

# Egypt: New Deal on Divorce

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In January 2000, the Egyptian People's Assembly passed a new law affecting women's rights to divorce as well as other matters. The Egyptian press and different sectors of the public had been engaged in prolonged debate about this piece of legislation, in debates examined later in this article. External media gave positive coverage: the BBC for example ran headlines on its Online service such as 'Egypt debates better deal for women' and 'Small victory of Egyptian women';<sup>1</sup> *The Guardian* had an article entitled 'Egypt's sexist divorce laws blamed not on Islam but on men', *The Independent* ran 'Egypt women start a revolution in divorce laws,' and *The New York Times* greeted the entering into force of the new law with 'Egypt's Women Win Equal Rights to Divorce'.<sup>2</sup> The title of an article by Oussama Arabi, one of several scholarly considerations of the law and what it represents, indicates some of the significance perceived by observers and commentators from different disciplines and perspectives: 'The Dawning of the Third Millennium on *Shari`a*: Egypt's Law No.1 of 2000, or Women May Divorce at Will.'<sup>3</sup>

Law No. 1 of 2000<sup>4</sup> is entitled Law Regulating Certain Conditions and Procedures of Litigation in Personal Status Matters.<sup>5</sup> The shorthand by which it has come to be known in parts of the Egyptian press is the Law of *Khul`*,<sup>6</sup> after the most controversial of its provisions: what Arabi refers to as 'women divorcing at will.' *Khul`* is a form of divorce long established in Islamic jurisprudence; English language

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<sup>1</sup> Respectively, 17 January 2000 (Caroline Hawley), 27 January 2000 (Caroline Hawley). BBC News online at [http://news.bbc.co.uk/hi/english/world/middle\\_east](http://news.bbc.co.uk/hi/english/world/middle_east).

<sup>2</sup> Mona Eltahawy, *The Guardian* 23 February 2000; Caroline Hawley, *The Independent*, 25 January 2000; Susan Sachs in *The New York Times*, 1 March 2000.

<sup>3</sup> Oussama Arabi, *Arab Law Quarterly* 16:1 (2001) 2-21, and in Arabi, *Studies in Modern Islamic Law and Jurisprudence*, The Hague: Kluwer Law International, 169-188

<sup>4</sup> The symbolism of it being the first law of 2000 is not lost on commentators such as Arabi.

<sup>5</sup> Law No. 1 of 2000, *Official Gazette* no.4 of 29 January 2000.

<sup>6</sup> Azza Soliman, 'Introduction' in Ahmed al-Sawi (ed), *Al-hisad: `amman `ala'l-khul` (The Harvest: Two Years of Khul`)* Cairo: CEWLA 2003, 7-12, at 7.

writers on Islamic family law usually gloss it as ‘divorce by mutual agreement.’<sup>7</sup> Essentially it involves the wife offering (or agreeing to pay) a consideration<sup>8</sup> to her husband in exchange for his pronouncing a divorce (*talaq*), which takes immediate effect as a final *talaq* and is therefore not subject to revocation by the husband during the ‘waiting period’ of the wife following the divorce.<sup>9</sup> The jurisprudential discussions of the Sunni schools of law examine such matters as what happens if the offer of a *khul'* is withdrawn, what is lawful compensation, and whether the husband may demand that his wife pay compensation more than the value of the dower.<sup>10</sup> However, as Arabi shows,<sup>11</sup> the jurists concur on the principle of mutual agreement: it is the husband who issues the *talaq* in such a divorce, and his participation in the process means that his agreement is integral.<sup>12</sup> A *khul'* is, in traditional Sunni law, a non-litigious form of divorce; no grounds have to be established or recognised by court; the couple concerned agree and the divorce is effected, whether this occurs extra-judicially, or whether the agreement is actually made or affirmed in court (possibly with the court’s assistance in reaching an agreement). What Egypt’s Law No.1 of 2000 did was to empower – or rather instruct - the court to effect a *khul'* divorce at the wife’s petition, in the event of the husband refusing to agree.

This article begins with a brief overview of Egypt’s reform of its divorce laws over the course of the twentieth century in order to contextualise the new law and its implications for women’s right to divorce, before proceeding to consider the new law. The examination of the new law includes a review of the motivations for and

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<sup>7</sup> See for example Dawoud El Alami and Doreen Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World*, The Hague: Kluwer Law International 1996, 27; and N. J. Coulson, *A History of Islamic Law*, Edinburgh: Edinburgh University Press 1964, 238.

<sup>8</sup> In practice this may involve the wife waiving (*ibra'*) any outstanding financial rights (including her deferred dower and any remaining maintenance entitlement), technically termed a *mubara'a* or a *talaq muqabil ibra'* (divorce for renunciation [of financial rights]). This is discussed further below.

<sup>9</sup> The *`idda* period is usually three menstruations (‘seeing blood three times’) or until childbirth if pregnant, with other periods stipulated for widows and those past the menopause.

<sup>10</sup> The dower being the husband’s obligation to the wife at the conclusion of the contract; it is customarily divided into ‘prompt dower’ payable at the start of the marriage and ‘deferred dower’ at its termination by death or divorce. Arabi examines some of these discussions with regard to compensation for *khul'* in ‘The Dawning of the Third Millennium.’

<sup>11</sup> Arabi, ‘The Dawning of the Third Millennium,’ 175-182.

<sup>12</sup> Although see Abdal-Rehim Abdal Rahman Abdal-Rehim, ‘The Family and Gender Laws in Egypt During the Ottoman Period,’ in Amira Al Azhary Sonbol (ed), *Women, the Family, and Divorce Laws in Islamic History*, Syracuse: Syracuse University Press 1996, 96-111. Abdal-Rehim (105-106) describes a number of cases from Ottoman court records in Egypt and notes that “in almost all cases of *khul'* the *qadi* granted the wife’s wish,” although the cases he describes appear to centre on the husband’s eventual agreement once the terms of the compensation from the wife had been agreed to his satisfaction.

objections to its promulgation, and of reports on how it appears to be operating in practice.

### **Divorce Law in Egypt: Early Reforms**

Unlike most of its close neighbours in both the Arab East and North Africa, Egypt has yet to promulgate a full code of personal status law for Muslims. It has addressed particular personal status matters in a number of laws from the early twentieth century.<sup>13</sup> Personal status law is applied to the Muslim majority population and to recognised non-Muslim communities through a unified national court system; in the case of Muslim personal status law, the dominant opinions of the Hanafi school of law remain the residual jurisprudential authority.<sup>14</sup>

In reforming its divorce laws, Egypt proceeded along the same path as many of its neighbours that were also addressing issues in Hanafi law. This involved two main approaches. The first was to constrain the impact of the man's pronouncement of unilateral *talaq* in certain physical and psychological circumstances, so that either no divorce took effect, or a single revocable divorce was effected in place of what Hanafi law (and in some cases the law of all four Sunni schools) would have ruled a three-fold and irrevocable *talaq*.<sup>15</sup> The second was to expand the grounds on which the wife could seek judicial divorce (*tafriq/tatliq*) beyond the extremely constrained grounds available under the dominant Hanafi legal opinions;<sup>16</sup> the approach here was, broadly, to specify, through using rules introduced from other schools of law,

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<sup>13</sup> For an early comparison of the terms of the Ottoman Law of Family Rights 1917 and the Egyptian Laws Nos. 25/1920 and 25/1929, see J.N.D. Anderson, 'Recent Developments in Shari'a Law V: The Dissolution of Marriage,' 41 *The Muslim World* (1951) 271-288.

<sup>14</sup> Egypt merged the *shari'a* and other religious courts into the unified national court system in 1955. See N. Safran, 'The Abolition of the *Shar'i* Courts in Egypt,' 48 *Muslim World* 1958, 20-28 and 125-135. The dominant opinion of the Hanafi school is specified as the residual authority in Article 3 of the Law of Promulgation of Law No.1 of 2000; previously, in article 280 of Law no. 78 of 1931, *Official Gazette*, extraordinary issue no. 53 of 30 May 1931. There had been a debate on introducing a reference to 'the four schools' in the new law of 2000, but the text as promulgated maintains the previous position.

<sup>15</sup> The third of three *talaqs* occasions what is called the 'greater finality' (*baynuna kubra*), ending the marriage irrevocably with immediate effect and disallowing the spouses from re-marrying unless and until the woman has been married to another man, widowed or divorced from him and completed the *'idda* period from that marriage.

<sup>16</sup> Which consisted of the husband's inability to consummate the marriage, or in the event of a missing husband, the time being reached when he would have been ninety years old. A person married in their minority by a guardian other than their father or paternal grandfather could opt to reject the marriage on reaching puberty.

circumstances that would be considered to harm or injury to wife, giving rise to a right to the remedy of judicial divorce.

Thus, Law No. 25 of 1920<sup>17</sup> permitted the wife to petition the court for divorce if her husband was unable to pay her maintenance or was absent or refusing to pay and had no visible assets on which a maintenance order could be executed. It also permitted a petition for divorce if the husband was either found to have or later developed a chronic and incurable condition that would cause injury to wife were she to remain in the marriage.<sup>18</sup> A second law, Law no.25 of 1929,<sup>19</sup> established grounds for divorce at the wife's petition if she had suffered injury due to her husband's absence from her, without reasonable justification, for a year or more, extending this also to allow a woman to apply if her husband had received a final prison sentence of three years or more, once the first year of imprisonment had passed.<sup>20</sup> Also established as grounds in this law was a more general ground of 'injury of a kind that would render it impossible for a couple such as they to continue living together.' Establishment of such injury (which as indicated in the text is a relative concept<sup>21</sup>) entitles the wife to a judicial divorce.<sup>22</sup> If the wife is unable to prove such harm and therefore fails to obtain a divorce on these grounds, but subsequently repeats her claim, the law provides for an arbitration process to be initiated by the court, involving two arbitrators (preferably from the families of the spouses) who are instructed to attempt to reconcile the spouses.<sup>23</sup> If they fail, the law provided that "if the arbitrators find the fault to be that of the husband, of both sides, or not clearly attributable to either, they shall decree a final divorce."<sup>24</sup> What the law did not

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<sup>17</sup> Law No.25 of 1920 Concerning Maintenance and Certain Provisions of Personal Status, *Official Gazette* no.61 of 15 July 1920.

<sup>18</sup> Articles 4, 5 and 9 of Law No.25 of 1920. The examples given of an incurable disease ('or curable only after a long time') are leprosy and madness.

<sup>19</sup> Law No. 25 of 1929 Concerning Certain Provisions of Personal Status, *Official Gazette* no.27 of 25 March 1929. For the way in which the *shari`a* courts of Egypt implemented these provisions before their abolition, see Ron Shaham, *Family and the Courts in Modern Egypt: A Study based on Decisions by the Shari`a Courts, 1900-1955*, Leiden: Brill 1997 113-138.

<sup>20</sup> Articles 12 – 14 of Law No.25 of 1929.

<sup>21</sup> The phrase 'a couple such as they' (*bayna amthalihuma*: literally 'among their like/peers') was translated in 1951 by Anderson as 'people of their class' ('Recent Developments' 284). See Shaham, *Family and the Courts*, 121-124 on the interpretation of 'injury' in the *shari`a* court system to the 1950s; and for an examination of the 'relativity of the notion of injury' in more recent application, see Hoda Fahmi, *Divorcer en Egypte: Etude de l'application des lois du statut personnel*, Cairo: CEDEJ,1987, 21-23.

<sup>22</sup> Article 6 of Law No. 25 of 1929.

<sup>23</sup> Articles 7 and 8 of Law No. 25 of 1929.

<sup>24</sup> Article 9 of Law No. 25 of 1929; Anderson, 'Recent Developments,' 286.

provide for was the remainder of the procedure established in Maliki law whereby if the arbitrators found the wife to be wholly or partly at fault, they would rule for a divorce with the wife's forfeiture of all or part of her dower. Writing in 1951, Norman Anderson noted that this gap in the Egyptian rules "is felt by many to be a defect in the Egyptian legislation which is likely to be revised in the future."<sup>25</sup> The revision was however not to come until 1979.

This second law also tackled the man's unilateral power of *talaq*, setting about reducing the essentially unintended consequences of expressions of *talaq* in certain circumstances. Thus, provisions of Law No.25 of 1929 stipulated that, in exception to the dominant opinions of Hanafi law, no divorce occurred if a man pronounced the *talaq* when intoxicated or under duress, or if he used a form of suspended or conditional *talaq* that was actually intended to have someone do or not do something (rather than being intended to cause a divorce); or indeed if he used indirect or metaphorical expressions of *talaq* that were not in fact intended to cause a *talaq* to occur. The law also provided that a *talaq* accompanied in word or sign by a number would give rise only to a single revocable *talaq*, rather than causing the immediate and irrevocable 'triple *talaq*' of traditional Sunni law. Other expressions of finality were held to cause only a single revocable divorce through a provision stipulating that "every *talaq* falls revocable, except the third of three, divorce before consummation, divorce for remuneration, or any other divorce explicitly designated as final under this or the previous law (of 1920)." Anderson considers these last three measures as "drastic" amendments to the existing Hanafi (and in some cases majority Sunni) doctrine, which went beyond the preceding reforms in the Ottoman Law of Family Rights applicable elsewhere in the region;<sup>26</sup> they have been taken up and in a few cases developed in subsequent personal status codes in different Arab states.

## Later Reforms

Further reforms in divorce law in Egypt had to await the 1970s, although the decades in between saw a number of attempts and proposals for more comprehensive

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<sup>25</sup> Anderson, 'Recent Developments,' 286; although he does cite certain jurisprudential authority for the restricted position initially taken by the Egyptian legislator. Compare Shaham, *Family and the Courts*, 117.

<sup>26</sup> Anderson, 'Recent Developments,' 276.

legislation on personal status law issues failing due to the intervention of external events (for example the 1967 Arab-Israeli war) and/or what Fauzi Najjar describes as “stiff opposition from religious conservatives.”<sup>27</sup> Among other provisions on personal status (for example on custody arrangements for minor children), Law No. 44 of 1979 introduced three substantial amendments to existing divorce law.

In the first, it tackled the problem of wives not knowing that their husbands had divorced them by *talaq*. Under traditional Sunni law, *talaq* is an extra-judicial procedure in no need of a court’s intervention or indeed of any form of official documentation for its validity. Abuses of the system were cited as justifying a provision in Law No.44 of 1979 requiring husbands to document their *talaq* with the appropriate notary and providing that the consequences of the divorce as far as the wife was concerned would take effect only from the date she is made aware of its occurrence – that is, rather than from the date it occurred, a controversial position for some. The wife would be considered to know of the *talaq* through attending its notarisation, and if not present at that documentation procedure then she was to be formally notified in person or at her place of residence through an official. The law also set penalties of six months imprisonment and/or a fine<sup>28</sup> for violation of the terms of this provision.<sup>29</sup>

In the second substantive amendment, Law no.44 of 1979 tackled the wife’s right to a remedy in the event of a polygynous marriage by her husband, providing that “it shall be considered injury to the wife if the husband marries another wife without her consent even if she has not stipulated in the contract of marriage that he shall not marry another wife while married to her; similarly [it shall be considered an injury] if the husband conceals to his new wife the fact that he is already married.” A dissenting wife in this situation was entitled to seek judicial divorce on the grounds of this injury for a period of a year from the date she first learned of the husband’s polygynous marriage.<sup>30</sup> The decidedly non-‘traditional’ point about this provision was its establishment of a legal presumption of injury arising through the mere fact of a

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<sup>27</sup> Fauzi M. Najjar, ‘Egypt’s Laws of Personal Status,’ 10/3 *Arab Studies Quarterly* (1988) 319-344, at 320. Legislation on certain aspects of the law of succession was issued in the 1940s.

<sup>28</sup> Of 200 Egyptian pounds.

<sup>29</sup> Article 5 bis of Law No.25 of 1929 as amended by Law No.44 of 1979.

<sup>30</sup> Article 6 bis of Law No. 25 of 1929 as amended by Law No.44 of 1979.

polygynous union not consented to by the wife. Critics argued, broadly, that this was effectively ruling that an institution permitted in Islamic jurisprudence *ipso facto* caused injury, a proposition untenable in light, *inter alia*, of the fundamental principle of Islamic jurisprudence of averting and remedying injury.

In the third, Law no.44 of 1979 introduced changes in line with standard Maliki law to the existing provision on judicial divorce for discord after the arbitration process in Law no.25 of 1929. If the arbitrators fail to reconcile the spouses, the amendment required them to include in their divorce recommendation to the court an assessment of fault: depending on the proportion of blame attached by the arbitrators to husband and wife, the court may rule for a divorce leaving the wife with all her financial rights intact, or may order that she provide an ‘exchange’ or a ‘recompense’ (*badal*) proportionate to her fault – that is, forfeit some or all of them to the husband. In theory, the arbitrators are supposed to complete their task within six months, with a possibility of one three month extension.<sup>31</sup> This form of divorce, subtitled ‘divorce for discord’ (*shiqaq*) in the law, is distinct from the traditional form of *khulʿ* through its necessary involvement of the court in litigation processes, and through the involvement of arbitrators to assess the proportions of blame. In the new provision for judicial *khulʿ* in Egypt, although as will be seen there is a requirement for mediators to be appointed, their only role is only to attempt reconciliation, rather than, having failed in this attempt, to assess blame and the ensuing financial arrangements for application by the court.

Law No.44 of 1979 was controversial before its promulgation (Najjar reports a four-year build-up to Sadat’s action)<sup>32</sup> and challenged almost immediately afterwards; it was eventually repealed in 1985. The “Egyptian family law saga”<sup>33</sup> of the late 1970s and 1980s is often cited as an illustration of sensitivities involved in reforming Muslim family law in Arab states, and of the external, nominally unrelated socio-political issues that may motivate those opposing change. Support for the 1979 law was closely associated with the person of Jihan Sadat, wife of the then President

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<sup>31</sup> Articles 6-11 of Law No.25 of 1929 as amended by Law No.44 of 1979.

<sup>32</sup> Najjar, ‘Egypt’s laws,’ 323.

<sup>33</sup> As described by Nadia Hijab, *Womanpower: The Arab debate on women at work*, Cambridge: Cambridge University Press 1988, 29. For an in-depth consideration of the public and parliamentary debates around Law No.44 of 1979, see Najjar, ‘Egypt’s Laws of Personal Status.’

Anwar Sadat, and was perceived by some observers as a response to the ‘Islamist’ challenge being posed to the government and political parties at the time. A counter-mobilisation among the Islamist groups charged Jihan Sadat and her associates among the Egyptian feminist movement with being ‘Westernized’, in discourses that are immediately evocative of similar discourses elsewhere in the region, and indeed of criticisms levelled at women supporting the new law of 2000 in Egypt.<sup>34</sup> The 1979 law became known as “Jihan’s Law” and Nadia Hijab observes that “this came to be used in a derogatory sense as the Sadats became increasingly unpopular in Egypt.”<sup>35</sup> Mervat Hatem puts the discussions on family law reform in the context of the unpopularity of Egypt’s Camp David agreement with Israel, which undermined on ‘unrelated’ grounds the prospects for the law to be passed by the People’s Assembly.<sup>36</sup> President Sadat passed the 1979 law by decree, invoking just a couple of days before the reconvening of the People’s Assembly his constitutional power to “take measures which cannot suffer delay” during a parliamentary recess.<sup>37</sup> Hatem reports that the decree was attacked by the left as authoritarian and anti-democratic and by the right as contradicting the *shari`a*, while women found themselves in the particular dilemma of not wanting to support anti-democratic methods in law-making and not wishing to denounce the changes introduced by its terms.<sup>38</sup> The law was duly brought before the People’s Assembly, which was controlled by a majority of the President’s National Democratic Party; Najjar notes that “as was expected, the Assembly approved the law, but not without one of its liveliest debates.”<sup>39</sup> Najjar’s examination of the debates in the Assembly compares to analyses made of the debates on the latest law No.1 of 2000, in the sense that arguments both for and against were made on the grounds of the compatibility or otherwise of the different provisions with “the Islamic *shari`a*,” almost to the exclusion of other discourses and considerations.<sup>40</sup>

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<sup>34</sup> See the articles by Annalies Moors, Leon Buskens, Anna Wuerth and Lynn Welchman in 10,1 *Islamic Law and Society* 2003.

<sup>35</sup> Hijab, *Womanpower*, 30.

<sup>36</sup> Mervat Hatem, ‘Economic and Political Liberation in Egypt and the Demise of State Feminism,’ 24 *International Journal of Middle East Studies* (1992), 231-251, at 243.

<sup>37</sup> Najjar, ‘Egypt’s Laws,’ 326-7.

<sup>38</sup> Hatem, ‘Economic and Political Liberation,’ 243. Compare Hijab, *Womanpower*, 30.

<sup>39</sup> Najjar, ‘Egypt’s laws,’ 323 and 326.

<sup>40</sup> Compare Marlene Tadrus, ‘Qanun al-khul` fi`l-sahafa al-misriyya’ (The Law of Khul` in the Egyptian Press) 83-100 in al-Sawi (ed), *Al-hisad*, ; and Huda Zakariya, ‘Al-khul’: dirasa fi`ilm al-ijtima` al-qanuni’ (Khul`: a study in legal sociology) 45-81 in al-Sawi (ed) *al-Hisad*.

Opposition by “Muslim conservatives”<sup>41</sup> to the terms of Law no.44 of 1979 continued after its approval by the People’s Assembly. Critics included some members of the judiciary; one study found twenty out of twenty seven judges interviewed to hold the legal presumption of injury arising from polygyny to be an explicit violation of the *shari`a*, and reported one as stating that “he himself had refused to implement the law and had postponed all such cases referred to him.”<sup>42</sup>

In the end however it was the form rather than the substance of Law No.44 of 1979 that fell foul of Egypt’s Supreme Constitutional Court, which in 1985 struck down the 1979 law as having been promulgated in violation of the constitutional constraints of ‘necessity’ on the president’s powers to issue legislation by decree in the absence of parliament. A vigorous response among women deputies in the National Assembly and among NGOs led to the establishment of the Committee for the Defence of the Rights of Women and the Family specifically to undertake advocacy efforts on reform of family law.<sup>43</sup> The state however – now under President Mubarak’s leadership - also moved quickly, in the face *inter alia* of the swiftly-approaching Nairobi conference at the end of the United Nations Decade for Women: Law no.100 of 1985 was presented and passed through the Assembly within weeks of the repeal of the 1979 law. The advocacy efforts of the women’s movement outlived the promulgation of the new law, feeding into the momentum for and content of the later law in 2000.<sup>44</sup>

The provisions of Law No. 100 of 1985<sup>45</sup> wrought changes to two of the three substantive reforms to divorce law introduced by Law no.44 of 1979. Firstly, while repeating the requirement for *talaq* to be notarised and the wife to be properly informed, the new law set a limit of thirty days during which the notarisation has to occur, and provided that its consequences (“in terms of inheritance and other financial

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<sup>41</sup> Najjar, ‘Egypt’s Laws,’ 336.

<sup>42</sup> Essam Fawzi, ‘Muslim Personal Status Law in Egypt: Prospects for Reform through Internal Initiatives’, in Lynn Welchman (ed.) *Women’s Rights and Islamic Family Law: Perspectives on Reform*, London: Zed Press, forthcoming 2004, citing A. Shmais, *Al-mar’a wa’l-talaq*, Cairo 1994, 133-146; citation at 144. See Fawzi more generally for opposition to the 1979 (and 2000) laws.

<sup>43</sup> Hatem ‘Economic and Political Liberation,’ 245. Hijab, *Womanpower*, 31-35, gives an overview of the debates in the press over this period; see also Najjar, ‘Egypt’s Laws,’ 338-340.

<sup>44</sup> See on this Diane Singermann, ‘Rewriting Divorce in Egypt: Reclaiming Islam, Legal Activism, and Coalition Politics,’ at: [www.ucis.unc.edu/Middle\\_East](http://www.ucis.unc.edu/Middle_East) (last visited 18 December 2003).

<sup>45</sup> Law No.100 of 1985 Amending Certain Rulings of the Laws of Personal Status, *Official Gazette* no.27 of 4 July 1985.

rights”) take effect from the date the *talaq* occurs “unless the husband conceals it from his wife,” in which case the consequences take effect from the date she knows of the divorce.<sup>46</sup> The general rule of suspension of the effects of *talaq* on a wife’s knowledge thereof in the 1979 law thus became constrained to the particular circumstances of deliberate concealment. Secondly, the innovative legal presumption of injury arising by the fact of a polygynous marriage by the husband of a wife who has not consented disappeared in Law no.100 of 1985, replaced by wording requiring the wife to establish such injury to the court’s satisfaction. The new provision reads that such a wife may “petition for judicial divorce from him if she is affected by some material or moral harm of a kind which makes it impossible for a couple such as they to continue living together, even if she has not stipulated in the contract that he should not take further wives.”<sup>47</sup> The provisions for judicial divorce for ‘discord’ (*shiqaaq*) between the spouses following a wife’s failed attempt to establish injury and the investigations of arbitrators are maintained in the 1985 law.<sup>48</sup>

### **Law No.1 of 2000**

Unlike the 1979 and 1985 laws, Law No. 1 of 2000 was not issued in the form of amendments and supplements to the laws of 1920 and 1929. As suggested by its title, Law Regulating Certain Conditions and Procedures of Litigation in Personal Status Matters, it is essentially a procedural law, described by Dawoud El Alami as “a law designed to rationalize and consolidate judicial procedure in personal status cases in a single law.”<sup>49</sup> This aspect of the law has been generally applauded, as has the intention of reducing both the effort and the expense of litigation.<sup>50</sup> Besides the provisions on *khul`*, discussed below, Law no.1 of 2000 introduces further changes to Egyptian divorce law. Firstly, it supplements through a procedural regulation the notarisation and registration requirement made in Law no.25 of 1929, as amended by

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<sup>46</sup> Article 5 *bis* of Law No.25 of 1929 as amended by Law No.100 of 1985.

<sup>47</sup> Article 11 *bis* of Law No.25 of 1929 as amended by Law No.100 of 1985.

<sup>48</sup> Articles 7-11 of Law No.25 of 1929 as amended by Law No.100 of 1985.

<sup>49</sup> Dawoud el-Alami, ‘Remedy or Device? The System of *Khul`* and the Effects of its Incorporation into Egyptian Personal Status law,’ 6 *Yearbook of Islamic and Middle Eastern Law* 2000, 134-139, at 134.

<sup>50</sup> See Soliman, ‘Introduction, 7-8; and Muhammad al-Ghamari, *Ru`ya maudu`iya haul qanun tanzhim ijra`at al-taqadi fi masa`il al-ahwal al-shakhsiya* (An Objective View on the Law Regulating Litigation Procedures in Personal Status Matters’) Cairo: CEWLA 2000, 12-14.

Law no.100 of 1985. Law no.1 of 2000 provides that in the event of a *talaq* being denied, the court will find it established only by the formal notarisation and documentation process required in the earlier law.<sup>51</sup> Critics of this provision voiced concern at the apparent denial of legal validity to a contested *talaq* otherwise perfectly valid under the *shari`a*. Others argued in support on the grounds that it would further protect women's rights and oblige the husband to document his *talaq* and have the wife notified accordingly. Fawzi reports particular support among a sample of lawyers and members of the judiciary familiar with what he describes as the "predicaments" of the complexities of existing procedure.<sup>52</sup> In a draft explanatory memorandum to the first draft of the law presented to the People's Assembly, the government argued that this provision effectively brought legal recognition of *talaq* into line with legal recognition of marriage – which, in the event of denial, has had to be established by official document since Law no.78 of 1931 in order for any claims related to that marriage to be considered by the court.<sup>53</sup> In an explicit recognition of the normative pluralism involved in this approach, the draft memorandum noted that while such a *talaq* would not count in law (*qanunan*), "this does not take away from the fact that the *talaq* occurs in religion (*diyanatan*)."<sup>54</sup>

A further change to divorce law arose directly from the above-mentioned long-established rules on marriage registration and the social phenomenon of unregistered, informal or 'customary' marriage (*`urfi* marriage), which has attracted much attention in Egypt in recent years. An *`urfi* marriage is typically concluded with a customary document replacing the official marriage registration procedures, serving *inter alia* to avert charges of illicit sexual relations. Although an *`urfi* marriage may technically fulfil the *shar`i* requirements for a valid marriage, and although there are a range of motivations underlying this form of marriage, there is strong disapproval from the authorities and public concern expressed at the potential for exploitation and

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<sup>51</sup> Article 21 of Law no.1 of 2000. This article also instructs the notary to advise the spouses of the risks of *talaq* and to suggest to them, where possible (i.e. if the divorce has not already taken place) the appointment of family mediators to enable them to come to agreement. Also of interest is Article 22, which allows the wife the right to establish by any means of proof her husband's revocation of his *talaq* of her (and thus her resumption of status as his wife), while disallowing claims of revocation by the husband, in the event of her denial, unless he had informed her of the revocation by official document within certain time periods.

<sup>52</sup> Fawzi, 'Muslim Personal Status Law,' table 1.24.

<sup>53</sup> A provision repeated in Law no.1 of 2000 in Article 17.

<sup>54</sup> Explanatory Memorandum to the Draft Law Regulating Conditions and Procedures of Litigation in Personal Status Matters, Appendix to the Record, 22<sup>nd</sup> Session, 16 January 2000, 100-101.

abuse of the rights particularly of young women getting involved in such arrangements.<sup>55</sup> A woman whose husband in an *`urfi* marriage was refusing to divorce her could not prove the marriage in court due to the exclusion from jurisdiction of claims arising from marriages denied by one party and not officially documented. Unable to prove the marriage, she not only could not claim any of her rights from the marriage, but also could not obtain a divorce from the court. Law no.1 of 2000 specifically addresses this last issue, adding to the provision denying jurisdiction for claims arising from marriages not officially documented a clause to the effect that “nevertheless, a claim of judicial divorce (*tatliq*) or dissolution (*faskh*) shall be accepted – to the exclusion of all other claims – if the marriage is established by any document.”<sup>56</sup> Those objecting to the provision argued that it ‘legitimised’ *`urfi* marriage and risked encouraging the practice by providing a way out.<sup>57</sup> Viewed by some observers as a concession by the official legal system to the unofficial practice, it is presented by the authorities as a protective measure to provide a remedy for women affected by the injury of this situation, enabling them at least to divorce and marry again if they choose.

### **‘The Law of *Khul*’**

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<sup>55</sup> *`Urfi* marriage is a complex phenomenon, and the opposition of the authorities is not derived only from their insistence on bureaucratic procedure. Fawzi for example reports that certain Islamist elements active in university circles have declared that *`urfi* marriage may be legitimate according to the *shari`a* if all it lacks is government certification. Other concerns revolve around marriages of younger women (away at university for example) without the knowledge of their families, and perhaps to younger men unable to afford the financial burdens of a wedding and marriage in the manner that would be expected (see below); and the marriage of underage females (sometimes to wealthy older men) avoiding the age requirements of the official documentation procedures, which require the bride to be at least sixteen years old by the solar calendar. Fawzi also gives examples of situations in which older women make an informed choice not to formally register their new marriage. See generally Fawzi, ‘Muslim Personal Status law in Egypt’. Reporting the initial results of a public opinion poll it carried out in 2000, Almishkat Centre for Research noted that “*Urfi* marriage, which many perceive as motivated solely by economic reasons (many young men unable to afford the amount of money necessary for a “normal” marriage: a dwelling, a dowry and the cost of the wedding reception), was considered wrong by 93.71 % of the sample.” Almishkat Centre for Research, ‘The Ultimate Emancipation of Women is in the Minds,’ at <http://www.almishkat.org/engdoc01>, last visited 15 December 2003. This poll is discussed further below.

<sup>56</sup> Article 17 of Law No.1 of 2000.

<sup>57</sup> See Fawzi, ‘Muslim Personal Status Law,’ and Zakariya, ‘Al-khul’, 70.

The article that prompted the designation of Law no.1 of 2000 as the ‘Law of *Khul`*’ comes in the third chapter of the law, entitled ‘On the raising of claims and their examination.’ Article 20 of Law No.1 of 2000 provides as follows:

The spouses may agree between themselves on *khul`*. If they do not so agree, and the wife submits a claim seeking [*khul`*], and she gives something for her freedom (/ransoms herself)<sup>58</sup> and undertakes a *khul`* from her husband<sup>59</sup> by waiving all her legal (*shar`i*) financial rights and returns to him the dower that he gave her, the court shall rule for her divorce from him (*tatliqha `alayhi*). The court shall rule for the divorce for *khul`* only after attempting to achieve reconciliation (*sulh*) between the spouses and charging two mediators to pursue efforts to effect reconciliation between them, during a period of not more than three months, in the manner set out in Articles 18(2) and 19(1) and (2) of this law;<sup>60</sup> and after the wife has explicitly stated that she loathes life with her husband<sup>61</sup> and that there is no way for their married life to continue, and that she is afraid that she will not [be able to] live within the limits ordained by Allah<sup>62</sup> because of this loathing.

Article 20 goes on to state that the wife’s waiving of her entitlement to custody of children from the marriage, or their maintenance or other rights, shall not be a valid consideration for *khul`*; that in all cases, the *khul`* gives rise to a final *talaq*; and that a ruling for *khul`* shall not be open to any form of legal appeal.

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<sup>58</sup> This phrase (*iftadat nafsa*), uses the same language as that in the Quranic verse cited in the draft explanatory memorandum as a source for this provision, 2:229. In English translations it is variously translated as ‘if she gives something for her freedom’ or ‘if she ransoms herself’ (see translations by A. Yusuf Ali and Marmaduke Pickthall).

<sup>59</sup> The phrase here is *khala`at zawjaha*, from the same root as *khul`*; since the root meaning of *khala`a* is usually given as ‘taking off’, as in garments, the literal meaning would be takes off, removes or ‘discards’ her husband, through her act of financial obligation.

<sup>60</sup> These provisions require the court to make efforts at reconciliation in every claim of *talaq* and *tatliq*, with specific requirements if there are children from the marriage; and regulate the naming of individuals as mediators where the law requires two to be appointed.

<sup>61</sup> The reference to ‘loathing life with her husband’ evokes the narrative of the *hadith* given in the Explanatory Memorandum as the second source of legitimacy for this provision, and generally cited as the basis for *khul`* divorce. For different versions of the *hadith* in point, see Arabi, ‘The Dawning of the Third Millenium,’ 180-186.

<sup>62</sup> The reference to not living within “the limits ordained by Allah” also uses language found in the same Quranic verse 2:229.

Later in the year 2000, the National Council for Women,<sup>63</sup> responding to a question from the Committee on the Elimination of All Forms of Discrimination Against Women considering Egypt's combined fourth and fifth periodic reports, gave the following assessment of the significance of the *khul'* provision:

An important step has been taken to promote equality between women and men in the area of Family Law which will pave the way to make Egypt's withdrawal of its reservation to Article 16 possible. Law no. 1 of 2000, effective as of 1 March 2000, gave women the equal right of divorce through "*Khul'*," or repudiation, which is the indigenous Islamic formulation of women's equal right to divorce for incompatibility without need to prove damage. The law also enhanced justice, including social and economic rights of women, and put an end to the suffering of over one million women each year involved in divorce cases. Such cases used to last from five to seven years on average and sometimes end with denial of divorce.<sup>64</sup>

Two of the elements in this presentation coincide with arguments made domestically by the Egyptian government in support of the provision on *khul'* in Law no.1 of 2000: its provenance from within the Islamic tradition, and the urgent need to speed up court procedures in view of the huge number of cases accumulating in the courts and extremely protracted litigation. Hoda Fahmi's ethnographic study of divorce cases at a Cairo court in the early 1980s indicates the pressures already evident on the system at that time:

En général, les procédures s'étalent sur de longues périodes. La plupart des plaideurs attendant le jugement durant au moins deux ans. D'autres meme, durant quatre ans. Une femme m'a affirmé avoir vu son cas en

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<sup>63</sup> An "independent national body" to promote the advancement of women, established by decree on 8 February 2000, replacing the previously existing National Committee for Women.

<sup>64</sup> CEDAW/PSWG/2001/I/CRP.2/Add.3 23 October 2000; page 4, on Question 3. Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women concerns equality in marriage and at its dissolution.

suspens pendant sept ans. Certaines, qui en sont encore au stade de la notification, ont déjà perdu une année entière à la cour.<sup>65</sup>

Fahmi reports the judges hugely overburdened, resorting to frequent adjournments and often spending “just a few seconds” talking with the petitioners or their representatives.<sup>66</sup> She observes that this is particularly the case with women of the ‘popular classes’ who may see their cases dragging on for years; the effect, according to Fahmi, is a realisation by such women that they are “becoming victims of the bureaucratic system”:

Ainsi, une des femmes interviewées, d’origine urbaine, réalisant à quel point l’expérience du tribunal était exténuante, a finalement décidé, au bout de deux ans de lutte, de “s’arranger” avec son mari qui s’était entre temps marié à une autre femme. Elle s’était endettée auprès de plusieurs personnes pour faire face aux dépenses, sans qu’apparaisse aucune issue à son cas. Finalement elle a été d’accord pour signer un papier déclarant qu’elle renonçait à ses droits matériels en échange de la repudiation.<sup>67</sup>

The abundance of such stories was a powerful argument made for the *khul'* provision; women – particularly poor women - were being forced into concluding a *khul'* divorce and giving up their financial rights, after investing considerable time and money in applying for a judicial divorce, because of the inability (or failure) of the judicial system to bring them prompt and equitable resolution of their application.<sup>68</sup> An agreement on the need for court procedures to be speeded up, however, did not necessarily extend to the introduction of judicial *khul'* as an answer. In particular, those opposing the law denied that it was part of traditional Islamic law and argued that removing the need for the husband’s consent to a *khul'* was a direct violation of the rules of the *shari`a*.<sup>69</sup> It was argued that all the Sunni schools had

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<sup>65</sup> Fahmi, *Divorcer en Egypte*, 15.

<sup>66</sup> *Ibid* 15-16.

<sup>67</sup> *Ibid* 19.

<sup>68</sup> See for example Tahani al-Gabali, ‘Al-Khul’ bayn al-qanun wa’l tatbiq,’ in al-Sawi (ed.) *Al-hisad*, 39-44, at 39-40; Zakariya, ‘Al-khul’,’ 51; and Azza Soliman and Azza Salah, ‘Al-khul’ qanunan wa tatbiqan’ (Khul’ in law and practice), 13-38 in al-Sawi (ed), *Al-Hisad*, at 13.

<sup>69</sup> Zakariya, in her critique of the debates at the People’s Assembly, observes that the emphasis on mutual agreement to *khul'* shifted to a focus on the consent of the husband: ‘Al-khul’,’ 54.

required the husband's agreement to a *khul'* divorce; that giving the court the power to over-ride his refusal to agree effectively removed the husband's 'authority' (*qiwama*)<sup>70</sup> over his wife; that it was "throwing a time-bomb into the Muslim household for the wife to set off at any moment."<sup>71</sup> Marlene Tadrus, in an analysis of the treatment of the *khul'* provision in the press, identifies the religious discourse as the major framework for the debate.<sup>72</sup> She also identifies a range of other arguments made by critics, including that this was an attempt to "make the Egyptian family a carbon copy of the Western family"; that it did not address the real problems in society, which were economic rather than related to personal status law; that women were governed by their emotions and were liable to make rash decisions on divorce; that the law would destroy the Egyptian family, lead to huge increases in the number of divorce cases and "compound the problem of spinsterhood." She further notes evocation of the "conspiracy analysis" in references to "external forces imposing the bill," links drawn with the programmes of international conferences such as the International Conference on Population and Development in Cairo and the Beijing Fourth World Conference on Women, and the idea of the law as "the fruit of the alliance between Western women's movements and the Egyptian women's movement."<sup>73</sup>

Those supporting the *khul'* provision generally responded within the discourses of Islamic jurisprudence and the stability of the family. The draft explanatory memorandum did not tackle the issue of the husband's consent in a manner that recognised that reading the source texts in this way might be considered contentious or innovative. Rather, it set out the two textual sources as justification for the provision (verse 2.229 of the Qur'an and the *hadith* on the first *khul'* in Islam), and pointed out that the 'basis' in *khul'* is mutual agreement, but that it was "established jurisprudentially" that in the event of no agreement, the court could rule for the *khul'*. Beyond this, the memorandum presented judicial *khul'* within the general framework of removing injury. Thus the husband has injury removed from

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<sup>70</sup> For an examination of interpretations of this concept in the Qur'an 4:34 see Barbara Stowasser, 'Gender Issues and Contemporary Qur'an Interpretation', 30-44 in Yvonne Haddad and John Esposito (eds) *Islam, Gender and Social Change*, Oxford: Oxford University Press, 1998.

<sup>71</sup> See review by Fawzi in 'Muslim Personal Status Law.'

<sup>72</sup> Tadrus, 'Qanun al-khul', 84. She observes that the religious discourse was used by those who opposed the provision on a range of other political and social grounds.

<sup>73</sup> *Ibid* 89-95.

him by the fact that “he may retrieve what he has paid and have raised from his shoulders the burden of paying any of the *shar`i* financial rights of the wife thereafter”. As for the wife, the draft memorandum continued, “this makes his holding on to the wife after she has decided to divorce him by *khul`* an injury to her, and the *shar`i* rule is that there shall be no injury and no counter-injury (*la darar wa la idrar*).”<sup>74</sup> The argument here clearly seeks to underpin the legitimacy of judicial *khul`* with the accepted principle of judicial divorce for injury already established in Egyptian law.

The third element in the presentation on the *khul`* provision by the National Council for Women is the promotion of equality between men and women in the area of family law, a theme picked up in the UK and US press coverage cited at the beginning of this article. This element was not, according to Tadrus, a feature in the domestic official discourse supporting the law. Despite the contributions made by broad sections of the women’s movement to the development of the law, she holds that the government appeared keen to distance itself from those calling for equality of the sexes; the dominant voices speaking in support appealed to concepts of the stability and security of the family, rather than the liberation of women or the violation of their rights. Similarly she found little use made of the discourses of citizenship or constitutional rights.<sup>75</sup>

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 the People’s Assembly or wider public opinion in Egypt. Coming back to Arabi’s phrase, it was the idea of ‘women divorcing at will’ that provoked (and/or was used to provoke) substantial opposition in some quarters: the idea that women could divorce their husbands without having to prove grounds, indeed with no ‘fault’ on the part of the husband, and against his will. Under the pre-2000 law, as noted above, a woman who was able and willing to persist might be able, eventually, to obtain a judicial divorce (*tatliq*) from her husband who might be found blameless by the arbitrators: but even here, the claim would start with failed claims of

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<sup>74</sup> Draft explanatory memorandum, 140-141. It went on to suggest that some wives might prefer the option of *khul`* to that of revealing, through a litigation process, intimate details about their married life (at 142).

<sup>75</sup> Tadrus, ‘Qanun al-khul’, 86-88.

injury made by the wife, and the husband could indeed be held to be wholly or partly to blame by the arbitrators. Just as under the rules on *talaq* a man can unilaterally divorce his wife for no reason on her part and against her will, paying her deferred dower and financial compensation as required by Egyptian law, so the deal presented by the *khul'* provision – at its most basic - requires the wife to pay ‘compensation’ to her husband in the event of her exercising this option. It is in this sense that the National Council for Women presents judicial *khul'* as ‘women’s equal right to divorce for incompatibility without need to prove damage.’

### Perceptions and Practice

As for Egyptian public opinion, polls and surveys carried out in the run-up to the promulgation of the new law showed quite a divide. An ‘elite opinion survey’ (including members of the judiciary, journalists, lawyers, civil society activists and leaders of different women’s groups) showed 60% in favour of the *khul'* provision.<sup>76</sup> A survey of broader public opinion found that 48.5% disapproved and 40.5% approved, with the rest reporting no comment; in this result, a gender difference was clear, with twice as many men disapproving as approved, while more women approved than disapproved.<sup>77</sup> On the other hand, a poll carried out by *Al Ahrām Weekly* and AlMishkat Centre for Research, published in 2001, found 49.94 % approving of the promulgation of the *khul'* provision and 49.52% disagreeing, “with no gender distinction”, although more women than men disagreed with the statement that ‘it is fair that a woman who seeks *khul'* must return everything her husband had given her.”<sup>78</sup>

This last result has interesting resonance with a public opinion survey carried out in Palestine after the promulgation of Egyptian No.1 of 2000. Asked whether they would like to see a similar provision on *khul'* enacted in the future Palestinian state, only about a third of respondents replied in the affirmative (37% of women and 32% of men). Questioned for the reasons, a majority of female respondents supported women’s right to obtain a divorce, but those who opposed the provision argued that

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<sup>76</sup> Fawzi, ‘Muslim Personal Status Law,’ table 1.21; 300 interviewees.

<sup>77</sup> Fawzi, ‘Muslim Personal Status Law,’ table 1.29; 200 interviewees.

<sup>78</sup> [www.almishkat.org/engdoc01](http://www.almishkat.org/engdoc01) figures 1 and 2. Over 1500 persons polled; the report notes that in this preliminary poll, “the poll sample over-represents the educated.”

women should not have to forfeit their property to do so.<sup>79</sup> The issue of what property a woman should forfeit for a *khul'* divorce, and the implications this has for the practicalities of the remedy provided by the law, was and is an issue around the Egyptian provision. Some opponents of the law had argued that the *khul'* provision was 'rich women's law', allowing a remedy only for those who could afford it. From another perspective, Hoda Zakariya points to the risk that a man who mistreats his wife may be the real winner through this arrangement, that *khul'* may end up being a deal made by "those despairing of change whose avenues are blocked and find themselves in front of two options, the sweetest of which is bitter."<sup>80</sup> Her particular criticism is of the requirement in judicial *khul'* that a woman pays back the prompt dower rather than simply waiving (*ibra'*) the remainder of her financial rights – the deferred dower and maintenance for the waiting period – an arrangement she identifies as "well known to Egyptian society as a popular remedy to the various problems of divorce through the official channels."<sup>81</sup> This scenario she puts in the context of the "feminisation of poverty," concerned that women, particularly in rural areas, may not only come out of the marriage with nothing, but may have to "borrow against the future" in order to do it, having already put the prompt dower into the establishment of the household and the raising of children.<sup>82</sup> The 'equality' of divorce rights entailing a cash repayment of the prompt dower is arguably less than real equality given that women are less likely than men to be involved in the waged economy.

In an examination of the implementation of the *khul'* provision over its first two years, Soliman and Salah criticise a lack of clarification in a number of court rulings as to how the assessment was made of the dower fees, along with certain cases

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<sup>79</sup> Rema Hammami, 'Doxa and Orthodoxy: Attitudes towards Legal Reform in Personal Status Law,' in Welchman (ed), *Women's Rights and Islamic Family Law*. Stratified random sample of 1200 persons.

<sup>80</sup> Zakariya, 'Al-khul', 52.

<sup>81</sup> Loc cit. By way of comparison, research in the Palestinian West Bank found divorce for *ibra'* (referred to as *mukhala'a* or *khul'* in the application Jordanian law, and *talaq muqabil ibra'* in the court records, generally involving the wife waiving her remaining financial rights, not also returning the prompt dower) to be the most common form of divorce in the years 1965, 1975 and 1985; of all divorces, 90% were non-litigious (*talaq* or *khul'*, with only 10% applications for judicial divorce) with an overall proportion of these in three courts of 60% *khul'* to 40% unilateral *talaq*. See Lynn Welchman, *Beyond the Code: Muslim Family Law and the Shar'i Judiciary in the Palestinian West Bank*, The Hague: Kluwer Law International, 2000, 248.

<sup>82</sup> Zakariya, 'Al-khul', 52. Compare el-Alami, 'Remedy or Device?', 139: "The pressures of the cost of living mean that the dowry will most probably already have been spent on household items, the education of children or generally have been absorbed into the family budget."

where the wife was ordered to pay the deferred dower as well as the prompt dower to her husband, rather than waiving her right to the deferred dower.<sup>83</sup> They point out that the draft explanatory memorandum had clear guidelines on this issue,<sup>84</sup> specifying for example that if the dower is specified in the contract but the husband claims he paid more than this amount, the *khul`* shall be granted on the wife's return of the amount specified in the contract, "and the husband may seek payment of his claim through a separate petition to the relevant court."<sup>85</sup> This may have been an answer to some opponents of the law who argued that the amount registered in the marriage contract does not represent 'everything a man paid' to effect the marriage to his wife, while not compromising on the wife's right to a *khul`* divorce on the basis of official records of the dower payment.<sup>86</sup> On this matter as well as on others, Soliman and Salah call for the publication of a formal and definitive Explanatory Memorandum to Law no. 1 of 2000 to guide the judiciary in its application.<sup>87</sup>

A further concern for Soliman and Salah is the length of time the courts are taking to process applications for *khul`*. In a review of 62 rulings for *khul`* in different courts in the first year of implementation, they found that half the cases took over eight months, in some cases taking up to 17 months.<sup>88</sup> This is partly attributed to the extended requirements for reconciliation attempts insisted upon in the discussions of the text at the People's Assembly,<sup>89</sup> but even allowing for the extra periods where there are children to the marriage,<sup>90</sup> it is reported that the deadlines may be missed

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<sup>83</sup> Soliman and Salah, 'Al-khul` qanunan wa tatbiqan,' 37. The research covered six governorates and found 5323 claims for *khul`* submitted in 2000, with 220 resolved; in 2001 they found 5201 claims submitted. By comparison they found 5439 claims for *taliq* submitted in 2000 and 5125 in 2001.

<sup>84</sup> To the effect that if there is a disagreement on what prompt dower was paid, reference is to be made to Article 19 of Law no. 25 of 1929, requiring the wife to prove her statement and if she is unable to do so then allowing the husband's statement to stand "provided he does not claim that which is not customarily a dower for her like/of her peers (*mithlha*)" in which case the 'proper dower' will be ruled for. Soliman and Salah, 'Al-khul`', 38.

<sup>85</sup> Ibid 38.

<sup>86</sup> It is noted by some that fees levied as a proportion of the registered dower may result in registration of either a symbolic dower or one that is lower than the amount actually paid. One of the questions over the implications of the new law is whether it will change the negotiations at the conclusion of marriage as well as at the end, with husbands-to-be seeking the registration of a higher dower. See Fawzi, 'Muslim Personal Status Law.'

<sup>87</sup> Soliman and Salah, 'Al-khul`', 38.

<sup>88</sup> Ibid 35. They note (at 36) that claims processed in the major urban centres in their survey (Cairo, Giza and Alexandria) were generally resolved more quickly than those outside those areas (Fayyoun and Suhag), while Qena saw 205 claims submitted in 2000 but none resolved.

<sup>89</sup> Zakariya, 'Al-khul`', 69; Soliman and Salah, 29.

<sup>90</sup> Article 18 (2) of Law No. 1 of 2000 provides that if the couple have a child, "the court shall propose reconciliation at least two times separated by a period of not less than 30 and not more than 60 days."

due, *inter alia*, to disagreements over how to resolve the issue of dower, repeated adjournments, and the attempts of some lawyers to initiate appeal despite the text of the law to the effect that a ruling for *khul'* is final.<sup>91</sup> Of particular note in Soliman and Salah's findings, however, is their listing of the reasons contributing to a shorter resolution time in the courts. They found that all the claims resolved in the relatively short period of three to nine months had one or more of four features in common. Two of these were the eventual agreement of the husband or mutual agreement of the spouses during the course of the claim, and a third was claims for *khul'* before consummation of the marriage. Significantly, the fourth feature was the changing of petitions originally submitted for judicial divorce (*tatliq*) on the various grounds of injury to petitions for *khul'*, with the original *tatliq* application having already spent "not less than three years" in the courts.<sup>92</sup> Specific examples given are *khul'* petitions describing not only fear of not being able to 'live within the limits ordained by Allah,' but also physical violence (beating) and humiliation, the husband's polygynous marriage causing injury, desertion, lack of consummation, and other examples of conduct attributed to the husband that would, if proven, give rise to the wife's right to a judicial divorce under existing Egyptian law without entailing forfeiture of her financial rights.<sup>93</sup>

In these cases, the problem is not with the *khul'* provision but with the failure of the legal system to provide proper and efficient remedy under the existing law where the wife has grounds and should not have to forfeit her financial rights. Writing in 2000, Dawoud el-Alami predicted that the *khul'* provision would provide a remedy for a woman who had the means to meet the financial obligations it entailed and who wanted a divorce "for no other reason than that she does not wish to be married to her husband." However, he continued:

the fact is that it is those who are most desperate and most vulnerable who are likely to resort to this device, in the knowledge that to pursue

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<sup>91</sup> Zakariya, 'Al-khul', 68-69.

<sup>92</sup> Soliman and Salah, 'Al-khul' qanunan wa tatbiqan', 35-36.

<sup>93</sup> Ibid, 32-34.

proper redress will be a painful and protected process with no guarantee of success.<sup>94</sup>

If Hoda Fahmi's research from the 1980s still holds good today, it would appear that women with means – women from the 'upper classes' – would already have greater prospects of more reasonably expeditious treatment of a claim submitted for *tatliq* requiring the proving of grounds for a judicial divorce that would leave their financial rights intact. The promulgation of the *khul'* provision would thus indeed go some way to providing 'equal access to divorce' in the legal system for women from these social classes without grounds for divorce recognised in law, offering the possibility of a divorce 'without the need to prove damage,' as pointed out by the National Council for Women. However, for women of the 'popular classes,' there is clearly concern that uptake of the *khul'* provision may be prompted by an abandonment of claims for judicial divorce on grounds that the law has long recognised, but on the basis of which they have despaired of obtaining a divorce. While a *khul'* divorce in such cases provides a way out of the immediate situation, it is of course at the expense of established rights.

It is clearly not the intention that a *khul'* divorce with its associated losses of *shar`i* rights for the wife should effectively be the only 'practical' avenue of judicial divorce for women. Further research over a longer time period would be needed to permit an evaluation of the practical impact of the *khul'* provision on Egyptian women's access to and rights on divorce, across the different classes. Such research would include not only the socio-economic standing of the litigants and the speed of resolution of the claims, but parallel studies of applications for judicial divorce on grounds of the different types of injury enumerated in the substantive law. Here again, it will take time for the procedural changes introduced by Law No.1 of 2000 to produce the hoped-for result of speedier resolution of claims and reduced outlay on related fees in personal status litigation. The publication of detailed judicial guidelines, including in an Explanatory Memorandum, the familiarisation of the judiciary with those standards, and determined attention to addressing the problems of Egypt's overburdened judicial system would doubtless contribute to the process.

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<sup>94</sup> El-Alami, 'Remedy or Device?' 139.

Some women's rights activists in the meantime remain convinced that what is really needed is a comprehensive review of Egypt's substantive law on personal status, to match the procedural provisions of Law No.1 of 2000.

## Implications

If, as noted in the CEWLA report on the first two years of implementation of Law no.1 of 2000, the introduction of judicial *khul'* did not produce the 'earthquake in the Egyptian family' direly predicted in parts of the Egyptian press,<sup>95</sup> it is clearly still hugely significant also beyond the field of judicial practice in Egypt. Dawoud el-Alami calls it "nothing short of revolutionary"<sup>96</sup> and Oussama Arabi finds evidence that it "marks a radical discontinuity with extant Islamic family law."<sup>97</sup> In Jordan, King Abdullah followed Egypt's lead in substance, if not in process, including a similar (although not identical) provision for judicial *khul'* in amendments to Jordan's Law of Personal Status which he issued by decree, along with a substantial amount of other such 'temporary legislation', during the prolonged absence of a sitting parliament, on the last day of December 2001.<sup>98</sup> Women's rights activists found themselves in a dilemma similar to that faced in Egypt after the promulgation of the 1979 law. Called upon to review the temporary laws after being reconvened, in September 2003 Jordan's parliament chose to refer the *khul'* provision to a legal committee for further study. Arabi's argument that the *khul'* provision is part of a longer and wider "process of reconstruction of *shari'a* of unprecedented dimensions"<sup>99</sup> is unlikely to be used in support of such legislation in government discourse, since the argument still tends to stress its 'traditional' legitimacy. Arabi's exposition focuses not so much on the legislature, however, as on the role of Egypt's Supreme Constitutional Court in evaluating, where called upon, whether particular pieces of Egyptian legislation are in accordance with the "principles of the

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<sup>95</sup> Soliman and Salah, 'Al-khul' qanunan wa tatbiqan,' 28; and Gabali, 'Al-khul',' 42.

<sup>96</sup> El-Alami, 'Remedy or Device?' 135.

<sup>97</sup> Arabi, 'The Dawning of the Third Millenium' 171.

<sup>98</sup> Temporary Law No.82 of 2001, Official Gazette no.4524 of 31 December 2001. The law amended by this legislation is the Jordanian Law of Personal Status 1976, itself a temporary law issued during the reign of his late father, King Hussein.

<sup>99</sup> Arabi, 'The Place of Islamic Law in the Modern World and the Reconstruction of Shari'a,' 189-211 in his *Studies in Modern Islamic Law and Jurisprudence*, at 201. The title of Arabi's article on Law No.1 of 2000 ('The Dawning of the Third Millenium on Shari'a') might be taken to indicate part of his argument about the relationship between Islamic law and 'modern world,' the 'third millennium' being a calculation by the 'common era' rather than the Islamic (*hijri*) calendar.

*shari`a.*”<sup>100</sup> A challenge to Law No.1 of 2000 has already been lodged,<sup>101</sup> and like the law itself, the deliberations of the Supreme Constitutional Court will be of considerable significance beyond as well as within Egypt’s borders.

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<sup>100</sup> In accordance with the 1980 amendment of Article 2 of the Constitution establishing “the principles of shari`a [as] the main source of legislation.” Arabi, ‘The Place of Islamic Law,’ 196.

<sup>101</sup> Constitutional Case no.201 for the 23<sup>rd</sup> Judicial Year, *Official Gazette* no.52 of 26 December 2002.