, 2015 and 2016.

¹⁴ In Indonesia, the Decree of the Bureau of Religious Courts no. 8/1/735 of 18 February 1958 stipulates: “To obtain the unity of substantive law in examining and adjudicating cases, the judges of religious courts or Mahkamah Syariahyah are recommended to refer to 13 books of *fiqh*.” These thirteen books are *al-Farā’id* (Shamsūrī); *al-Fiqh ‘alā al-Madhāhib al-Arba‘ah* (‘Abd al-Raḥmān al-Jazīrī, d. 1941); *Bughyat al-Mustarshidīn* (Ḥusayn al-Ba‘lawī); *Fath al-Mu‘īn* (Zayn al-Dīn Malībārī, d. ca. 1579); *Fath al-Wahhāb* (Zakariyyā al-Anṣārī, d. 1520); *Hāshiyah Kifāyat al-Akhyār* (Ibrāhīm b. Muḥammad al-Bājūrī, d. 1860); *Mughnī al-Muḥtāj* (Muḥammad Sharbīnī, d. 1569); *Qawānīn al-Shar‘iyya* (Sayyid ‘Abdullāh b. Ṣadaqah Ṣan‘ān); *Qawānīn al-Shar‘iyya li Ahl al-Majālis al-Ḥukūmiyyāt wa’l-Iftā’iyyāt* (Sayyid ‘Uthmān b. Yaḥyā, d. 1913); *Sharḥ Kanz al-Rāghibīn* (al-Qalyūbī, d. 1659); *Sharqāwī ‘alā al-Taḥrīr* (‘Alī b. Ḥijazī b. Ibrāhīm al-Sharqāwī d. 1737); *Targhīb*

al-Mushtāq (Shihāb al-Dīn Aḥmad b. Ḥajar al-Haythamī, d. 1665); *Tuḥfat al-Muḥtāj* (Shihāb al-Dīn Aḥmad b. Ḥajar al-Haythamī, d. 1665).”

¹⁵ This *Kompilasi Hukum Islam* (KHI) regulates the personal status of Muslims. On the basis of thirty-eight books of *fiqh*, the majority of which are Shafi‘i texts, the KHI marks the apex of the codification process of *fiqh* in Indonesia and is in force in the religious courts.

¹⁶ This verse is extracted from the poem known as *Tuḥfat Ibn ‘Āṣim*. In his explanation of this verse, al-Tasūlī cited Ibn Lubb’s *fatwā*, according to which a marriage is not void in the absence of witness testimony, on the condition that it was celebrated and publicized, and that the spouses and legal guardian were known.

¹⁷ The last paragraph of Article 5 of the PSC states that “in an exceptional way, judge may adjudicate all petitions seeking marriage recognition and may admit for these purposes all means of legal evidence.” In its ruling dated 21/10/1986, the Cassation Court defined the “state of exception” as any kind of difficulty that prevents the spouses from registering the marriage contract (Ghmīja, 2000: 73).

¹⁸ *Majalla qaḍā’ al-majlis al-a‘lā*, Vol. 70, 2009, p. 514.

¹⁹ In Case no. 416 dated 11/5/1982, the Court of Cassation stated that *laḥf* is a common judicial practice. *Laḥf* is thus accepted as a legitimate evidence. See Ghmīja, 2000: 98.

²⁰ On 2/2/2005, a circular from the Minister of Justice urged judges to adjudicate marriage recognition petitions with flexibility in order to preserve progeny rights and also for the sake of family stability.

²¹ The same template was adopted in the following cases: Case no. 1300, 26 February 2012, Ain Shams family court; Case no. 72, 31 March 2013, Zaytūn family court; Case no. 260, 27 January 2011, Zaytūn family court; Case no. 361, 26 March 2012, Zaytūn family court; Case no. 1341, 30 April 2011, Zaytūn family court; Case no. 1133, 28 June 2008, Heliopolis family court; Case no. 1020, 28 January 2010, Heliopolis family court, and Case no. 1014, 28 January 2010; Case no. 222, 20 May 2010, Heliopolis family court; Case no. 1671, 27 March 2011, ‘Ayn Shams family court; Case no. 1472, 27 February 2011, ‘Ayn Shams family court, Case no. 1280, 25 February 2013, ‘Ayn Shams family court; Case no. 290, 17 April 2011, ‘Ayn Shams family court.

²² Case no. 72, 31 March 2013, Zaytūn family court. The same template was adopted in the following cases: See Case no. 260, 27 January 2011, Zaytūn family court; Case no. 361, 26 March 2012, Zaytūn family court; Case no. 1341, 30 April 2011, Zaytūn family court; Case no. 1133, 28 June 2008, Heliopolis family court; Case no. 1020, 28 January 2010, Heliopolis family court, and Case no. 1014, 28 January 2010; Case no. 222, 20 May 2010, Heliopolis family court; Case no. 1671, 27 March 2011, ‘Ayn Shams family court; Case no. 1472, 27

February 2011, ‘Ayn Shams family court, Case no. 1280, 25 February 2013, ‘Ayn Shams family court; Case no. 290, 17 April 2011, ‘Ayn Shams family court.

²³ Case no. 125, ‘Ayn Shams family court, 16 November 2008.

²⁴ *Sistem Informasi Administrasi Perkara Pengadilan Agama* (Administration and Information Systems of Religious Court Cases). SIAPDA, which is desktop-based, is gradually being replaced by the SIPP (*Sistem Informasi Penelusuran Perkara*, Information System for Case Searching), which is web-based.

²⁵ The UCSFT is a compilation of citations from various Shafī‘i *fiqh* texts on family issues. It has between fifty-five and seventy-five pages in five different versions (received differently by many judges).

²⁶ The use of the decision-making ‘template’ program in religious courts has been compulsory since 2007.

²⁷ (1) Articles 1(1) and 3(5) of Law no. 22/1946; (2) Article 1 of Law no. 32/1954; (3) Article 49(2) (and its explanation no. 22) of Religious Judicature Act no. 7/1989; (4) Article 2(2) of Marriage Act no. 1/1974; (5) Article 2(1-3), Article 10(2), and Article 6(1-2) of Government Regulation no. 9/1975; (6) Article 7 of the KHI; (7) Articles 9(1-3), 34, 35, and 90 of Civil Administration Law no. 23/2006; (8) Articles 8(2) and 58 of Population and Civil Registration Law no. 24/2013; (9) Minister of Religious Affairs Regulation no. 11/2017; and (10) Decree of the Chief-Judge of the Supreme Court no. KMA/032/SK/2006.

²⁸ Case no. 57/Pdt.P/2016/PA.Mj, 10p., p. 8.

²⁹ Case no. 110/Pdt.P/2014/PA.Pdlg, 13 p., p. 9.

³⁰ Case no. 110/Pdt.P/2014/PA.Pdlg, 13 p., p. 9.

³¹ Case no. 110/Pdt.P/2014/PA.Pdlg, 13 p., p. 11.

³² This reference is actually to Sayyid Bakrī al-Dimyāfī, n.y., vol. 4, pp. 253-4, instead of p. 254. The judges also referred to the same *fiqh* book, vol. II, at p. 308, but we could not find the exact quotation.

³³ Case no. 110/Pdt.P/2014/PA.Pdlg, 13 p., p. 9.

³⁴ The reference is not written in its entirety, which makes it difficult to verify whether the citation is correct or not. However, we found it to be correct: Sayyid Bakrī al-Dimyāfī, n.y., vol. 4, pp. 253-4.

³⁵ In the ruling, the reference is incomplete. This is a correct citation of Shihāb al-Dīn Aḥmad b. Ḥajar al-Haythamī, n.d., vol. 7, p. 241.

³⁶ *Fiqh* and Indonesian procedural rules are largely identical.

³⁷ See Ghmīja, 2000.

³⁸ On the use of sample documents for a variety of practices in the Ottoman empire, see Rubin, 2011: 89.