

# The Reform of *Shari'a*-derived Divorce Legislation in Egypt: International Standards and the Cultural Debate

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## Abstract

In Egypt, conservative voices have labelled universal human rights standards an alien imposition that is inapplicable to 'Muslim culture', arguing that they threaten to disrupt the fabric of Egyptian society. This paper examines the reform of divorce legislation, which falls under the broad category of personal status law, the only body of law that was not secularised. In Egypt, Islamic reform tools have been utilised since the beginning of the 20th century to mitigate the harsh effects of existing personal status laws. In the year 2000, *ijtihad* - a new reform tool grounded in the *Shari'a* - was employed for the first time, granting women near-equality rights in divorce legislation. This reform represents a huge leap towards modifying Egypt's personal status law, granting women more equality rights, without secularising it altogether. The result has been to give effect to international standards of equality without ignoring cultural and religious particularities.

## 1. Introduction

Personal status laws, which govern the most private area of human relations, the family, are often considered the area of law in which discrimination on the grounds of gender is most solidly entrenched, most widely accepted and hence most difficult to modify. Personal status legislation worldwide has been identified as a potential location for the oppression of women for its 'tremendous impact on gender and power hierarchies within the family'.<sup>1</sup> In Egypt, the personal status law that governs the Sunni Muslim majority is the only aspect of the *Shari'a* that was carried on to modern times, resisting displacement by European codes during the colonial era, and surviving attempts at secularisation in the post-colonial period.<sup>2</sup> As such, the protection and preservation of *Shari'a*-derived personal status codes has become intricately tied with the preservation of culture and identity, prompting a defensive reaction with regards to any international instruments that seek to modify the principle tenets of such legislation. As a result, it is the area of law where feminists have achieved

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<sup>1</sup> Guenena and Wassef, *Unfulfilled Promises. Women's Rights in Egypt* (Cairo: Population Council, 1999) 20, available at: [http://www.popcouncil.org/pdfs/unfulfilled\\_promises.pdf](http://www.popcouncil.org/pdfs/unfulfilled_promises.pdf) (accessed 20 December 2004).

<sup>2</sup> Hajjar, 'Domestic Violence and *Shari'a*: A Comparative Study of Muslim Societies in the Middle East, Africa and Asia', *Islamic Family Law Project*, available at: <http://www.law.emory.edu/IFL/index2.html> (accessed 13 January 2005).

the most modest results, and where the government has been most willing to compromise in the face of religious conservatism.

In States that apply *Shari'a*-derived personal status laws, many conservative voices have considered universal human rights standards to be an alien imposition, at best, or an imperialist tool that is inapplicable to 'Muslim culture'. Some have gone so far as to argue that universal human rights standards threaten to destroy Muslim family relations in their entirety and disrupt the very fabric of Muslim society. These beliefs have manifested themselves in extensive criticism of what are widely perceived to be 'Western' standards of gender equality enshrined in international human rights treaties. The result has been an attempt to shield the State of its obligation to reform discriminatory personal status legislation through the articulation of broad reservations to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),<sup>3</sup> based on the pretext that it is culturally insensitive. For over half a century, treaties establishing binding international human rights standards have been the subject of a fierce debate between proponents of universalism, who advocate the equal application of international human rights standards to all human beings, regardless of cultural, religious and other particularities, and proponents of cultural relativism, who contend that human rights standards differ from one group to another and are thus culturally qualified. This trend has been exacerbated by the contention held by many universalist scholars that the Islamic *Shari'a* is essentially discriminatory towards women, and has thus rendered women an ideologically charged symbol of cultural conflict. Such generalisations, however, are misleading; Islamic law or *Shari'a* is not a monolithic code of law that is applied equally in all so-called Islamic countries. It is an aggregation of individual opinions and juristic interpretations that have been subject to a perpetual process of interpretation and reinterpretation over many centuries. In codifying the *Shari'a* into modern laws, States have made choices as to which interpretations to adopt, with direct implications on the rights of women. Consequently, women living under *Shari'a*-derived personal status laws enjoy different degrees of protection and benefit from different rights depending on where they live; a consequence of variations in culture, political and historical circumstances, social realities and economic conditions, as well as other complex factors.<sup>4</sup> This paper departs from the view that both analytical approaches (universalism and cultural relativism) suffer from major flaws. Whereas universalism does not recognise the enormous impact of culture, which may dampen the effectiveness of international human rights regimes, cultural relativism threatens to shield discriminatory laws and practices from international scrutiny. As such, international standards will only have resonance if they are indigenised so as to become part of the legal culture of the particular society they seek to influence.

In light of this reality, Egyptian feminists have struggled throughout the 20th century with the question of how to modernise and reform *Shari'a*-derived personal status legislation, so as to conform to international standards, short of secularising it altogether. In this paper, I will examine how legislators in Egypt have succeeded in reforming divorce

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<sup>3</sup> Convention on the Elimination of All Forms of Discrimination Against Women 1979, 1249 UNTS 13.

<sup>4</sup> See Helie-Lucas, 'What Is Your Tribe? Women's Struggles and the Construction of Muslimness', in Howland (ed.), *Religious Fundamentalisms and the Human Rights of Women* (New York: St. Martin's Press, 1999) 23.

legislation in such a way as to bridge the gap between once-discriminatory legislation and the international obligation of equality in family relations (which includes the principle of equality between the spouses in the dissolution of marriage.) The paper begins with an examination of Egypt's obligation under international law to promote equality in family relations, followed by an analysis of the indigenous reform tools employed to modify divorce legislation. The use of such tools, which are grounded in the *Shari'a*, and hence culturally accepted and more likely to be effective, have allowed Egypt to advance women's equality rights within the family without displacing religious law altogether, which is arguably an equally valid human right deserving of universal protection. Coulson aptly describes virtues of this approach as follows:

Radical though the break with past tradition which such an approach involves might be, it is nevertheless a break with a particular construction of the religious law and not with its essence. This, at any rate, would seem to be the only realistic basis for future development and the only alternative to the complete abandonment of the notion of a law based on religion. Law to be a living force, must reflect the soul of a society; and the soul of present Muslim society is reflected neither in any form of outright secularism nor in the doctrine of the mediaeval text books.<sup>5</sup>

Article 2 of CEDAW recognises that it is impractical to seek to eliminate discrimination against women immediately. States are required to '*pursue* by all appropriate means and without delay *a policy* of eliminating discrimination against women in all its forms and manifestations'. This does not imply progressiveness in the enforcement of treaty provisions; however, it recognises that States must execute specific policies that are estimated to have the effect of eliminating discrimination once implemented. Although Egypt's personal status legislation is far from meeting the equality norm espoused by CEDAW, progress can be seen in the area of divorce legislation in which reformers have employed innovative tools to interpret the religious texts and modify legislation, bringing Egypt's laws closer to international standards of equality, outlined in the following subsection.

## **2. The International Norm of Equality in Family Relations: Discerning Egypt's Obligations**

The principle of gender equality in all areas of life is a well-founded principle of international law, and is entrenched in the Charter of the United Nations (UN), the Universal Declaration of Human Rights (UDHR)<sup>6</sup> as well as the two International Human Rights Covenants.<sup>7</sup> This broad principle encompasses the more specific issue of equality in

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<sup>5</sup> Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1968) at 225.

<sup>6</sup> Universal Declaration on Human Rights 1948, GA Res. 217A (III), 10 December 1948, A/810 at 71.

<sup>7</sup> On 14 January 1982, Egypt ratified the International Covenant on Civil and Political Rights, 1966, 999 UNTS 171, and the International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3. See

family relations, which is explicitly stated in Article 16 of the UDHR.<sup>8</sup> The provision includes equality of the spouses with regards to the dissolution of marriage. Similarly, Article 23 of the International Covenant on Civil and Political Rights (ICCPR) stipulates that ‘no marriage shall be entered into without the free and full consent of the intending spouses’ and obliges States-Parties to ‘take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.’ Although the principle of equality in family relations is well-founded under treaty law, general human rights instruments have failed in elucidating the steps required to translate it from a conceptual aspiration into practical, concrete policies. This remained the case until CEDAW came into force, imposing upon States-Parties the obligation to regulate the private sphere and to influence entrenched cultural attitudes, while prescribing the necessary ‘measures’ to eliminate discrimination against women in family relations. Article 16 of CEDAW provides the most comprehensive formulation of the right to equality between the spouses in family relations.<sup>9</sup> It stipulates that States will take ‘all appropriate measures to end discrimination against women in all matters relating to marriage and the family’ and requires States Parties to ensure equal rights between the spouses upon entering marriage, during marriage and at its dissolution.<sup>10</sup> Egypt has entered a general reservation

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Egypt. Treaties: Ratifications and Reservations, for the record 2003: The United Nations Human Rights System [Hereinafter Ratification and Reservations] (Human Rights Internet, 2003) available at: <http://www.hri.ca/fortherecord2003/vol2/egyptrr.htm>.

<sup>8</sup> Article 16 of the UDHR states that:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

<sup>9</sup> Article 2 of CEDAW lists the various policies that States must pursue in order to effectively eliminate gender discrimination in all fields.

<sup>10</sup> Article 16 of CEDAW requires states to ensure that men and women enjoy, on the basis of equality, the following rights:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

to Article 2 of CEDAW, which embodies States' general undertakings, as well as Article 16 on equality in family relations on the pretext of a perceived conflict with the Islamic *Shari'a*. However, these reservations do not shield Egypt from the obligation to eliminate equality in family relations for the following reasons: (a) the reservations violate the object and purpose of CEDAW, (b) Egypt is obligated to end discrimination in family relations (and hence divorce legislation) by virtue of customary international law as well as its international treaty obligations (Article 16 of the UDHR and Article 23 of the ICCPR). Each of these two grounds will be examined in greater detail in the following two subsections.

#### ***A. Incompatibility with the Object and Purpose of the Treaty***

Article 28(2) of CEDAW stipulates that 'a reservation incompatible with the object and purpose of the present Convention shall not be permitted.' Egypt's reservations to Articles 2 and 16 of CEDAW fall under sub-paragraph (c) of Article 19 of the Vienna Convention on the Law of Treaties,<sup>11</sup> since they are not specifically prohibited by CEDAW but have been deemed by a number of States to be against its 'object and purpose.' The CEDAW Committee has repeatedly expressed the view that Articles 2 and 16 are 'core provisions of the Convention'.<sup>12</sup> Reservations to these Articles were found to violate, in essence, the 'object and purpose' of CEDAW 'posing an acute problem for the implementation of the Convention and for the Committee's ability to monitor compliance with it.'<sup>13</sup> Egypt's broad reservation to Article 2, and which stipulates that 'the Arab Republic of Egypt is willing to comply with the content of this Article, provided that such compliance does not run counter to the Islamic *Shari'a*', is particularly problematic. In effect, the reservation is stated in such general terms that it practically shields Egypt from any obligations under CEDAW that may be deemed incompatible with the Islamic *Shari'a*. In particular, reservations to Article 2 signify an unwillingness to implement the provisions of CEDAW; they protect laws and policies that perpetuate such discrimination on the grounds of gender. According to Riddle, 'Article 2 arguably forms the crux of CEDAW by essentially requiring the ratifying states to "incorporate the convention into domestic policy."<sup>14</sup> In addition, Egypt's reservation to Article 2 fails to point out precisely how the provisions of CEDAW are inconsistent with the Islamic *Shari'a*. It is therefore difficult to assess the scope and effect

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<sup>11</sup> Article 19 of the Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331 stipulates that reservations to international treaties are permissible unless:

- (a) The reservation is prohibited by the treaty;
- (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- (c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

<sup>12</sup> Report of the Committee on the Elimination of Discrimination Against Women, 14 May 1998, A/53/58, Rev.1, 47.

<sup>13</sup> *Ibid.* at 48.

<sup>14</sup> Riddle, 'Making CEDAW Universal: A Critique of CEDAW's Reservation Regime Under Article 28 and the Effectiveness of the Reporting Process.' (2002) 34 *George Washington International Law Review* 605 at 629.

of the reservation even with a sound knowledge of the Islamic *Shari'a*. Clerk elucidates this point as follows:

There is considerable scope for different judgments about the nature and extent of conflict between the *Shari'a* and the Convention, their interpretation or application of the *Shari'a* may differ considerably from that of the reserving state. Only the reserving state knows what its reservation means. It is not a stated requirement that a reservation be specific, but *ex post facto* demonstrations of incompatibility mean that imprecise reservations 'cheat' the requirements of the Vienna Convention since the Article 19(c) test cannot be applied. This consequence undermines that regime in general, as well as the particular treaty to which the reservations pertain.<sup>15</sup>

It is arguable that articulating such broad reservations is also a violation of the principle of good faith, which is recognised as a general principle of international law, and is one of the cornerstones of the international legal regime.<sup>16</sup> By their very nature, Egypt's reservations to CEDAW, particularly the reservation to Article 2, seem to suggest that they are 'designed to avoid any obligation to bring domestic laws in conformity with the obligation to eliminate discrimination against women.'<sup>17</sup> The effect of such reservations is to allow States to ostensibly commit themselves to the broad goal of women's equality in all fields, while acknowledging that they have no real intentions of actually granting women these equal rights.<sup>18</sup>

Egypt's reservation to Article 16 of CEDAW is also clearly inconsistent with the 'object and purpose' of the Convention. The reservation similarly makes reference to obligations under the Islamic *Shari'a*, stating the following:

Reservation to the text of Article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic *Sharia's* provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementarity which guarantees true equality between the spouses. The provisions of the *Shari'a* lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged

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<sup>15</sup> Clerk, 'The Vienna Convention's Reservations Regime and the Convention on the Elimination of All Forms of Discrimination Against Women', (1991) 85 *American Journal of International Law* 310 at 311.

<sup>16</sup> According to Article 31 of the Vienna Convention on the Law of Treaties, all treaty provisions are to be interpreted in good faith.

<sup>17</sup> Hossain, 'Equality in the Home: Women's Rights and Personal Laws in South Asia', in Cook (ed.), *Human Rights of Women* (Philadelphia: University of Pennsylvania Press, 1994) 473.

<sup>18</sup> Riddle, *supra* n.14 at 629.

to spend anything on her keep. The *Shari'a* therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.<sup>19</sup>

Ironically, in the year 2000 Egypt's personal status law was reformed to grant the wife the right to initiate no-fault divorce, a reform that was clearly grounded in the sources of *Shari'a*. This reform clearly contradicts Egypt's contention that the laws governing family relations at the time the reservation to Article 16 was formulated 'may not be called into question' and proves that *Shari'a*-derived legislation is neither immutable nor impervious to changing social realities.

The question of incompatible reservations has been complicated by the subjectivity of the 'object and purpose' test, and its inconsistent application, particularly since States are the final arbiters on the compatibility of reservations. Objections by States-Parties to Egypt's reservations, however, have been both haphazard and subjective.<sup>20</sup> As a result, the CEDAW Committee has assumed an active role with regard to incompatible reservations; it has expressed its concern about particular reservations that violate the 'object and purpose' of CEDAW, and has appealed to States to withdraw, reconsider or limit their reservations, as well as commending States that ratify CEDAW without reservations.<sup>21</sup> For instance, ever since its examination of Egypt's initial report in 1983, the CEDAW Committee has repeatedly expressed concern regarding the sweeping reservations to Articles 2 and 16.<sup>22</sup> Moreover, the Committee's appeals to Egypt to withdraw its reservations have not passed unheeded. In its latest report to the Committee, Egypt asserted that it was in the process of withdrawing a number of reservations, particularly its general reservation to Article 2. This suggests both a toleration of the CEDAW Committee's authority to scrutinise reservations, as well as Egypt's conviction that the reservations hamper women's equality and thus need to be revised. Such practice is tantamount to acquiescence on the part of Egypt, and may hence justify the Committee's scrutiny of Egypt's reservations, and its pronouncements on their invalidity.

### ***B. Inconsistency with Existing International Obligations***

Egypt's reservations to CEDAW are also impermissible by virtue of the international customary norm prohibiting gender discrimination. State practice with regard to the principle of non-discrimination on the basis of gender, which has been enshrined in numerous universally-accepted international instruments, including the UN Charter, the

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<sup>19</sup> Lijnzaad, *Reservations to UN Human Rights Treaties. Ratify and Ruin?* (London: Martinus Nijhoff Publishers, 1995) at 340.

<sup>20</sup> Only four States, Germany, Mexico, the Netherlands, and Sweden, have articulated objections to Egypt's reservations. None of the four States has precluded the entry into force of CEDAW in relation to Egypt; they hold Egypt bound by all provisions of the Convention, including the reserved Articles.

<sup>21</sup> Tyagi, 'The Conflict of Law and Policy on Reservations to Human Rights Treaties', (2000) 71 *British Yearbook of International Law* 232 at 240.

<sup>22</sup> The reservations entered by Egypt to CEDAW were the first ones to be considered by the CEDAW Committee. See Lijnzaad, *supra* n. 19 at 342.

UDHR and both human rights Covenants seems to be both consistent and general.<sup>23</sup> Although the mere conclusion of a treaty does not necessarily establish that treaty's provisions as norms of customary international law, wide adherence to the treaty may be considered as evidence of custom. States generally consider most of the rights laid down in the UDHR and the two Covenants as universal and binding; an opinion that has been confirmed by many legal scholars.<sup>24</sup> In addition, the principle of non-discrimination on the basis of gender has been adopted in the vast majority of domestic legal systems, appearing in many national constitutions and domestic statutes. As such, it is evident that State practice supports the existence of a general customary international rule that prohibits gender discrimination.

However, identifying the existence of *opinio juris* is a more difficult task. Although 'most States agree that men and women should enjoy formal equality under the law', simultaneously 'the international community generally accepts the idea that the norm of gender equality implicates culture.'<sup>25</sup> Although many scholars support the view that non-discrimination on the basis of gender is a norm of customary international law, there is little evidence to support that contention with regards to women's equality rights in family relations. In this area, State practice is not as consistent as is the case with non-discrimination in the so-called 'public sphere'. Many national constitutions make exceptions regarding the applicability of equal rights to women in family relations. Moreover, it seems that the cultural exception to gender equality is more widely tolerated in the area of family relations. In other words, it may be argued that the principle of non-discrimination in family relations is, at best, *lex ferenda* and is yet to be established as a norm of customary international law.

Nonetheless, Egypt may still be held accountable for violations of women's equality rights through its obligations under general human rights treaties. The equal rights of women in the family are guaranteed under many international and regional treaties, of both a general and a specific nature. As a Party to the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), Egypt is under an obligation to eliminate discrimination on the basis of gender, with regard to both civil and political rights as well as economic, social and cultural rights.<sup>26</sup> As relates specifically to the 'private sphere' of family relations, Egypt is bound by Article 16 of the UDHR and Article 23 of the ICCPR, which unequivocally call for equality between the spouses in all aspects related to family relations. Egypt is hence under an obligation to reform its personal status law so as to conform to international standards of gender equality encompassed in these two instruments.

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<sup>23</sup>Establishing a principle as a customary norm of international law requires both 'consistency' and 'generality' of practice by a significant number of States; it does not require absolute or universal practice. See *Military and Para-Military Activities in and Against Nicaragua* (Nicaragua v United States), Merits, Judgment, ICJ Reports 1986, 88. See also Bayefsky, 'General Approaches to the Domestic Application of Women's International Human Rights Law, in Cook (ed.), supra n. 17, 360.

<sup>24</sup> See Paul, 'Cultural Resistance to Global Governance', (2000) 22 *Michigan Journal of International Law* 10 at 16-8.

<sup>25</sup> *Ibid.* at 18.

<sup>26</sup> See supra n. 6.

According to Articles 16(1)(c) of CEDAW and 23(4) of the ICCPR, women are to be guaranteed equality in the dissolution of marriage. Women in Egypt were able to partially achieve this right with the adoption of Law no. 1 of 2000. As will be further demonstrated, reformers have successfully utilised *Shari'a*-based tools to advance women's equality rights in the area of divorce legislation, bringing Egypt one step closer to fulfilling its international obligations. Whereas other areas of personal status law reform have not been as successful, recent developments in the area of divorce legislation have set a precedent that may translate into more extensive future reforms. The following sections will examine this reform effort in greater detail, emphasising the use of innovative interpretation techniques to advance women's rights and bring Egypt's *Shari'a*-derived personal status legislation in conformity with international human rights standards. The analysis will begin with an overview of classical Islamic jurisprudential methodology, and will outline the rise of legal modernism and its effect on personal status law reform.

### 3. Reform of Divorce Legislation in Egypt

Contemporary Egyptian personal status law has a 'broad conception of personal status that encompasses questions of marriage, divorce, paternity and successions.'<sup>27</sup> It is based on legislative enactments adopted since the 1920's and throughout the last century (the most recent was adopted in 2004). Throughout this time-span, divorce legislation has developed considerably, the largest breakthrough occurring in 2000 when the State finally endorsed *ijtihad* as a reform tool, granting women near-equality rights in the initiation of divorce.

#### A. The Development of *Taqīd* Law

The four *Sunni* Jurisprudential Schools, widely considered as the authoritative interpretations of the sources of Islamic law, date back to the eighth and ninth centuries AD.<sup>28</sup> The Schools were established through the allegiance of groups of jurists to any one of the founders, namely *Abu Hanifa* (the *Hanafi* School), *Malik bin Anas* (the *Maliki* School), *al-Imam el-Shafi'i*, (the *Shafi'i* School) and *Ahmed bin Hanbal* (the *Hanbali* School).<sup>29</sup> By the ninth century AD, all the schools of Islamic *fiqh* (jurisprudence) had come together and coalesced into the four surviving *Sunni* jurisprudential schools; within one century the gates of *ijtihad* had been effectively closed.<sup>30</sup> Although the different jurisprudential schools are based on similar fundamentals, they diverge on many details. *Shari'a*-derived legislation is based on imitations (*taqlid*) of the mediaeval interpretations, with the caveat that Muslims could select interpretations from either of the Schools without

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<sup>27</sup> Bernard-Maugiron and Dupret, 'From Jihan to Susanne. Twenty Years of Personal Status Law in Egypt', (2001) 19 *Recht van de Islam* 1 at 2.

<sup>28</sup> Venkatraman, 'Islamic States and the UN Convention on the Elimination of All Forms of Discrimination Against Women: Are the *Shari'a* and the Convention Compatible?', (1995) 44 *American University Law Review* at 1970.

<sup>29</sup> Coulson, *supra* n. 5 at 40-51.

<sup>30</sup> Behrouz, 'Transforming Islamic Family Law: State Responsibility and the Role of Internal Initiative', (2003) 103 *Columbia Law Review* 1136 at 1147.

any formalities. The interpretations of each of the Schools on any given point are considered equally valid. The technique of selection allowed Muslims to make use of the divergent opinions of the Schools, a tool that has been aptly used in modern times to reform *Shari'a*-derived personal status laws.<sup>31</sup>

According to the classical doctrine of jurisprudence, the sources of Islamic law are categorised as follows: the *Quran* as the primary source, the *Sunnah* as a secondary source, followed by consensus (*ijma'*) and reasoning by analogy (*qiyās*). The *Quran* is regarded as the utterance of God, and is hence indisputable. The *Quran* is not, in fact, a code of law; out of more than 6,000 verses only 600 deal strictly with legislation.<sup>32</sup> The *Sunnah* is the collection of Prophetic traditions and customs, or 'anything that could be proven to have been the practice of the Prophet and his oldest disciples.'<sup>33</sup> The traditions were recorded in six collections in the ninth century, now considered equally authentic sources of the Prophet's *Sunnah*.<sup>34</sup> The *Quran* and the *Sunnah* are often referred to as the 'roots of the bases' (*usul-al-usul*), which implies that the other sources are subordinate to and dependent on them.<sup>35</sup> *Ijma'* (consensus of the Muslim community) is the third source of law, and was deduced from both *Quranic* injunctions and Prophetic *ahadīth* (sayings), which held that God 'would not permit his people universally to be in error.'<sup>36</sup> It refers to the consensus of scholars as well as the Islamic community as a whole. Finally, *qiyās*, or reasoning by analogy, depends on the 'fallible judgement of man.'<sup>37</sup> As such, one is to resort to *qiyās* only where the three other sources leave a matter ambiguous. It is important to note that *qiyās* does not imply purely personal judgement, on the other hand, it indicates an 'inductive process governed by the rules of logic.'<sup>38</sup> Other minor sources of Islamic jurisprudence also exist, although by and large, they have been relegated to sidelines since the elaboration of the doctrine of *usūl-al-fiqh*. The principle of *istihsān* (preference) which literally means 'choosing the better' was most extensively used by the *Hanafi* School, particularly where the application of *qiyās* would lead to an unreasonably harsh result.<sup>39</sup> Another source is *istislāh* or *maṣlaḥa* (general interest), which considers the spirit of the law, or 'what was aimed at for mankind in the law.'<sup>40</sup> Finally, the principle of *ḍarūra* (necessity) was applied sparingly by both the *Hanafi* and the *Maliki* Schools.<sup>41</sup>

After the closure of the gates of *ijtihad*, independent reasoning was no longer considered an option for Muslim jurists; they had to engage in *taqlīd*, a method of

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<sup>31</sup> Ibn Khaldun, 'The Muqaddimah', quoted in Liebesny, *The Law of the Near and Middle East. Readings, Cases and Materials* (New York: State University of New York Press, 1975) at 30.

<sup>32</sup> Santillana, *Istituzioni di Dirritto Musulmano Malichita*, Volume 1, at 32-3, quoted in Liebesny, supra n. 31 at 12.

<sup>33</sup> Goldziher, *Mohammedanische Studien*, Volume 2, at 13, quoted in Liebesny, ibid. at 13.

<sup>34</sup> These are *al-Bukhari*, *Muslim*, *al-Nissa'i*, *Ibn Maja*, *Abu Dawud* and *al-Tirmithi*. See Vesey Fitzgerald, 'Nature and Sources of the *Shari'a*', in Khadduri and Liebesny (eds.), *Law in the Middle East*, Volume 1, (Washington DC: The Middle East Institute, 1955), 94.

<sup>35</sup> Ibid. at 95.

<sup>36</sup> Ibid.

<sup>37</sup> Santillana, supra n. 32 at 46.

<sup>38</sup> Ibid.

<sup>39</sup> Vesey-Fitzgerald, supra n. 34 at 101.

<sup>40</sup> El Ghazali, quoted in ibid. at 101.

<sup>41</sup> Ibid. at 102.

reasoning or ‘imitation’ based on the precedents set by the four *Sunni* jurisprudential schools. The rise of *taqlīd* ushered in an era of rigidity, whereby laws were based on precedents elaborated by jurists in the Middle Ages, and left unchallenged for centuries. This method of jurisprudence effectively limited ‘the influence of independent value judgments on the content of the revealed law.’<sup>42</sup> As will be presently illustrated, personal status law reform in Egypt has evolved since the turn of the 20th century from strict adherence to *taqlīd* law, to the development of other innovative methods. Departing from a personal status code based on the *Hanafi* doctrine, the reform movement initially employed the techniques of *takhayyur* (selection) and *talfīq* (patchwork or combination) to introduce aspects of *Maliki* law that were more favourable to the position of women. The most recent reforms, however, have taken a further stride, employing the technique of *ijtihād* based on the novel interpretation of the primary sources of Islamic law, disregarding the centuries of *fiqh* based on the *ijtihādāt* (opinions) of the mediaeval jurisprudential schools.

### **B. The Rise of Legal Modernism**

Legal developments over the past few decades, in countries that apply *Shari’a*-derived laws, indicate that the *Shari’a* is not a rigid body of law that is insensitive to the needs of society.<sup>43</sup> Although the classical theory of Islamic jurisprudence, as consecrated since the 10<sup>th</sup> century AD, left little room for the modification of *Shari’a*-derived legislation by any legislative authority, the *Shari’a* was aroused from its ‘state of coma’ by the rise of Islamic legal modernism, which was born in the nineteenth century and championed by Egypt’s Grand Mufti *Sheikh Mohamed ‘Abduh*. The tools proposed by the modernisers included: (a) the codification of the ethical provisions of religious law into positive law; (b) the utilisation of the doctrines of *takhayyur* (selection of the most favourable interpretation from the preponderant opinions of the four Jurisprudential Schools) and *talfīq* (patching up opinions from the different schools so as to arrive at a rule that exists in neither of the schools); (c) the reopening of the gates of *ijtihād*.<sup>44</sup>

The tools of *takhayyur* and *talfīq*, by far the most widely employed reform tool, emanated from the doctrine of *supra-madhhab*, or the notion advocated by ‘*Abduh*, that ‘the state should not be confined to the rules of one *madhhab* but should be free when appropriate to seek the rules for its purposes in the doctrine of any school of law.’<sup>45</sup> The fourth tool, *ijtihād*, was reinterpreted so as to include a ‘humanistic-liberal’ element, namely the principles of *istislah* and *maslaha* (public welfare and public interest).<sup>46</sup> If any particular social need was not covered by the canonical sources of Islamic law, then ‘a jurist should select an interpretation that best accorded with the public interest.’<sup>47</sup> The principle of *maslaha* became the cornerstone of ‘*Abduh*’s reforms allowing for alternative

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<sup>42</sup> Behrouz, supra n. 30 at 1147.

<sup>43</sup> Coulson, supra n. 5 at 4.

<sup>44</sup> Classification by Layish, *The Contribution of the Modernists to the Secularization of Islamic Law*, (1978) 14 Middle East Studies 263 at 263-4.

<sup>45</sup> Abu-Odeh, ‘Modernising Muslim Family Law: The Case of Egypt’, (2004) 37 *Vanderbilt Journal of Transnational Law* 1043 at 1091.

<sup>46</sup> See Layish, supra n. 44 at 264, and Abu-Odeh, supra n. 45 at 1091.

<sup>47</sup> Abu-Odeh, *ibid.* at 1091-92.

ways of legislating the *Shari'a* by modifying the hierarchy of the sources of law advocated by the theory of *Usul-al-fiqh*.<sup>48</sup>

In the area of divorce legislation the gates of *ijtihad* were effectively re-opened with the recent adoption of Law no. 1 of 2000. Whereas early reforms were confined within the limits of *taqlid* law (the strict adherence to the four orthodox schools), recent reforms have successfully departed from the doctrine of the four schools, which is unprecedented in the history of personal status legislation in Egypt.

### C. Contemporary Divorce Legislation in Egypt

The legal rules on which personal status law in Egypt was traditionally based were adopted from the *taqlid* era, particularly the *Hanafi* School of jurisprudence, which is often regarded as the most restrictive when it comes to personal status issues. According to Abu Odeh, the *Hanafi* doctrine 'advocates a particularly patriarchal structure of the family. This is so because [...] the *Hanafis* give women fewer financial rights in marriage as well as less means of exit from marriage. At the same time, *Hanafi* rules reward the husband more for his financial obligations by adding to his powers in marriage.'<sup>49</sup> The first attempt to codify personal status law in Egypt was the endeavour by Mohamed Qadri Pasha, in 1875, to compile the provisions of the *Hanafi* Jurisprudential School into a comprehensive code on personal status. Although the code was never actually promulgated, in 1897 *Hanafi* personal status law was officially endorsed by the State and *Qadis* (judges) were instructed to apply it in adjudicating on all questions of personal status.<sup>50</sup> Ever since, Egyptian legislators have attempted to mitigate the harsh effects of the restrictive *Hanafi* School by adopting interpretations of other Jurisprudential Schools, most notably the *Maliki* School.<sup>51</sup> However, *Hanafi* law remains a fundamental source of law in Egypt's personal status legislation. In the absence of a textual provision in Egypt's codified personal status law, recourse must be made to the predominant opinion in the *Hanafi* School, in which case judges usually refer to the unofficial codification of Qadri Pasha.<sup>52</sup>

A series of further significant developments took place in the early 21st century, including the imperial edicts of the Ottoman Sultan in 1915, who declared for the first time that women had the right to sue for divorce under certain circumstances.<sup>53</sup> In 1917, an Ottoman Family Code, based on the four Schools of Islamic jurisprudence, was adopted, prompting the promulgation of a number of statutes in Egypt, including Decree-Law no. 25 of 1920 and Decree-Law No. 25 of 1929. These two laws still form the basis of Egypt's personal status law. The following sections will examine the divorce structure in Egypt's legislation, emphasising the development of these laws since the 1920's.

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid. at 1125.

<sup>50</sup> Arabi, 'The Dawning of the Third Millennium on *Shari'a*: Egypt's Law No. 1 of 2000, or Women May Divorce at Will', (2001) *Arab Law Quarterly* 1 at 2.

<sup>51</sup> Ibid. at 8.

<sup>52</sup> Article 280 of Decree-Law No. 78 of 1931, the Bill of Organization of *Shari'a* Courts, later abrogated by Article 4 and replaced by Article 3 of Law No. 1 of 2000.

<sup>53</sup> Esposito, *Women in Muslim Family Law*, (Syracuse: Syracuse University Press, 1982) 3-10.

(i) Unilateral Divorce (*talāq*) by the Husband

Under Egypt's personal status law, the husband has the right to unilateral and unconditional divorce (*talāq*) also known as repudiation. This type of divorce is revocable, up to the third time. However, after three divorces, it becomes an irrevocable separation. The two decree-laws of 1920 and 1929 responded to feminist demands by placing effective limits on the husband's right to unilateral divorce so as to balance the gender hierarchy within the family. According to the *Hanafi* doctrine, *talaq* is effective even if the husband is intoxicated or under duress, and may be conditional (meaning that the husband may make the divorce effective on condition of any particular behaviour on the part of the wife). The divorce is not effective if the husband stated the repudiation formula when in a state of anger, such that he was acting irrationally.<sup>54</sup>

In the 1920's, feminists demanded that the subordinating provisions of *Hanafi* law be modified so as to restrict the husband's unfettered right to divorce the wife. They suggested that the husband be allowed to divorce his wife only for 'serious reasons' and after an attempted reconciliation by a *qadi* [judge].<sup>55</sup> Although these demands were based on direct interpretations of *Quranic* provisions, they were not well-received by the legislature.<sup>56</sup> Nonetheless, Decree-Law no. 25 of 1929 placed several restrictions on the husband's right to unilateral divorce, derived from several different juristic opinions. Among the reforms, the law selected interpretations from the *Shaf'i*, *Maliki*, and *Hanbali* Schools in order to prohibit a divorce declared by a man who was intoxicated or under duress. In contravention of the teachings of the *Hanafi* School, it also stipulated that repudiation could not be conditional; neither could its wording be ambiguous. In other words, the husband must explicitly state the repudiation formula (*anti tāliq*) in order for the separation to be effective. This provision was based on the minority opinions of the Meccan scholar 'Ata' and the Iraqi scholar *Shurayh*.<sup>57</sup> Similarly, Article 3 of Decree-Law no. 25 of 1929 adopted the minority opinions of the *Hanbali* scholar *Ibn Taymiya* and *Ibn el Qayim* to stipulate that only after three separate pronouncements of the repudiation formula could a divorce be considered irrevocable.<sup>58</sup> This was a clear departure from the *Hanafi* doctrine, which held that in cases where the husband makes three repudiations in one statement, the divorce becomes irrevocable.<sup>59</sup> The law also kept some of the provisions of the *Hanafi* School, most notably the provisions on the invalidity of a divorce stated in a moment of anger.<sup>60</sup> Further tangential restrictions on unilateral repudiation were incorporated into Law No. 100 of 1985, which placed procedural prerequisites for repudiation. For instance, Article 5bis of Law no. 25 of 1929 as amended by Law no. 100 of 1985 requires the husband to register the divorce within 30 days of its occurrence. If the wife is absent from

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<sup>54</sup> Al-Siba'ie, *Al-Mar'ah bayn al-fiqh wal qānūn*, [Women Between Jurisprudence and Law] (Cairo, 2002) 94.

<sup>55</sup> Badran, *Feminists, Islam, and Nation. Gender and the Making of Modern Egypt*; (Cairo: American University in Cairo Press, 1996) 131.

<sup>56</sup> Similar provisions, however, were later adopted in Tunisia and Syria. They were based on *ijtihād* from the text of the *Quran* and *Sunnah*.

<sup>57</sup> Coulson, *supra* n. 5 at 194-95.

<sup>58</sup> See Badran, *supra* n. 55 at 131, and Coulson, *supra* n. 5 at 195.

<sup>59</sup> Al-Siba'ie, *supra* n. 54 at 92.

<sup>60</sup> Badran, *supra* n. 55 at 131.

the registration proceedings, the registrar is under an obligation to inform her of the divorce. According to Article 23bis of Law no. 25 of 1929 as amended by Law no. 100 of 1985, the husband's failure to abide by this provision may lead to a six month prison term. The registrar's failure to comply with his duties is also penalised; he may face a fine and a one-month prison term.

(ii) Unilateral divorce through delegation (*'iṣmah*)

Egypt's personal status law grants the wife the option of unilateral repudiation through delegation, known as *i'ṣmah*. This is in accordance with *Hanafi* doctrine, which allows the husband to delegate to his wife the right to divorce herself. However, this type of divorce cannot be exercised unless the husband consents to the delegation at the time of marriage. Although this type of divorce has always been available to Egyptian women, it is seldom practiced for its association with a negative social stigma. In the 1980's, a new marriage contract was proposed, which granted both spouses the right to divorce. It also created a checklist of conditions which the wife could demand to place herself on equal footing with her husband. None of these clauses were compulsory; however, they allowed the prospective wife to be aware of her rights before the marriage took place.<sup>61</sup> The new standard-format marriage contract was not adopted until the year 2000.<sup>62</sup>

(iii) Judicial Divorce

Until the year 2000, women seeking the dissolution of an unhappy marriage had to sue for divorce through the court system. According to *Hanafi* law, the wife could obtain a judicial divorce only on very limited grounds, namely the husband's incapacity to consummate the marriage, his apostasy, or in the case of a 'fraudulent marriage contracted prior to puberty.'<sup>63</sup> Judicial divorce is considered a single irrevocable divorce that is subject to appeal. Decree Laws no. 25 of 1920 and 1929 came as a watershed by considerably increasing the grounds on which a wife could obtain a judicial divorce. The laws departed substantially from traditional *Hanafi* teachings, relying on various provisions of the *Maliki* School and were thus 'cloaked under the veil of the "acceptable" reform mechanism of *takhayyur*.'<sup>64</sup> Basing themselves on the wide interpretation of harm (*ḍarar*) of the *Maliki* School, the two laws provided for irrevocable divorce by judicial decree. Articles 4 and 5 of Law no. 25 of 1920 stipulated that the husband's failure to provide maintenance (*nafaqah*) may be considered grounds for judicial divorce. Article 6 of Law no. 25 of 1929 further stipulated that 'if the wife claims that husband has caused her harm rendering the resumption of conjugal relations impossible, she may sue for a separation, in which case the divorce is irrevocable, if the existence of harm is proven, and reconciliation fails.'<sup>65</sup>

<sup>61</sup> Guenena and Wassef, supra n. 1 at 44.

<sup>62</sup> Bernard-Maugiron and Dupret, supra n. 27 at 15.

<sup>63</sup> See *Qadri Pasha'a Egyptian Hanafi Code of Personal Status* (1875), Articles 298 and 303, quoted in Arabi, supra n. 50 at 2. See also Esposito, supra n. 53.

<sup>64</sup> Venkatraman, supra n. 28 at 1988.

<sup>65</sup> Quoted in El-Guindy, *Al- ta'liq 'ala nuṣūṣ qānūn ta'nzīm ba'd awḍa' wa iḡra'āt al-taqāḍī fī massā'il al-aḥwāl al-shakḥsiyya* [Commentary on the Personal Status Law] (Cairo, 2000) 419.

According to decision No. 432 of the Court of Appeal of 1964, the definition of harm includes the husband's systematic maltreatment, either verbal or physical, of the wife in a manner that is not suitable to women of her standing (*lā yalīq bimithliha*).

Articles 12 and 13, which deal with divorce for the prolonged absence of the husband, aptly illustrate the employment of the technique of *talfīq* to come up with a single legal rule. In conformity with the *Maliki* legal doctrine, Articles 12 and 13 stipulated that prolonged absence of the husband (for more than a year) constituted grounds for divorce. However, the provisions also adopted aspects of *Hanbali* law; divorce is only granted if the husband is absent for no 'justifiable reason.' Absence for any reason that does not violate the *Shari'a*, including work, education, and trade is considered 'justifiable.' This is in stark contrast to *Maliki* law, which places no preconditions to rendering prolonged absence by the husband a basis for judicial divorce. Reverting to *Maliki* legal doctrine once more, Article 13 establishes that judicial divorce for the prolonged absence of the husband is an irrevocable divorce.<sup>66</sup>

Combining the opinions of *Malik* and *Ibn Taymiya*, Article 14 of Law No. 25 of 1929 stipulated that the imprisonment of the husband for three years or more, also constituted grounds for divorce. The wife could sue for divorce only after a year of the prison term had passed, and in the case that the husband's absence caused her harm.<sup>67</sup> In addition, Articles 9, 10 and 11 of Law No. 25 of 1920 made a similar pronouncement with regards to harm caused by the husband's incurable 'disease or defect' (*marad aw 'ayb*). The wife loses the right to sue for divorce if she was aware of the 'disease or defect' before marriage, or if she learnt about it after the marriage and acquiesced.<sup>68</sup> Going beyond the teachings of the four *Sunni* schools, as well as the *Shi'i* and *Zaydi* Schools, the aforementioned provisions widened the definition of 'disease or defect' to encompass any incurable disease, rather than restricting the definition to a disease that obstructed normal conjugal relations. Basing themselves on the opinion of *Ibn al-Qayyim*, the legislators of Law no. 25 of 1920 granted the judge discretion in deciding whether the 'disease or defect' in question justified judicial divorce. In suing for a divorce on the basis of harm, the burden of proof lies on the wife; she may be granted the divorce only if she succeeds in proving to the judge that she has, in fact, suffered from some kind of harm for any of the above-mentioned reasons.<sup>69</sup>

In 1979, President *Sadat* issued Decree Law no. 44, commonly known as Jihan's Law, by presidential decree during parliamentary recess, so as to prevent the People's Assembly from blocking the law.<sup>70</sup> Inspired by *Maliki* jurisprudence, Law no. 44 of 1979 covered many of the most important demands made by feminists over the previous half century, extending the grounds on which the wife could obtain a judicial divorce. The most controversial aspect of the new law was its approach towards polygamy, which it sought to effectively limit through granting the wife the right to an automatic divorce in the case of her husband's subsequent polygamous marriage, without needing to prove harm. In other words, Law no. 44 of 1979 assumed that any polygamous union between a married man

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<sup>66</sup> Law no. 25 of 1920 as amended by Law no. 100 of 1980, *qawaneen al-ahwal ashakhsiyya* (Cairo: *Dar Al-Haqāniyya*, 2004) 17-18.

<sup>67</sup> El- Guindy, supra n. 65 at 419.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Venkataraman, supra n. 28 at 1988-9.

and a second wife constituted, in essence, a type of harm to the first wife, if it happened without her knowledge and consent. Once again, by adopting the technique of *takhayyur* and invoking the *Maliki* and *Hanbali* doctrines, reforms were cloaked with an Islamic garb for legitimation. The widespread opposition to the law, however, indicates that patriarchal social attitudes play a huge role in blocking reforms that may, in fact, be in complete accord with the provisions of the *Shari'a*. In 1985, the Supreme Constitutional Court (SCC) repealed Decree Law no. 44 of 1979. Departing from what was in essence a procedural point, the SCC held that the law was unconstitutional since there was no adequate constitutional basis for modifying Law no. 25 of 1929 through Presidential Decree during parliamentary recess. Nonetheless, the Court's judgement was widely considered 'a success for Islamists and a blow to reformers.'<sup>71</sup>

Two months after Law no. 44 of 1979 was rescinded, a massive effort by feminists led to the promulgation of Law no. 100 of 1985, a watered-down version of the 1979 law. The new law (the first personal status law ever adopted by the People's Assembly), was almost identical to Decree-Law no. 44 of 1979; the most notable difference being the exclusion of the provision on the wife's 'automatic' divorce in the case of the husband's subsequent marriage. The removal of this provision from the text of the new law was regarded by many critics as a compromise in favour of conservatives. The law did not replace the Decree-Laws of 1920 and 1929, but modified some of their provisions. Under Article 11 of the new law, divorce may be granted in the case of discord.<sup>72</sup> In addition, Law no. 100 of 1985 placed restrictions on polygamy by treating it as a special type of harm, based on which the wife could sue for divorce. However, the law makes the wife's right to obtain a judicial divorce on the grounds of the husband's subsequent marriage up to the court's discretion. Article 11*bis* of the 1985 law requires the wife to prove that the polygamous marriage caused her moral or material harm that obstructs normal cohabitation as husband and wife. The Article further stipulates that the first wife may only seek judicial divorce if she had no knowledge of and did not consent to the second marriage. It also places another restriction on the wife's right to divorce; she must file the lawsuit within one year of learning about her husband's second marriage. Finally, the second wife may also seek judicial divorce on the basis of harm if she was ignorant to the fact that the husband had other wives at the time of marriage. The restrictions on polygamy were based on *Maliki* jurisprudence, and were supplemented by the procedural restriction that the first wife must be notified of the husband's subsequent marriage.

Law No. 100 of 1985 proved detrimental when enforced by the courts; even if the wife obtained a ruling for divorce, it could not be executed unless it passed through all three degrees of litigation.<sup>73</sup> Women seeking judicial divorce often spent several years in the process. Although judicial divorce was initially considered a substantial advancement

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<sup>71</sup> Bernard-Maugiron and Dupret, *supra* n. 27 at 5.

<sup>72</sup> This type of divorce is detached from divorce on the basis of harm, and is derived from the 'obedience' stipulation of the *Shari'a*. According to the *Hanafi* legal doctrine, the wife generally owes her husband obedience. A wife is considered disobedient if she leaves the matrimonial home and refuses to return, in spite of the husband's invitation (*da'wa*) at the hands of an Officer (*mohqdar*). The wife may object to this procedure before the Court, on the basis that she has legitimate reasons (*awgoh shar'iya*) to leave the matrimonial home and may request a judicial divorce based on discord.

<sup>73</sup> Shadow Report of the Egyptian NGO's Coalition on the CEDAW (2000) (on file with author).

for women, who previously could not hope to initiate divorce proceedings at all, in effect thousands of women suffered significant hardship for their inability to prove the existence of harm justifying divorce to male judges. They thus remained stranded in unhappy marriages with no possibility of separation.

(iv) *Khul* 'divorce

It was the plight of women who waited years for a divorce ruling and, worse still, those whose cases were eventually dismissed, that prompted the adoption by the People's Assembly of the new Law Regarding Certain Conditions and Procedures of Litigation in Matters of Personal Status, or Law no. 1 of 2000. After ten years of negotiation, Law no. 1 of 2000 introduced a new type of divorce, known as *khul*', by virtue of which the wife may obtain an irrevocable judicial separation, if she so desires, on condition of restitution of the dower and forfeiture of alimony. According to Article 20 of the law:

The two spouses may agree between themselves upon *khul*', but if they do not agree mutually and the wife files a claim requesting it [*khul*'], and ransoms herself and releases herself by *khul*' (*khala'at zawjaha*) by forfeiting all of her lawful financial rights, and restores to him [her husband] the dower he gave to her [upon marriage], then the court is to divorce her from him (*taṭlīqiha 'alayh*).<sup>74</sup>

In its current formulation, the provision accords full weight to the wife's desire to separate from her husband. His consent is not necessary; the wife may literally divorce herself if she so wishes, on condition of the forfeiture of all her financial rights.<sup>75</sup> As will be further demonstrated, this provision contradicts the opinions of the four *Sunni* Schools, which make *khul*' divorce contingent upon the husband's prior consent. Hence, the provision was widely contested between conservatives who held that the law should conform to the interpretations of the Schools, and liberals who argued that the law only needed to take into consideration the canonical sources, namely the text of the *Quran* and the Prophet's tradition (*Sunnah*).

Article 20 of the law makes the *khul*' divorce contingent upon a reconciliation attempt. If the spouses are not reconciled, the judge 'is required to pronounce the divorce, even against the husband's will.'<sup>76</sup> The wife is not required to prove harm or to ground her petition in any reason other than that she can no longer bear life with her husband. According to section 2 of Article 20:

The court shall only grant a divorce (*taṭlīq*) by *khul*' after there has been an attempt at reconciling the two spouses, and after it has appointed two arbitrators

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<sup>74</sup> Article 20 of Law no. 1 of 2000, Regarding the Promulgation of a Law to Organize Certain Conditions and Procedures in Matters of Personal Status, *Official Gazette*, Arab Republic of Egypt, No. 4, (29 January 2000).

<sup>75</sup> Dupret and Bernard-Maugiron, *supra* n. 27 at 14.

<sup>76</sup> The reconciliation attempt is carried out by two mediators appointed by the court, and may not exceed 3 months. In the case that the couple have children, there may be a second reconciliation attempt of three months, which is separated from the first attempt by a period of thirty to sixty days.

(*hukkām*) to undertake the endeavour to reconcile them within a period not exceeding three months ... and after the wife declares explicitly (*tuqarrir sarāhatan*) that she detests life with her husband and that continuation of married life between them is impossible and that she fears that she will not maintain the “limits of God” due to this detestation.

It is important to note that all four Schools agree that the wife’s right to custody over her children is not affected by the *khul’* procedure, neither are the children’s maintenance rights. They are also in agreement as to the necessity of a reconciliation attempt before the court grants the divorce.<sup>77</sup> According to section 3 of Article 20:

The separation effected by *khul’* is, under all circumstances, an irrevocable divorce (*talāq bā’in*); and the court’s decision is, under all circumstances, not subject to appeal (legal contestation; *ta’n*), in any of the forms of appeal.

As such, the law stipulates that divorce by *khul’*, unlike judicial divorce on the grounds of harm is a single irrevocable divorce, and is not subject to appeal, which is also in accordance with the opinions of all four Jurisprudential Schools. The current formulation of Article 20 departs from the teachings of the four Schools only with regards to the issue of consent of the husband, relying on the account of the Prophet’s tradition involving the compulsory divorce of *Ḥabiba* from her husband *Thābit bin Qays*, as documented in two of the six compendia of Prophetic traditions, namely *al-Bukhari* and *al-Nissa’i*.<sup>78</sup> In justifying its novel formulation of the *khul’* formula, the government referred to the text of the *Quran*<sup>79</sup> and *Sunnah*, it failed to refer to any juristic interpretations, even minority views. In so doing, the Egyptian legislature shifted from its traditional use of the tools of *takhayyur* and *tafīq*, adopting *ijtihād* based on the primary sources of the *Shari’a*.<sup>80</sup>

Law no. 1 of 2000 undoubtedly represents a quantum leap for feminist demands in Egypt and marks ‘a radical discontinuity with extant Islamic family law, brought about by

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<sup>77</sup> El-Guindy, supra n. 65.

<sup>78</sup> According to *Al-Bukhari’s* Compendium (*al-Jami’ al-Sahih*), the following *ḥadīth* was narrated by *bin ‘Abbas* (the Prophet’s cousin and widely recognised authority):

The wife of *Thābit bin Qays* came to the Prophet [p.b.u.h.] and said, “O Allah’s Apostle! I see no fault with *Thābit*’s character or his religion, but I, being a Muslim, dislike to behave in un-Islamic manner (if I remain with him).” On that Allah’s Apostle said (to her), “Will you give back the garden which your husband has given you [as dowry: *mahr*]?” She said, “Yes.” Then the Prophet said to *Thābit*, “Accept (*iqbal*) your garden, and divorce her once (*talliḥā*).”

See *Ṣaḥīḥ al-Bukhariy*, available at: <http://www.sahihbukhari.com/sps/sbk/> (accessed 10/11/2004).

<sup>79</sup> Verse 229 of *Sūrat Al-Baqarah* stipulates that:

And it is not lawful for you that ye take from women aught of that which ye have given them; except (in the case) when both fear that they may not be able to keep within the limits (imposed by) Allah. And if ye fear that they may not be able to keep the limits of Allah, in that case it is no sin for either of them if the woman ransom herself.

The *Quranic* verse has been interpreted by the four Islamic jurisprudential schools to allow a woman to ‘buy’ her divorce through relinquishing her financial rights, even in the case that the husband is guilty of no fault of his own. They also share the common understanding that the *khul’* procedure involves the notions of ransoming and mutual exchange, necessitating the husband’s consent as a *sine qua non* to effect the separation. See Arabi, supra n. 50 at 15-16.

<sup>80</sup> *Ibid.* at 6.

the tragic fate of wives suing for divorce under the existing laws.’<sup>81</sup> Although women still do not have full equality rights in the area of dissolution of marriage, they have come a long way from the provisions of the 1985 law. Hence, the CEDAW Committee welcomed the adoption of Law No. 1 of 2000 although it expressed concern that the law would be restricted in its application to rich women who could afford to relinquish their financial rights.<sup>82</sup> This shortcoming could be overcome, however, by employing similar innovative tools of interpretation, since the Prophetic precedent outlining the *khul’* procedure involved only a restitution of the dowry (and no relinquishment of alimony). The People’s Assembly should consider further amending divorce legislation so as to decrease the financial burden of *khul’*. Another important reform would be to require the husband to submit to mediation as a prerequisite for unilateral repudiation. Such reforms would undoubtedly bring Egypt’s divorce legislation in conformity with Article 16(1)(c) of CEDAW and Article 23(4) of the ICCPR.

#### 4. Changing Interpretations in A Changing Society

The CEDAW Committee has on several occasions called upon States that apply *Shari’a*-derived personal status law to seek innovative methods, within the context of the *Shari’a*, to reform legislation, particularly laws that discriminate against women. At its Sixth Session, the CEDAW Committee adopted a decision in which it:

Request[ed] the United Nations system as a whole, in particular the specialised agencies of the United Nations, and the Commission on the Status of Women, to promote or undertake studies on the status of women under Islamic laws and customs and in particular on the status and equality of women in the family on issues such as marriage, divorce, custody and property rights and their participation in public life of the society, taking into consideration the principle of *El-Ijtihad* in Islam.<sup>83</sup>

Applying such innovative tools of interpretation, Egypt’s People’s Assembly succeeded in granting women unprecedented rights in initiating divorce through the introduction of Article 20 on Judicial *khul’*. The deep schism in religious opinions with regards to this provision, exhibited by both legislators in the People’s Assembly as well as some religious scholars at the state-sponsored Islamic Research Academy (*magmaa’ al buhooth al-Islāmiyya*) resulted in a nine-year-long negotiating and drafting process. In spite of the objection of many religious scholars, the Grand *Sheikh* of *Al-Azhar* and the Islamic Research Academy declared that the new law, including the provision on judicial *khul’*, was in conformity with the Islamic *Shari’a*. Notwithstanding, it is evident that Article 20

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<sup>81</sup> Ibid. at 4.

<sup>82</sup> Concluding Observations of the Committee on the Elimination of Discrimination Against Women regarding Egypt, 2 February 2001, A/56/38.

<sup>83</sup> Decision 4 of the Committee on the Elimination of Discrimination Against Women, 6th Session in *The Work of CEDAW. Reports of the Committee on the Elimination of Discrimination Against Women, Volume II 1986-1987* (New York: United Nations, 1990) 296.

departs substantially from the teachings of the four Schools, as will be revealed through examining the Minutes of the Parliamentary Sessions in which the law was debated, and the attached Annexes.

Perhaps most illuminating was the statement made by *Fathi Sorour*, Chairman of the People's Assembly, immediately following the law's adoption by Parliament. *Sorour* emphasised that in drafting Law No. 1 of 2000, the People's Assembly had:

Complied with Article 2 of the Egyptian Constitution, which stipulates that the *Shari'a* is the primary source of legislation. In spite of the controversy surrounding the opinions of the jurists, the Assembly has conformed to the Supreme Constitutional Court's interpretation of the phrase "principles of Islamic *Shari'a*" as the clear-cut decrees of the *Quran* and the *Sunnah*. *Ijtihad* is limited to issues that are ambiguous and therefore the Assembly has referred to the decrees of the *Quran* and the *Sunnah*, disregarding specific juristic opinions and *ijtihadat*. The Assembly has selected the interpretations that reinforce the clear-cut decrees [of the *Quran* and *Sunnah*] since the issue at hand does not involve ambiguous provisions. The principles of the *Shari'a* are limited to what was decreed by the *Quran* and the *Sunnah*, and the Assembly has respected these sources.<sup>84</sup>

This statement, and several others, indicates that the promulgation of Law No. 1 of 2000 marks a newfound willingness to go back to the sacred texts and legislate afresh, leading to the adoption of laws that are not necessarily based on the predominant interpretations of either of the four *Sunni* jurisprudential schools. In effect, the statement asserts that the People's Assembly relied on absolute provisions of the sacred texts (with definitive and unambiguous meaning as defined by the SCC) and suggests that in the face of such provisions, the historical doctrines of the major schools lost their once-privileged authority as sources of *Shari'a*. According to Arabi,

There are important signs indicating that this new phase represents the State's positive and formal endorsement, a century later, of Muhammad Abduh's program of going back to the revealed sources of *Shari'a* for inspiration in all modern legislation, and to abandon any prior commitment to either the historically established School doctrines of Islamic law (*madhāhib*) or to culturally sedimented rules of behaviour (*'urf*).<sup>85</sup>

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<sup>84</sup> Sorour, (Chairman of the People's Assembly) *Statement before the People's Assembly*, 26 January 2000, Minutes of the 29th Parliamentary Session, *Official Gazette*, 79 (9 March 2000). Article 2 of the Egyptian Constitution was amended in 1980, such that the provision, which previously stipulated that the *Shari'a* is a principal source of legislation, currently stipulates that 'the *Shari'a* is the principal source of legislation.' The Supreme Constitutional Court of Egypt, in a series of landmark opinions in the early 1990's explicitly stated that the meaning of the '*Shari'a*' as used in Article 2 of the Constitution refers strictly to the primary and secondary source of Islamic jurisprudence, namely the *Quran* and the Prophet's tradition, or *Sunnah*. As such, the opinions of the four major *Sunni* jurists were no longer to be considered as part of the binding corpus of Islamic law.

<sup>85</sup> Translation in Arabi, *supra* n. 50 at 6.

In the following sub-sections, the foundations for khul' divorce will be analysed, contrasting the interpretation favoured by the People's Assembly with the positions of the four Schools. Although both interpretations are based on the same canonical sources, namely verses 1:229 of the *Quran* and a Prophetic precedent, the outcome of the interpretive process is radically different in each.

#### ***A. The Basis of judicial Khul' in the Quran and Sunnah***

Article 20 of Law no. 1 of 2000 is based on a *hadith* of the Prophet Mohammed, involving *Thābit bin Qays* and his wife *Habība*, who was granted a divorce although her husband was free of any 'fault of his own.'<sup>86</sup> According to this *hadith*, the divorce is contingent on the wife's restoration of the dower she received at the time of marriage. A literal reading of the *hadith* indicates that the Prophet addressed *Thābit* in the imperative, ordering him to accept it (*iqbal* or *khudh*), which he did. The present formulation leaves no room for the assumption that the husband's consent was necessary for the divorce to take place. The same account of the tradition was recorded in *al-Nissai's* compendium; it was these two compendia that the People's Assembly referred to in drafting the new law. Although the Prophetic tradition involving *khul'* was compulsory for the husband, the verses of the *Quran* seem to envision a different type of *khul'* separation. There is a certain incongruity in meaning between judicial *khul'* as practiced by the Prophet, and the *Quran's* endorsement of the wife's right to ransom (*tafiadī*) herself through a negotiated settlement. Verse 229 of *Sūrat Al-Baqarah* stipulates that:

And it is not lawful for you that ye take from women aught of that which ye have given them; except (in the case) when both fear that they may not be able to keep within the limits (imposed by) *Allah*. And if ye fear that they may not be able to keep the limits of *Allah*, in that case it is no sin for either of them if the woman ransom herself.<sup>87</sup>

The *Quranic* verse has been interpreted by the four Islamic jurisprudential schools to allow a woman to 'buy' her divorce through relinquishing her financial rights, even in the case that the husband is guilty of no fault of his own. They share the common understanding that the *khul'* procedure involves the notions of 'ransoming and mutual exchange', necessitating the husband's consent as a *sine qua non* to effect the separation.<sup>88</sup> This is different from the Prophet's tradition, which clearly indicated that the husband had no choice, but to accept the dowry and divorce the wife. The medieval jurists came to terms with this seeming inconsistency between the stipulations of the *Quran* and the *Sunnah* by 'allowing the *Quranic* implication of a consensual transaction to overrule the Prophetic ruling in

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<sup>86</sup> See supra n. 78.

<sup>87</sup> Translation of M. Pikhall, Online, University of Southern California, available at: <http://www.usc.edu/dept/MSA/quran/002.qmt.html> (Accessed 24/12/2004)

<sup>88</sup> Arabi, supra n. 50 at 15-6.

*Hab̄ba's khul'* separation case.<sup>89</sup> Examining the primary sources from a different perspective, the People's Assembly arrived at a novel interpretation of *khul'* as a divorce settlement that does not necessarily require the consent of the husband. In so doing the Assembly clearly abandoned the four Schools' doctrine of *khul'*, as will be demonstrated in the following two sub-sections.

### ***B. Khul' in the four Sunni Jurisprudential Schools***

All four *Sunni* Jurisprudential Schools expressly recognise the *khul'* divorce procedure, albeit with some notable differences. The Schools approach the issue of *khul'* as a right of the husband, rather than as one of the wife; they are predominantly concerned with the question of the husband's right to reclaim the dowry and gifts he gave to the wife upon marriage. The *Shafi'*, *Hanafi* and *Hanbali* Schools all treat *khul'* as a sale transaction, which requires the explicit consent of the husband. In his Compendium *al-Umm, al-Shaf'i* explicitly describes the *khul'* procedure as a sale transaction, underlining both the consensual and negotiated character of the divorce. He states that:

Were a man to separate from his wife by *khul'* (*khāla' al-rajul imra'atah*) then the separation is a single irrevocable divorce because it is a sale like other sales. It is not permissible for him to take possession of her money while continuing to possess her.<sup>90</sup>

It is noteworthy that *al-Shaf'i* refers to the divorce by *khul'* as an action carried out at the husband's prerogative (it is the husband that separates from his wife, and not vice-versa). As such, it is clear that the decision to effect the divorce lies ultimately with the husband, who may choose to either 'possess' the wife or, alternatively, the money and gifts he gave her. Although *al-Shaf'i* made clear reference to the Prophet's command to *Thābit* to divorce his wife (without asking for his approval) he goes on to elaborate on the *Quran's* doctrine on *khul'* as a negotiated ransom necessitating the husband's consent. According to *al-Shaf'i*, *khul'* as described in the *Quran* is a type of sale, which allows 'the amount that the vendor and buyer mutually agree to without any (prior) specification.'<sup>91</sup> Similarly, the *Hanbali* and *Hanafi* Schools described the *khul'* procedure as a 'transactional bargaining' process.<sup>92</sup> *Hanbali* scholar *Muwaffaq al-Din bin Qudama* describes it as a 'transaction, similar to a sale or a marriage contract; it does not require a judge ... and is a dissolution of a contract by mutual consent.'<sup>93</sup> He further stresses that this is the position each of *Ahmed bin Hanbal*, *Malik*, *al-Shaf'i* and *ahl-al-ra'y* (or the people of opinion, in reference to the *Hanafi* School).<sup>94</sup>

The *Maliki khul'* doctrine departs significantly from the approach of the other three schools; however, no *Maliki* scholar expressly states that the *khul'* separation may take

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<sup>89</sup> Ibid. at 18

<sup>90</sup> Ibid.

<sup>91</sup> Ibid. at 15.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid. at 14.

<sup>94</sup> Ibid.

effect in spite of the husband's objection. Conversely, *Malik* explicitly introduces the husband's consent as a necessary factor by citing a different account of the Prophetic precedent involving *Ḥabība* and *Thābit*. According to this account, reported on the authority of *Sa'īd bin Muṣayyib*, a seventh century jurist from *Medina*,

The Prophet invited *Thābit bin Qays* to be present, and he told him about *Ḥabība* and about her positive response to the Prophet's asking her whether she would be willing to give him back his garden. *Thābit* said: "This is to my liking"; yes." The Prophet (p.b.u.h) said: "Then she gives it back"... and he told *Thābit*: "It is just one statement (*hiya wahida*)."<sup>95</sup>

The above-mentioned account is the only one that makes explicit reference to the consent of the husband, and was quoted in *Imam Malik's* Compendium in order to arrive at the opinion that divorce by *khul'* is irrevocable. Jurists have referred to another passage in the Compendium to suggest that *Malik* envisaged a type of *khul'* that would not require the consent of the husband, and that would take place at the hands of a judicial authority. However, a close reading of the passage, which appears in the section on divorce for harm suggests otherwise:

Were the dispute between the couple to aggravate and were they to refer to the governor [judge], he is to appoint two arbitrators, one from his family and the other from hers.... If the arbitrators establish that the harm (*ḍarar*) originates from the husband, they are to separate them (*farrāqa baynahumā*) without the wife being liable '...'; if the harm originates from both, they are to separate them, with the wife paying back a portion of the dower, either its half or more or less, depending whether the mutual harm is equal on both sides, or more from her, or more from him.<sup>96</sup>

Although the statement 'they are to separate them' does indeed suggest that the judgement of the arbitrators is decisive, regardless of the opinion of the husband, it is important to note that the above applies to situations where there is 'mutual harm'. It therefore does not envision a case where the wife demands a no fault divorce, without a claim of harm, and without the husband's consent. In fact, the above-mentioned passage clearly deals with a particular type of judicial divorce for harm, known in Egypt's personal status code as divorce on the basis of discord (discussed above). In such a case, the husband may also receive compensation for harm caused by the wife.

The argument that the *Maliki* School does not recognise judicial *khul'* without the husband's consent is further confirmed by the debates that took place in the ninth session of the Council of the Islamic Research Academy, in which it discussed the conformity of draft Law no. 1 of 2000 with the Islamic *Shari'a*. Regarding the issue of consent of the husband, *Sheikh Ibrahim El-Dessouky* asserted that allowing for a judicial settlement of the dispute

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<sup>95</sup> Ibid.

<sup>96</sup> *Supra*, n. 33 at 13.

does not necessarily mean that the husband's consent is automatically waived. In fact, according to *el-Dessouky* all four Schools agree that:

both spouses must be present in the *Majlis* [now court] where the decision regarding the divorce is delivered. If either of them leaves or objects to the procedure at any point, even with a lowered voice, the divorce is not accepted.<sup>97</sup>

Only one of the thirteen members attending the session objected to *el-Dessouky's* statement, on the grounds that the debate on the topic had been closed in the previous session. He failed to provide any detailed evidence to support a contrary argument. *El-Dessouky* was urged to record his opinion in the Explanatory Memorandum (*al-mudhakkira al-idāhiyyah*) of the new law.<sup>98</sup> However, no indication of his views is to be found in either the law, or its Explanatory Memorandum. A brief exposé of the positions of the four Schools was incorporated into the Annexe to the Minutes of the 22nd Parliamentary Session. It is evident that the document was hastily prepared; it is handwritten, seemingly by *el-Dessouky*, himself. Citing the reference *Al-fiqh 'alā el-madhāhib el-'arba'ah*, the document asserts that consent of the husband is requisite in all four Jurisprudential Schools.

The question that arises therefore, is how the Government was able to sell the reform to conservative forces? How was it able to introduce a law that broke radically with the *fiqh* of the four Schools? The Parliamentary debates surrounding the adoption of the law explicate some of these issues, demonstrating the effect of patriarchal social attitudes and religious conservatism on personal status law reform. They also aptly illustrate that reforms are most likely to be successful if they are cloaked in the garbs of what is socially acceptable. Although this technique has led to some significant compromises in the face of conservatives, it has nonetheless allowed for unprecedented reforms in the area of personal status legislation.

### ***C. Debating khul' in the People's Assembly***

While Law no. 1 of 2000 may not represent a major transformation in Egypt's personal status legislation, it undoubtedly marks a newfound commitment to legal modernism. Throughout the five parliamentary sessions in which the law was debated a great deal of criticism to Article 20 resurfaced, in spite of the law's endorsement by the official religious establishment.<sup>99</sup> However, the debates in the People's Assembly capture only the tip of the iceberg, particularly since the majority of seats in the Assembly are monopolised by the ruling National Democratic Party (NDP), which introduced the draft law. The following section will examine the rhetorical arguments that were articulated in the People's Assembly against the *khul'* provision, as well as the counter-arguments made in favour of the provision. The debate includes arguments based on religious considerations, social

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<sup>97</sup> Annex to the Minutes of the 22nd Parliamentary Session 307 (16 January 2000) (on file with author).

<sup>98</sup> *Ibid.* at 295-7.

<sup>99</sup> The 22nd Parliamentary Session (16 January 2000), 23rd Parliamentary Session (16 January 2000), 27th Parliamentary Session (25 January 2000), 28th Parliamentary Session (26 January 2000), and 29th Parliamentary Session (26 January 2000), 5th Ordinary Session, 7th legislative year (on file with author).

factors as well as procedural issues, which have been repeatedly used by conservatives to attempt to stall reforms in personal status legislation. Most importantly, the parliamentary discussions shed light on the pragmatic techniques used to limit opposition to the law, and to ultimately defeat conservative and patriarchal views of women and their rights.

(i) Arguments against the current formulation of Article 20

Out of a total of about 100 MPs that commented on the new law in the People's Assembly, less than 15 openly spoke up against the Article 20 provision on *khul'*. However, this evident lack of opposition towards *khul'* is less an indication of societal consensus than one of the paucity of parliamentary seats occupied by members of the opposition and independents (a total of about 40 out of 454 seats, less than 10%). Whereas some members of the ruling NDP articulated arguments against the *khul'* provision, the vast majority supported the new reform. In spite of the fierce criticism levelled against Article 20, the Government succeeded in appeasing conservative elements by appealing to patriarchal mentalities, and introducing restrictions to the *khul'* procedure. Most notably, the government agreed to the proposition by conservatives to introduce a provision requiring the wife to submit to mediation. In the following sub-sections, the rhetorical arguments against Article 20 are mapped out and grouped into five main categories. All arguments reflect the existence of a patriarchal outlook that promotes a stereotypical view of women as irrational and dependent. These negative arguments will be contrasted, in the following sub-section with the arguments formulated in favour of the law.

*Rhetorical Argument 1: Instability of the family*

The most popular argument among opponents of the new law was the allegation that granting women the right to *khul'* divorce would destabilise family relations, which has direct bearings on the fabric of society. According to one MP, *khul'* will inevitably lead to an increase in the crime rate. He justifies this proposition by contending that social conditions have changed considerably since the *khul'* of *Habība* from her husband *Thābit*.<sup>100</sup> According to another MP, the tradition involving *Habība* and *Thābit* cannot be generalised into a general legal rule, specifically because the wife in that specific story purportedly had no children.<sup>101</sup> He seems to suggest that the absence of children means, in essence, that there is no family, and that the separation was therefore of no consequence. Surprisingly, *Yassin Serag Eddin*, Head of the Parliamentary Committee of the *Wafd* Party, a party traditionally seen as rather supportive of women's equality rights also held the view that *khul'* would lead to unprecedented instability in Egyptian family relations.<sup>102</sup> His argument relied on the stereotypical view of women as emotionally unstable, and hence

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<sup>100</sup> Statement of Allam Mohamed Abdel Halim, 22nd Parliamentary Session, supra n. 99 at 29-30.

<sup>101</sup> Statement of Badr Mahrous Mohamed Soliman Sha'arawy (National Democratic Party), *ibid*.

<sup>102</sup> Serageddin was one of law's fiercest opponents and walked out in the midst of the parliamentary discussions on the new law, on the pretext that the sessions were being conducted in an undemocratic manner. He was of the view that the People's Assembly was dealing with the law in a hasty manner, and that the *khul'* provision was in clear violation of the *Shari'a*. See Tadros, 'Rooster's Wrath', *Al-Ahram Weekly*, 20-26 January, 2000.

more prone to destroy the family on irrational impulse. According to this view, *khul'* must be opposed since granting women the right to such divorce would inevitably lead to societal chaos;<sup>103</sup> a view widely propagated by the popular media.

*Rhetorical Argument 2: The Khul' procedure is limited to rich women*

A small number of MP's criticised Article 20 of Law no. 1 of 2000 on the basis that it was limited in its application to rich women, who could afford to 'ransom' themselves from their husbands. They maintained that the provision did not adequately meet the needs of poor Egyptian women, who constitute more than 60% of society.<sup>104</sup> In this vein, MP *Abdel Moneim el-Oleimy* argued that the provision contravened Article 40 of the Constitution, which stipulates that all citizens are equal before the law.<sup>105</sup> Although this argument did not constitute a major basis for opposition to the new law in the People's Assembly, it was widely disseminated in the media, as evidenced in journalistic accounts.<sup>106</sup>

*Rhetorical Argument 3: Law no. 1 of 2000 is a procedural law*

Challenging reforms in personal status legislation on the grounds of procedure is a known strategy in Egypt, as was the case with Decree-Law no. 44 of 1979, which was repealed by the SCC on procedural grounds in 1985. In a similar vein, a number of MP's attempted to challenge Article 20 of Law no. 1 of 2000 on the grounds that the new law was an exclusively procedural personal status law, and hence ought not to deal with substantive issues at all.<sup>107</sup> This argument, however, had few supporters. It has been suggested, on the other hand, that introducing the *khul'* provision through a procedural law was a deliberate strategy by the Government, allowing it to potentially curtail opposition to the new law.

*Rhetorical Argument 4: Khul' Violates the principle of Guardianship (qiwama) of the husband*

One basic argument against granting the wife the right to initiate *khul'* divorce was that such a right would violate the principle of *qiwama* or guardianship of the husband, which is enshrined in the *Shari'a*. This argument, however, arguably rests on an erroneous understanding of the principle of *qiwama* that has been propagated by patriarchal religious scholars over the centuries. Whereas the principle of *qiwama* does indeed exist in the *Shari'a*, it does not grant men a superior status over women, nor does it allow them to

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<sup>103</sup> This argument was widely propagated by the media, which predicted that between 1.5 and 2 million women would apply for *khul'*; however, only a few thousand cases have been filed since the law was passed. See Tadros, 'The Third Option', *Al-Ahram Weekly*, 31 October – 6 November 2002.

<sup>104</sup> Statement of Abdel Halim 22nd Parliamentary Session, supra n. 100.

<sup>105</sup> Statement of Abdel Moneim El-Olaimy (Independent), 22nd Parliamentary Session, supra n. 99 at 31.

<sup>106</sup> See for example, El-Bendary, 'Conditional Surrenders', *Al-Ahram Weekly*, 13-19 January 2000, and Tadros, 'What Price Freedom?', *Al-Ahram Weekly*, 7- 13 March 2003.

<sup>107</sup> Statement of El-Olaimy, supra n. 105 at 32.

proscribe rights that have been ordained by God.<sup>108</sup> One MP went even further, arguing that a strict adherence to the letter and spirit of the *Quran* necessitates that women remain confined to the home.<sup>109</sup> Although these opinions were relatively limited, they clearly indicate the existence of a conservative trend that is openly hostile to any improvement in the rights and status of women in Egypt.

*Rhetorical Argument 5: Article 20 violates the precepts of the Shari'a*

According to this view, judicial *khul'*, as properly applied, requires the consent of the husband in order for the separation to take effect. Proponents of this view, a minority in the People's Assembly, based their argument on a different account (*riwaya*) of the prophetic tradition involving *Habiba* and her husband *Thabit*. According to this account, the Prophet when approached by *Habiba* regarding the separation, asked her to go back to her husband and seek his consent.<sup>110</sup> They also interpret the verses of *Sūrat al-Baqarah* on which *khul'* is based to mean that the husband's consent is contingent for the divorce to take place. Verse 229 stipulates that 'they are not at fault (*la junaha 'alayhimma*) at what she pays to ransom herself.'<sup>111</sup> In other words, the decision is taken by the two spouses concomitantly; there is no room for judicial action, let alone such action without the husband's consent. According to this view, even if judicial intervention were to be permitted, it cannot be done in the manner provided for in Article 20, which leaves absolutely no room for judicial discretion. In effect, it grants the wife an automatic divorce if she insists on her position. These MP's based their claims on the interpretations of the four *Sunni* jurisprudential schools, which maintain that *khul'* is a consensual transaction that may only be executed by the prior agreement of the two parties.<sup>112</sup> This argument presented the most significant challenge to the new law; only by introducing *ijtihad* as a reform tool could it be confronted and defeated.

(ii) Arguments in favour of the current formulation of Article 20

On the other hand, many arguments were expressed in favour of Article 20, primarily by members of the ruling NDP, as well as other government representatives. Given the current composition of the People's Assembly, which largely militates in favour of the ruling party, these arguments naturally outnumbered those expressed against the law. An obvious trend

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<sup>108</sup> Unfortunately, it will not be possible to delve into a detailed discussion of the principle of *qiwama* within the limits of this paper. However, for a comprehensive examination of the different interpretations of *qiwama*, see al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights', (1997) 12 *American University Journal of International Law and Policy* 2.

<sup>109</sup> This argument invoked the *Quranic* verse commanding the wives of the Prophet to remain within their matrimonial home (*waqarn fee biyutikinna*).

<sup>110</sup> They include Yassin Serag Eddin (*Wafd* Party), Ragab Helal Hemeida (*Al-Ahrar* party), Minutes of the 22nd Parliamentary Session, supra n. 97 at 37 and Abdel Aziz Mohamed Ahmed Shahin, Minutes of the 28th Parliamentary Session, supra n. 99 at 13.

<sup>111</sup> *Surat al Baqara*, verse 229, Translation of M. Pikhall, supra n. 87.

<sup>112</sup> See, for instance, the Statements of Ragab Helal Hemeida (*al-Ahrar party*), Mohamed Abdel Fattah Elmasry, Mohamed Ahmed Marzouk, Abdel Moniem el-Olaimy (Independent); Abdel Aziz Mohamed Shahin, in the Minutes of the 28th Parliamentary Session, supra n. 99.

in all arguments in favour was an unmistakable tendency to lean towards patriarchal argumentation so as to avoid unnecessary hostility. Very few arguments were articulated in terms of women's human rights or gender equality, or international legality. Conversely, most proponents of the new law vehemently argued against its characterisation as an achievement for women, as will be demonstrated in the following sub-sections.

#### *Rhetorical Argument 1: Stability of the Family*

Faced with the critique that the new law would inevitably lead to a breakdown in family structure, proponents of Article 20 held that the new provision on *khul'*, conversely, would actually contribute to the stability of family relations. This line of argumentation sought to avoid any reference to the human rights of women; the reasoning was actually based on a number of other considerations, namely: (1) no healthy family can be based on hatred and oppression; (2) the husband stands to benefit from the *khul'* separation. Reference was made to the fact that the husband's dowry would be restored, and his dignity maintained (since no dignified man could accept to hold a wife that loathes him). In expressing this argument, the Minister of Justice claimed that the new law 'does not take from the man to give to the woman, neither does it take from the woman to give to the man.'<sup>113</sup> In fact in order to sell Article 20, the Minister of Justice asserted that the intention of the law was not to grant women the right to no-fault divorce according to their whims. On the contrary, it was envisaged to govern only situations of extreme injustice and oppression. This portrayal of *khul'* as a type of divorce for harm was clearly intended to gain the support of conservatives, whose patriarchal approach to family relations would not allow for a law that placed women on an equal footing with their husbands. The reform was thus sold as upholding the rights of the man and the family. Any reference to equality rights for women would have arguably aborted the whole process.<sup>114</sup>

#### *Rhetorical Argument 2: The law is not limited to rich women*

In response to allegations that *khul'* will necessarily be restricted to rich women who could afford to ransom themselves from inconvenient marriages, Dr *Abdel Rahman el-'Adawy*<sup>115</sup> provided a counter-argument, which he based on purely logical considerations. He explained that the *khul'* procedure only requires the wife to return the dowry she received from her husband upon marriage. In the case of a rich woman, that would likely amount to a large sum of money; however, for a poor wife, the dowry would in all likelihood be much less. As such, all women, rich and poor are treated equally. Notwithstanding this argument, requiring the wife to forfeit her right to alimony could be a major disincentive for women, particularly poorer women who may face difficulties finding an alternative source of income. For this reason, many feminist activists have called for the amendment of the *khul'* procedure such that the wife only be required to return her dowry, and no more, in

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<sup>113</sup> Statement of the Minister of Justice, Minutes of the 22nd Parliamentary Session, supra n. 99 at 7.

<sup>114</sup> This argumentation was also adopted in the Explanatory Memorandum of the new law.

<sup>115</sup> The Government's representative in the Islamic Research Academy.

conformity with the prophetic precedent.<sup>116</sup> It remains to be seen whether the People's Assembly will respond to these demands.

*Rhetorical Argument 3: The draft-law has been aptly examined and approved*

Many proponents of Article 20 suggested that since the law had been examined by several high-level committees, and had passed through a nine-year review process, the Assembly should accept the validity of the provision, without need for further debate. Ministers reiterated that the law had been previously examined by a Committee of representatives from the Ministry of Justice, as well as the Islamic Research Academy of *al-Azhar*, Chaired by the *Sheikh of al-Azhar*, and hence should not even be debated by the People's Assembly.<sup>117</sup> This argument was advanced by the representatives of the Parliamentary Committees of both the *Tagammu'* and National Democratic Parties<sup>118</sup>, and calls into question the role of the People's Assembly and its legislative mandate. The fact that several Members of Parliament suggested that the law did not even require further discussion is evidence of the Assembly's passivity, and its role as rubber-stamp for government-introduced legislation. It also attests to the important function of the religious institutions in legitimating reform of *Shari'a*-derived legislation.

*Rhetorical Argument 4: Khul' exists in other Arab and Islamic countries*

The argument that the *khul'* procedure exists in the laws of other Arab and Islamic countries, specifically Libya, Morocco, Jordan, Syria, Yemen and Kuwait lent credence to the claim that *khul'* was not a novel *ijtihad* of the Egyptian jurists.<sup>119</sup> Reference was also made to the draft Arab Model Unified Law on Personal Status, which includes a provision on *khul'*. To support the claim that *khul'* does not necessarily require the husband's consent, reference was made to Article 14 of the Libyan Personal Status Law, which states that if the spouses do not consent to the separation, a judge may decide to effect the *khul'* divorce in exchange for a reasonable sum.<sup>120</sup> No mention was made as to whether other Arab countries waived the requirement of obtaining the husband's consent. This argument was later incorporated in the Explanatory Memorandum of the law.

*Rhetorical Argument 5: The khul' procedure upholds justice*

Another important argument was that the introduction of the new law was necessary in order to meet the changing needs of society. Several Members of Parliament suggested that

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<sup>116</sup> Interview with Nihad Aboul Komsan, Director, Egyptian Center for Women's Rights, 11 November 2004.

<sup>117</sup> According to Law no. 103 of 1961, the Islamic Research Academy is the highest institution for theological research, and therefore has the mandate to research and approve issues related to the *Shari'a*. Law no. 1 of 2000 was approved by a majority of 35 of the 40 members of the Academy and also received the approval of the legislative Committee of the State Council (*majlis al-dawla*).

<sup>118</sup> Khaled Mohy Eddin (*Tagammu'* Party) and Ahmed el-Alfy (National Democratic Party).

<sup>119</sup> Supporters of this argument include Mohamed Mohamed Aboul Einein (National Democratic Party), Minutes of the 28th Parliamentary Session, supra n. 99 at 30.

<sup>120</sup> Ibid.

the *khul'* procedure established justice by giving the wife a means to evade 'repression', 'slavery' and 'imprisonment'. According to the *Sheikh* of *al-Azhar*, the *khul'* procedure puts an end to the wife's suffering at the hands of an oppressive husband. He emphasised that the *Shari'a* is based on the concept of justice, and that marital relations in Islam are based on compassion and mercy (*mawadda wa rahma*.) He further asserted that the *Shari'a* upholds the equality of the genders in particular areas, including equality in dignity and equality of religious obligations and proceeded to explain that the Islamic *Shari'a* does not accept oppression and injustice.<sup>121</sup> In other words, his argument proposed that judicial *khul'*, as envisaged by Article 20, was legitimate inasmuch as it served the interest of society by ensuring social justice and avoiding oppression.

*Rhetorical Argument 6: Khul' will end the suffering of the wife*

Another argument, which is based on a similar premise as the above-mentioned argument 4, but with a fundamentally different objective, is the feminist argument. This view holds that the *khul'* law is necessary in order to ensure women's equal rights, and to end their suffering through the procedure of divorce for harm, which often takes as long as eight or nine years. In this vein, *Farran* proposed an Islamic basis for the principle of the equality of the genders, founded on the *Quranic* stipulation that women have rights equal to their obligations (*lahunna mithl alathy 'alayhinna*.)<sup>122</sup> Proponents of this view were few, probably since associating the new law with women's equality rights would have gained it additional hostility, particularly in light of the massive opposition to *khul'* in the popular media.

*Rhetorical Argument 7: Khul' has a solid foundation in the Quran and Sunnah*

A common thread that ran through the arguments of the Minister of Justice, Grand *Sheikh* of *Al-Azhar*, and representatives of the government was that the *khul'* procedure was well-grounded in the verses of the *Quran* and the Prophet's tradition. In expounding this opinion, they asserted that the *khul'* procedure existed in the *Quran* and the *Sunnah*, as well as the four *Sunni* Jurisprudential Schools and the *ijma'* of the religious scholars. However, they failed to comment on whether the procedure envisaged by the four schools was the same as the one codified in Article 20 of the new law. Proponents of this view did not refer to the teachings of any of the Schools to confirm that *khul'* did not require the husband's consent. On the other hand, they referred to the specific accounts recorded by *al-Bukhari* and *al-Nissa'i* of the prophetic tradition involving *Habiba* and *Thabit*. As described above, these accounts of the tradition clearly indicate that the prophet did not seek *Thabit's* consent, but granted *Habiba* the separation automatically when she expressed her willingness to return the dowry. Very few references were made to the opinions of the four *Sunni* schools. *Ahmed Omar Hashem*, Chair of the Committee of Religious and Social Affairs, and *Waqf*, asserted that the Assembly was actually going back to apply the true *Shari'a* once more, proving that it is flexible, and that *Shari'a*-derived legislation may

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<sup>121</sup> Statement of *Sheikh* Mohamed Hussein Tantawy, *Sheikh* of *Al-Azhar*, Minutes of the 22nd Parliamentary Session, supra n. 99.

<sup>122</sup> Statement of *Farran*, Minutes of the 28th Parliamentary Session, supra n. 99.

therefore be modified legitimately. He added that ‘the *Quran* and *Sunnah* are clear; who are we to defy their stipulations?’<sup>123</sup> In light of the obvious lack of support of the four schools, reference to their opinions was both sparse and superficial.<sup>124</sup> No reference was made to direct passages from the Compendia of the four *Sunni* schools. Instead, proponents of Article 20 emphasised the evidence of *khul’* as a non-consensual procedure in the Prophetic traditions, repeatedly making reference to the account recorded by *al-Bukhari* and *al-Nissa’i*. Nonetheless, the *Sheikh* of *al-Azhar* asserted that ‘we are not basing his law on our own *ijtihadāt*’, as any official acknowledgement of the contrary would have potentially alienated many supporters and provoked many opponents of the law.<sup>125</sup> In other words, the Government has developed a pragmatic reform agenda, which has clearly endorsed *ijtihad* as a reform tool, while maintaining a semblance of continuity with the past.

## 5. Conclusion

The human rights of women have always represented a front line between the principle of universality of human rights on the one hand, and demands for pluralism, tolerance, and cultural sensitivity, on the other. Egypt is undoubtedly under an obligation to reform its personal status legislation so as to accord women full equality rights in the area of family relations, in line with universal standards that it has accepted by virtue of its ratification of international instruments. However, the goal of eliminating gender discrimination does not necessarily require the secularisation of personal status legislation, which is manifestly impractical and clearly raises questions of morality. In fact, the process of divorce law reform in Egypt demonstrates that women’s equality rights can be achieved through modifying *Shari’a*-derived laws using Islamic reform tools. And whereas conservative voices have often hampered the reform effort, recent developments indicate that the adoption of a pragmatic and gradual reform framework promises to grant women greater equality rights within the family, eroding traditional and once firmly-entrenched gender hierarchies.

Every national, religious and cultural group has the right to practice and manifest their own religious and cultural beliefs; depriving them of such a right would, in itself, constitute a violation of international human rights standards. *Shari’a*-derived personal status legislation has become engrained in the identities of many Muslim women as well as men. Although CEDAW is unequivocal in its demand for equality between the genders in

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<sup>123</sup> Statement of Ahmed Omar Hashem (Chairman of the Committee of Religious and Social Affairs and Waqf), Minutes of 22nd Parliamentary Session, supra n. 99 at 27-8.

<sup>124</sup> However, the Minister of Justice attempted to prove that the *Maliki* School recognised judicial *khul’* without the husband’s consent. He held that the *Maliki* School had acknowledged the right of the couple to refer the dispute to a judge, in the case that they failed to reach an agreement. This argument was further expounded by Dr Abdel Rahman el-Adawy who maintained that the *Maliki* School allowed for judicial intervention at the hands of two arbitrators, and if that failed then at the hands of a judge, in the case that the spouses failed to reach an agreement on separation. The decision of the judge in such a case was binding. Through this argumentation, proponents of the law contended that the *Maliki* School envisaged a situation where the wife would be granted a divorce without the husband’s consent. However, as discussed in section 2-B above, this contention is clearly untenable.

<sup>125</sup> Statement of Sheikh Mohamed Hussein Tantawy, supra n. 121.

family relations, it is inconceivable for the international human rights movement to be unreceptive to the cultural particularities and diverse worldviews that constitute an inescapable reality of the contemporary international community. According to Behrouz,

imposed foreign values are not easily internalized. As a matter of both ethics and policy, then, restrictions on the rights of Muslim women can best be challenged by showing that such restrictions are not in fact required by Islam in the context of present-day Islamic societies. This is not an unrealistic task. Although, in its present formulation, Islamic family law conflicts with international standards for gender equality, Islamic legal reform can be employed to resolve this apparent conflict.<sup>126</sup>

In other words, it is narrow-minded to construe the relationship between international human rights standards and religious beliefs as inherently antagonistic. Rather than engaging in such polemics, what is required is, on the one hand, a heightened respect for pluralism in the human rights debate in order to adequately address the needs of diverse groups of women, as well as a revision of *Shari'a*-derived personal status legislation on the other. Although Egypt's reform effort is still far from achieving the required transformation in women's rights and status, the adoption of *ijtihad* as a reform tool augurs well for feminists, intent on introducing reforms in the areas of polygamy and unilateral repudiation, among others. The time has come for a move from piecemeal reform to a comprehensive review of Egypt's personal status legislation, and the adoption of a new law that would replace the decree laws of 1920 and 1929 and the subsequent amendments. This new law should depart from a premise of equality of the genders, treating women as rational and independent legal persons capable of taking their own decisions with regards to all aspects of family relations.

The adoption of the recent provision on *khul'* divorce indicates that *Shari'a*-derived legislation may be preserved compatibly with the simultaneous observance of women's international human rights. It can only be hoped that this development will usher in a new era of vivacity and potential development of once stagnant laws, ending the time-honoured moratorium imposed by *taqlid* law for over ten centuries, and bringing Egypt's legislation in line with international standards of women's human rights.

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<sup>126</sup> Behrouz, supra n. 30 at 1139-40.