

American University in Cairo

AUC Knowledge Fountain

Theses and Dissertations

Student Research

2-1-2013

Patriarchy and khul': women's struggle for equal rights in pre and post revolution Egypt

Nada Elafify

Follow this and additional works at: <https://fount.aucegypt.edu/etds>

Recommended Citation

APA Citation

Elafify, N. (2013). *Patriarchy and khul': women's struggle for equal rights in pre and post revolution Egypt* [Master's Thesis, the American University in Cairo]. AUC Knowledge Fountain.

<https://fount.aucegypt.edu/etds/959>

MLA Citation

Elafify, Nada. *Patriarchy and khul': women's struggle for equal rights in pre and post revolution Egypt*. 2013. American University in Cairo, Master's Thesis. *AUC Knowledge Fountain*.

<https://fount.aucegypt.edu/etds/959>

This Master's Thesis is brought to you for free and open access by the Student Research at AUC Knowledge Fountain. It has been accepted for inclusion in Theses and Dissertations by an authorized administrator of AUC Knowledge Fountain. For more information, please contact thesisadmin@aucegypt.edu.

The American University in Cairo
School of Global Affairs and Public Policy

**PATRIARCHY AND *KHUL'*: WOMEN'S STRUGGLE FOR EQUAL
RIGHTS IN PRE AND POST REVOLUTION EGYPT**

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law**

By

Nada Elafify

June 2013

The American University in Cairo
School of Global Affairs and Public Policy

PATRIARCHY AND *KHUL'*: WOMEN'S STRUGGLE FOR EQUAL RIGHTS IN PRE
AND POST REVOLUTION EGYPT

A Thesis Submitted by

Nada Elafify

to the Department of Law

June 2013

in partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law

Professor Nesrine Badawi _____
Thesis Supervisor
American University in Cairo
Date _____

Professor Hani Sayed
Thesis First Reader _____
American University in Cairo
Date _____

Professor Thomas Skouteris _____
Thesis Second Reader
American University in Cairo
Date _____

Professor Thomas Skouteris _____
Law Department Chair
Date _____

Ambassador Nabil Fahmy _____
Dean of GAPP
Date _____

The American University in Cairo
School of Global Affairs and Public Policy
Department of Law

PATRIARCHY AND *KHUL'*: WOMEN'S STRUGGLE FOR EQUAL RIGHTS IN PRE
AND POST REVOLUTION EGYPT

Nada Elafify

Supervised by Professor Nesrine Badawi

ABSTRACT

Societal perceptions and the patriarchal structure dictated by our culture has manifested itself through the implementation and interpretations of the laws, which undermine the theoretical benefits of *khul'*. Prior to 2000, women were only allowed to obtain a divorce based on limited grounds and the judge's consent. The ongoing resistance to the *khul'* law of 2000 highlights the inadequate ability of legal reform to have a transformative effect on women's position in society. This thesis examines the challenges that the *khul'* law no.1/2000 continues to confront from early opposition to the renewed scrutiny in post Mubarak Egypt. The legal and social hurdles put forth by the state as well as rise of Islamists and women's right's slow advancement in society are examined, highlighting that the resistance is based on patriarchal beliefs and societal perceptions of women. This paper further examines the role of legal reform in providing revolutionary change in Egypt and whether adopting law has, in fact, advanced women's position in society. Over a decade after its enactment, *khul'* is still resisted and even threatened in post revolutionary Egypt. I argue that the patriarchal beliefs embedded in our society and manifested through state imposed barriers and interpretations of the law directly undermine the purpose of legal reform and the ability of the law to achieve the desired change.

TABLE OF CONTENTS

I	INTRODUCTION.....	1
A	Recent Aspirations Of Equality.....	2
B	Methodology	3
C	Theoretical Framework.....	4
II.	DEVELOPMENT OF PERSONAL STATUS LAWS IN EGYPT.....	11
A.	Development Of Divorce Laws In Egypt.....	12
1.	Laws No. 25/1920 And 25/1929.....	12
2.	Law No. 44/1979.	13
3.	Law No. 100/1985.....	15
B.	<i>Khul'</i>	16
1.	In Islam.....	16
2.	In Egypt	18
C.	The Role Of The Supreme Constitutional Court In Family Law Reform.....	20
III	RESISTANCE TO <i>KHUL'</i>	27
.		
A.	The Fundamentalist Discourse.....	27
B.	Why Reform?	28
C.	Strategy Adopted By Reformers.....	29
D.	Resistance To <i>Khul'</i>	
1.	Debate Surrounding <i>Khul'</i>	32
a.	Stability Of The Family.....	32
b.	<i>Shari'a</i>	33
2.	Resistance In The Media.....	35
E.	Giving In To Islamists Pressure.....	36
1.	Revoking Financial Rights.....	36
2.	Mandatory Reconciliation.....	38
I	CURRENT SITUATION IN EGYPT.....	41
V.		

A. Role Of Women In The Revolution	41
B. Role Of The State/Rise Of Islamists.....	41
1. Salafists.	45
C. The Constitution And Gender Equality.....	46
D. Violence Against Women	49
E. Societal Resistance.....	51
F. Legality Of <i>Khul'</i> Under Challenge.....	52
1. Stability Of The Family.....	53
2. Associating <i>Khul'</i> With The Old Regime.....	54
G. Other Forms Of Resistance.....	55
V CONCLUSION.....	57

I. INTRODUCTION

This thesis explores the ongoing resistance that the *khul'* law no.1/2000 continues to receive in Egypt. From the slow advancement of women's position in society since its inception in the late 1990s, to the rise of Islamists in power and increased violence against women in the post Mubarak era. The legal and social hurdles put forth by the state as well as strategies used by opponents and proponents to further their claims are analyzed to highlight the resistance is based on patriarchal beliefs and societal perceptions of women. I argue that these patriarchal beliefs embedded in our society and manifested through state imposed barriers and interpretations of the law directly undermine the purpose of legal reform and the ability of the law to achieve the desired change.

This thesis is divided into four chapters. The first includes this introduction, brief background on inequality and women's aspirations during the January 25th revolution. The methodology and theoretical framework for this thesis are also included.

Chapter two provides a historical background on the development of Personal Status Laws in Egypt in general, and divorce laws in particular. This is important as it highlights the resistance that family law reform received in the past century, as it came to represent the last bastion to the Islamic state, which Islamists aimed to preserve through Personal Status Laws. The difference between the *khul'* law in Islam and the one adopted by Egyptian legislatures in 2000 is highlighted and the chapter concludes with the role of the Supreme Constitutional Court in family law reform.

Chapter three examines the strategies adopted by reformers to advocate *khul'* and the resistance and controversy that it faced despite being in the language of Islam. The general resistance in government, media and from Islamists is also examined. The chapter concludes with the implications of the implementation obstacles that hinder women's access to divorce and undermine the theoretical benefits of *khul'*.

The fourth and final chapter discusses women's role and position in society in post revolutionary Egypt as well as the role of the state and the rise of Islamists to power. The increasing violence against women and rejuvenated resistance to *khul'* are also examined to support the argument that legal reform has been limited in achieving social change and advancement of women's rights in Egyptian society. The paper concludes by arguing that the past and present resistance to *khul'* is a product of our patriarchal society and hierarchy between men and women and not religion per se. Finally, no matter how often we change the legal code, the patriarchal order embedded in our society and manifested through the state undermines the purpose of legal reform in changing societal perceptions and empowering women.

A. Recent Aspirations for Equality

Growing up in Egypt in the 1980s and 1990s, I witnessed a lot of gender inequality around me, from sexual harassment and restrictive societal norms to women's complete exclusion from political life. The gendered roles of male and female, husband and wife that our society dictates and the government perpetuates through unequal laws, makes it extremely hard to tell whether certain laws or traditions are a product of our culture or Islam itself. Male domination and female subordination at the family level as well as on the state level are so embedded in the Egyptian culture that they have become the norm. Patriarchy is openly practiced in our daily lives and mostly accepted by women as well as men. Some women firmly believe that men are stronger, more able beings and happily accept this hierarchy that our society has constructed while some simply do not even recognize it because they do not know any other way.

After the fall of the Mubarak regime, many women, including myself, believed in a new, equal Egypt. We witnessed history unfold before our eyes and hoped for positive change. We fantasized about the inclusion of women in all aspects of society, and a new secular, constitution that gave women equal rights that were denied to them for years. The slogans of the revolution: dignity, social justice and freedom were chanted everywhere by men and women regardless of socioeconomic class or religion. Many believed that we would achieve those goals for all Egyptians, women and men, Muslims and Copts alike as soon

as the revolution was over and Mubarak had fallen. However, in the days after the fall of Mubarak, conservatives along with their patriarchal and sexist beliefs replaced women in Tahrir Square. Women were slowly shut out, once again, from the socio-political arena. Violence against women escalated turning hopes of equality into hopes of survival. The first International Woman's Day after the fall of Mubarak, a number of women, and men, went out to protest for gender equality, however, they were quickly outnumbered and attacked by conservatives who claimed that a woman's place was not in Tahrir square but rather in the home where they belong.¹ And that their demands are against Islam. This was a wake up call that quickly reminded us of the reality that the change women fought for alongside men, simply excluded women. It was clear that women needed to fight their own revolution in order to gain some rights. That no matter how often laws are reformed and amended, leaders changed, patriarchy which is too often intertwined and masked by Islamic principles, is what must be overcome, especially now with the current unstable and ever-changing political situation and an overwhelming Islamist majority in power.

It is a fact that family laws in Egypt have witnessed the least progress and the most resistance in the past century.² Although women made some progress in other aspects of society like in education for instance, very little progress has been made in the field of family law reform. For the purpose of this paper, I will focus on divorce law reforms, particularly law no.1/2000 known as *khul'*. The government has maintained two entirely distinct systems of divorce for men and women.³ While men have unilateral power to divorce, women, prior to *khul'*, had to go through the grueling "notoriously backlogged and inefficient courts to divorce their spouses."⁴ Reformists' efforts are too often limited because of conservatives' vehement resistance to personal status law reforms. While they succeeded in reforming divorce laws to finally give women the option of initiating a divorce, feminist reformers did not go as far as breaking down the patriarchal structure

¹ Hadeel AL-Shalchi, *Egyptian Women's Rights Protest Marred By Hecklers*, WASHINGTON POST, Mar. 8, 2011, www.washingtonpost.com/wp-dyn/content/article/2011/03/08/AR2011030803583.html

² Nathalie Bernard-Maugiron, *Promotion of Women's Rights, Personal Status Laws in Egypt*, available online at [http://genderingermandevelopment.net/files/images/gtz-personal-status-law-in-egypt\[1\].pdf](http://genderingermandevelopment.net/files/images/gtz-personal-status-law-in-egypt[1].pdf) (last visited on April 13, 2013), at 3

³ HUMAN RIGHTS WATCH, *Divorced from Justice: Women's Unequal Access to Divorce in Egypt*, 29 (2004), <http://www.hrw.org/reports/2004/11/30/divorced-justice>, last visited on Feb. 23, 2013.

⁴ *Id.*, women must still go through the inefficient court systems for a fault-based divorce

and societal perceptions of women which significantly impede women's access to divorce. *Khul'* did not remedy the hierarchy and gendered roles between husband and wife nor did it limit men's unconditional right to divorce, but rather created an avenue for women to get out of a bad marriage.

B. Methodology

Scope

In order to examine the ways in which resistance was expressed to law no. 1/2000, I have chosen a qualitative research method that aims to analyze the general opposition to *khul'* before its adoption, as well as most recently in the post Mubarak era. Furthermore, the legal and social obstacles mandated by fundamentalists and implemented by the government to restrict the law are also scrutinized in order to test the hypothesis that patriarchy embedded in our society always manages to resurface and manipulate the outcome of reform. For example, adopting implementation hurdles such as mandatory reconciliation to appease Islamists' opposition to the law. These obstacles have ultimately limited the ability of *khul'* to substantially advance women's position in society.

C. Theoretical framework

This thesis offers a descriptive analysis of the resistance towards law no.1/2000 *khul'* and the limitations of the law's transformative ability in achieving social change through a feminist perspective. I argue that reforming the law without addressing patriarchy from which this resistance stems, undermines the theoretical benefits of *khul'* and the effects it could have on enhancing women's position in society. I question the purpose of legal reform if societal perceptions and government impediments only change the legal code but not necessarily the outcome.

The literature on the law as a toll for women's empowerment suggests that the law has a limited ability to provide transformative change because of preconceived societal perceptions. Nividita Menon's arguments regarding these limits is a useful tool for understating the challenges that deter the law from achieving its goals. She argues that discrimination against women over the years has resulted in an "increasingly critical engagement with the legal discourse."⁵ When patriarchal practices and values become too embedded in society the state and the law become the only reliable power to transform society. She discusses the different critiques of feminist theory of the inability of the law to achieve social change. She identifies these intertwined engagements as follows: First, most legal systems deny women equal rights especially in areas of family law; second, even if there is *de jure* equality, the law still discriminates against women because it is interpreted in a patriarchal way; and third, even if the law treats men and women equally, the social, cultural and economic hierarchy still discriminates against women, reinforcing the belief that it is "unjust to treat unequals equally".⁶ Therefore simply giving women the same rights as men is not the answer because that will not change the gender hierarchy between them.

The constant resort to the law does not necessarily result in satisfactory change, but rather as Nandita Haksar notes "is a substitute for the other harder option of building a

⁵ NIVIDETA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW, 4 (2004).

⁶ *Id*

movement for an alternative vision.”⁷ This is particularly apparent in the Egyptian context, specifically with personal status law reform. Reformists’ efforts ended in legal reform but did not go as far as a social reform movement. The constant reliance on the law to give women more rights has not been effective in shifting societal perceptions of women, which have a direct influence on the outcome and implementation of the law.

Too much emphasis is given to law reform. Although legal campaigning is key in spreading and gathering support and other short term remedies, it has proven to not be enough in changing the patriarchal structure ingrained in our society. Nandita Shah and Nandita Gandhi argue that the law is not panacea. They note “no part of the women’s movement is under any illusion that the law is a genuinely transformative instrument . . . continuous engagement with the political, economic, and social basis of gender injustice”⁸ is required to successfully breakdown patriarchy. The new laws in theory progress women’s rights, however they face the same societal, cultural and patriarchal challenges regarding implementation. Many campaigns for reform resulted in legal changes, which often led to further “conservative and partial,”⁹ interpretation of the laws. As Flavia Agnes notes for example, as result of the rising violence against women in India, laws were amended to further protect their rights and include wider basis for harm. However, the harsher penalty resulted in fewer convictions than before.¹⁰ So, achieving more ‘equal’ laws does not necessarily mean equality between men and women but is only a part of a bigger, broader struggle to reach gender equality. Nandita Haksar also notes that regardless of the rules of laws they cannot be separated from the values of society.¹¹ For example, law’s implementation and interpretation are directly influenced by society. This is particularly appropriate for this thesis, as we will see in the following chapters. Even though *khul’* was adopted over a decade ago, the ongoing resistance to it and perceptions of women as being caretakers and subordinate beings have no been significantly altered. Those perceptions are what undermine the purpose of legal change.

⁷ *Id*, at 6

⁸ *Id*

⁹ *Id*

¹⁰ *Id*, at 7

¹¹ *Id*

Much like Menon and Shah and Ghandi, Lama Abu Odeh believes that simply giving women the same rights as men will not do much to attain the desired social change we need. In her article *Egyptian Feminism: Trapped in the Identity Debate*, she looks at personal status law reform from the perspective of Egyptian feminists. She argues that relative equality should be the goal and not necessarily formal equality between men and women; “achieving substantive equality would require improving the daily bargaining position of women vis-a-vis their spouses, rather than simply granting them the same powers and responsibilities as men”¹² This reinforces Menon’s view that it is unjust to treat unequals equally. Giving men and women the same rights will not change the social hierarchy between the two, but rather it is recognizing women’s rights outside of men’s rights that will.

Like Abu Odeh and Menon, Deniz Kandiyoti criticizes traditional methods that rearrange and reinterpret the same patriarchal laws to fit women as being ineffective at breaking down patriarchy. In her article *Gender, Power and Contestation: Rethinking Bargaining with Patriarchy*, she explores other mechanisms of tackling gender equality and social change.¹³ For instance by strengthening “the capacity of disadvantaged groups, including women, to achieve a degree of articulation of their interests and to acquire the means to act in their furtherance.”¹⁴ Like Menon, this idea suggests that women’s rights should be sensitive to their needs and defined outside of men’s existing rights. Egyptian feminist activist’s efforts attempted to bend the existing patriarchal laws that had been in place to include more rights for women. By doing so, they were successful in reforming the legal code but not at breaking down patriarchy.

Another important concept in this paper is resistance to personal status law reform in what Islamists believed to be an effort to preserve Islam. Lama Abu Odeh, Deniz Kandiyoti and Margot Badran agree that for fundamentalists, Muslim family law came to represent the last link with the Islamic state and control over women. Badran notes in

¹² *Id.*, at 190

¹³ Deniz Kandiyoti, *Gender, Power and Contestation: Rethinking Bargaining with Patriarchy*, in FEMINIST VISIONS OF DEVELOPMENT: GENDER, ANALYSIS AND POLICY 135 (1998)

¹⁴ *Id.*, at 142

Feminists, Islam And Nation: Gender Making Of Modern Egypt despite the modernization efforts made in Egypt, Islamists would not give up control over personal status laws along with control over women's rights:

Family law became a last bastion of control over women. The patriarchal family would not relinquish this control, nor would the state exact it. Having removed all other areas of law from the jurisdiction of Islam, the state had left Muslim religious authorities in control of Islamic personal status laws.¹⁵

Patriarchy and Islam were linked to the extent that the Islamic state came to be intertwined with patriarchal beliefs. Kandiyoti notes that the core areas of Islamic civilization “have historically coincided with areas of patriarchy, and encouraged a confusion between the assumed workings of Islam and those of a specific type of patriarchy,”¹⁶ especially in the degree of access to political participation, employment and matters of the family. Confusion between what is truly based on Islamic principles and what is patriarchy is what fundamentalists were able to use to their advantage in order to mobilize the population to support their agendas.

Islamists' resistance to personal status law in general and *khul'* in particular reflects their fear to threatening the status of the longstanding patriarchal structure, which they believe is sanctioned in Islam. Their resistance to reform was presented as protecting Islam, which made the debate on women's rights “impossible to engage with except on their own terms.”¹⁷ Further, Odeh agrees that in the past century, feminist activists struggled with the fact that personal status law reform too often turned into a debate over Islamic law.¹⁸ Conservatives' resistance to family law reform was often backed by verses from the Qur'an or *Hadith* to show that feminist ideals were un-Islamic. Religious conservatives' resistance to *khul'* forced reformers to challenge them on religious grounds and reinterpret verses to prove that their goals were religiously founded. As we will see in the following chapters, this ongoing resistance and attachment to the patriarchal interpretations of Islam have not changed but rather were reinforced by the

¹⁵ MARGOT BADRAN, *FEMINISTS, ISLAM AND NATION: GENDER MAKING OF MODERN EGYPT*, 10 (1995).

¹⁶ *Id*

¹⁷ MENON, *supra* note 5, at 123

¹⁸ Lama Abu Odeh, *Egyptian Feminism: Trapped in the Identity Debate*, 16 *Yale J.L. & Feminism* 145, 172 (2004)

state through implementation obstacles.

In an effort to appease both Islamists who the Egyptian government both relied on and competed against for legitimacy, and the international community, which it depended on for much funding, the government developed what Abu Odeh calls a “centrist compromise.”¹⁹ In her article *Modernizing Muslim Family Law: The case of Egypt*, she offers a comprehensive background on personal status law reform. She notes that in an effort to deal with both the religious conservatives as well as reformists, the Egyptian government adopted a “policy of splitting the difference between the demands of women activists in Egypt pushing for liberal feminist reforms and those of a conservative religious intelligentsia that was antagonistic to these reforms.”²⁰ This centrist compromise was indeed what happened in the case of Egypt and the *khul’* law of 2000. In an effort to conciliate Islamists and secularists, the Egyptian government adopted *khul’* yet injected it with debilitating hurdles in the women’s path to divorce resulting in an unequal divorce process for women. The Supreme Constitutional Court also adopted this strategy to appease both Islamists and feminist activists after the year 1980 and the amendment of the constitution.²¹ However, Odeh does not explore the question of what if the government and the Islamists who oppose reform are one entity and what that could mean for women’s rights, which this paper aims to examine in chapter four.

Another concept central to this paper is that more focus should be directed towards the effective implementation of the laws and not just law in the books. Nathalie Bernaud-Maugiron and Dupret, in *Breaking Up The Family*, ask how the law can be a vehicle for social change when there are insurmountable hurdles imposed on women seeking a divorce. They argue that there is a conflict between efforts pursued by the legislature through the “adoption of a law and the practical effects of the text. This is the case with

¹⁹ Lama Abu Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 Vand. J. Transnat’l L. 1045 (2004).

²⁰ *Id*

²¹ See the ROLE OF THE SUPREME CONSTITUTIONAL COURT IN PERSONAL STATUS LAW REFORM in chapter II of this paper.

legal reforms related to divorce, which clash with social and economic obstacles.”²² In addition to Maugiron and Dupret, Mulki Al-Sharmani in *Egyptian Family Courts: A Pathway of Women's Empowerment?* agrees that effective implementation of the new laws is compromised by a number of inadequacies, which consequently impede women’s access to justice.²³ Implementation difficulties along with mandatory reconciliation, forgoing all financial rights are examples of these inadequacies in the legal system that consequently take away from *khul*’s theoretical benefits.

The above literature can help shed light on some of the issues discussed in this paper particularly the historical development of Egyptian family law. However, the literature on the law’s ability to change societal perceptions in the Egyptian context, specifically related to the *khul*’ law and the ongoing resistance to it, is limited. The renewed scrutiny post-revolution, epitomizes the underlying patriarchy from which this resistance stems, undermining the purpose of legal reform in advancing women’s position.

²² Nathalie Bernard-Maugiron & Baudouin Dupret, *Breaking Up the Family: Divorce in Egyptian Law and Practice*, 2 (2008).

²³ Mulki Al-Sharmani, *Egyptian Family Courts: A Pathway of Women's Empowerment?* Hawwa Volume 7, Issue 2, 89 (2009).

II. DEVELOPMENT OF PERSONAL STATUS LAWS IN EGYPT²⁴

During the second half of the nineteenth century, in an effort to modernize, Egypt disposed of rules of Islamic law that had been in place.²⁵ Egypt started borrowing European law, specifically the French code in all aspects except those related to family law.²⁶ Family law, which deals with inheritance, marriage, divorce and custody for Muslims, remains based on interpretations of *shari'a*.²⁷ For conservatives who (and still are) opposed to Europeanization and secularization, keeping family law, particularly the control over women, under strict *shari'a* interpretations “came to symbolize the last bastion of a dismantled Islamic legal system, the reform of which threatened to flood Egypt with the European and the secular. Thus, attachment to medieval patriarchy came to mean attachment to the Islamic.”²⁸ This has resulted in confusion between what are truly Islamic values and unfounded patriarchal beliefs.

These laws have seen the least progression and most resistance in Egyptian history.²⁹ History has proven that these laws are incredibly difficult to amend because of the resistance of conservatives as well as societal perceptions of women.³⁰ In spite of the progression made by women in other areas like education, for instance, family law has remained “relatively unchanged and continues to undermine women’s full personhood in society.”³¹ Personal Status Laws often leave a lot of room for interpretation therefore they are viewed through the spectrum of predominantly males with patriarchal mindsets.³² In the event that there is not a clear definition or ruling on a specific matter, judges refer back to the most conservative of all interpretations, the Hanafi School.³³

²⁴ I use the terms Personal Status laws and family law interchangeably throughout this paper.

²⁵ Abu Odeh, *supra* note 19, at 1046

²⁶ *Id*

²⁷ *Id*

²⁸ *Id*

²⁹ *Id*, see also BADRAN *supra* note 15

³⁰ Maugiron, *supra* note 2, at 6

³¹ HUMAN RIGHTS WATCH, *supra* note 3, at 10

³² Bernard-Maugiron & Dupret, *From Jihan to Susanne. Twenty Years of Personal Status Law in Egypt*, 19 *Recht van de Islam* 1 (2001) at 2.

³³ Oussama Arabi, *The Dawning of the Third Millennium on Shari'a: Egypt's Law no. 1 of 2000, Women*

As a result of the resistance to Personal Status Law reform, lawmakers avoided it since the subject generally stirred up a lot of controversy between conservatives who see “women as the bearers and perpetuators of cultural values and social mores,”³⁴ on one hand and feminists and secularists on the other. To this day, women’s public affairs are handled by the state and their private affairs are controlled by *Shari’a*, which as we will see later makes it harder to bargain with for more rights.

A. DEVELOPMENT OF DIVORCE LAWS IN EGYPT

The slow development of divorce laws beginning in 1920 and ending in 2000 reflects the challenges that personal status law reform faced, and the controversy it generated, making it difficult to amend.

1. Laws no. 25/1920 and no.25/1929: *Extending grounds for harm*

Prior to 1920, the Hanafi family law, which had been in place since 1897, only allowed divorce on the basis of the inability of the husband to consummate the marriage and his apostasy from Islam.³⁵ In the beginning of the twentieth century, laws No. 25 of 1920 and No. 25 of 1929 widened the definition of harm based on the Maliki School of interpretation, increasing the chances of a woman being granted judicial divorce.³⁶

Depending on the suing woman’s ability to convince the judge,³⁷ she can be granted a divorce on the basis that she suffered harm from one or more of the following: systematic

May Divorce at Will, Arab Law Quarterly, Vol. 16, No. 1, 7 (2001); for more on the Hanafi code “also called Qadri Pasha Code by the name of the then Minister of Justice, codified *shari’a* rules regarding family law on the basis of the Hanafi doctrine. The code, made of more than 600 provisions, was never promulgated and never acquired binding legal force. However, it resulted in a concise and accessible account of the Hanafi doctrine and became a standard manual for the judges of the *shari’a* courts, who did not have to look for legal provisions in multiple medieval treatises and commentaries, hard to access, anymore. It advocated a particularly patriarchal structure for the family.”

³⁴ HUMAN RIGHTS WATCH, *supra* note 3, at 10

³⁵ Arabi, *supra* note 33, at 2

³⁶ DAWOUD SUDQI EL ALAMI & DOREEN HINCHCLIFFE, ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD 56 (1996) *see also* Laws no. 25/1920 and 25/1929, State Information Services website, available at <http://www.sis.gov.eg/ar/Story.aspx?sid=66171> accessed on May 5th, 2013

³⁷ Arabi, *supra* note 33, at 2, notes that the woman’s ability to persuade the Judge is crucial for the outcome of a divorce case. *See also* Maugiron, *supra* note 22, at 56; for the importance of women’s persuasion abilities in a divorce case.

maltreatment; non-provision of maintenance; prolonged absence or imprisonment; and an incurable disease.³⁸

Although laws no. 25/1920 and 25/1929 widened the definition of harm, it was still the woman's responsibility to provide witnesses and prove to the judge that she indeed endured the said harm. The fate of a divorce case was up to the judge's discretion as well as the women's persuasion abilities,³⁹ and even then, there were no guarantees that the judge would rule in her favor.⁴⁰

Finding witnesses was a huge obstacle since much of the abuse takes place in the couple's home where there are no witnesses.⁴¹ This was especially burdensome in cases of physical abuse, where women would have to "provide the court with a medical certificate from a government hospital outlining her condition and two witnesses (preferably not related to her) who saw the abuse occur."⁴² In addition, "a woman's testimony is worth half that of a man."⁴³ Therefore, a battered woman would need testimonies from either two men, four women, or one man and two women.⁴⁴

2. Law no. 44/1979: Polygamy

Half a century later, President Anwar Al Sadat issued, by presidential decree, decree-law No.44 of 1979.⁴⁵ This law was revolutionary, as it gave women a lot of rights compared to the 1920 and 1929 laws, which were still in place at the time.⁴⁶ For the first time in Egyptian history, polygamy was considered sufficient evidence of harm without the requirement of actually proving harm. The act of the husband taking on a second wife,

³⁸ EL ALAMI & HINCHCLIFFE *supra* note 36, at 58 *see also* Arabi, *supra* note 29, at 2

³⁹ HUMAN RIGHTS WATCH, *supra* note 3, at 22

⁴⁰ Judges often based harm on a woman's social status and upbringing because there was not set definition of harm making the outcome of divorce case unpredictable. *See* Maugiron, *supra* note 22, at 56

⁴¹ *Id*

⁴² HUMAN RIGHTS WATCH, *supra* note 3, at 22

⁴³ Egyptian jurisprudence applies the witness testimony rules of the Hanafi school, which requires the testimony of two male witnesses or two females and one male witness. HUMAN RIGHTS WATCH, *supra* note 3, at 22 *See also* Amina Chemais, *Obstacles to Divorce for Muslim Women in Egypt, Women Living Under Muslim Laws Special Dossier 1*, 3 (1996).

⁴⁴ HUMAN RIGHTS WATCH, *supra* note 3, at 22

⁴⁵ Also referred to by "jihan's law" president Sadat's wife's efforts and support to the law.

⁴⁶ Maugiron, *supra* note 22, at 56

alone, was enough for the woman to be granted a divorce, as long as she filed within one year of her knowledge.⁴⁷ This also meant that husbands had to inform their wives of their second marriage, which was not required before. This was liberating for women who could not otherwise get a divorce, were forced into living with multiple wives and had to go through the grueling court procedures of proving harm. Women were also given the right to the marital home as long as they had physical custody of their children.⁴⁸ Again, this was revolutionary since women are not generally entitled to marital assets (i.e marital home, land, car etc.) after divorce and the non-waged contribution made by the wives are not taken into consideration. This of course, compared to the restrictive previous laws, was emancipating for many women.

In order to bypass religious conservatives and members of parliament, Sadat decreed the law No. 44 of 1979 while Parliament was on recess.⁴⁹ Consequently, this law was vehemently rejected. Women's newfound powers were not taken lightly amongst conservatives who perceived the law "as constituting an indirect restriction to polygamy which, since it is legally and religiously legitimate, should not be considered as harm for the first wife."⁵⁰ Moreover, many judges refused to implement the new law or take it into consideration when ruling a divorce case because they did not agree with it.⁵¹

Mervat Hatem argues that Islamists were successful at mobilizing people against the law and they "tapped the latent male opposition to their diminishing monopoly of power by presenting the new laws as denying them the right to take more than one wife."⁵² They also accused Jihan Sadat along with the feminists supporting the law of being too westernized,⁵³ and "different from the average devout Muslim woman who recognized the religious wisdom behind the gender asymmetry between men and women in the family and sanctioned by the Qur'an."⁵⁴ Furthermore, they claimed that polygamy is

⁴⁷ EL ALAMI & HINCHCLIFFE *supra* note 36, at 51

⁴⁸ Maugiron, *supra* note 32, at 4

⁴⁹ *Id*

⁵⁰ Maugiron, *supra* note 22, at 56

⁵¹ *Id*

⁵² Mervat Hatem, *Economic and Political Liberation in Egypt and the Demise of State Feminism*, 24 *International Journal of Middle East Studies*, 242 (1992).

⁵³ Lynn Welchman, *Bahrain, Qatar, UAE: First time Family Law Codifications in Three Gulf States*, IN *INTERNATIONAL SURVEY OF FAMILY LAW BRISTOL*, 8(Atkin, Bill, Jordan, 2010).

⁵⁴ Hatem, *supra* note 52, at 243

protected by *shari'a* and to restrict it would be “in violation of the *shari'a* and thus represented the views of atheists who were engaged in subverting Islamic rules.”⁵⁵ In 1985 the Supreme Constitutional Court struck down the law on procedural grounds.⁵⁶

3. Law no. 100/1985: *A step in the wrong direction*

Later that year, amendments were made to the annulled 1979 law. A more patriarchy-friendly version was adopted to appease judges and conservatives. Law No. 100/1985 was passed, but lacked many of the progressive characteristics of its predecessor. Law no. 100/1985 now mentioned polygamy as potential basis of harm.⁵⁷ However, it is still the woman’s responsibility to prove harm to the judge as well as provide witnesses to attest that she indeed received harm directly related to the polygamy. To make it clear that the government has no intention of limiting the husband’s absolute right to polygamy, the explanatory note clarified that “the 1985 law does not aim to restrict the husbands right to polygamy, but to offer a remedy to the first wife who would be damaged by her husband’s remarriage.”⁵⁸

As stated before, finding witnesses was especially difficult for women because the abuse usually happens within the couple’s home when there are no witnesses.⁵⁹ Judges also required considerable amounts of evidence for harm and since there is no set definition of what qualifies as substantial harm, “judges often grant divorces in a discriminatory fashion based on various subjective interpretations of harm, including linking a woman’s socio-economic background with her ability to tolerate and endure violence.”⁶⁰

Therefore, a woman from an upper social class may be granted a divorce for minimal physical abuse but the divorce may not be granted to a woman from a lower social class based on the same amount of harm.

⁵⁵ *Id*

⁵⁶ Supreme Constitutional Court Ruling, Case no. 28, of May 4, 1985, available at <http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=342&searchWords=>

⁵⁷ EL ALAMI & HINCHCLIFFE *supra* note 36, at 52

⁵⁸ *Id*, at 217

⁵⁹ *Id*

⁶⁰ HUMAN RIGHTS WATCH, *supra* note 3, at 29

In addition, a woman's right to the couple's home while having custody was changed to husbands providing housing expenses.⁶¹ Again, giving absolute power to the judge to decide how much money to be given. In reality, men often got away without paying adequate housing expenses and court-ordered collectors were often easily bribed.⁶²

Bailiffs assigned to notify a husband of a court session or an alimony ruling often take bribes in return for neglecting these duties. In return for a bribe, a bailiff will inform the court that he could not locate the person. It is easy for a husband to run away and it is easy for a husband to pay bribes. The government does not prioritize the implementation of court rulings.⁶³

The situation of women seeking a divorce prior to 2000 was arduous in comparison to men's unconditional right to divorce. In addition to the long amount of time cases took, decisions left up to the whims of judges and inadequate implementation of court rulings, women had no guarantee that a divorce case would be ruled in their favor.

B. KHUL'

1. Khul' in Islam

Islam has allowed divorce on several grounds if life between spouses became unbearable and reconciliation impossible.⁶⁴ The Prophet denounced divorce however, when it is not necessary, saying, "Of all the things that Islam has permitted, divorce is the most hated by Allah."⁶⁵ Although divorce is most commonly initiated by men, there always existed *khul'* in early Islamic law. *Khul'* is a way by which a wife can initiate a divorce without having to prove harm and without the husband's consent provided, she return the dower given to her.⁶⁶

There are precedents of *khul'* as a way for women to exit a bad marriage in exchange for financial compensation and all four classical schools of *shari'a* interpretation agree that a wife has the right to *khul'*. As the Egyptian historian Abdal-Rahman Abdal-Rehim,

⁶¹ EL ALAMI & HINCHCLIFFE *supra* note 36, at 52

⁶² HUMAN RIGHTS WATCH, *supra* note 3, at 33

⁶³ *Id*

⁶⁴ ABDUR RAHMAN I. DOI, SHARI'AH: THE ISLAMIC LAW 168 (1984).

⁶⁵ ABDUR RAHMAN I. DOI, WOMAN IN SHARI'AH (ISLAMIC LAW) 84 (1989).

⁶⁶ *Id*, See also Arabi, *supra* note 33

reviewed cases of *khul'* during the Ottoman Empire, women were allowed to divorce in exchange for their financial compensation to the men;

A large portion of the cases that wives brought before the judge, involved husbands who were unwilling to divorce and who had not broken any of the conditions in the marriage contract. ... In such cases the wife demanded *khul'* (repudiation) by which the judge allowed for legal separation, but on condition that the wife forfeit any alimony. ... Frequently, the wife was also required to pay back all or part of the dowry paid to her by her husband at the time of marriage.⁶⁷

Once the divorce is final, a husband may not return to the woman without her consent or appeal the decision. According to the Maliki school of interpretation, which is the one closest to the *khul'* law that Egypt adopted in 2000, *Habība*, the wife of *Thabit Bin Qais* came to the Prophet (p.b.u.h) saying:

"I see no fault with Thabit's conduct or his religious demeanor, but I hate to disobey (the rules of) Islam". The Prophet (p.b.u.h.) said: "Would you give him back his garden?" She said: "Yes". Then the Prophet said (to Thabit): "Accept (iqbal) the garden and divorce her (talliqa) a single divorce". [In another wording:] Then the Prophet ordered him ('amarahu) and he separated from her.⁶⁸

There are three versions of the *Habība* story according to the Maliki School.⁶⁹ The first two define *khul'* as a transaction whereby a woman initiates the divorce and returns the dower to the husband in exchange for her freedom. In the third version of the *Habība* story, emphasis is given to the husband's response and the importance of the husband's consent in granting the wife a divorce.⁷⁰ It states,

The precedent (al-sunna) in separation (*khul'*) is that anyone who divorces for a compensation without stipulating or indicating the nature of the divorce, then it is a separation (*khul'*); and separation (*al-khul'*) is a single definitive divorce with no possibility of retrieval. ... The Prophet invited Thabit b. Qays to be present, and he told him about Habiba and about her positive response to the Prophet's asking her whether she would be willing to give him back his garden. Thabit said: "This is to my liking; Yes (na'am)". The Prophet (p .b.u.h.) said: "Then she gives it back," ... and he told Thabit: "It is just one statement (hiya wahida)."⁷¹

⁶⁷ Abdal-Rahman Abdal-Rehim, *The Family and Gender Laws in Egypt during the Ottoman Period*, in *WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY*, ed. Amira El-Azhary Sonbol, 105 (Syracuse University Press, 1996). See also Arabi, *supra* note 29, at 3 quoting Abdal-Rehim.

⁶⁸ *Abu Abdallah Al-Bukhari, Al-Jami' al-Sahih*, 9 Vols (Cairo: People's Edition, n.d.), 6: 162-163. Quoted from Arabi, *supra* note 33, at 16, see also DOI *supra* note 64, at 298 for a narrative *Sahih al Bukhari hadith (bab al khul wa kayfiyyat al talaq fih)*

⁶⁹ DOI, *supra* note 64, at 298

⁷⁰ *Id*

⁷¹ Arabi, *supra* note 33, at 9, Quoting Sahnun b. Sa'id, *Al-Mudawwana al-Kubra li'l Imam Malik b. Anas*, 231 (4 Vols Cairo: Kayriyya Press, 1325 AH, Vol. 2)

The four Sunni schools of law have differences of opinion regarding the sum to be paid by a wife to her husband in exchange for divorce, depending on the version of the *Habība* Hadith that the jurists approve. In the Maliki School of interpretation, the sum of money to be paid to the husband is negotiated between the couple, but the wife cannot be coerced into it.⁷² Nevertheless, they all agree that a husband is entitled to compensation and the requirement of the husband's consent. Although many have agreed that the Prophet ordered *Thabit*, imperatively, to take the garden, all four schools do not recognize *khul'* without the husband's consent.⁷³ While the Maliki school is the one closest to the *khul'* law adopted by Egyptian legislatures, it departs from the Maliki interpretation on the issue of the husband's consent.

2. *Khul'* in Egyptian law: Law no.1/2000

Although *khul'* as a way in which a woman can initiate a divorce without the need for harm existed in pre-modern Egyptian history, the *Habība* story being a prime example, it was not until the year 2000 that the Egyptian legislature amended the personal status code,⁷⁴ to include Law No. 1 of the Year 2000: Regarding the Promulgation of a Law to Organize Certain Conditions and Procedures of Litigation in Matters of Personal Status. Despite the fact that law no. 1/2000 included many provisions, it quickly became known as the *Khul'* law, based on article 20, which stipulates:

A married couple may mutually agree to *khul'*...However, if they do not agree and the wife sues demanding it, and separates herself from her husband by giving up all her financial legal rights, and restores to him the *sadaq* he gave to her, then the court is to divorce her from him. The court shall not rule for divorce through *khul'* except after trying to reach reconciliation between the spouses, and after trying to reach reconciliation between the spouses, and after delegating two arbiters to continue reconciliation endeavors between them, within a period of not exceeding three months and also after the wife explicitly declares that she hates living with her husband, that there is no way for continuing marital life between them, and that she fears to commit a violation of the restrictions that God has placed of that hatred. The separation effected by *khul'* is under all circumstances an irrevocable divorce. The court's decision is under all circumstances not subject to appeal, in any of the forms of appeal.⁷⁵

⁷² DOI, *supra* note 65 *see also Revoking Financial Rights* in chapter three of this paper.

⁷³ Arabi, *supra* note 33, at 12

⁷⁴ "Though formally a procedural law, it included however some substantive provisions like an article providing for *khul'* divorce and one allowing wives married 'urfi to get a judicial dissolution of their marriage. These 2 provisions were hidden in this procedural law to be adopted more easily and to avoid the passionate debates a proper substantive law would have generated in the parliament and in society."

See Bernard-Maugiron supra note 2, at 4.

⁷⁵ Law No. 1 of the Year 2000: Regarding the Promulgation of a Law to Organize Certain Conditions and Procedures of Litigation in Matters of Personal Status, Available on State Information Services website at

Even though each of the four schools of *Shari'a* interpretation have made it clear that consent is crucial, Egyptian legislatures were able to omit the need of consent in the new law. After amending article two of the 1971 Egyptian constitution in 1980, *Shari'a* became *the* main source of legislation rather than *a* source of legislation.⁷⁶ By using *takhayyur*⁷⁷ and *talfiq*,⁷⁸ Egyptian legislatures were able to use a wider, more moderate interpretation of the Maliki school.⁷⁹ Furthermore, in 1993 the Supreme Constitutional Court differentiated between the absolute rules of *shari'a*, which are not open to interpretation, and the relative rules *shari'a*, which leave more leeway for *ijtihad*.⁸⁰ That said, because the *Habiba hadith* did not explicitly mention the husband's consent, and because the Qur'an and *Hadith* are absolute principles of *shari'a*, Egyptian jurists were able to use *ijtihad*. to justify their deviation from the four schools of interpretation.⁸¹

Khul' was introduced by the group of feminist activists known as the 'Group of Seven',⁸² who strategically used a religious discourse to argue that *khul'* is indeed a woman's right in an attempt to avoid opposition.⁸³ Even after *Al-Azhar* affirmed that *khul'* is in conformity with *shari'a*, the law was still the subject of much controversy. As a result of pressure from opponents, the government made concessions and included a mandatory three-month reconciliation period.⁸⁴ This was seen as the government's way to appease Islamists who feared that women are irrational and hasty in resorting to *khul'*.⁸⁵ If the

<http://www.egypt.gov.eg/arabic/laws/download.pdf> (accessed on May 30, 2013) Transl. in Arabi, *supra* note 29, at 6

⁷⁶ Supreme Constitutional Court Ruling, Case no. 28 of May 4, 1985 available at <http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=330&searchWords=> trans. in Arabi, *supra* note 33, at 6, *see also* Text of the current Egyptian constitution as well as older constitutions can be found on the Supreme Constitutional Court's website. Available at <http://www.hccourt.gov.eg/Constitutions/Constitution71.asp>

⁷⁷ Choosing one opinion over another from the different schools

⁷⁸ Combining interpretations of the different schools creating a hybrid that does not belong to a specific school, *see* Arabi, *supra* note 33, at 19

⁷⁹ *Id*

⁸⁰ Supreme Constitutional Court Ruling, case no.7 of 15 May 1993 available at <http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=520&searchWords=>

⁸¹ Arabi, *supra* note 33, at 21

⁸² NADIA SONNEVELED, KHUL' DIVORCE IN EGYPT: PUBLIC DEBATED, JUDICIAL PRACTICES, AND EVERYDAY LIFE, 37 (2012), *see also* Arabi, *supra* note 29

⁸³ Strategies adopted by reformers will be discussed in detail in chapter three of this paper.

⁸⁴ Al Sharmani, *supra* note 23, at 18

⁸⁵ HUMAN RIGHTS WATCH *supra* note 3, at 28, *see also* Tadros *supra* note 170

couple has children, an additional three-month reconciliation period with a thirty-day waiting period in between attempts was adopted to the law.⁸⁶ After the reconciliation attempt(s), a woman must make the declaration that “she detests life with him, that continuation of married life between them became impossible, and that she fears she will not maintain the ‘limits of God’ due to this detestation”⁸⁷ is sufficient for the judge to grant the divorce. Although still unequal relative to men’s absolute right to divorce, *khul’* threatened the patriarchal structure and gender hierarchy embedded in our society by giving women the freedom to exit an unwanted marriage without the consent of the husband or the judge. In 2002, *khul’* received increased legitimacy when the Supreme Constitutional Court confirmed that *khul’* is constitutional and is in conformity with *Shari’a*.⁸⁸

In theory, *khul’* is much quicker than a traditional fault-based divorce of law no. 100/1985, which can take years to be resolved. In reality, this timeframe was often prolonged because of implementation difficulties, mandatory reconciliation and disputes over paid dowry.⁸⁹ These challenges will be discussed in more detail in the next chapter.

C. THE ROLE OF THE SUPREME CONSTITUTIONAL COURT AND FAMILY LAW REFORM

In charge of determining the constitutionality of laws and interpreting the existing legislative texts, the Supreme Constitutional Court has the power to pass or annul any law that it is not in conformity with the Egyptian Constitution. The Court was established in 1979 after the 1971 Constitution called for its creation to ensure compliance with constitutional rights.⁹⁰ The Supreme Constitutional Court of Egypt played an important role in Personal Status Law reform in Egypt in “determining the nature of public life in

⁸⁶ *Id.*

⁸⁷ Maugiron, *supra* note 22, at 58

⁸⁸ Supreme Constitutional Court ruling, case 201 of December 15th, 2002 available at <http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=124&searchWords=>

⁸⁹ HUMAN RIGHTS WATCH, *supra* note 3, at 50

⁹⁰ Articles 174-178 of the 1971 constitution available on the Supreme Constitutional Court website, <http://www.hccourt.gov.eg/About/chairmanword.asp> (last visited May 30th, 2013)

Egypt as a modern state formally governed by principles of Islamic *Shari'a* laws."⁹¹

Many laws of personal status risk being struck down by the Egyptian Constitutional Court for not being in conformity with *shari'a*, specifically against article two of the constitution.⁹² Lama Abu Odeh notes that the significant majority of Supreme Constitutional Court cases under article 2 are of personal status law. This demonstrates how often opponents of personal status law reform invoked *shari'a* in hopes to curb reform. The amendment of Article 2 of the constitution in 1980 marked a new look at interpreting laws. The Supreme Constitutional Court in its ruling of May 4th, 1985 explained:

[T]he aim of the new formulation of Article 2 of the Constitution is to force the legislator to have recourse to the commands of Shari'a, to the exclusion of any other source, in order to discover what he is searching for; then, if he does not find there an explicit ruling, he is to employ the Shari'a resources of interpretive effort (al-ijtihadiyya) in order to arrive at the proper rules to follow and which do not transgress the foundations and general principles of Shari'a.⁹³

The new amendment inspired conservatives to “argue that certain legislative reforms in family law were un-Islamic, or contrary to the *Shari'a*.”⁹⁴ Therefore, The Supreme Constitutional Court received many claims on the bases of article 2, however, avoided them by either annulling laws based on procedural grounds or by invoking the non-retroactivity rule which exempts all laws prior to 1980 from challenges under article 2.⁹⁵ The Supreme Constitutional Court tended to not get involved in interpreting *shari'a*, and has instead “followed a strict technical principle,”⁹⁶ on challenges of un-constitutionality. For instance, after president Sadat decreed law no. 44/1979, which was challenged for being against *shari'a* for restricting polygamy, the Supreme Constitutional Court struck down the law in its ruling on May 4th, 1985 based on procedural grounds and not on

⁹¹ Ran Hirschi, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CAN. J.L. & JURIS. 191,197 (2002).

⁹² Odeh, *supra* note 19, 1137 “It is interesting that non-religious laws are rarely brought to the attention of the Court for non-conformity with Article 2.

⁹³ Supreme Constitutional Court Ruling, Case no. 28 of May 4, 1985

<http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=330&searchWords=> trans. in Arabi *supra* note 33, at 6

⁹⁴ Odeh, *supra* note 19, at 1050

⁹⁵ Marie-Claire Foblets & Baudouin Dupret, *Contrasted Identity Claims Before Egyptian and Belgian Courts*, in LEGAL PLURALISM IN THE ARAB WORLD 63 (Baudouin Dupret et. al. eds., 1999), see also Odeh *supra* note 19, at 1137

⁹⁶ Foblets & Dupret, *supra* note 95, at 63

article 2.⁹⁷ The Supreme Constitutional Court claimed that there was no real emergency for the president to decree the law while Parliament was on recess or a need to amend the previous laws of 25/1920 and 25/1929.⁹⁸ Therefore, law no. 44/1979 was considered unconstitutional.⁹⁹ The annulment of law no. 44/1979 was seen as a huge setback for feminist activists and a victory for Islamists.¹⁰⁰

It was not until the year 1993, after avoiding article 2 twelve consecutive times,¹⁰¹ that the Supreme Constitutional Court differentiated between absolute and relative principles of *shari'a*. The former is not open to interpretation, whereas the latter may change based on societal need and *ijtihad*..

This signifies that no legislative text may contradict those formal rules of Shari'a whose origin and meaning are definitive (qat'iyyat al-thubit wa'l dalala): these rules and their delimitation cannot be the object of interpretive effort (ijtihad). ... It is inconceivable, therefore, that the content thereof be modified according to changes in time and place. The authority of the High Constitutional Court in this regard is limited to safe guarding their implementation and their overruling any other legal rule that contradicts them.¹⁰²

The Supreme Constitutional Court was subsequently faced with a number of important cases being challenged under article 2. For example, on August 14th, 1994, article 11 of law no. 25/1929 (as amended by law no. 100/1985) was challenged under article 2.¹⁰³ This article gives the judge the power to grant a divorce to a suing wife that has demonstrated harm, *darar*, as a result of her husband taking on a second wife.¹⁰⁴ The plaintiff argued that he alone has the right to divorce his wife, claiming that it is in

⁹⁷ Supreme Constitutional Court Ruling, Case no. 28, of May 4, 1985, available at <http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=342&searchWords=>

⁹⁸ *Id*

⁹⁹ *Id*

¹⁰⁰ Maugiron, *supra* note 32, at 5

¹⁰¹ Odeh, *supra* note 19, at 1137

¹⁰² Supreme Constitutional Court Ruling, Case no.7, of May 15, 1993. Available at <http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=520&searchWords=> See also trans. in Arabi, *supra* note 33, at 10

¹⁰³ Article 11 of law no. 25/1929 amended by 100/1985 stipulates "[a] wife whose husband takes a second wife may petition for divorce from him if she is affected by some material or moral harm of a kind which would make it impossible for a couple such as them to continue living together, even if she has not stipulated in the contract that he should not take further wives..." See EL ALAMI & HINCHCLIFFE *supra* note 36, at 58

¹⁰⁴ Supreme Constitutional Court Ruling, case no. 35 of 14 August 1994. Available at <http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=600&searchWords=>

violation of *shari'a* as it restricts his right to polygamy. In its ruling, the court acknowledged men's unconditional right to polygamy, however, it did not see a woman's right to file for divorce as a threat to men's right to polygamy.¹⁰⁵ The court further declared that giving the judge ultimate power in deciding a divorce case, and not leaving it up to the discretion of the wife herself, ensures that women's claims of harm are founded and "real not illusory, actual not imagined, demonstrable not assumed, independent of the incident of the later marriage although occasioned by it."¹⁰⁶ Therefore, the court declared that article 11 of law no. 25/1929 (amended by law 100/1985) was not unconstitutional.

Furthermore, in 1996, the Supreme Constitutional Court was faced with the issue of Islamic dress. A Ministerial decree made by the Minister of Education prohibiting girls from wearing the headscarf (*hijab* or *niqab*) in schools, was being challenged under article 2.¹⁰⁷ The edict stirred much controversy and resistance from Islamist groups, leading the Minister to reduce the tone of it to allow girls who had permission from their parents to wear it.¹⁰⁸ The Supreme Constitutional Court's ruling on May 18, 1996 declared that since edict no. 113 of 1994 which requires all girls to wear a uniform in public schools does not require girls to wear the *hijab*, and after examining relevant verses of the Qur'an that discuss women's dress, it concluded that although covering up certain parts of the body is understood, the Qur'an does not explicitly require women to cover up the hair or face.¹⁰⁹ In addition, they concluded that according to Prophetic precedence (*sunna*), the Prophet did not force women to cover their hair.¹¹⁰ Therefore, the Court declared that it is a matter more to do with modesty than religious requirement, and

¹⁰⁵ Odeh *supra* note 19, at 1143

¹⁰⁶ *Id*

¹⁰⁷ Supreme Constitutional Court Ruling, case no. 8 of 18 May 1996. Available at <http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=1280&searchWords=>

¹⁰⁸ Odeh, *supra* note 19, at 1141

¹⁰⁹ *Id*

¹¹⁰ *Id*, see also Clark Benner Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 37 COLUM. J. TRANSNAT'L L. 81, 109 (1998) discussing the hijab not being a requirement

the Ministerial decree no. 208 of 1994 was declared constitutional as it did not violate the principle of modesty.¹¹¹

On May 3rd, 1997, the Supreme Constitutional Court ruled on the question of maintenance due to a wife who continued to work despite her husband wanting her to stay at home.¹¹² The plaintiff challenged the constitutionality of article 1 of law no. 25/1920, amended by law no.100/1985, regarding a wife's obedience to her husband.¹¹³ While the court agreed that a women's maintenance is dependent on her obedience, it acknowledged that once he has given her permission to do so either implicitly or explicitly it could not be revoked unless it is against the interest of the family or the wife abuses this power.¹¹⁴ Therefore, the court declared that article 1 of law no. 25/1920, amended by law no.100/1985 was indeed constitutional.¹¹⁵

In 1997 the Supreme Constitutional Court was presented with a case challenging the constitutionality of article 11 of law no. 25/1929 (amended by law no. 100/1985), which gives the judge the power to grant a woman a divorce if the reconciliation is unsuccessful or impossible.¹¹⁶ A wife refused to return to the marital home and asked the judge to grant her a divorce. The husband claimed that article 11 was unconstitutional, because only he has the power to divorce his wife. On July 7th 1997, the court ruled that indeed the divorce is an absolute right to the man. However, it reaffirmed that in the event of discord between spouses, the Qur'an states¹¹⁷ that two arbiters from each of the spouse's families must try to reconcile the couple who can then recommend divorce and it did not

¹¹¹ *Id*, see also Supreme Constitutional Court Ruling, Case no. 8 of May 18th, 1996. Available at <http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=1280&searchWords=>

¹¹² Supreme Constitutional Court Ruling, Case no.18, May 3rd, 1997. Available at <http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=2728&searchWords=>

¹¹³ EL ALAMI & HINCHCLIFFE *supra* note 36, at 52

¹¹⁴ *Id*

¹¹⁵ Maugiron, *supra* note 32, at 7

¹¹⁶ Supreme Constitutional Court Ruling, case no. 82 of July 5th, 1997

<http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=1238&searchWords=> see also EL ALAMI & HINCHCLIFFE *supra* note 36, at 58 "If the court is unable to bring about agreement between the spouses and it becomes obvious to the court that they cannot live together, and if the wife insists upon divorce, the court shall rule for their irrevocable divorce with the forfeit of all or part of the wife's financial rights and her obligation to pay appropriate compensation if this seems appropriate."

¹¹⁷ Referencing *surat al nisa*, chapter titled Women in the Qur'an.

prohibit judges from granting the divorce.¹¹⁸ Although the Qur'an does not state what happens if the reconciliation attempt fails, by exercising *ijtihad*, the court declared that the arbiters can recommend divorce to the judge and he may make the ultimate decision, which is in conformity with *shari'a*.¹¹⁹ Therefore, article 11 of law. no 25/1929 amended by law no. 100/1985 is not unconstitutional.

Further, the *Khul'* law of 2000 passed a significant hurdle when it was brought to the Supreme Constitutional Court and challenged under article 2 of the Egyptian constitution.¹²⁰ The plaintiff challenged the constitutionality of article 20 of law number 1/2000 claiming that it is against *shari'a* because he did not consent to the *khul'*. In the Supreme Constitutional Court ruling of December 15, 2002, it affirmed that the *khul'* law was indeed in conformity with *shari'a*.¹²¹ For reformers, the Supreme Constitutional Court's decision was the ultimate test of the controversy surrounding the *khul'* law and the future of it. The passing of the *khul'* and the support of the Supreme Constitutional Court was a huge victory for feminist reformers and human rights advocates.

The Supreme Constitutional Court position on personal status law reform has been fundamental in family law reform and the advancement of women's rights. It was clear, in the beginning, that it avoided ruling under article 2 and getting involved in interpreting *shari'a*.¹²² The Court employed its power to exercise *ijtihad* to interpret certain laws that benefit women, without moving away from *shari'a*. As Lama Abu Odeh argues "these particular cases, in their aggregate, delimit the Court's ideological position on the social matters at hand. Each case, like the majority of such cases, presents the Court with the question of what to do about the "battle of the sexes" and the fate of patriarchy in Egypt."¹²³ The Supreme Constitutional Court's ruling of 2002 on *khul'* law marked an important eraits support of reform. Although it did not attempt to limit men's unilateral right to divorce or polygamy, it gave women an option to leave a polygamous marriage

¹¹⁸Odeh *supra* note 19, at 1140

¹¹⁹ *Id*

¹²⁰ Supreme Constitutional Court Ruling, case no. 201 of December 15th, 2002. Available at <http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=124&searchWords=>

¹²¹ *Id*

¹²² Odeh *supra* note , at 1137

¹²³ *Id*

and gave judges the right to intervene by allowing a divorce if reconciliation is impossible. Many have criticized the Court for taking a middle of the road approach. For instance, Lama Abu Odeh and Ran Hirschil have argued that in an effort to appease both Islamists and feminist activists, the Court has taken an intermediate stance in almost every case that it was faced with after 1980.¹²⁴

The Supreme Constitutional Court 's affirmation of the *khul'* law was a step in the right direction for women's rights. Although the court did not go as far as limiting men's absolute right to divorce, it did provide women with an avenue to get out of a bad marriage without deviating too far from *shari'a*.

¹²⁴ *Id.*, at 1144 see also Ran Hirschil, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CAN. J.L. & JURIS. 191, 115 (2002) for the Supreme Constitutional Courts middle of the road approach in *shari'a* interpretation.

III. RESISTANCE TO *KHUL'*

This chapter will discuss the challenges that the *khul'* law of 2000 faced and the nature of the debate surrounding it, as women's new decision making power provoked the patriarchal order from which the resistance stems.

A. THE FUNDAMENTALIST DISCOURSE

The 1990s witnessed a greater participation from reformers, as well as Non-Governmental Organizations and women's groups who called for gender equality and were often backed by development and international organizations. At the same time, "the more liberal political climate also allowed Islamists of various signatures to claim greater public presence in mobilizing the people against family law reform."¹²⁵ Fundamentalists strategically used mosques to spread their agendas and refused rational and open discussions with secularists.¹²⁶ Their approach was essentially based on "persuasion (to "see the true path") or conversion (to "return to the true faith") rather than debate, reasoning, or argument."¹²⁷ The constant struggle between reformists who wanted to modernize family law and advance women's rights versus fundamentalists who often manipulated "rhetoric of the sacred texts,"¹²⁸ to rationalize patriarchal interpretations of Islam has resulted in a purely political struggle rather than a moral or religious one.¹²⁹

The fundamentalist discourse comes directly from authoritative texts "which bases its claims on truth and validity."¹³⁰ This type of discourse is often successful at blocking any kind of criticism or substitution, therefore making it a valuable one to use in order to legitimize one's beliefs. Here, fundamentalists succeed in obstructing other methods of

¹²⁵ Annelies Moors, *Introduction: Public Debates on Family Law Reform Participants, Positions, and Styles of Argumentation in the 1990s*, 5 (2003)

¹²⁶ *Id*

¹²⁷ HISHAM SHARABI, NEOPATRIARCHY: A THEORY OF DISTORTED CHANGE IN THE ARAB WORLD, 10 (1988).

¹²⁸ *Id*, see also: Adrien Catherine Wing, *Custom, Religion, and Rights: The Future Legal Status of Palestinian Women* HARV. INT. LAW 01, 35 (1994) "This patriarchy stems from historical realities where the physically strongest were responsible for the protection of the family. Gender roles, in which men were the protectors and providers while women were the child rearers and nurturers, developed as a result of these realities."

¹²⁹ SHARABI, *supra* note 127, at 45

¹³⁰ *Id*

thinking,¹³¹ and replacing them with strict interpretations of their version of Islam, making it difficult for secularists to challenge them.

Activists' efforts targeted amending existing codes and adding provisions that enhanced women's rights, which resulted in successful reform of the legal code. Legal campaigning is key in spreading awareness, gaining support, and pressuring governments.¹³² However, it alone cannot be seen as an end result that changes the patriarchal interpretations of laws and perceptions in society.¹³³ Even though Egyptian feminist activists knew that women's status had to be upgraded,¹³⁴ they did not address the patriarchal mentalities or societal norms that are often concealed under the guise of *shari'a*. Instead, they attempted to repair the existing, sexist laws and did not go beyond the idea of *tajdīd* and *takhayyur*.¹³⁵ Resorting to *tajdīd* was an effort made by feminist activists to reclaim the rights that they believed were given to them in Islam, but deferred from the Islamists' sexist mode of thinking.

B. WHY REFORM?

Prior to the adoption of *khul'*, the challenges women faced when seeking divorce were highly problematic. Women's situation reinforced misogynist perceptions in society that portrayed them as subordinate second-class citizens.¹³⁶ These unequal divorce laws were still in place to maintain the imbalance between the genders; "the entire mechanisms of society could alter but the patriarchal family unit was guarded from any such change."¹³⁷ Judges had absolute discretion in granting the divorce and it would take years for women to get a divorce finalized.

¹³¹ *Id*

¹³² Maryam Elahi, *International Human Rights Organizations and Advocacy for Change*, in *MUSLIM WOMEN AND THE POLITICS OF PARTICIPATION*, 126 (MAHNAZ AFKHAM, ERIKA FRIEDL EDS., 1997)

¹³³ MENON, *supra* note 5, at 4

¹³⁴ Wing, *supra* note 128, at 35

¹³⁵ *Id*, see also SHARABI, *supra* note 127, at 33

¹³⁶ Essam Fawzy, *Muslim Personal Status Law in Egypt: The Current Situation and Possibilities of Reform through Internal Initiatives*, in *WOMEN'S RIGHTS & ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM*, 36 (Lynn Welchman ed., Zed Books 2004)

¹³⁷ Guenena and Wassef, *Unfulfilled Promises. Women's Rights In Egypt* 21 (Cairo: Population Council, 1999), available at: http://www.popcouncil.org/pdfs/unfulfilled_promises.pdf (last visited 26 February 2013).

Aside from being in limbo for years, women faced other hurdles in their path to divorce. Poor enforcement of court rulings for alimony and child support, for instance, was challenging because husbands rarely paid it.¹³⁸ Further, women would not qualify for any social assistance from the government, since they were still legally married.¹³⁹ The divorce process for women was dire as women struggled with the law and the courts for years to be granted a divorce, which was an unconditional right for men.

There was a visible disconnect between the perception of women and their lived realities. The socio-economic situation of women was changing, which directly challenged the presumed Islamic notions of the male breadwinner and the realities of family life.¹⁴⁰ Because of financial constraints on the family, more and more women were financially supporting their families but were still denied some rights that seemed to be only reserved for men. Feminist activists along with women's Non-Governmental Organizations and human rights organizations were instrumental in bringing the issue of family law reform back on the agenda.¹⁴¹ It was the right time to address personal status law reform, which had been a battleground for perpetuating women's subjugation since the start of the century.¹⁴²

C. STRATEGY ADOPTED BY REFORMERS:

Reformers knew that in order for *khul'* to pass, they had to adopt the same language, the language of Islam, as the opposition. On the other hand, they had to refrain from using the "westernized" language of human rights and equality.¹⁴³ Although many international and development organizations helped advance the law, it was necessary to present *khul'*

¹³⁸ See HUMAN RIGHTS WATCH *supra* note 3. "Women can spend years tracking down their ex-husbands for child support. "Once an ex-husband is deemed missing, they are provided with little assistance from the police or any other government authority. If a woman does not know her husband's exact address to forward to the bailiff (the court official responsible for announcing and implementing court orders relating to a case), she is simply denied the money she was awarded in the court ruling."

¹³⁹ HUMAN RIGHTS WATCH, *supra* note 3, at 34

¹⁴⁰ Al Sharmani, *supra* note 23

¹⁴¹ Sonneveld, *supra* note 82, at 36

¹⁴² Badran, *supra* note 15

¹⁴³ Mona Zulficar *The Islamic Marriage Contract In Egypt*, in THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW 242 (A. Quraishi ed. Harvard University Press 2008).

from a conformity with *shari'a* angle versus equality and women's emancipation.¹⁴⁴

As a result of the resistance,¹⁴⁵ and later annulment, of decree law 44/1979, reformers needed new strategies to enhance their legitimacy by using Islam to advance women's rights and position in society. They needed to examine and reinterpret *shari'a* principles in order to legitimize *khul'* and prove that their efforts were in fact religiously based, therefore curbing resistance by fundamentalists. The Group of Seven adopted a strategy to use the language of Islam to back up *khul'*,¹⁴⁶ and avoided the language of human rights and equality, which often got them accused of being anti-Islamic or conspiring with the west to destroy the Muslim family.¹⁴⁷ Mona Zulficar, a prominent lawyer and member of the Group of Seven, notes that these accusations forced women's groups to implement new strategies that challenged Islamists on religious grounds:

This led to the emergence of a public sphere in which the religious language of the *shari'a* is utilized to persuade opponents and to gain legitimacy for one's actions. In this case of the *khul'* law, women activists sought to reach out to the masses by speaking what they perceived to be "their" language, the language of Islam.¹⁴⁸

The activists knew that Islam could not be left up to traditionalists' authority;¹⁴⁹ and went to great lengths to show that advancing women's rights is not against *shari'a*, nor is it a western conspiracy, but rather in line with the principles of justice portrayed in *shari'a*.¹⁵⁰ They claimed that it is in fact the current laws and practices that deny women the dignity given to them in *shari'a*.¹⁵¹ Zulficar explains that they needed to look for creative ways to diversify their approach by reaching out to ordinary religious men and women to get their

¹⁴⁴ Lynn Welchman, *Egypt: New Deal on Divorce*, in THE INTERNATIONAL SURVEY OF FAMILY LAW, 134 (Andrew Bainham ed. 2004). Welchman notes the Egyptian government may well have judged that supporting the legislation through the discourse of equal rights in family law would not have the widest resonance in either Parliament or the general public opinion in Egypt.

¹⁴⁵ Fawzy *supra* note 136

¹⁴⁶ See also Wing, *supra* note 128, for more on the need for reformers to ground their claims for change in *shari'a* principles.

¹⁴⁷ Zulficar, *supra* note 143

¹⁴⁸ *Id*

¹⁴⁹ *Id*, See also Diane Singerman, *Restoring the Family to Civil Society: Lessons from Egypt*, 10 (Journal of Middle East Women's Studies 2.1, 2006); "Ceding "the family" to Islamists only reinforces their ability to shape the terms of struggle and frame a range of issues to their advantage."

¹⁵⁰ Zulficar, *supra* note 143

¹⁵¹ LYNN WELCHMAN, WOMEN AND MUSLIM FAMILY LAWS IN ARAB STATES: A COMPARATIVE OVERVIEW OF TEXTUAL DEVELOPMENT AND ADVOCACY (Amsterdam 2007)

support.¹⁵² However, their efforts were often resisted by the oppressive measures of conservatives' authoritarian and patriarchal attitudes, as well as the unsympathetic attitudes of many ordinary men.¹⁵³

D. RESISTANCE TO *KHUL'*

Opposition to *khul'* came as no surprise but rather highlighted the strong resistance family law reform received, even when its in the language of Islam.¹⁵⁴ Despite being supported by *Al Azhar*,¹⁵⁵ and promoted by Islamic analysis to legitimize it, *khul'* witnessed vehement rejection throughout political, legal and social circles.¹⁵⁶ The resistance that *khul'* faced was also manifested through hurdles set forth by the state to hinder women's access to divorce. Although some of the arguments made against the law were based on religious, social and procedural grounds, the majority of the arguments made were "constructed along masculine perspectives and conservative interpretations of the *shari'a*."¹⁵⁷

The idea that women could divorce at their own will, even without harm and without their husband's consent was very controversial.¹⁵⁸ It was this freedom that turned the hierarchal structure and model of marriage, jeopardizing the dictated gendered roles between husband and wife. Women's freedom to end an unwanted marriage was translated by opponents into women wanting to leave their husbands for more attractive, richer men as Fawzy argues of claims made by the Wafd Party in Parliamentary debates

¹⁵² See Zulficar, *supra* note 143.. Zulficar explains further that it was clear reformers couldn't depend on the "modern constitutional grant of equality before the law, as this did not equally apply under family law, which claimed to be based on principles of *shari'a*. We could not afford to shy away from the challenge and continue using a strategy based solely on human rights. We had to prove that the standard religious discourse could also be used by women to defend women their cause."

¹⁵³ Asef Bayat, *A Women's Non-Movement: What It Means to Be a Woman Activist in an Islamic State*, 160 (2007)

¹⁵⁴ BADRAN, *supra* note 15

¹⁵⁵ Al Sharmani, *supra* note 23, at 10, *See also*, SONNEVELD, *supra* note 82, at 56

¹⁵⁶ SONNEVELD, *supra* note 82, at 56

¹⁵⁷ Fawzy, *supra* note 136, at 36

¹⁵⁸ See LYNN WELCHMAN, ISLAM AND HUMAN RIGHTS: ADVOCACY FOR SOCIAL CHANGE IN LOCAL CONTEXTS, 10 (M, Baderin and M, Monshipouri and S, Mokhtari and L, Welchman, eds. 2006). Referring to Ousama Al Arabi's title of his article "The Dawning of the Third Millennium on Shari'a: Egypt's Law no. 1 of 2000, or Women May Divorce at Will" *supra* note 33.

surrounding *khul'*.¹⁵⁹ The obedience-maintenance relation between husband and wife was threatened as a result of *khul'*, underscoring the conservative interpretations of the law to fit patriarchal mindsets.

Using a standard religious discourse may have been why reformers succeeded in passing *khul'*. However, they did not go far in dismantling sexist beliefs disguised as religious norms, which still managed to influence the outcome of the law through impediments mandated by Islamists and implemented by the state.¹⁶⁰ Instead of leading new reform, reformists found themselves restructuring past reforms and mending laws based on patriarchal perceptions of women. As we will see in the next sections, women are still marginalized and reforms have not succeeded in changing the hierarchal, gendered standard of marriage, which continues to live on through the 'new' laws.

1. Debate surrounding *khul'*:

Essam Fawzy,¹⁶¹ Hoda Zakariyya¹⁶², Jasmine Moussa¹⁶³ and Nadia Sonneveld¹⁶⁴ agree that the debate in parliament was far from dull. Based on these authors' description of the parliamentary debates, many arguments made against the law were based on women's rationality and concern over the stability of the family as well as the law's conformity with *shari'a*.

a. Stability of the family:

One argument that is often seen in opposition analysis surrounding *khul'* involves women's rationality and stability of the family.¹⁶⁵

¹⁵⁹ Fawzy *supra* note 136, at 66

¹⁶⁰ ANN E. MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS, 113 (2007)

¹⁶¹ Fawzy *supra* note 136

¹⁶² Hoda Zakariyya, AL KHUL', THE HARVEST : TWO YEARS AFTER KHUL' CEWLA 49 (2003)

¹⁶³ Jasmine Moussa, *Competing Fundamentalisms and Egyptian Women's Family Rights: International Law and the Reform of Shari'a-Derived Legislation*. 4. Vol. Boston: Brill, 23 (2011)

¹⁶⁴ SONNEVELD, *supra* note 82, at 56

¹⁶⁵ Zakariyya, *supra* note 162, *see also* Summary of parliamentary debate on January 16th 2000 published in *jaridat al ahram January 17th, 2000* available at <http://www.ahram.org.eg/Archive/2000/1/17/INVE4.HTM>

Their portrayal of women presumes women constantly have bad intentions. Women are considered too emotional to have the right to unilateral divorce and that they would destroy their families for frivolous reasons through divorce.¹⁶⁶ The idea that giving women the right to divorce would result in women immaturely abandoning their children for more attractive men was seen throughout analysis of parliamentary debates.¹⁶⁷ It also portrays women as merely sexual beings, which is uneven logic as men are the ones that often marry more than one woman. The tone of the arguments regarding women's ability to make adult decisions demonstrates the attachment to the patriarchal structure of male supremacy. It is as if women are no different from unruly children trying to manipulate their way into achieving immature and shortsighted goals.

Furthermore, it is troublesome that these claims emphasize the belief that only female initiated divorces would ultimately destroy the family. They assume that it is entirely the woman's responsibility to keep the family together, and if she were to seek a divorce, she would be abandoning her children based on petty reasons. It is striking that opponents who base their claims on the stability of the family and the children's well being do not acknowledge the effects of male-initiated divorce in particular and actions in general on the family.

b. Shari'a:

Opponents treated *khul'* law as if it were an innovation, despite being mentioned in the Qur'an and *Sunna* fourteen centuries ago.¹⁶⁸ Some disparagements of *khul'* were based on different interpretations of *Shari'a*, such as whether or not the husband's consent is required for divorce to be granted. Zakariyya notes that even some "wise parliamentarians who had extensive knowledge of *khul'* in the *shari'a*, intervened in the debates to explain how making *khul'* contingent upon a husband's approval violated the intent of *khul'*."¹⁶⁹

¹⁶⁶ Fawzy, *supra* note 136 at 66, *see also supra* note 165

¹⁶⁷ Fawzy, *supra* note 136 at 66, *see also* Moussa *supra* note 163, at 24

¹⁶⁸ Amira Mashhour, *Islamic Law and Gender Equality: Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 583 (Human Rights Quarterly, Vol. 27, No. 2, 2005).

¹⁶⁹ Zakariyya, *supra* note 162, at 57

The resistance, anger and fear that judges, as well as members of parliament, exhibited in the debate surrounding *Khul'* has as much to do with widespread societal restrictions and gendered roles as religion, per se.¹⁷⁰ It was clear that not all claims against *khul'* were genuinely religiously motivated, rather religion was used as a guise for preserving the traditional hierarchy between husband and wife and maintaining the status quo that opponents contended were sanctioned by Islam. Arguing against *khul'* on the basis of *shari'a* was easily altered into a debate over defending Islam, rather than patriarchal interpretations, which opponents used to gain legitimacy and support. For example, Essam Fawzy notes that some members of parliament had to keep in mind upcoming elections and wanted to view themselves as the ones defending and preserving Islam to gain more political support.¹⁷¹

Islamists' strict interpretations of *shari'a* impeded reformists' efforts to pass the law, ultimately challenging reformers to religious argument on the Islamicity of *khul'*. For example, anyone not in agreement with conservatives was often accused of being a Zionist agent, westernized and anti-Islamic.¹⁷² Opponents went as far as calling the sheikh of *Al Azhar* a non-believer, *kafir*¹⁷³, for approving the new law. This would redirect and refocus the debate on Islam itself, rather than patriarchal interpretations from which this resistance stems.

Some religious scholars, *ulama*, believed that the law went against men's guardianship over women, *qiwama*.¹⁷⁴ Asef Bayat argues that Islamists often use their interpretation of the Qur'an to defend misogyny, particularly the verse *al-rejal qawwamoun ala-nisa* (Nisa, 4:34).¹⁷⁵ However, theologians determined that "the word *qawam* not to the Arabic root *qym*, meaning guardianship over other, but to *qwm*, signifying "rising up," "fulfilling needs," or 'protecting,'" ¹⁷⁶ and that the meaning did not give men the exclusive right to

¹⁷⁰ Al Sharmani, *supra* note 23, at 10

¹⁷¹ Fawzy, *supra* note 136

¹⁷² *Id* at 67

¹⁷³ SONNEVELD, *supra* note 82, at 58

¹⁷⁴ Al Sharmani, *supra* note 23, at 11

¹⁷⁵ AL Bayat, *supra* note 153, at 167

¹⁷⁶ *Id*

divorce, nor did it deny women the right to divorce.¹⁷⁷ The irony is that the verse that was often used to defend their paradigm can be used to break it apart. Interpreting the Qur'an and Hadith in ways to further Islamist's ideology has been an effective tool for a long time. Unfortunately, women are often the ones who pay the price for this manipulation of religious texts, as their family rights are the ones at stake.

Finally, as Moussa notes, claims against *shari'a* were harder to challenge in parliament and it was not until *ijtihad* was introduced as a reform tool that the law passed and opponents were defeated.¹⁷⁸ In 2002, the Supreme Constitutional Court reaffirmed that the *khul'* law is in conformity with *shari'a*, which was a relief and victory for feminist activists.¹⁷⁹ By resorting to the language of Islam and exercising *ijtihad*, the Group of Seven, supported by other forces, managed to successfully reach legal reform. However, this is part of a wider struggle for social reform and gender equality. Patriarchal interpretations of the law, the confusion between patriarchal beliefs and religion, along with the social hierarchy between men and women significantly continue to undermine *khul'* theoretical benefits.

2. RESISTANCE IN THE MEDIA

The media's portrayal of women pursuing *khul'* echoed society's heavily patriarchal beliefs and perceptions of women. In the media, *khul'* was treated not as giving women equal rights, but rather as an emasculating law, taking power away from the man and giving it to the woman.¹⁸⁰ The campaign against *khul'* was portrayed in newspaper headlines and caricatures that showed women with mustaches and pregnant men.¹⁸¹ It portrayed women as lewd and western like; wearing tight, revealing clothes, high heels and not wearing a veil, emphasizing the idea that *khul'* is a western, untraditional and immoral notion. The way in which the women seeking *khul'* were depicted echoed opponents' agenda that the law would be abused by women who would manipulate their

¹⁷⁷ *Id*

¹⁷⁸ Moussa, *supra* note 163, at 26

¹⁷⁹ Supreme Constitutional Court Ruling, case no.201 of Dec.15th 2002. Available online at <http://www.hccourt.gov.eg/Rules/getRule.asp?ruleId=124&searchWords=>

¹⁸⁰ SONNEVELD, *supra* note 82, at 64

¹⁸¹ *Id*

husbands, that it was a western plot aimed at destroying the Egyptian family. Showing women as foreign was an attempt to gather support against *khul'* by making it seem alien.¹⁸² The media's portrayal of the law sent the message that the *khul'* law would ultimately threaten the identity of Egyptian society.¹⁸³

E. GIVING IN TO ISLAMISTS' PRESSURE

The Egyptian government gave in to pressure from Islamists and made concessions to the *khul'*. The hurdles injected to the legal system were based on sexist and misogynist perceptions of women,¹⁸⁴ and reinforced Islamists' patriarchal views of women's capability to make rational decisions. They reasserted the perception of women as second-class citizens, as these hurdles significantly impeded women's access to divorce and undermined the theoretical benefits that *khul'* came to offer.

This leads one to question the purpose of legal reform when patriarchal views determined to maintain the gender hierarchy manages to resurface and reinvent themselves under new forms, directly affecting the effects of the law. Patriarchal beliefs have not subsided after the adoption of *khul'*, but were in fact reasserted by the legal, social and financial obstacles that women must endure.

1. Revoking financial rights:

Although the Maliki hadith that the Egyptian legislature adopted stated that *Habība* give back the garden that *Thābit* had given her as dowry¹⁸⁵, the Egyptian version included paying back the dowry as well as renouncing all financial rights that women are usually entitled to at the time of divorce.¹⁸⁶ As Amira Mashhour states “most of the classical

¹⁸² *Id*

¹⁸³ *Id*

¹⁸⁴ HUMAN RIGHTS WATCH, *supra* note 3

¹⁸⁵ Fawzy, *supra* note 136, at 68

¹⁸⁶ Mashhour, *supra* note 169, at 584. The Egyptian version requires that women forfeit financial rights that women are entitled to in modern day Egypt. Mashhour notes that most of the classical jurists declared that the wife should pay back her dowry, however the Egyptian government requires that that women revoke all their legitimate marital rights for example, deferred dowry, spousal support, marital home etc.

jurists adjudged that the wife should pay back her dowry, while the government version stipulated that women should revoke all their legitimate material rights.”¹⁸⁷

The idea that a woman must ‘ransom’ herself from an unwanted marriage and forfeit all legitimate financial rights “serves to both deter woman from ever seeking to divorce their husbands and make their lives miserable post-divorce.”¹⁸⁸ Additionally fueling the sexist nature of the law, since a woman has to revoke all her financial rights as well as pay back the dowry, *khul’* can be financially advantageous to men as men may refuse to initiate the divorce themselves to avoid expenses and get reimbursed, for example.¹⁸⁹ This underscores the inequalities in women’s path to divorce. Even with a law that is supposed to enhance women’s rights, there are loopholes men may abuse. Conversely, threatening to revoke financial rights appeases opponents fears that women would use *khul’* to manipulate their husbands for money.

Some men dispute how much they pay at the time of marriage, delaying the process further. Judges go to great lengths to investigate and ensure that men get reimbursed exactly what they paid.¹⁹⁰ Muntasir Ibrahim, an attorney at the Association for the Development and Enhancement of Women, a Non-Governmental Organization that provides legal and financial assistance to low-income female-headed households, explained to Human Rights Watch:

They said it [*khul’*] would take six months maximum. Some cases we’ve seen have taken as long as three years even though the law itself was intended to shorten the process.... The problem is that the husband says that the dowry is more than what it is, what they agreed upon. The majority of people in Egypt of all classes put a token 1 Egyptian pound [\$US 0.16] dowry [in the marriage contract]. The husband contests this amount and says that he paid more. The judge gives him time to get witnesses. But [then the judge is told that] the witnesses are sick. Other men say that the *ayma* [list of wife-owned household furniture signed by the husband before marriage] was actually the dowry. The process just keeps getting delayed.¹⁹¹

¹⁸⁷ *Id*

¹⁸⁸ HUMAN RIGHTS WATCH, *supra* note 3, at 34

¹⁸⁹ Maugiron, *supra* note 22, at 71

¹⁹⁰ SONNEVELD, *supra* note 82, at 102

¹⁹¹ HUMAN RIGHTS WATCH, *supra* note 3, at 34

The reality that marriage contracts do not reflect the true amount paid can delay the *khul'* process, as husbands claim paying differing amounts.¹⁹² Judges determine how much a woman has to pay back to the husband, often giving men multiple opportunities to show they paid more than they did. Furthermore, according to a study done on family courts in Egypt,¹⁹³ some women were “ordered by the judges to pay the deferred as well as the advance parts of the dower, although it was customary for wives to collect the deferred part of the dower at the time of divorce or the death of the husband.”¹⁹⁴ In other words, women were ordered to pay more than what they received from their husbands at the beginning of the marriage in exchange for her freedom. As far as men are concerned, judges are quite flexible, providing them with leeway and time to support payment claims. Also, women’s non-financial contributions to the household, including child bearing, are not taken into account.

2. Mandatory reconciliation:

In addition to renouncing all legitimate financial rights, the government also implemented mandatory reconciliation. The process should not exceed three months. If the couple have children, another three months must be completed, with a three month waiting period between attempts, before a *khul'* can be finalized.¹⁹⁵ The court assigns two arbiters, one of which is female, to mediate between the couple.¹⁹⁶

While a woman must go through multiple reconciliation attempts when she initiates a divorce, the same is not true for a man. In fact, men do not have to enter a courtroom when they initiate the divorce. The opponents to *khul'* never question men’s unconditional right to divorce or the potential effects of men’s relatively easy divorce procedure on the stability of the family. A public prosecutor in Cairo told Human Rights Watch that mediation was necessary because “a woman may be hasty in filing for a divorce and may not have a strong keenness in keeping the family together. The court has

¹⁹² *Id*

¹⁹³ Al Sharmani, *supra* note 22, at 20; noting a study done by Soliman and Salah El Din in 2003 based on of 6 governorates over the course of 2 years.

¹⁹⁴ *Id*

¹⁹⁵ HUMAN RIGHTS WATCH, *supra* note 3, at 27

¹⁹⁶ *Id*

to play this role and intervene. Men are more wise and rationale than women. A woman's emotions can overcome her rationality."¹⁹⁷ The one-sided reconciliation requirements reinforces Islamists' suspicions that women are irrational, need time to get back to their senses, and cannot make such big decisions on their own.

Women in abusive relationships are not exempt from mandatory reconciliation, as victims of domestic abuse must still go through the reconciliation period.¹⁹⁸ This is another example of the effect of patriarchy on attempted reform, as this was not originally a part of *khul'* but was added to placate Islamists. It is humbling for women and empowering for men without serving a practical purpose, reinforcing the inequality in the divorce system.

Aside from the aforementioned constraints, women face social constraints as well. Arbiters are often inexperienced or have typical gendered views of women, pressuring women to accept conditions offered by the husband or persuading women to drop the case instead of trying to reconcile the couple.¹⁹⁹ Judges and mediators warn women of the stigma and difficulties they will face as a result of the *khul'*, and that her daughters will have difficulty finding prospective suitors to marry.²⁰⁰ The question of why these limitations only apply to women reinforces the level of sexism involved in all aspects of the divorce process. This highlights how ingrained sexism is in social, legal and religious interpretations and implementations. As Mashhour explains, "when patriarchal culture dominates, conservative, literal, and selective interpretations of the text prevail, as in the case of *khul'* in Egypt, which denies women some rights that were already granted in classical Islamic jurisprudence."²⁰¹ Mandatory reconciliation, which has no bases in *shari'a* and emphasizes opponents' patriarchal beliefs that women are not keen on preserving their marriage, exemplifies this.

¹⁹⁷ *Id*

¹⁹⁸ *Id*

¹⁹⁹ Mariz Tadros, *What Price Freedom?* AL-AHRAM WEEKLY, Mar. 7-13, 2002, <http://weekly.ahram.org.eg/2002/576/fe1.htm>

²⁰⁰ See Mulki Al Sharmani, *Legal Reform, Women's Empowerment and Social Change: The Case of Egypt*, 13, (2010) and Mougiron, *supra* note 20, for the stigma surrounding divorced women.

²⁰¹ Mashhour, *supra* note 169, at 582

The effectiveness of mediation is very limited, since many women resort to *khul'* after all other reconciliation efforts have been exhausted. Many judges agree that reconciliation is ultimately a mere formality and they are more concerned with having complete documents than what happens in the actual mediation sessions.²⁰² This disingenuousness is demonstrated by the detail that even if the couple reaches an agreement through reconciliation, there is no follow up by the court. If the agreement falls through after the wife accepts going back to the husband, she would have to start the entire divorce process all over again, including undergoing another set of reconciliation attempts.²⁰³ Therefore, mandatory reconciliation acts as a stalling mechanism, providing obstacles for women considering divorce. The Egyptian government succumbed to Islamists' concern that *khul'* would empower women to divorce their husbands more freely.²⁰⁴ This also supports the belief that it was inserted to deter women from resorting to *khul'* by making it a long and complex process.

²⁰² SONNEVELD, *supra* note 82, at 102

²⁰³ Maugiron, *supra* note 22, at 63

²⁰⁴ Zakariyya *supra* note 162, at 50, see also SONNEVELD, *supra* note 82, at 40

IV. THE CURRENT SITUATION IN EGYPT

The revived resistance to *khul'* in particular and advancement of women's rights in general in post revolutionary Egypt highlights the persistent patriarchy from which this opposition stems. No matter how often we change the legal code, whether the constitution or family law itself, sexist perceptions of women ingrained in our society manage to impede the law from advancing women's status in society.

A. WOMEN'S ROLE IN THE REVOLUTION:

The January 25th revolution brought about a sense of unity amongst Egyptians: young and old, men and women, Christians and Muslims alike. We saw men and women form human chains around the Egyptian museum to keep out looters and protect fellow Egyptians during prayers, directing traffic and guarding neighborhoods when the police forces disappeared. It was this sense of unity that made us believe that change will come for all. Women played a big role, as they stood shoulder to shoulder with men demanding justice for all in Tahrir square, the epicenter of the Egyptian revolution. They defied the stereotypes dictated by society and made their voices heard. They believed that the fall of Mubarak's regime would bring down with it patriarchy and oppression and make way for equal rights and freedoms. This sense of optimism and unity quickly dissolved as Mubarak's regime was brought to an end. Optimism for women's advancement faded as sexist and stereotypical views of women from emerging Islamist groups that had been in the shadows for years, gained power. And the hopes of advancing women's rights turned into hopes that the modest rights we have now remained, not be repealed and erase some of the progress that had been made over the years.

B. ROLE OF STATE/ RISE OF ISLAMISTS

At the time of adoption of *khul'* in 2000, the Egyptian government's response to conservatives' demands underscored the middle of the road approach that it usually adopted in the pre-revolution period to appease both the religious conservatives and the international community which it depended on for much funding. However, this resulted

in an uneven divorce system where women are still marginalized despite these new reforms. By including mandatory reconciliation and revoking all financial rights, the government reinforced the subjugated perception of women irrational cannot be trusted to make such big decisions on their own. The government, therefore reasserted the dominant values of female oppression and male supremacy, which ultimately took away from the potential benefits of *khul'*. By backing Islamists' fears, the government was looking out for its own interest in order to validate its own uncertain legitimacy. Sharabi argues that fundamentalists are "not only allowed to proclaim their doctrines freely and publicly but are often provided with substantial aid by the state institutional machinery and media. While the new radical critics are routinely attacked, muzzled and suppressed."²⁰⁵ This was clear by the government's concessions and the resistance in the media, which heavily criticized the law and those who labeled it as anti Islam, western and made by elites to emasculate men.

Whereas before the revolution, the secular government adopted a piecemeal approach to deal with personal status reform and *khul'* law in particular, the majority of Islamists in government right now may not be as inclined to appease both parties since they themselves share similar values as those who attack women's rights and resist reform. Furthermore, while the Muslim Brotherhood is still concerned with appeasing the West, it is to a lesser extent than the Mubarak regime. Malika Zeghal notes that Islamists gain of power could have one of two possible outcomes. The first and more optimistic outcome views the participation of Islamists in free elections as a path to democratization, as they themselves become democrats just by participating regardless of their original commitments.²⁰⁶ The second account sees their participation and inclusion in the system "ending in the creation of an Islamist authoritarian regime by means of 'one man, one vote, one time,' with the Islamists' lack of commitment to democracy being the most crucial factor explaining the type of polity that they will shape."²⁰⁷ The second scenario is what many people are afraid of in Egypt, especially given Islamists actions during their first few months in control.

²⁰⁵ SHARABI, *supra* note 127, at 60

²⁰⁶ Malika Zeghal, *Participation Without Power*, 31 (Journal of Democracy vol 19, no. 3, 2008)

²⁰⁷ *Id*

In contrast to before the revolution, when Islamists were in the shadows, they have now gained real power to implement their views. Islamists, as is the case with democracy, support political pluralism when it substantiates their agenda.²⁰⁸ On the one hand, they claim democracy because that is how they won and that the principle of universal citizenship is necessary to vital to democracy. On the other hand, they are “divided about equality between Muslim and non-Muslim citizens and between men and women,”²⁰⁹ and are quick to criticize and punish those that disagree with them.²¹⁰ Differing opinions are brushed off as “anti-Islam” or “old regime”. They are for democracy when it is convenient and supports their goals.²¹¹

The political turmoil in the country post revolution has undoubtedly helped Islamists mobilize and gain support. While secularists seemed overwhelmed, divided, and out of touch with the masses, Islamists, by using religious texts as means of persuasion, are able to mobilize and persuade the people, especially in times of crises.²¹² Since they use Islam and *shari'a* to back their agendas rather than logic and debate, they become a stable formation that ordinary people yearn for at times of instability. In Hisham Sharabi's words;

Secular criticism's fatal weakness lies in that, unlike fundamentalism, it is an avant-garde movement and out of touch with the masses. As such it finds itself at a double disadvantage: it enjoys limited power in the political arena (lacking political organization), and as state censorship erodes, restricts, and deflects its effectiveness, it finds itself also opposed by mass (religious) opinion. Fundamentalism, on the other hand, is able by means if it religious appeal to put the status quo on the defensive as well as mobilize the masses. But perhaps the greatest drawback the secular critics suffer stems from the fundamentalists' refusal to engage in rational and open discussion. The latter's approach is essentially one of persuasion or conversion rather than debate, reasoning or argument. Thus secular criticism is reduced to the status of the heretical or subversive discourse and the radical critics are pushed back to the position of defensive interlocutors who lacks legitimacy. It is fair perhaps to conclude that the moment fundamentalism gains power it will tend to rule out the possibility of any sort of dialogue.²¹³

²⁰⁸ Marina Ottaway & Amr Hamzawy, *Getting to Pluralism: Political Actors in the Arab World*, 83 (2009)

²⁰⁹ *Id*

²¹⁰ *Id*

²¹¹ *Id*

²¹² SHARABI, *supra* note 127, at 11

²¹³ *Id*

The victory of the Muslim Brotherhood candidate Mohamed Morsi came as a setback for many, especially feminist activists who knew, given the Muslim Brotherhood's history,²¹⁴ that women's rights would be threatened. Islamists define women within a family and interpret texts in a way that favors men.²¹⁵ After Morsi became president, there has been a clear polarization of power making it problematic for women's rights, as reforms would be revised by an extension of the government itself with conservative views.

The legal system has a great influence on limiting or allowing patriarchy to control women's rights. By allowing patriarchal mentalities to interpret the laws and social roles, the government reinforces sexist beliefs and practices embedded in our society. In Valentine Moghadam's words:

Another critical factor in the persistence of patriarchy lies in state policy, including the legal system, which exerts a further influence on the persistence, modernization, or weakening of patriarchy and, by extension, on women and the family. It enjoins men to take responsibility for the support of their wives and children. In the Arab-Islamic family, the wife's main obligations are to maintain a home, care for her children, and obey her husband. He is entitled to exercise his marital authority by restraining his wife's movements and preventing her from showing herself in public. I have referred to this as the patriarchal gender contract, The patriarchal contract is realized within the family and codified by the state in the form of Muslim Family Law or the Personal Status Code.²¹⁶

Not surprisingly, the Muslim Brotherhood's rise to power has also brought with it a new space to debate women's rights within *shari'a*. Patriarchy, society, the law and religion are often too intertwined, as Islamists use that to their advantage in order to maintain the status quo restraining the rights of women that are actually awarded to them in *shari'a*.²¹⁷ Mino Moallem argues that "religion and culture are not only inseparable from each other, they cannot be divorced from the historical conditions in which they emerge; nor can they

²¹⁴ MARIZ TADROS, THE MUSLIM BROTHERHOOD IN CONTEMPORARY EGYPT: DEMOCRACY REDEFINED OR CONFINED?, 5 (2012) See also Mona Alami, *Egypt Constitution Will Be Bad News for Women*, USA TODAY, Jan. 13, 2013, <http://www.usatoday.com/story/news/world/2013/01/11/egypt-constitution-women-rights/1784135/>; "But elections that followed the ouster have largely benefited Islamists and radical Salafists who view women according to the teachings of the Qur'an and Islamic traditions that in some cases have relegated women to the status of property."

²¹⁵ MENON, *supra* note 5.

²¹⁶ VALENTINE M. MOGHADAM, MODERNIZING WOMEN: GENDER AND SOCIAL CHANGE IN THE MIDDLE EAST, 126 (2003)

²¹⁷ Mashhour, *supra* note 169; See also MINO MOALLEM, BETWEEN WARRIOR BROTHER AND VEILED SISTER: ISLAMIC FUNDAMENTALISM AND THE POLITICS OF PATRIARCHY IN IRAN, 24 (2005)

be separated from the law, interpretations of the law, or an understanding of religion that accounts for sexualized bodies and desiring subjects.”²¹⁸ The current patriarchal landscape in Egypt is ripe for the Brotherhood to influence the masses at the expense of women’s rights.

In an effort to show that the government is indeed changing the old regime, instead of addressing key issues that have genuinely been affected as a result of the revolution, Islamists preferred to address unnecessary changes. Because they fail to understand the true principles of democracy,²¹⁹ and have no experience in advancing a nation economically and socially, they use quick remedies to validate their legitimacy.²²⁰ For instance, threatening to repeal laws that have relatively benefited our society based on gendered perceptions of women under the guise of *shari’a*.

1. Salafists

The political landscape is only moving further and further to the right since the revolution due to the Brotherhood’s stranglehold on power. However, the Brotherhood is relatively liberal compared to the Salafists. The ultra-conservative Salafists have an increasing influence based on fundamental interpretation of Islam. Salafists who did not have a voice under Mubarak, as they were silenced, now they have a voice portraying extreme ideals that are far from the beliefs of women’s rights reformists. For example, major affronts to women’s rights such as female genital mutilation and marriage to minors.²²¹ Salafists gained power and influence post-revolution and have attempted to curtail women’s rights based on their own rigid interpretation of Islam. The Salafist ideology is based in the return to *al salaf al saleh*, referring to the righteous, pure past “as lived by the Companions of the Prophet in the first three centuries of Islamic society”²²² and

²¹⁸ MOALLEM, *supra* note 218

²¹⁹ Nehad Abul Komsan *supra* note 246. *See also* Zeghal, *supra* note 207

²²⁰ Nehad Abul Komsan, *supra* note 246

²²¹ Amr Hamzawy, *The Constitution, the commodity of the Salafis*, THE DAILY NEWS EGYPT, Oct. 29, 2012, <http://www.dailynewsegypt.com/2012/10/29/review-human-rights-police-brutality-and-salafis/>

²²² TADROS, *supra* note 215, at 5

condemn other Islamist groups from deviating from this righteous path.²²³ As potential allies, the Brotherhood does not want to alienate the Salafists, often attempting to appease them and turn them “into a reservoir of support for the [brotherhood’s] movement. In March 2011, the two groups co-led the campaign for the “yes” vote to approve proposed constitutional amendments. The fact that their camp received 77 percent of the vote was interpreted as a victory for both.”²²⁴ Any secular pressure is more than offset by the combination of Salafist pressure and Brotherhood power, resulting in a significant loss for women’s rights, even in comparison to Mubarak’s days in power. Salafists are a tremendous threat to reform and a danger to take women’s rights severely backwards.

C. THE CONSTITUTION AND GENDER EQUALITY:

The traditional equality approach used in constitutions is predominantly the same worldwide.²²⁵ The constitution in and of itself can do very little to help advance women’s position in society. The idea of treating unequals unequally (versus equals equally) fits the patriarchal structure ingrained in Egyptian society when it comes to men and women. The sexes are “kept pervasively unequal by social orderings,”²²⁶ confining women within socially accepted roles. This is not perceived as inequality because women were not seen as men’s full human equals.²²⁷

Catharine Mackinnon explains how being defined as different under the traditional equality approach can result in being treated unequally without that treatment being regarded as unequal. For example, when women are paid less for doing different work from men it is not seen as a problem of inequality, because even if it is of comparable value the work is different.²²⁸ When reasonableness is established by mirroring society as it is, inequality is validated by an unequal status quo.²²⁹ Under this belief treating people

²²³ *Id*

²²⁴ Stephane Lacroix, *Sheikhs and politicians: Inside the New Egyptian Salafism*, 4 (foreign policy at Brookings Doha Center, 2012)

²²⁵ Catharine A. MacKinnon, *Sex Equality Under the Constitution of India: Problems, Prospects, and “Personal Laws,”* 4 INT’L J. CONST. L. 181, 202 (2006)

²²⁶ *Id*

²²⁷ *Id*

²²⁸ *Id*

²²⁹ *Id*

worse is seen to be reasonable and not subjective.

The alternative view begins not with abstract views of equal and unequal, but with the question of whether an existing social hierarchy exists. Assuming that no social group is inferior to another, then social inequality occurs when members of society are treated unequally.²³⁰ A contradiction in the interpretation of women versus men is the thinking that they need to be protected for their differences on the one hand, but the reality of women being exploited and violated on the other. The same logic supports protecting women also supports contempt for them. The result has been the rationalization of social inferiority by terming it difference. Equality under the law has failed to deliver due to the social subordination of women that has been ingrained into society. This also justifies poor treatment of women by men, since it is practically sanctioned by the state.

In order to improve their status, women need to look outside of formal equality that aims to treat likes alike, because men and woman are not perceived as equal. They are put on opposite ends of the social spectrum, so it should not be expected that they are treated the same. As Menon notes “society is steeped in patriarchal values and practices, the law and the state were seen as the only agents with the power and the legitimacy to bring about social transformation,”²³¹ however the law is limited in ways to provide social equality through advancing legal rights. In order for the constitution and the law in general, to have an effective transformative ability in overcoming the patriarchal order, substantive equality measures must be reached. Social, political and economical hierarchal changes that recognize women as autonomous individuals and give them their own rights outside of men’s rights will allow women to improve their position in society that they hoped the revolution would bring.

The status of women has taken a step back rather than forward in post revolutionary Egypt. Societal perceptions of women, the new constitution and the legal and physical attacks on women have proven to be a step backwards for female empowerment.

²³⁰ *Id*

²³¹ MENON, *supra* note 5, at 6

The constitutional committee assigned to draft a new constitution was not by any means representative of the Egyptian population; comprised of mostly men belonging to the Muslim Brotherhood while Christians and liberals resigned in protest. Women represented only seven percent of the constituent assembly designed to draft the new constitution and most of the members belonged to Islamist parties.²³²

Presently, women are recognized in their own rights only as mothers and caregivers. For example, Article 10 of the Egyptian constitution underlines the role of women ‘caregivers’ first and foremost.²³³ They may juggle their work at home with professional work, although no such obligations are imposed on men. This kind of thinking fuels societal perceptions of women as being defined only within a family, undermining their lives outside of the family as individuals. The constitution also fails to explicitly address discrimination on the basis of sex and stresses adherence to the principles of *shari’a*. Nehad Abul Komsan, director of the Egyptian Center for Women's Rights asks, who gets to define the principles of *shari’a* ? She notes “the same (Islamic) principles allow for women to be heads of states in Pakistan while banning them from driving in Saudi Arabia.”²³⁴ The constitution has perpetuated and supported women’s presumed gendered roles in society instead of minimize them.

Although this was in the 1971 constitution, the Muslim Brotherhood’s policies are much more conservative than Sadat and Mubarak’s general attitudes towards personal status law reform. The Brotherhood being in power may very well exacerbate sexist presumptions under the guise of Islamic jurisprudence.

Furthermore, there are no longer quotas in parliamentary elections. In parliament, women represented less than two percent, taking up only 11 of 805 seats. This is especially alarming, since even in Mubarak’s last parliament women had a quota of 64 seats.²³⁵

²³² TADROS, *supra* note 215 at 155

²³³ The Egyptian Constitution Text available at http://www.egypt.gov.eg/arabic/laws/download/Current_Constitution_20121225.pdf

²³⁴ Nehad Abul Komsan in Dina Samir, *Egyptian Women Still Struggling Two Year After the Revolution*, AL-AHRAM, Feb. 12, 2013, <http://english.ahram.org.eg/NewsContentPrint/1/0/63114/Egypt/0/Egyptian-women-still-struggling-for-rights--years-.aspx>

²³⁵ TADROS, *supra* note 215, at 132

While adding articles that spell out women's rights and protection in the constitution may spread awareness about gender equality, it is not enough and cannot be seen as an end result. Like Personal Status Law reform, it is only part of a wider struggle of advancing women's rights in Egypt.

D. VIOLENCE AGAINST WOMEN

Post revolution backlash to reform can be seen in Tahrir Square itself with the abuse of women that continues to take place. Ranging from catcalls to rape,²³⁶ women have been targeted by Islamists, police and sexist individuals in general. This can be linked directly to the current regime's hostility towards women's rights, even when compared to the challenges reform faced during the Mubarak regime. The Muslim Brotherhood is an organization dominated by men with traditional views regarding the role of women. The message that the new government has consistently sent, whether it is directly from President Morsi or from other members of his government, has been decidedly traditional. This does not escape the attention of Egypt's citizens. Between government officials denouncing women on television and perpetrators not being held accountable for acts of violence against women, reform has taken a step backwards post-revolution.

Further, the violence against women in the past two years has seen new highs. Women have blamed the rise of political Islam and Islamist elected officials who "have used their new positions to vent some of the most patriarchal impulses in Egypt's traditional culture and a deep hostility to women's participation in politics."²³⁷

²³⁶ *Id*, see also *Women in post-revolutionary Egypt must be free from fear of sexual violence*, UNITED NATIONS NEWS CENTRE, April 3RD, 2013 available at <http://www.un.org/apps/news/story.asp?NewsID=44546#.Ua7EwpVNGRM>

²³⁷ Mayy El-Shiekh & David Kirkpatrick, *Rise in Sexual Assaults in Egypt Sets Off Clash Over Blame*, N.Y TIMES, Mar. 25, 2013, http://www.nytimes.com/2013/03/26/world/middleeast/egyptian-women-blamed-for-sexual-assaults.html?pagewanted=all&_r=0

In fairness, it is important to point out that secular institutions like the military that graduated Mubarak and Sadat, who supported personal status law reform in the past, committed some of the crimes against women, like the forced virginity tests. However, reforming personal status laws and implementing them are two different things. Adopting *khul'* has done little to change societal perceptions of women and the patriarchal mentalities of those in power, whether Muslim Brotherhood or military.

Women in Tahrir have been systematically attacked in the months following the revolution. From gang rape to forced virginity tests performed by the military, sexual assault has become a part of the political struggle that women face in asking for equal rights.²³⁸ The violence can also be viewed as organized attacks against female protesters to intimidate and keep them out of the square in order to weaken their stance and silence their voices.

A few months after the revolution a number of women got arrested, attacked and dragged to a military prison where they had virginity tests performed on them by a male military doctor while other military personnel watched. One of the girls sued the military, which vehemently denied the case. The military later admitted to having ordered it, stating that it was routine procedure because men and women had been camped out together in Tahrir. A general defended the tests saying that, "The girls who were detained were not like your daughter or mine. These were girls who had camped out in tents with male protesters in Tahrir Square, and we found in the tents Molotov cocktails and (drugs)."²³⁹ The military doctor who performed these tests was acquitted.²⁴⁰ The way the government treated the virginity tests and other attacks epitomizes their stance when handling violence against women. Perpetrators are rarely punished for violence against women and many women do not report assault in fear that it will affect their reputation.²⁴¹ Women

²³⁸ *Id*

²³⁹ ROBIN WRIGH, *ROCK THE CASBAH: RAGE AND REBELLION ACROSS THE ISLAMIC WORLD WITH A NEW EPILOGUE THE MORNING AFTER*, 237 (2012),

²⁴⁰ *Id*

²⁴¹ HUMAN RIGHTS WATCH, *WORLD REPORT 2013: EVENTS OF 2012*, 529 (2013)

https://www.hrw.org/sites/default/files/wr2013_web.pdf (visited on Apr. 10, 2013); It states that "Systematic sexual harassment of women and girls in public spaces continued without serious attempts by the government to intervene and halt, or deter the practice. For example, in June, mobs attacked and

are often blamed and the perpetrators cleared. It is this notion of male supremacy and female subjugation that hinders the law from enhancing women's status.

E. SOCIETAL RESISTANCE

In addition to the physical violence, women face a lot of social hurdles and stigma. Our society often blames female victims and not the perpetrators for sexual attacks.²⁴² The idea that a woman “was asking for it” or brought it on to herself by dressing a certain way or being in the wrong place is unfortunately all too common. After the assaults in Tahrir, officials said that the victims “had invited the attacks” by participating in public protests.²⁴³ On the other hand, excuses are often made for men. By not explicitly addressing gender based violence in the constitution especially after the surge of violence against women in the past two years, the government is not doing enough to curb the violence at best and sending the message that it is acceptable at worst.

This mentality of traditional roles limiting women's options in society coincides with opposition to any kind of reform attempting to empower women. As Mayer argues women are often blamed for societal ills and are expected to preserve cultural values.²⁴⁴ It also highlights the lack of progress made in changing perceptions of women and the advancement of their position in society since *khul'* was adopted in 2000. Even after a decade since the adoption of *khul'*, and a revolution based on equality, freedom and social justice, women are still treated as second-class citizens. The irony of the revolution

sexually assaulted at least six Egyptian and foreign women in Tahrir square. Although prosecutors investigated two of those incidents, they did not refer any cases to court in 2012, and overall the government failed to prioritize addressing violence against women.”

²⁴² *Id*, See for example, one of the women assaulted in Tahrir, “Hania Moheeb, 42, a journalist, was one of the first victims to speak out about her experience that day. In a television interview, she recounted how a group of men had surrounded her, stripped off her clothes and violated her for three quarters of an hour. The men all shouted that they were trying to rescue her, Ms. Moheeb recalled, and by the time an ambulance arrived she could no longer differentiate her assailants from defenders. To alleviate the social stigma usually attached to sexual assault victims in Egypt's conservative culture, her husband appeared alongside her.

²⁴³ El-Sheikh, *supra* note 238.

²⁴⁴ Mayer, *supra* note 160

is that the current environment threatens to undo a century worth of personal status reform.

F. LEGALITY OF *KHUL'* IS UNDER CHALLENGE

The rise of Islamists may have provided a space in which patriarchal mentalities can impose their conservative beliefs backed by selective interpretations of religious texts feeling that their ideals are widely supported. This is not solely an issue of Personal Status laws, but rather the new direction of which our country is headed. According to Mohamed Al Omda, a member of the Freedom and Justice party and former head of the constitutional and legislation affairs committee of Parliament, in multiple televised interviews, has claimed that he has proposed to repeal the *khul'* law.²⁴⁵ He has gone on numerous talk shows to explain his position regarding the matter in an effort to influence public opinion. His claims stirred up much controversy and renewed a debate to overturn *khul'* the likes of which has not been seen in over a decade. The arguments and justifications used by Omda, which echo Islamists', have not changed since *khul'* was first introduced. Confirming that even over a decade after legal reform and adoption of *khul'*, persistent patriarchal views manage to resurface and hinder women's advancement in society. Omda's arguments against *khul'* centered around two themes: family stability, and association with the old regime.

1. Stability of the family:

Omda expressed great concern over women's rights being defined outside the family and blamed women seeking a divorce through *khul'* for not having an interest in keeping the family together.²⁴⁶ He directly ties women with children; stating that a woman is primarily a wife and a mother, she cannot have her own rights separate from her

²⁴⁵ Al Omda has appeared on a number of talk shows explaining his views on *khul'* and his proposal to repeal it. This is the one I refer to in this thesis. The entire interview/debate is available at <https://www.youtube.com/watch?v=0R41veQGeSE> (accessed on April 6, 2013)

²⁴⁶ *Id.*

children's and her husband's rights.²⁴⁷ This epitomizes the sexist thinking that only female initiated divorce destabilizes the family and that women always have ulterior motives versus just trying to get out of an unwanted marriage. This mistrust of women and the belief that they would abandon their children at any moment not only is sexist but goes against the lived realities of many women seeking *khul'*. This is similar to the argument made pre-*khul'* adoption in 2000, which seems to have gained some momentum after the revolution.

In addition, Omda argues that women's intentions must be investigated by a judge and then he will have the ultimate say.²⁴⁸ However at no point did he mention the need for men's motives for divorce be investigated under the same criteria. This one-sided type of argument is all too common when it comes to the patriarchal opposition's point of view. Omda, and many like him, give men the benefit of the doubt while at the same time questioning women's intentions.

It has been over a decade since the implementation of *khul'* and statistics have not supported the claim that women get divorced for petty reasons and abandon their children.²⁴⁹ The continued resistance to *khul'* shows how much it threatens the status quo that Islamists want to preserve.

2. Associating a law with the old regime:

Another argument made in opposition to *khul'* categorizes it as Suzanne's laws or associates it with the old regime. After the revolution this argument became popular because of the disapproval of Mubarak's regime. Omda, as well as other opponents of, explained that *khul'* is a product of Suzanne Mubarak, who had direct relations with foreign organizations aimed at destroying the family and Islam.²⁵⁰

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

Associating the old regime with the law in order to mobilize people against it is not new in Egyptian history. Decree law 44/1979 faced the exact argument and was labeled Jihan's law, which gained a lot of support against the law and was later annulled by the Supreme Constitutional Court. This strategy is used to make people who hate the Mubarak regime hate this law as well, regardless of whether or not it was a good law. It is fair to point out that even though Suzanne Mubarak is associated with the old regime, she did help pass a law that was in the making for years. Because of the understandable displeasure of the Mubarak regime, this argument may have some merit. However, we must first see if this law has benefited society before we can simply do away with it because it is simply associated with the old regime and throwing away a century's worth of personal status law reform efforts. Using the Mubarak regime rhetoric is just another attempt to gather public opinion under the guise of revolutionary rhetoric in order to hinder women's advancement in the area of personal status laws. How about all the other laws that were formulated under Mubarak, why are just Personal Status Laws being labeled as 'old regime'?²⁵¹

Mulki Al Sharmani adds that Islamists invoking *shari'a* is not something new, what is new "is their being presented to the public as part of a revolutionary struggle against corruption and the political repression of the old regime."²⁵² These Islamists are looking to use whatever means they can to advance their agenda by attempting to use the post-revolution political climate in their favor. For example, attaching old regime and Mubarak to issues are now as effective as criticizing the West or using the Qur'an to rally the masses. Opponents pointed to "old regime" to support certain positions, but ignore it if it contradicts their agenda.

²⁵¹ See Singerman, *supra* note 149, at 9; "Macroeconomic and social changes during the past decade in Egypt have shaken the foundations of the household, its norms, and its gendered division of labor, and radical Islamist activists have used the increasing economic, social, and moral predicaments of lower-income communities as fodder for their opposition to the Mubarak regime and its allies in the West and the Middle East. Culture, values, norms, religion, and the structure of the family remain at the center of their counterhegemonic movements"

²⁵² Camilo Gómez-Rivas, *Women, Shari'a, and Personal Status Law Reform in Egypt after the Revolution*, (Oct 1, 2011) <http://www.mei.edu/content/women-shari'-and-personal-status-law-reform-egypt-after-revolution>

This leads to question whether people's perceptions have changed in the past thirteen years, since the adoption of *khul'*. How can the law have a transformative power if thirteen years later societal perceptions remain unchanged? Furthermore, how about women with no children? How about divorce statistics in the past 10 years?²⁵³ How about male initiated divorces and their effect on the stability of the family? Women's happiness contributes a great deal to the stability of the family love and mutual respect as well.

G. OTHER FORMS OF RESISTANCE

The attack on *khul'* was a part of a series of proposals from Islamists to reform existing laws of personal status and women's rights fueling controversy over Islamists attempts to curb women's already limited rights.²⁵⁴

The most recent hurdle in the advancement on women's rights was Egypt's resistance to the United Nations Commission on the Status of Women.²⁵⁵ This rejection based on women's roles within society and the family exemplifies the ongoing resistance to women's rights in post-revolution Egypt. The Muslim Brotherhood gave many reasons why they reject the declaration. They believe that this declaration would destroy the cohesion of the Muslim family. They argued that this would "give girls sexual freedom, legalize abortion, provide teenagers with contraceptives, give equality to women in marriage and require men and women to share duties such as child care and chores. Egypt's ruling Muslim Brotherhood warns that a United Nations declaration on women's rights could destroy society by allowing a woman to travel, work and use contraception without her husband's approval and letting her control family spending."²⁵⁶

²⁵³ According to Nehad Abul Komsan, The National Council for women, the Ministry of Justice announced that only 3 percent of divorce cases are through *khul'* and 97 percent is fault based.
<http://www.ncwegypt.com/index.php/ar/2013-03-06-10-17-18/factsara>

²⁵⁴ HUMAN WATCH WORLD REPORT, *supra* note 199, at 530

²⁵⁵ The text of the Declaration of the Elimination and Prevention of all Forms of Violence Against Women and Girls, available at
http://www.un.org/womenwatch/daw/csw/csw57/CSW57_Draft_AC_proposal_presented_by_CSW_Bureau_8_February_2013.pdf

²⁵⁶ *see supra* note 258, *see also* Patrick Kingsley, *Muslim Brotherhood Backlash Against UN Declaration on Women's Rights*, THE GUARDIAN, Mar. 15, 2013, www.guardian.co.uk/world/2013/mar/15/muslim-brotherhood-backlash-un-womens-rights.

The National Council for Women released a statement in response to the Muslim Brotherhood's rejection on proposed draft stating:

The claim that the proposed document contradicts Islamic Sharia Law and its principles, destroys and demolishes Islamic manners, and destroys ruins the family institution is completely false. This claim is deceiving, misleading, and constitutes a misuse of religion, in an attempt to destroy the image of the United Nations, in order to prevent preclude and all women's rights for women. Moreover, the ten points of the MB's statement on the subject completely lacks any element of truth. The proposed document did not mention anything about inheritance, divorce, guardianship, or any permission granted to Muslim women to marry non- Muslims, or sexual freedom for the girl child, or granting homosexuals all rights.²⁵⁷

Their quick response to attack the draft without even reading it closely shows the Muslim Brotherhood's avoidance of even having a dialogue where women's rights are discussed. Time and time again, Islamists use interpretations of Islam favorable towards their agenda in order to justify attempts to suppress women's rights and maintain the hierarchy between men and women. Although using Islam to avoid abiding by women's rights' conventions is not new to Egypt, the new constitution demonstrates that the new government has no intention of advancing women's rights further.

²⁵⁷ The National Council for Women's response to the Muslim Brotherhood's statement on the proposed draft of the 57th commission on the Status of Women. Available at <http://www.ncwegypt.com/index.php/en/media-centre/ncw-news/147-ncw-s-stand-with-regards-to-the-current-events-and-issues/748-the-national-council-for-women-s-response-to-the-muslim-brotherhood-s-statement-on-the-proposed-agreed-conclusions-by-the-57th-session-of-the-commission-on-the-status-of-women-on-violence-against-women>

V. CONCLUSION

After examining the resistance to *khul'* law of 2000, the environment for women in the post revolution era remains hostile, further reinforcing societal perceptions and patriarchal order under the guise of Islam. This highlights that women's position in society has not changed enough for the better. However, even though the role of *khul'* in advancing women's rights has been limited, it has offered a remedy for those who did not have a choice before and has increased awareness towards women's rights. Repealing it would be a major step backwards for the future of women's rights and would throw away a century worth of legal reform efforts.

Legal reform must be part of a wider effort against Egypt's patriarchal culture in order to improve the status of women in society. Women seeking divorce who understandably do not trust the system may be inclined to resort to other options to escape a bad marriage. The system's negative impact on women trickles down to the children and family as a whole. On the other hand, human nature implies that men going into a marriage knowing they have easy options to get out of it, if things don't work out to their liking, may not be as motivated to make it work. Unconditional power for men to divorce destabilizes the family no less than female initiated separations. What is more, if the limited options available through *khul'* were repealed, increasing the level of difficulty for women to divorce, this could have a dissuading effect on the next generation of women considering marriage. In addition to fewer marriages, unregistered *urfi* marriages could arise due to the hardships women face from traditional, fault based divorce.

Little progress is still better than no progress or regression, as *khul'* has benefited women as a whole and given them more rights. Prior to its adoption women had to resort to the traditional divorce system that left them in limbo and in the hands of the courts for years. Nevertheless, the legal benefits of *khul'* have been less than ideal due to implementation flaws. State imposed hurdles strengthened ingrained sexist mentalities and was often defended through the cloak of *shari'a* interpretations.

Post revolution, the current political environment has only strengthened Islamists ability to express and execute their extreme patriarchal beliefs when it comes to the role and rights of women. Women's rights have taken a step back in the short term under Mohamed Morsi's Muslim Brotherhood government, but the fight to retain *khul'* is essential for long term gains. Maintaining *khul'*, despite the renewed public opinion campaign against women's rights under the new predominantly Islamic government, would be a significant victory demonstrating the resolve and resiliency of reformists. Maintaining past achievements coupled with small steps is crucial in reforming the patriarchal structure of Egyptian society. I believe that Islamists will continue to use their means to mobilize the country against reform. While they continue working to perpetually curb women's rights and sustain the authority of men, reformists must persevere.