Sharia and public policy in Egyptian family law
Berger, M.S.

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INTRODUCTION

The intricate relation between 'Islamic law' and public policy came to my attention when, as a Dutch lawyer I dealt with cases of Moroccan family law in the Netherlands. As Dutch choice of law in family matters primarily refers to the national law of the parties rather than the law of their habitual residence, Moroccans living in the Netherlands are entitled to have Moroccan law applied to their marriage and divorce. (One of the exceptions to this rule is when the habituation is extended for such a period that one can not be deemed a foreigner anymore.) In some instances, however, Moroccan family law collides with Dutch public policy, i.e. the fundamentals of the Dutch legal order: in several cases the Dutch court has refused to apply certain rules of Moroccan law as they were said to violate Dutch public policy. Polygamy and the husband's unilateral divorce called repudiation (tālāq) are primary examples of Moroccan legal institutions considered irreconcilable with the fundamentals of the Dutch legal order.

What these fundamentals are was not always clear, however, and some of them have changed in time. An interesting example in this respect is the Dutch case law regarding the tālāq. Repudiation was often used as a means of divorce at the Moroccan consulate in the Netherlands, but in 1986 the Dutch Court of Cassation ruled that this practice could not be recognized due to its violation of Dutch public policy.¹ Public policy in this particular instance was defined as the principle of due process (‘behoorlijk geregelde procespleging’) that was considered of paramount importance to safeguard the rule of law and to protect the interests of the weaker party. The tālāq as defined in the Moroccan family code of that time did not meet these standards, being a unilateral divorce that becomes effective by the husband's declaration thereof and lacking any judicial or otherwise administrative supervision or authorization of the effects of the divorce. Fifteen years later, however, when a case of tālāq was again raised in a Dutch court, Dutch public policy was interpreted as the equality between men and women, a fundamental principle that was being violated by Moroccan law that granted the husband a right of divorce that was being withheld from the wife.² These examples are not to suggest that the Dutch courts were merely trying to block any application of Moroccan law, or maintain a negative attitude vis-à-vis the Moroccan husband's use of his divorce right, because both cases were legally too complex to merit such judgment. The point I want to make is that the definition of public policy can change in accordance with time and circumstances, even within a single legal system.

These developments and rulings spurred my interest in the concept of public policy, a flexible and fluid notion in an otherwise formalistic system of private international law. Aside from the interesting legal mechanisms that envelop public policy, it is also an interesting indicator of what a legal community cherishes as its most important values. This is especially the case in matters of family law, where I tend to look at public policy as a measure of tolerance: to what extent does a legal system allow the application of foreign law, to what extent should it safeguard its own fundamentals, and what are these fundamentals? My interest then shifted to the other side of the coin: if Dutch law denies the applicability of Islamic rules because of principles held dear in the Netherlands, what are the Islamic principles that may deny the applicability of Dutch, or even Western rules? This has led me to undertake this study. But before I explain the central questions and methodology of my research, a brief introduction to a few of the technical terms is in order.

¹ Court of Cassation, 31 October 1986, Nederlandse Jurisprudentie 1987, Nr. 924.
² Court of Appeal, 14 December 2000, upheld by the Court of Cassation, 9 November 2001, Nederlandse Jurisprudentie, Nr. 279. The outcome of the case put the Moroccan petitioner in a rather awkward position: in first instance he was denied a divorce according to Dutch law on the grounds that, given the specific circumstances of the case, Moroccan law was applicable, but his only means of divorce under Moroccan law, tālāq, was also refused this on the grounds of its violation of public policy.
1. Conflict Law, Interreligious Law and Public Policy

1.1 Conflict law

IN ENGLISH LEGAL terminology, 'conflicts law,' 'conflict of laws' or 'private international law' is a part of national law that establishes rules dealing with private law cases involving a foreign element. The foreign element is usually reflected by the involvement of different countries and nationalities: a Moroccan residing in the Netherlands petitioning for a divorce; a Frenchman involved in a car accident in Spain; an American conducting business in Germany. The foreign element can also be attached to different legal systems that are active within the same country, such as the federal states in countries like the United States or India that maintain their own legislative and judicial powers. Finally, the different legal systems can also be connected to personal laws: ethnic or religious communities within a country can be entitled to uphold their own laws, most often personal status laws, and sometimes even their own courts. When several religious family laws co-exist within a single national legal order, as is the case in Egypt, the conflicts law that deals with this particular situation is called interreligious law.

Generally speaking, conflict law deals with three kinds of problems: judicial jurisdiction (i.e., is a national court competent to adjudicate disputes which have some connection to another country); choice of law (i.e., what law is to be applied to that dispute); and recognition and enforcement of foreign judgments. In the case of the Moroccan petitioner in the Netherlands, for instance, the Dutch court had declared itself competent to hear the case because the husband was domiciled in the Netherlands and, as a matter of choice of law, had designated Moroccan family law rather than Dutch law as the law to be applied. And to complete our example with the third problem that conflict law deals with: if the husband had divorced his wife in Morocco, the Dutch court might have been asked to recognize the Moroccan divorce.

With regard to choice of law, which will be the main point of interest in this study, the applicable law is ascertained by means of 'connecting factors,' i.e. the indicators that link the legal issue to the law by which it is governed. Connecting factors can be locations (the tort law of the place where the accident occurred, for instance, or the inheritance law of the place where the property is located), but in case of personal status law they are commonly the nationality, or the domicile or habitual residence of the legal subject. In addition, some legal systems apply religion as a connecting factor so that the person's religion determines the applicable (religious) family law.

1.2 Public policy

HOWEVER, ANY LEGAL system prepared to solve legal disputes containing a foreign element by means of conflicts law will also retain the power to refuse to apply foreign rules, or to recognize or enforce foreign decisions or rights acquired under foreign law. This refusal is based on grounds of public policy, a concept that is usually left undefined, but may best be described as the fundamental principles of the domestic legal order.

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constitutes a violation of the legal order. Public policy is therefore invoked only on an ad hoc basis. Furthermore, the primary characteristic of public policy is that it changes with time and place: its interpretation may differ considerably from one country to another, and even within one country its interpretation may change in time, as is shown by the aforementioned example of talāq in the Netherlands.

The concept of public policy is of European origin and has developed considerably since its introduction in the 11th century. In general terms two 'types of approaches' to public policy may be detected: a) applying certain national provisions that are qualified as fundamental, and b) displacing the normally applicable provision of the foreign law and replacing it by a rule which is usually, but not always, borrowed from the national law. Following the Egyptian legal doctrine (which draws heavily on French legal literature of the 1930s and 1940s) these two approaches will be called the positive and negative function of public policy, respectively.

The 'positive' function of public policy excludes the application of foreign law altogether, in favor of the application of certain provisions of domestic law. Public policy is named 'positive' in its assertive meaning: certain domestic provisions are of such importance that they have overruling authority without having to scrutinize the foreign rules. This concept is close to the principle of territoriality in public law: domestic public law, like criminal law, is applied to anyone within the territorial jurisdiction of a state regardless of his or her nationality, domicile or religion. The doctrine of positive public policy has been abandoned and replaced by more qualified and refined conceptions — one of them being the concept of 'internationally mandatory rules' or 'lois de police' — but it is still relevant when we come to the comparative description of Egyptian public policy.

Where positive public policy and mandatory rules represent a direct and anterior approach, 'negative' public policy is a corrective device of a posterior nature. Public policy in its negative function is applied only in the last instance, after the foreign law has been allocated as the applicable law, or after a foreign judgment has been submitted for judicial approval in another country. Only then may it be decided that some of its contents or effects are in violation of fundamental principles of the domestic legal order. Negative public policy is the exception to the rule that a foreign law is applicable once it is allocated as such by conflicts law: application of the foreign rules should only be denied after due examination of the possible harm they could cause to the forum's society. It is a corrective device of the last resort, not to be applied too easily since it constitutes a departure from what has been stipulated by the domestic conflicts rules. The court should only refuse to apply a rule of foreign law or to recognize or enforce a foreign judgment after scrutiny of the rule and examination of the actual circumstances of the case.

The difference between positive and negative public policy also shows in their results: positive public policy aims at the direct application of the domestic rule, but negative public policy has merely established the fact that the foreign rule or judgment is not to be applied or recognized (hence the 'negative'). In the case of negative public policy, the court is left with the question how to fill the void that is left by the non-applicable rule. This is a much debated issue in Western legal doctrines: the foreign law may be applied without its odious rule; the odious rule may be replaced by a domestic rule; or the odious rule may be adapted to domestic needs. These debates are reiterated in Egyptian legal literature, but appear to be of no relevance in Egyptian case law, as we will see.

1.3 Interreligious law

SO FAR WE discussed public policy in an international dimension, i.e. related to legal disputes that contain a foreign element. In some countries, however, several internal laws co-exist, mostly concerning family law, and often related to religious, ethnic or tribal communities. This,
in turn, poses several possibilities for the administration of these internal laws. Both the law and the court established by it may be outside any state sovereignty, as is the case with the law of the Catholic Church, which determines autonomously its sphere of application and the persons affected by it. More common, however, is that state courts administer the internal laws, or that the law is being administered by the tribunals of the community concerned. In the case of Egypt, twelve religious family laws co-exist: in addition to the family law for Muslims, there are nine family laws for Egyptian Christians and two for Egyptian Jews. Until 1956, these laws were administered by the religious tribunals of the respective communities, but since 1956 all family laws are administered by the state court.

It is argued that interreligious law uses conflicts rules and the concept of public policy in ways similar to private international law. There are a few essential dissimilarities, however. With regard to conflict rules it should be noted, for instance, that religious laws by their very nature do not accept the application of other religious laws to members of their own religious community, although they may be very willing to impose their own rules upon non-believers under their jurisdiction. Also, the connecting factor is the religion of the person involved, which implies far-reaching consequences in the case of conversion or apostasy: this is not an individual act of personal faith anymore, but has as a legal consequence that the person is automatically subjected to the jurisdiction of another religious law.

Public policy plays a very minor role as long as the religious laws are applied by separate religious tribunals, or when they are applied by a state court on a basis of equality. The acceptance by the state of parallel systems of law renders the effort of unifying the legal norms by means of public policy obsolete. This is different however, when a state wishes to maintain some kind of legal fundamental principles to which all religious laws should adhere. The choice is then between setting the principles of one of the religious laws as the standard, or selecting a set of religiously neutral principles for all religious laws. Egypt has opted for the first solution, by setting the principles of Islamic family law as the 'common' or 'general' law to which all religious family laws are subjected. However, we will see that Egyptian public policy in its definition as Islamic principles is applied with restraint so as not to infringe on the religious principles of the other family laws. Based on my research of Egyptian case law and legal literature, it is my contention that public policy in Egyptian interreligious law plays a larger role than is generally assumed. Indeed, it plays a crucial role in the interaction among the religious legal systems. In addition, it will be shown that Egyptian public policy in matters of interreligious law differs from public policy concepts in international conflicts law.

2. Set-up of the Research

THIS STUDY FOCUSES on the role of public policy in both international and internal laws, within an Islamic legal setting. In choosing my field of research, I confined myself first to family law, where the role of public policy is most conspicuous, and furthermore to Egypt, which has a rich legal tradition that has served as the prime legal model for most legal systems in Arab countries during the 20th century, and because my knowledge of the Arab language and my extended stay in that country had given me time and opportunity to gain insight in its legal system. The sources used are those of case law (in particular that of the highest courts in Egypt, i.e. the Court of Cassation, the High Administrative Court and the Supreme Constitutional Court) and

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8 Lipstein and Szaszy (1994: 5).
11 Klaus Wöhler makes a distinction between 'offensive' religious laws like Christianity and Islam, that welcome conversions and tend to apply their own rules to non-believers who are in their jurisdiction and 'defensive' religions like Judaism and Hinduism, that do not welcome conversions and refrain from imposing their norms and rules on non-believers (Wöhler, 1978: 405-6).
legal literature. In addition to the study of the legal mechanisms of Egyptian public policy, I expect to obtain insight as well in its social, religious and political implications.

This study is divided into five separate fields of research. The groundwork is laid down in the first two chapters, in which the legal structure, mechanism and terminology of public policy and family law in contemporary Egypt are discussed and analyzed. The subsequent two chapters focus on case studies relating to specific issues of public policy and family law. The final chapter deals with the assumed Islamic legacy of Egyptian interreligious law. It should be noted that these chapters have been published prior to the writing of this Introduction. The publication references have been mentioned above, under the acknowledgements. The five chapters are the following:

Chapter 1: 'Public policy and Islamic law: the modern dhimmi in contemporary Egyptian family law.'
The first chapter contains an analysis of the role of public policy in Egyptian interreligious law, i.e. the interaction between Muslim and non-Muslim Egyptian family laws. It will be shown that Egyptian public policy in matters of family law is based on 'essential principles' of Islamic law, but that exceptions are made for certain rules of non-Muslim laws.

Chapter 2: 'Conflicts law and public policy in Egyptian family law: Islamic law through the backdoor.'
The second chapter contains an analysis of the role of Egyptian public policy in international conflicts law, i.e. the role of Egyptian public policy will now be studied in the interactions between Egyptian and foreign family laws. It will become apparent that the content of the principles that constitute public policy differs from that in interreligious law. Another difference is that public policy introduces religion as an additional connecting factor and, consequently, makes Islamic family law applicable to foreigners who happen to be Muslim.

Chapter 3: 'Regulating tolerance: protecting Egypt's minorities.'
The previous two chapters show that public policy is defined as 'essential principles of Islamic law' which apply to all Egyptians, Muslim and non-Muslim. But public policy is also explained as the Islamic principle to 'protect' the non-Muslim communities in preserving their essential principles of family law. This function of public policy is elaborated in two case studies. The first is of a series of court cases relating to public policy issues particular to foreign residents in Alexandria during the 1950's. These court cases highlight the shadowy border between interreligious and international conflicts law: the Greeks and Italians who have lived for generations in Alexandria are foreigners by nationality but native Egyptians by domicile, which gives rise to specific problems for the use of Egyptian public policy. The second series of court cases are the rulings of the Egyptian Court of Cassation dated 1979 and 1984. In these rulings the Court invokes public policy to safeguard essential rules of Christian law which under the existing system of Egyptian law would otherwise be overruled by Islamic law.

Chapter 4: 'Apostasy and public policy in contemporary Egypt: An evaluation of recent cases of Egypt's highest courts.'
Religion is the key connecting factor in both Egyptian interreligious law and international conflict law in determining which law is to apply to the legal subject. Consequently, conversion has far-reaching legal consequences, especially in the case when conversion is branded as apostasy. This chapter will elaborate on the issue of apostasy, and focus on the apparent contradiction in Egyptian legal discourse between disallowing apostasy on the one hand, while upholding the international and constitutional right of freedom of religion, on the other hand. It will be argued that both the act of apostasy as well as its consequences (which, as will become clear, are two entirely different issues), and their relation to the freedom of religion can be more clearly understood in the light of the concept of public policy.

Chapter 5: 'Secularizing interreligious law in Egypt.'
The definition of public policy as 'essential principles' of Islamic law implicitly refers to principles specified by the medieval Islamic legal scholars. This chapter compares the 'essential principles' as used by contemporary Egyptian interreligious law with those identified in Islamic legal doctrine (fiqh). It will be shown that Egyptian interreligious law formally adheres to the legacy of Islamic law, but allows for new interpretations that are of a secular rather than religious nature.

3. Methodology (1): Comparative Law

EGYPTIAN CONFLICTS LAW and interreligious law are indebted to both Islamic and French law. Generally speaking one could argue that Egyptian law is structured in accordance with French legal principles, while the interpretation of its rules follows those of Islamic law. This is reflected in the two legal jargons being used interchangeably. One sees this most clearly in the Egyptian legal literature, which uses French legal terminology as its parlance and translates this directly into Arabic, but at the same time refers to Islamic legal concepts which might have a complete different meaning. The concept of public policy is the most illustrative example of this dichotomous nature of Egyptian law: while the legal literature defines public policy mainly in terms of a 'negative' function, its use in case law reveals other, specific practices that I have named the 'Islamic' and "dhimm" functions of public policy.

This confusion in terminology is compounded by the use of English as the language in which this thesis is written. English legal terminology implies an implicit adherence to common law vocabulary, although the subject-matter of the research is based on Islamic and civil law terminology. The best example is again the term public policy, a concept used in both the French civil law and English common law system, but often applied in different instances, or in a different manner altogether. Public policy in common law has assumed far less prominence than the corresponding doctrine in civil law countries, and is therefore not the object of a general legal doctrine as is the case in most civil law countries. In this thesis I will use the English (hence, common law) term 'public policy,' but in its meaning of French/Egyptian civil law.

To sum up, the legal comparison of this study is primarily confined to the Egyptian legal system itself, being legally multifaceted. Add to this the fact that I myself am trained in Dutch law, and for the purpose of this study am writing and reading in languages that are not my native tongue nor the language of my legal background. All this combines to a cross-translation of a multitude of legal terms and concepts in an attempt to give each of these its proper meaning and relevance. We may very well acknowledge that we have entered a veritable laboratory of comparative law. In my opinion there is no methodology to overcome its obstacles other than being aware of the many frames of reference and exercising caution and accuracy in the use of terminology.

4. Methodology (2): 'Sharī'ā' and 'Islamic law'

THE EGYPTIAN LEGAL literature and case law on interreligious law show that the jurists and judges position themselves squarely and emphatically within the tradition of what they call the Islamic Sharī'ā (al-Sharī'ā al-Islāmiyya). This becomes particularly clear in their abundant reference to vocabulary and doctrines of the fiqh, the early scholarly sources of Islamic law. The problem, however, is that the Egyptian jurists fail to explain the Islamic terminology and concepts, in particular the term 'Sharī'ā'. Indeed, the self-evident and self-explanatory manner with which Islamic legal jargon is being used is perhaps one of the most striking features of

\[\text{See for the comparison between ordre public and public policy, e.g., Dicey, Cheshire and North (1993-95: 88-89); Lloyd (1953); Morris (2000: 47); North and Fawcett (1992: 128); Meinertzhagen-Limpens (1995). One of the reasons for the lesser prominence of public policy in English law is that the English court applies English law in many cases in which conflicts rules of civil law countries allow the application of foreign law. This is the case, particularly, in matters of personal status. Also, in common law systems the courts have traditionally more discretionary powers to dismiss actions on the ground of injustice (Dicey, 1993-95, 94).}\]
contemporary Egyptian legal discourse. For an observer like me, this raises elementary questions. Is the 'Islamic Sharī'ā' that modern Egyptian jurists refer to the family law for Egyptian Muslims which has been partly codified during the twentieth century? Is it the substantive rules and specific ways of legal reasoning as used in the fiqh literature (in particular that of the Hanafite legal doctrine that contemporary Egyptian jurisprudence claims to adhere to)? Or is Sharī'ā meant to be the ultimate and authoritative source of the divine code that serves as an ideal model of law? Or is it a combination of these?

One may wonder why distinctions or definitions need to be made considering the fact that Egyptian jurists don't. Why not assent to the single term 'Sharī'ā' or its translation 'Islamic law'? In addressing this question, a Western scholar once made the following comment: 'To the question 'what is Islamic law?' we should substitute the question 'what do people do when referring to Islamic law?''. There is no case to make personal status in Egypt an example of the larger 'model' of Islamic law.\[^{15}\] Although I concur with this line of reasoning, it is only of relative help to the way this research is being conducted because, as I mentioned earlier, the written sources do not 'show' or explain what is meant by Sharī'ā.

Moreover, settling for the single term 'Sharī'ā' or its translation 'Islamic law' without knowing its meaning is not satisfactory from a methodological and comparative point of view. For one, various sets of rules may be categorized as 'Sharī'ā' and these may very well differ from each other. Rules of Islamic family law as codified in Egypt may be different from, for example, the rules as codified in Pakistani, Iranian or Moroccan family codes. Still, they are considered all to be Islamic law. Differences also exist between the Egyptian Islamic family code and the fiqh, the Egyptian code having made certain selections of the fiqh and sometimes even amended these. And within the fiqh different interpretations exist between the various schools of law, and even within the Hanafite school of law itself. So if Egyptian legal doctrine demands that 'rules of the Islamic Sharī'ā' are to be applied without specifying which rules they refer to, we are left in the dark.

For the purpose of this research it is therefore necessary to come to some kind of definition or at least understanding of the term Sharī'ā. This requires a comparative study which, to my knowledge, has not been conducted before.\[^{16}\] The following will therefore be no more than a survey of comparative issues that have come up during my own research, with the aim to illustrate the multiple dimensions of the term Sharī'ā that I have encountered, and to finally settle for a definition suitable within the confines of this research.

4.1 Comparative issues: the Western approach to Sharī'ā law

NO LAW IS burdened with more pre-conceived notions than Sharī'ā law, and with the risk of oversimplifying one may say that Western legal scholars tend to underestimate or even disdain the Sharī'ā as a system of law because of its religious nature, while Egyptian Muslim legal scholars tend to overestimate its compatibility with Egyptian statutory law which is mostly based on Western legal concepts.

In Western comparative law, legal systems are commonly subdivided into legal 'families', and Islamic law is categorized into the family of 'religious legal systems' together with a few other legal systems like Hindu law.\[^{17}\] While other legal families like common law or civil law are duly defined, the religious law family generally is not. The fact that religious texts form the basis of that legal system appears to be the main indicator to define it as religious law. In Western legal theory, religious laws are considered foreign to western legal systems and theories. Moreover, the term 'religious law' summarizes the confusion of western scholars with – in their view – a normative system that is inherently self-contradicting because it is based on religion as well as on law.\[^{18}\] The relation between these two is conceived as an antithesis of faith and reason.

\[^{15}\] Badouin Dupret (forthcoming).
or as a contrast between a 'primitive society' without the rule of law and hence suffering from arbitrary justice (coined by Max Weber's famous notion of *qadi Justiz*) and a 'well-ordered society' that is part of 'the legal world, with legislature, courts and officials' and has moved beyond religious or moral law into the next phase of 'legal law'.

When using the term religious law, or more particular 'Islamic law,' one should therefore bear in mind that from a Western legal perspective there is a negative connotation to its meaning. However, many of the qualities that are being attributed by Western jurists to the term 'religious' law, and in particular to Islamic law, do not hold. While Islamic law may hold religious texts as its origin, its developments and practices show a very persistent human influence that may at times be compared to that in common and civil law systems. Also, the religious factor is not so much a source of arbitrary justice, as is claimed by Western jurists, but rather a force that keeps the jurists within strict limits and, to put it negatively, may very well restrict free human thinking on matters of law. Finally, Islamic law is not static and archaic — to the contrary, it has at times been very innovative, the developments of the past century being a case in point. All this is not to extol [applaud] the exemplary role of Islamic law, or its contributions to equality and justice. Both the practice and theory of Islamic law has its shortcomings. But I want to emphasize that the fourteen centuries of Islamic law have produced a highly evolved legal system in its own right that cannot be dismissed as an obsolete and medieval practice that is being conducted under a palm tree.

4.2 Shari'a as moral, jurists' and codified law

**THE SHARI'A IS** first and foremost a metaphysical concept denoting God's plan for a just and virtuous society. In this sense the Shari'a does not provide a comprehensive system of laws and rules, but an incentive to construct such a system based on the limited guidelines set out in the words of God (the Quran) and His prophet Muhammad (the Sunna). In the words of a renowned Muslim scholar: the Shari'a is 'none else than God, the source of religious values.'

This moral authority, based on divine origin, is one of the meanings that Egyptian jurists refer to when they mention the Shari'a.

This metaphysical concept was the starting point for Muslim jurists to develop a corpus of rules during the first centuries of Islam. This corpus is named *fiqh*, which may very well be considered as 'positivist law,' because its main body of rules has been developed by man and, consequently, its rules can be amended, depending on the circumstances in time and place. This has resulted in three centuries of spirited legal activity among Muslim jurists, who clustered around 'masters' of law and formed schools of law. One of these is the Hanafite school of law, the school to which contemporary Egyptian family law is indebted. The *fiqh* is a jurists' law where jurists rather than the state have the exclusive authority to formulate rules of law. The Muslim jurists did so in a scholarly discipline that used an academic debate to discuss conflicting views that existed even within one and the same school of law. In addition to a corpus of substantive rules, *fiqh* is therefore also a legal science with an elaborate methodology of legal reasoning to deduct, induct and interpret the rules as laid down in the sacred texts.

Since the late nineteenth century Muslim nations have codified parts of the Shari'a, in particular their family laws. This legal activity constituted a radical change in both the nature of substantive law and legal reasoning: the medieval books of *fiqh* with lengthy casuistic discussions were replaced by compact articles grouped in a code, and the interpretation of these codes now became the exclusive right of the legislator and the judge rather than the jurists. In short: the jurists' law became state law. In Egypt, parts of the family law for Muslims have been codified first in 1920 and 1929, with numerous additions and amendments ever since. For the interpretation of these codes, as well as those parts of family law for which these codes did not provide, the court was to refer to the 'most prevalent opinion' of the Hanafite doctrine. The Hanafite doctrine was

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19 Hart (1961: 197); Rawls (1972: 490).
20 Fazlur Rahman (1979: 100).
23 Peters (2002).
also to serve in matters of family law related to the international conflicts rules (codified in the Civil Code in 1949) and the rules of interreligious law (codified in 1955).

4.3 Shariʿa in Egypt

WITH THE RISK of oversimplifying, one could say that in matters of Egyptian family and interreligious law, Islamic legal subject matter was fused with a 'Western' legal framework of legislature, independent judiciary and codifications. Both, however, brought their own methodology and reasoning, which at times conflicted. This shows in the 'essential principles of Islamic Shariʿa' which make up public policy. The Court of Cassation and especially the Constitutional Court have made elaborate arguments why certain Shariʿa rules may be amended and others not. In their arguments the courts followed closely the methodology of reasoning as used in the fiqh. From the perspective of the fiqh, the main body of substantive rules is changeable with time and place since it was developed by the scholars. A small number of rules, however, are explicitly mentioned in the sacred texts of the Quran and Sunna, and by consequence are deemed fixed and unchangeable. Most of these rules pertain to family law. It is these rules that are not to be amended by man, whether jurist, legislator or judge, and for that reason are considered a fundamental part of the Egyptian legal order. In this capacity these rules have entered contemporary Egyptian jurisprudence through the concept of public policy.

While most rules with such a fixed and immutable character have been identified, some remain controversial. This dispute has been part of the scholarly debate over the past centuries, but has recently also entered the Egyptian court room. The elaborate and scrupulous attention paid by Egypt's highest courts to the interpretation and definition of the Shariʿa can be partly explained by the introduction in Egypt's Constitution of 1980 of the Shariʿa as 'the main source of legislation, but it is also a sign of an increasing trend in Egyptian legal doctrine and practice to return to a faithful reading of the original sources of the Shariʿa. This does not necessarily mean that Egyptian family law and interreligious law is becoming more religious in nature. To the contrary: the following chapters will show that the 'essential principles of Shariʿa' when applied to non-Muslim family laws are not typically Islamic at all (Chapter 1), and I will argue that the system of contemporary Egyptian interreligious law is in name indebted to Shariʿa but its contents are interpreted in general, non-religious terms (Chapter 5).

This brings us to another issue which is outside the scope of this research but needs to be mentioned: the political dimension of the Shariʿa in contemporary Egypt. It has been observed by several scholars, that the Shariʿa has become a bone of contention between the religious scholars on the one hand, and the state and judiciary on the other. The power struggle - because that is what is effectively taking place - centers on the authority to apply and interpret the Shariʿa, whereby the scholars are trying to regain their former exclusive authority as sole interpreters of the Shariʿa.

4.4 Definitions of Shariʿa

THE QUEST FOR a proper understanding of the term Shariʿa has led us along winding paths of law, religion and politics. I should emphasize that the question here is how to make sense of the term Shariʿa as being used by contemporary Egyptian jurists, and not whether contemporary Egyptian family and interreligious law are still a reflection of an authentic Shariʿa, or whether they have developed in their own right - away from their Islamic legacy. Also, it should be borne in mind that my insight in the concept of Islamic law has developed with the studies that have already been published prior to the writing of this introduction. The findings of this introduction are therefore not necessarily reflected in the chapters below, but are a result thereof.

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24 See Chapters 1 and 4.
25 Bālz (1999); Peters (2002); Layish (2004).
With regard to the proper translation of the term Shari'a, it is only in the last chapter that I come to a satisfying terminology by distinguishing between 'Egyptian Muslim family law' as the law for Muslims in contemporary Egypt, and 'Islamic law' as a generic term and translation of 'Sharī'a' in its broadest sense. 'Egyptian Muslim family law' refers to both the statutory law and the substantive rules derived from the fiqh. 'Islamic law' or 'Sharī'a' refers to the original source, i.e. the divine and authoritative blueprint, as well as to the scholarly tradition of fiqh.