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THE JUDICIAL CONSTRUCTION OF THE FACTS AND THE LAW

The Egyptian Supreme Constitutional Court and the Constitutionality of the Law on the *khul'*

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On the fourteenth of July 2001, 'Ala' Abu al-Ma'ati Abu al-Futuh decided to challenge the constitutionality of Law No. 1 for the year 2000, organizing certain forms and procedures of litigations related to personal status.[1] He did so after his wife, 'Aliya Sa'id Mohammad, had seized the Alexandria First Instance Court, Personal Status Section, of her request for *khul'* in order to unilaterally put an end to their marriage which had been concluded three years earlier. She had accepted, in exchange, to reimburse the dowry she had received *('ajil al-sadaq)*, as well as the *shabka*[2]; she had also accepted to relinquish the deferred dowry *(mu'akhkhar al-sadaq)*. According to the claimant, discord had broken out between her and her husband, so much so that she could no longer bear to live with him and was afraid of God's displeasure because of the aversion she felt towards her husband and because she no longer wished to live with him. The court made a first attempt at conciliation, but the wife refused whereas her husband had accepted. The judges then decided to appoint mediators. The latter carried out their mission and submitted a report in which they recommended the separation of the couple through *khul'*. They were convinced that life in common had now become impossible for the couple. They added that they had made certain the wife was ready to relinquish all her financial rights.

That is when Abu al-Ma'ati Abu al-Futuh raised his claim of unconstitutionality. In his opinion, article 20 of the year 2000 law, concerning

deadline to ascertain absence of pregnancy). In our present case, the former couple cannot remarry except by virtue of a new marriage contract and a new declaration of acceptance by both.

3. The woman commits herself to reimburse the part of the dowry which had been given her as well as the *shabka* and she relinquishes the part of the dowry that should have been paid in the case of an ordinary divorce. The *khul'* is indeed a unilateral way of putting an end to marriage, one that allows the woman to obtain a dissolution of the union in exchange of relinquishing the financial rights[7]she could have claimed, as well as accepting to reimburse the dowry she had received at the moment of marriage.[8] She can no longer claim alimony *(nafaqa)*,[9] nor can she claim financial compensation *(mot'a)*.[10] Moreover, she has to relinquish the unpaid part of her dowry.[11]

Let us note that, according to the court, the wife declared herself ready to reimburse the *shabka*. Yet, for many scholars, the *shabka* does not represent a part of the gift that the wife has to give back in order to end her marriage through *khul'* (Mansur 2001: 270). Indeed, since they were offered during the engagement, the gifts are not directly related to the marriage but should be considered as a donation. It is nevertheless true that the application of article 20 gave rise to widely different interpretations by the judges. In the absence of a published explanatory note of the law[12] and, notably, the absence of executive regulations, judges dealing with substance found themselves at a bit of a loss. Because they are allowed a large margin of freedom of interpretation, some judges follow their own personal feelings concerning the legitimacy of that procedure. Being opposed to the *khul'*, they will tend to bring in bigger financial charges to be paid by the wife, for example, imposing that she reimburses the *shabka* and, sometimes, that she pays her husband, the deferred dowry.

4. The Constitutional Court calls to mind that, according to the wife, the conflict with her husband had become so serious that she no longer could live with him and feared God's anger because of her hatred for her husband and her desire to no longer live with him.

According to the law of the year 2000, it is sufficient for the claimant to declare before the judge that she no longer wishes to remain married to her husband, that marital life has become intolerable for her and that she fears to violate God's orders *(tubghid al-hayat ma'a zawjiha wa (...) la sabil li-istimrar al-hayat al-zawjiyya baynahuma wa takhsha ala tuqim hudud allah bi-sabab hadha al-hughd)*[13] she were forced to go on living with him. She does not have to justify her request nor to prove that it is well founded. Unlike a "classical" request for divorce, she does not have to prove the existence of a fault or prejudice.

It is to be noted that the wife did invoke her fear of disobeying God's orders, even if the terms she used were not exactly those appearing in the law of the year 2000.[14]

5. The Constitutional Court goes on to indicate that the judge dealing with the substance did make an attempt to reconcile the couple, but that the wife had refused even though her husband had accepted.

Article 20 does stipulate that the court must not grant a divorce through *khul'* without a prior attempt at reconciliation *(muhawalat as-sulh)*. If he does not manage to convince the couple to put an end to their conflict, the judge has to recognize the impossibility of reconciling them.

6. The judge pursues his narration by recalling that following the failure of the attempt at conciliation, the court had decided to appoint two mediators *(hakamayn)*. The latter had accomplished their mission and submitted a report recommending the separation of the couple by means of *khul'*, having realized that their life in common had become impossible.

The law of the year 2000 stipulates that in case the attempt at conciliation fails, two mediators must be appointed by each party from among the members of their respective families. They must then try for a maximum period of 3 months to reconcile the couple *(li-mawalat masa'a al-sulh baynahuma)*.[15] If they fail by the end of that deadline, and if the woman maintains her claim, the judge must dissolve the marriage, even if the husband does not agree.

The judge, however, is free to follow or not the conclusions of their report. The law of the year 2000 does indeed indicate that the court can select to accept the conclusion of the arbitrators or the conclusion proposed by only one of them, or to adopt any other solution drawn from the examination of the file. The arbitrators do not have the authority to decide.

This stipulation making it imperative to resort to arbitration did not appear in the first draft of the law submitted to the People's Assembly; it was added when the text was introduced by the Minister of Justice in answer to a pressing request by the Consultative Council. The Minister justified that amendment before the People's Assembly as being in conformity with the prescriptions of the school of thought of Imam Malik which authorizes the judge to appoint two arbitrators to try and reconcile the couple in case of *khul'* for a maximum period of three months before pronouncing his decision. The president of the People's Assembly, Fathi Surur, also affirmed that such a measure was indeed in conformity with the principles of the Maliki school, applied in Morocco and in other Arab countries. The adoption of that amendment helped to overcome the reticence of some deputies concerning article 20.

The Supreme Constitutional Court then stops its narration of the facts to introduce the constitutional dimension which led to its intervention in the case, that is when, the court notes, the defence raised the question of the unconstitutionality of Law No. 1/2000 and, in particular, that of article 20 thereof. The judge dealing with the substance, having considered this challenge serious, allowed the claimant to resort to the Constitutional Court.[16]

One realizes that in its narration of the facts, the court only dwells at length on the elements of the procedure stipulated by article 20, not mentioning anything that was unnecessary to legally justify the regularity of the procedure followed by the judges dealing with the substance and, therefore, the regularity of why and how it was seized of the case. Even though the report of the commissioners' body[17] indicates that a female child had been born to the marriage; that the wife had asked her husband to repudiate her; that the family and friends had intervened more than once in an attempt to find an amicable solution and that the mediators appointed by the court had been social workers and not members of the couple's family, the Constitutional Court did not deem it necessary to go back to all those elements in its own narration. The choice made by the court shows that the work of the judge does not only consist of a decision regarding the facts (or regarding the law), but that it "deals, at least in part, with their foundation and their legal qualification. Yet, the facts in themselves cannot be taken into consideration unless they are formulated within concepts and within a legal system" (Spiz 1995: 289). Even if the Constitutional Court is not a judge of facts and is not called upon to legally qualify them it, nevertheless, has to make sure of the legality of its being seized of the case. Thus it must verify that the procedure that led to the question of constitutionality was not incorrect and that the claimant did indeed have an interest in the case. To do so, it refers itself to the procedure stipulated by article 20 of the law of the year 2000, deleting from its narration everything unnecessary for the justification of its objective.[18]

Following this reference to the facts at the origin of the case, the constitutional judge will give answer to the three arguments concerning unconstitutionality advanced by the claimant, starting with the procedure that led to the adoption of Law No. 1/2000 which the court will briefly call to mind.

The Court Examines the Procedure Followed for the Adoption of the Law

In answer to the allegations claiming that the law on the *khul'* had not been submitted to the Consultative Council whereas it is among the texts that have to be submitted imperatively for a prior opinion, the court underlined the fact

that the draft law had indeed been submitted to the Consultative Council on 25 and 26 December, 1999 and had been approved after being debated.[19] The complaint is thus not founded. The court clearly indicates that it does not have to pronounce itself with regard to the necessity or lack of necessity of consulting the Consultative Council since, anyway, the draft had been submitted to it.

If the Constitution of 1971, as amended in 1980, stipulates in its article 195 that "the laws completing the Constitution *(al-qawanin al-mukammila li-l-dustur)* must be submitted to the Consultative Council for its opinion, it does not, however, give a definition of the meaning of "laws completing the Constitution" nor does it enumerate them. It is only in 1993, in a case also concerning personal status law, that the Supreme Constitutional Court clearly indicated, finally, what those laws consist of. It recalled that several provisions of the 1971 Constitution referred to a law in order to organize their implementation or in order to define the framework and limits within which they are applicable. If this reference by the Constitution to the law is a necessary condition for a law to be considered as "completing the Constitution," it is not, however, a sufficient condition. The court added that not all the texts referred to by the Constitution must be considered as such. Only the laws explicating a fundamental rule *(qa'ida kulliya)* are to be considered part of those complementary laws. In other words, only rules that are protected by all constitutions, because to omit them would deprive the text itself of any value. As an example, the Court mentioned the rules related to the protection of the independence of the judiciary. In that case of 1993, the recourse concerned Law No. 100 of the year 1985 amending the provisions relevant to personal status. The court noted that no stipulation of the 1971 Constitution referred to the adoption of a law regarding personal status. Thus, since the first condition had not been met, the law of 1985 could not be considered as a law "completing the Constitution".[20] The fact that the Consultative Council had not been consulted when the law was adopted did not involve its invalidity.

The report of the commissioners' body calls to mind this jurisprudence and, therefore, the non obligatory nature of submitting Law No. 1 for the year 2000 to the Consultative Assembly, since it was also a law dealing with personal status matters. The fact that the Government had, nevertheless, elected to submit the text to the Assembly for its opinion despite the 1993 decision, could be the result of excessive prudence following the invalidation in 2000 by the Supreme Constitutional Court of the procedure of adoption of the law concerning associations, adopted in 1999, which had not been submitted to the Consultative Assembly. The Supreme Constitutional Court

had decided in that case that the 1999 NGO law was a law "completing the Constitution" and had judged it unconstitutional on procedural grounds.[21] It is also perhaps because of the fact that some consider the law of the year 2000 to be related to the right to a fair trial, a right contained in the 1971 Constitution.

The way in which the Supreme Constitutional Court determined the significance of the term "laws completing the Constitution" shows the freedom of interpretation given to the court. Not only did the court determine the criteria necessary for such, it also was the one to decide, case by case, which laws were to be recognized as "completing the Constitution." The criterion of the "fundamental rule" is, in itself, open to interpretation. That decision shows that the court's reasoning is only deductive in appearance. In fact, the interpreter, in our case the court, at its own discretion, establishes for itself the norm that it subsequently applied. It is only later that it sought the principle or principles of interpretation allowing it to justify the meaning attributed to the text and that established the deductive process in giving the motive of its decision. The judge does not interpret a text through a process of pure deductive logic; several subjective elements of appreciation are taken into account.[22]

After having been submitted to the Consultative Assembly, the law was then communicated to the People's Assembly in January 2000 and was adopted. What the decision of the court does not, however, allow us to retrace, are the very heated debates that took place in both assemblies, mainly concerning the Islamic nature of the *khul'* as well as its possible effects on Egyptian society.

The Court and the Conformity of *khul'* with the Principles of the Shari'a

The court next dealt with the conformity of article 20 with the principles of Islamic shari'a, since the claimant had affirmed that the shari'a demanded the prior agreement of the husband. The revolutionary nature of the law of the year 2000 resides indeed in the fact that it does not require the agreement of the husband. Yet, with the exception of divergences as to certain details, the four Sunnite schools seem unanimous in demanding the husband's agreement as part of the *khul'* procedure.[23] In answer to this argument, the Court examined successively two types of events that had taken place in the past, events that it related in its own terms: its previous decisions regarding the interpretation of article 2 on the one hand, and principles of the shari'a on the other.

What Happened in Previous Decisions of the Court?

The Supreme Constitutional Court began by calling to mind that "in conformity with its constant jurisprudence," article 2 of the Constitution, as amended in 1980, means that legislative texts must not contradict the rules of the shari'a whose origin and significance are absolute *(al-ahkam al-shar'iyya al-qat'iyya fi thubutiha wa dalalatiha)*, those rules being the only ones for which interpretative reasoning *(ijtihad)* is not authorized. Since they incarnate the foundations *(thawabit)* of Islamic shari'a, they admit no interpretation and no modification *(ta'wil aw tabdil)*.

To the contrary, there exist relative rules *(ahkam zanniyya)* either because of their origin, or because of their significance or also because of both. The latter can be submitted to interpretative efforts *(ijtihad)* within the framework of the organization of human affairs *(shu'un al-'ibad)* and in order to protect their interests which change and multiply as life evolves and as changes take place in both space and time. The Court also called to mind that the "person in authority" *(wali al-amr)*[24] is the best placed to undertake such an *ijtihad* and that he may resort to reasoning whenever there is no explicit text. The Court added that the shari'a does not attribute a sacred nature *(qudsiyya)* to any opinion.

In a consideration based on a basic principle established for the first time in 1993,[25] and later systematically repeated in all its decisions regarding the conformity of texts with article 2 of the Constitution, the constitutional judge thus affirmed that he had to make a distinction between absolute and relative principles of the Islamic shari'a.[26] In his opinion, only the principles "whose origin and significance are absolute," i.e. which represent uncontestable Islamic norms, be it because of their source or their meaning, must necessarily be applied. They are fixed; they cannot be subject to interpretative reasoning and thus cannot evolve with time. They represent the fundamental principles and the fixed foundation of Islamic Law.[27] The role of the Supreme Constitutional Court must, therefore, be limited to verifying whether or not they have been respected and that any contrary norm shall be considered unconstitutional.

Apart from those absolute principles, however, the Constitutional Court also identified a group of relative rules, either with regard to their origin or to their significance, or with regard to both at the same time. They are rules which can evolve in time and space, they are dynamic, they give rise to different interpretations and they are adaptable to the nature and the changing needs that take place in society. It is up to the *wali al-amr*, i.e. the legislator according to the Constitutional Court, to carry out the task of interpreting and establishing the norms related to such rules, guided by his individual reasoning and in the

interest of the shari'a. Such an interpretative effort should be based on reasoning and will not be limited by any previous opinion.[28]

In 1985,[29] the constitutional judge, called upon, for the first time, to pronounce himself with regard to the interpretation of article 2, had established the principle of non-retroactivity of the 1980 amendment, declaring himself not competent to verify the conformity with Islamic Law of laws adopted prior to 1980. Noting that article 2 of the Constitution had been amended in 1980 to read as follows "the principles of Islamic shari'a are the main source of the legislation" *(mabadi' al-shari'a al-islamiyya al-masdar al-ra'isi li-l-tashri')* instead of "the principles of Islamic shari'a are a main source of legislation" *(mabadi' al-shari'a al-islamiyya masdar ra'isi li-l-tashri')*, the Court had interpreted this stipulation as introducing a new obligation, one that did not have to impose itself except as of the moment of its promulgation. Laws subsequent to the constitutional amendment of 22 May 1980[30] must then respect the principles of Islamic shari'a or else be declared unconstitutional for having violated article 2 of the Constitution. On the other hand, all the texts adopted by the Egyptian legislator before 22 May 1980 are exempted from such a control; in other words, the Supreme Constitutional Court is not competent to verify their conformity with the principles of Islamic shari'a. These texts will, consequently, remain in force as long as they have not been abrogated or amended by the legislator.

If the Court recalls in principle this distinction in all the matters related to article 2[31], we note that, in the present case, it did not explicitly quote the decision to which it was referring. The Court only referred in general to its own "constant jurisprudence"[32]. In this case, the text, subject recourse, had been adopted in 2000, i.e. much after the 1980 amendment. The exception of non-retroactivity of article 2 could not, thus, be applied and the Court had to examine the substance of the case.

This interpretation in 1993 by the Court as to the scope of article 2 was more or less well-received. It shows, once more, how a text can be the bearer of several significances and that the choice of the judge constitutes the authoritative interpretation. Moreover, let us note that the Court invokes its own decisions handed down in previous cases. When, as is the case here in 2002, the principle in question in the claim has already been the object of a previous decision, but that the stipulation itself is for the first time submitted to its control, the Court repeats a full presentation of its motives and does not only refer to the previous decision in which it had already established the principle. It very often happens, as is the case here, that the Court repeats word for word the same justifications.

Even if its own precedents do not bind it legally, the court thus attributes an indirect normative scope to its own jurisprudence by giving its own interpretations the value of being a precedent. One may object that this solution, even if it allows for a certain stability of the legal order, may, however, prevent the Supreme Court from adapting its own interpretation of the Constitution to transformation in the normative, social and institutional field in Egypt. Even though on the strictly legal level, nothing can prevent the Supreme Court from not applying its own jurisprudence.

What Happened in Islamic Fiqh*?*

After this reference to its jurisprudence relative to the interpretation of article 2, the Supreme Constitutional Court launched into an explanation as to the significance of marriage in the shari'a, explaining that it had been conceived as meant to last forever or, at least, as long as the personal relationship between the couple was such that they had an appropriate marital life. But, if aversion came to replace compassion, if dispute intensified and made understanding more and more difficult, added the Court, shari'a had authorized the husband to put an end to the marital relationship by means of repudiation, to which he was entitled in case of necessity and within the limits fixed by shari'a.

In exchange for this right given to the husband, the Court underlined, it was necessary to allow the wife to ask for a divorce for various reasons and, moreover, that she be allowed to free herself by reimbursing the husband what he had given her as a prompt dowry *('aql al-sadaq)*, a procedure known as *khul'*. In either case, explained the Court, the wife must address herself to the judge.

The constitutional judge then invoked a Qur'anic verse as well as a *hadith* by the Prophet which, according to the Court, were at the origin of the *khul'* procedure. Thus the Court quoted verse 229 of the Surat of the Cow *(al-Baqara)* according to which "Divorce must be pronounced twice and then (a woman) must be retained in honour or released in kindness. And it is not lawful for you that ye take from women aught of that which ye have given them; except (in the case) when both fear that they may not be able to keep within the limits (imposed by) Allah. And if ye fear that they may not be able to keep the limits of Allah, in that case it is no sin for either of them if the woman ransom herself (...)." The Court stressed the fact that the woman's right to resort to *khul'* and to set herself free in exchange of repudiation, figured indeed in a Qur'anic text of absolute origin.

Then came the *sunna*, added the Court, and the *hadith* of Ibn-Habath as narrated by al-Bukhari, according to which the wife of Thabit b. Qays, though

she had nothing to reproach her husband in matters of religion nor morals, was afraid of being unfaithful to Islam. The Prophet asked her if she was ready to give back a piece of land that she had been given by her husband. She answered that she was indeed ready to give back the piece of land and even more. The Prophet answered that it was not necessary to give back more. After she had given back the piece of land, he ordered Thabet b. Qays to repudiate her and the latter did so. The Court reminded of the fact that several versions of this *hadith* existed and that according to some, the Prophet pronounced the repudiation formula himself in the absence of the husband. The Court added that, however all the versions agreed as to the authorization of *khul'* and that the latter does indeed figure in a text of the *sunna*, also absolute in its origin.

Though the *khul'* does indeed constitute part of the principles which are absolute in their origin, added the constitutional judge, the details of its organization had not been fixed in a definite manner. This had led the Islamic scholars to give their own interpretation. Some of them held that the husband's agreement was indispensable for the woman to be able to resort to *khul'*. Others, however, deemed that it was not necessary for the couple to be in agreement. Now, the text that was the object of the constitutional challenge had been founded on the Maliki school to authorize the wife to resort to *khul'* in case of necessity, if she could no longer bear to live with her husband. This was only a logical solution *(wa laysa dhalika illa i'malan li-l-'aql)*, specified the Court, which in no way contradicted the rules of Islamic *shari'a*. One cannot force a woman to live with a man.

As underlined by the Court, the compulsory nature or not of the husband's prior consent for *khul'* is a matter on which the authors of the past had not agreed. What the Court does not add, however, is that this matter gave rise to very heated debates in parliament when the text had been adopted in January 2000.

On the day the People's Assembly adopted the draft law on the principle, January 16, 2000, Sheikh al-Azhar had come personally to defend the law, affirming that it was entirely in conformity with Islamic shari'a and that the *khul'*, in particular, figured in both the Qur'an and the *Sunna*.[33] During the debate in the Consultative Assembly, the Minister of Justice had also underlined the fact that the Academy of Islamic Research *(Majma' al-buhuth al-islamiyya)* of al-Azhar had guaranteed the "Islamicity" of the procedure. In the People's Assembly the Minister of *Waqf* also justified the text by the fact that there was no possible discussion that "the *khul'* is an Islamic principle for which there exist several interpretations *(ijtihadat)* among the schools of thought,

and that there was no harm in referring to the predominant opinion considered to be in conformity with general interest." The minister of justice added that marriage should not be a prison for wives and that the draft law aimed at alleviating suffering and at ensuring equality The representative of the majority party at the People's Assembly called upon the deputies to vote in favour of the text, invoking the agreement given by the Academy of Islamic Research which, according to him, put an end to any possible contestation. He went on to say that a wife must not be deprived of the right to *khul'*, a right given to her by Islamic shari'a.[34]

On the other hand, those who were opposed to the law maintained that draft article 20 was contrary to the shari'a, since the latter deemed the husband's agreement indispensable. Moreover, the conservatives believed that the *khul'* was a major threat to the foundations of Egyptian society. At the Consultative Assembly, one deputy declared that he was opposed to the draft law because it would lead to the dislocation of the family *(tafakkuk al-usra)* and would have nefarious consequences for the children. He added that "the text, in its present form, gives priority to the individual aspect at the expense of the social aspect. Yet Islamic shari'a considers marriage to be a social function *(wazifa ijtima'iyya)*. A woman may make wrong use [of that text] by declaring that she detests her husband and asking for the *khul'*, and the judge may grant her a divorce even if the words she had uttered were not true, but just an abusive use of the right in question *(ta'assuf fi istikhdam al-haqq)*." He added that it was up to the legislator to protect the existence and the cohesion of the family and went on to conclude: "this text is dangerous (...), it should be submitted to further discussion in order to establish rules to protect the family from the suffering of the husband and the obstinacy of the wife in order to defend the interests of society." This declaration elicited an immediate intervention by the Minister of Social Affairs who reacted strongly by declaring: "If the deputy is opposed to granting a wife this right, why is he not opposed to the right given to the man?" This reaction immediately lead to several protests within the Assembly: "No! No! No! This is a principle of the shari'a Madam Minister! And you are trying to violate this principle! You should be ashamed of yourself *(haram 'alayki)*!"

One deputy declared before the People's Assembly: "*Khul'* is a kind of irrevocable divorce that requires two conditions: first of all, the agreement and the consent of the couple and, secondly, divorce is in the hands of the husband and it is up to the husband and not the judge to pronounce clearly the word divorce. All four doctrines are unanimous about it. The draft law, in its present form, is contrary to the shari'a in that it gives a woman the right to *khul'* without the husband's consent. The law should be amended so as to

be in conformity with the unanimous opinion of the Islamic scholars *(ijma' al-fuqaha')*" (Ferrié and Dupret 2004: 273). The representative of the liberal party al-Ahrar also insisted on the necessity of the husband's prior consent. To which another deputy, member of the Academy of Islamic Research, answered by affirming that, if the couple did not reach an agreement to proceed with the *khul'*, then Islamic shari'a authorized the wife to resort to a judge as being the representative of the authority *(na'ib 'an wali al-amr)*. He also added that "article 20 in its present formulation is not contrary to the principles of Islamic shari'a, and is in conformity with both Imam Malik and Imam al-Shafi'i who authorized the woman to redeem herself by mutual consent or by addressing herself to the authorities *(sultan)*."

Other deputies questioned the acceptance of the draft law by the Front of the Ulema of al-Azhar *(Jabhat ulama' al-Azhar)*, and blamed Sheikh al-Azhar for not having consulted them. It is true that some members of this institution had written a statement published in different newspapers, in which they had asked for a three months postponement of the discussion of the *khul'* so that they may proceed with an in-depth study of the draft article. The deputies of the Wafd party withdrew from the People's Assembly in protest against the fact that article 20 constituted a matter of substance and not one of form and that it should not have been included in a law on procedure. Above all, they considered that it was not in conformity with the shari'a and that it was wrong to pretend that the Academy of Islamic Research had given its unanimous approval since only 23 members out of the 40 had participated in the debate.

This lively controversy that had shaken both the People's Assembly and the Consultative Assembly does not appear in the Court's narration. The latter recognizes that there are different versions of the *hadith*, but maintains that all of them authorize the *khul'* and that, since there is no unanimity among the Islamic scholars about the meaning of *khul'*, the legislator was entitled to legislate in the matter. By mentioning the fact that there are indeed several versions of the *hadith* in question, the Constitutional Court however proved itself more concerned than the legislator about stating the fact that there existed more than one opinion. Indeed, the legislator by means of the presentation made by the Minister of Justice before the People's Assembly or in the explanatory note to the law of the year 2000, only gave one version of the *hadith*, the one in which the Prophet ordered Thabet b. Qays to divorce his wife, giving him no chance of refusing: "*aqbal al-hadiqa wa tallaqha tatliqa*" (accept the piece of land and divorce her).

What did actually happen at the time of the Prophet? Each protagonist gave his own version and interpretation of the facts about what happened at

that time. For some, the prophet had ordered Thabet b. Qays to divorce his wife. For others, he only suggested to him to do so. By choosing one of the versions of the Prophet's *hadith* and by proceeding to undertake an *ijtihad*, the Court did indeed give its own version of what *fiqh* and the law of the year 2000 actually meant. The debate concerning the "islamicity" of the *khul'* as codified by the Egyptian legislator in Law No. 1/2000 shows, moreover, the flexibility that the norms of Islamic shari'a can have according to the interpretations thereof.

The *khul'* and the Right to a Fair Trial

Finally, the claimant was attacking the fact that the judge's decision concerning the *khul'* was without appeal.[35] Here, the Court answered by invoking its "constant jurisprudence," to declare the claimant's objection not receivable, recalling that it had, in the past, judged that limiting the action before the courts to one single instance of jurisdiction was not a violation of the constitution since it fell within the discretionary prerogatives of the legislator when organizing the laws, on the condition that such a limitation should have objective foundations.[36]

It is true that the constitutional judge had affirmed more than once the discretionary prerogative of the legislator to decide that a judgment would be handed down first and last and that such a principle was not in violation of the constitution.[37] With all due respect for parliamentary sovereignty, the constitutional judge is indeed seeking to maintain a margin of appreciation for the legislator, one that is sufficient for him to carry out his legislative function. Nevertheless, the judge established limitations to this discretionary prerogative of the legislator: the prohibition of any judicial recourse must be motivated by general interest *(al-saleh al-'amm)*.[38] This prohibition must also stem from a clear text *(sarih)* and must be based on an objective foundation.[39]

Thereafter, the Court sought the intention of the legislator when he established the regulation of the procedure of *khul'* in the law of the year 2000. The Court explained that all the provisions of the article completed one another and that they constituted an indivisible whole. The intention of the legislator was to put an end to the prejudice and the discomfort of both parties to the marital relationship, since the article leads to putting an end to the injustice suffered by the wife because of the husband's obstinate refusal to repudiate her even though there was no possible remedy to the situation. Similarly, added the Court, it dispenses the husband from any financial burdens that he would otherwise have had if the marital relationship had been ended by a conventional divorce.

The Court then recalled how the legislator had regulated the *khul'*. The wife must reimburse the sum of the dowry as stated in the marriage contract or as determined by the court in case of a litigation about the sum. This precision given by the Court is interesting because, practically speaking, the judges of substance when dealing with cases of *khul'* are faced with several such litigations. Indeed some husbands contest the sum indicated in the marriage contract; they declare that it does not correspond to the sum which had actually been paid. Problems related to the application of the law arose, particularly concerning the reimbursements by the wife of the part of the dowry paid at the moment of marriage, the one appearing in the marriage contract being one that does not always correspond to the actual sum paid by the husband. The State levies certain taxes proportionate to the sum of the dowry, that is why the husbands tend to declare a sum inferior to the one actually received by the wife. If one is to stick to the wording of the law, however, the wife is only called upon to reimburse the sum mentioned in the marriage contract, i.e. very often 1 Egyptian pound. Faced with the protests of the husbands, some judges resort to article 19 of the Law No. 25 for the year 1929 in order to evaluate the sum to be reimbursed by the wife. According to that provision, in case of contestation about the sum of the dowry, the burden of the proof falls upon the wife. If she can provide no proof, then the judge will accept the sum indicated by the husband under oath. If the judge deems that the sum indicated by the latter does not correspond to general custom concerning dowries paid to women of the same social standard as the wife in the case, then the judge can fix another sum.

The explanatory note of the law of the year 2000 makes it clear, however, that article 19 of Law No. 25 for the year 1929 should only be applicable if the sum of the dowry is not mentioned in the marriage contract. In case of litigation about the sum indicated, the personal status judge must respect the sum registered in the contract and the husband may contest that sum before the competent courts. The Court seems to stand in favour of contesting husbands and complacent judges by envisaging the possibility of having the exact sum of the dowry contested.

In concluding its reference to the functioning of *khul'*, the court added that the legislator had based himself on the consensus of the Islamic scholars *(akhadha bima ajma'a 'alayhi fuqaha' al-muslimin)*. Upon reading the parliamentary debates and recalling the divergent views of the different schools of thought, one can however, query the court's affirmation.

The court ends its explanation by affirming that it was logical for the legislator not to make allowance for any appeal of decisions concerning the

khul', since the latter is founded on personal considerations that only the wife can know. Only God can bear witness of her animosity against her husband and of the impossibility to continue living with him. The judge must then believe her declarations and it would be useless to allow an appeal's procedure. To claim *khul'* is different from any other claim, added the court. To allow an appeal would go against the social objectives sought by the legislator.[40]

The President of the Court Disqualifies Himself: What Happened During the Preparation of the Draft of the Law?

After having examined the content of the Supreme Constitutional Court's decision, what remains for us to do is to query the absence of the Court's president during the examination of the case.

The Court's decision gives a list of the members who took part in the examination of the case and adds that it met under the presidency of its vice-president, Mahir al-Bahiri. What the decision did not specify, is that the court's president Fathi Najib, had disqualified himself in conformity with article 15 of the law governing the court, which refers to the conditions of withdrawal applicable to the members of the Court of cassation. In conformity with the Code of civil and commercial procedures, judges must disqualify themselves in different circumstances where a lack of impartiality might be feared vis-à-vis the parties involved or the case itself.[41] Why did the president of the Constitutional Court fear that he might not be impartial with regard to this decision?[42]

We must go back to the history of the preparation of the draft of this law in order to understand the reasons behind Fathi Najib's decision. As was recalled by the Minister of Justice before the Parliament when he introduced the draft, the preparation thereof lasted nine years. The initiative had been launched by a group of activists, lawyers, NGOs and other scholars (Singerman, 2003). Various past experiences and several failures show that it is not easy to reform personal status law in Egypt. The feminists who undertake this task are soon considered traitors being paid by the West or are accused of supporting anti-Islamic reforms: "patriarchy has had the temerity to label feminism in Egypt as Western (akin to its labelling feminism un-Islamic) in an effort to discredit feminism by undermining its national legitimacy (Badran 1993:144). In order to reject these accusations of anti-Islamism, the group in question chose to place itself at the very heart of the religious reference, i.e. on the very terrain of its detractors, in order to seek the support of modern and liberal religious men.

That is what Mona Zulficar explains, one of the main instigators of the draft. She thus openly admits having used the strategy of religious reference,

particularly on the occasion of the campaign for reforming the marriage contract (Zulficar 1999:14): "for the first time in the Egyptian women's movement, we reclaimed our right to redefine our cultural heritage as Muslim women under the principles of the shari'a (...). The religious extremist groups consistently place women's issues at the forefront of their publicized agenda to implement shari'a principles or "codify" shari'a and assert their cultural identity. They, therefore, accuse any secular feminist opposition of being anti-Islamic, an agent of either the "non-religious" Eastern block or "the corrupt" Western block. It was therefore essential for the women's movement to diversify its strategies and adopt a credible strategy that could reach out and win the support of simple, ordinary religious men and women" (Zulficar, 2003:14). In exactly the same way as in the early XX century, the feminists had used the nationalist discourse in order to gain recognition and to formulate a certain number of claims. At the time, some of them had justified the necessity of improving the status of women by the fact that children are educated by mothers and that illiterate and uncultured mothers can not properly bring up children; this weakens the families and, consequently the nation. Also at that time "a nationalist/feminist alliance of progressive men and women produced a new discourse on women and the family which was predominantly instrumental in tone. Women's illiteracy, seclusion and the practice of polygyny were not denounced merely because they so blatantly curtailed the individual human rights of one half of the population, but because they created ignorant mothers, shallow and scheming partners, unstable marital unions and lazy and unproductive members of society. Women were increasingly presented as a wasted national resource" (Kandiyoti 1991:9 and following).

Conscious of the fact that any attempt to reform the personal status law is quickly politicized, the legislator always made an effort to justify his laws by resorting to endogenous solutions, legitimized by having recourse to the precepts of shari'a. He consequently presents any transformations introduced into the law as being the result of an internal process of renovation, one that respects the requirements of Islam, but not as the result of importing codes and principles from abroad. The reference to Islam seems "in a way, to have become a condition for 'audibility' and respectability – one leading to the other – that very few people think of doubting" (Ferrié and Dupret 2004:264).

The coalition wherein the initiative of the draft law originated had also positioned itself in relation to the religious repertory and resorted to arguments from Islamic law in order to justify the adoption of article 20 of Law No. 1/2000. The call for a new reading of the classical texts, and for the need to re-interpret them in order to restore their initial spirit deformed by

patriarchal interpretations by men, is not something new as such: "male bias in traditional interpretations of the Islamic sources can be seen as the major problem in reconciling the Islamic tradition and human rights (...). As a whole, members of the Islamic religious establishment have tended to be conservative, if not reactionary, in their attitude towards women's rights" (Mayer, 2001:368). Some progressive Muslims have already attempted to break this masculine monopoly and to associate women in the re-interpretation of Islamic sources: "One task facing Muslim feminists is to disaggregate what is properly Islamic from patriarchal attitudes and customs and to highlight the elements in the Islamic heritage that are favourable to women's claims to freedom and equity" (ibid :369). What is new is that even the NGOs and women's rights defenders who had so far been secular now place themselves resolutely on the grounds of shari'a and claim the right to proceed to a new reading of classical texts and to the necessary and logical amendment of the present personal status laws.

This argument was repeated by the Minister of *Waqf* himself when he affirmed before the People's Assembly that a wife's right to resort to *khul'* would lead to the establishment of a balance with the right to repudiation recognized to the husband, and that Islam respects the feelings of women: "the *khul'* is in conformity with the Qur'an and the Sunna," he added, "we must get rid of obsolete and static habits and customs *(al rakida wa al baliyya)*, and we must come back to Islamic shari'a for it is the source of legislation, in conformity with the constitution." The government defended its draft mainly by referring to the Islamic repertory, going directly to the Qur'an and *hadith*, without any mention of the contrary interpretations given by the four Sunnite schools of thought.

By claiming a reform of women's right on the basis of an Islamic reference, the Egyptian coalition adopts the point of view of Abdullah an-Naim who considered international standards of human rights as having little legitimacy in Muslim countries because they are perceived as alien to their values. For this scholar, the defenders of human rights must place themselves within the framework of Islam if they want to be effective: "The only effective approach to achieve sufficient reform of shari'a in relation to universal human rights is to cite sources in the Qur'an and sunna which are inconsistent with universal human rights and explain them in historical context, while citing those sources which are supportive of human rights as the basis of legally applicable principles and rules of Islamic law today" (An-Naim 1990: 171).[43] Let us note that this is also the position adopted by the Supreme Constitutional Court, who affirmed the legitimacy of its re-interpretation of the relatives rules of the shari'a.

Fathi Najib, then advisor to the Minister of Justice played a basic role in the preparation of the draft. "He is recognized by many activists in the coalition as one of its prime 'architects' and strategists, who for a variety of reasons that are both professionally and personally-motivated, believed that women should have greater access to divorce and that personal status law needed substantial reform on a variety of fronts" (Singerman 2003: 19). He defended the draft up to when it was submitted to the People's Assembly, the Minister of Justice, at the opening of the debate in the Assembly on January 16, 2000, having requested the Assembly to authorize his presence. In an interview given in 2001 and in answer to the question "What challenges did you face as a legislator in the process of issuing this law?" he answered: "A culture that upholds the supremacy of men and uses religion in that manner. A patriarchal culture based on male chauvinism. That is why no one can imagine that women can be given the right to break their chains."

A few months following his death in 2003, a coalition of twelve non governmental organizations paid him tribute by organizing a special day of commemoration for him. It was even decided to set up an annual award in his name, to be given to a defender of the rights of men or women.[44]

Conclusion

It may be noted that the international and the constitutional repertories of human rights were not even mentioned in the debates[45]. The only time when a member of the People's Assembly criticized the draft of article 20, considering it in violation of the principle of equality stipulated in article 40 of the constitution, he did so because according to him, only well-to-do women will be able to resort to the *khul'* procedure. When the notion of women's rights was mentioned in the parliamentary debates, it was with reference to the rights granted to her by Islamic shari'a and not in relation to the rights guaranteed namely by the International Convention against all Forms of Discrimination against Women, ratified by Egypt.[46]

The Constitutional Court itself makes no mention of the international law on human rights in its decision, whereas the same Court had, more than once, referred to international treaties for interpretation purposes, in order to confirm the existence of a fundamental right or in order to shed light on its content (Bernard-Maugiron 2003: 436 and following).

As we have seen, the activists themselves stood on the grounds of Islamic law in order to establish the legitimacy of their claims. No mention was made of international human rights law nor of the conventions regarding the rights of women. This position was due to a strategic choice: "It was evident that we could not rely on modern constitutional rights of equality before the law, as these did not equally apply under family laws, which claimed to be based on the principles of shari'a. We could not afford to shy away from the challenge and continue using solely a strategy based on constitutional and human rights. We had to prove that the religious discourse could also be used by women to defend their cause" (Zulficar 2003: 14).[47]

The compatibility of the *khul'* law with international human rights law is, anyhow, contested by different sources. The United Nations committees responsible for supervising the implementation of conventions regarding human rights ("treaty bodies"), criticized the fact that the wife had to relinquish her financial rights in exchange for putting an end to the marriage; according to them, this only perpetuated the inferior status of women. The Human Rights Committee also criticized the *khul'* in its conclusions: "The Committee notes with concern that women seeking divorce through unilateral repudiation by virtue of Act 1/2000 must waive their rights to financial support and, in particular their dowries {articles 3 and 26 of the Covenant}. The State party should review its legislation as to eliminate financial discrimination against women."[48] In its conclusions, the Committee for the Elimination of all Forms of Discrimination against Women (CEDAW) noted with concern that "women who seek divorce by unilateral termination of their marriage contract under Law No. 1/2000 *(khul')* must in all cases forego their rights to financial provision, including the dowry."[49] Similarly, Human Rights Watch in its report published in December 2004, criticized the *khul'* procedure for the same reasons: "While *khul'* has clearly helped some women have easier access to divorce, it has not adequately remedied the fundamental inequality of the divorce process. Human Rights Watch interviews reveal that because of the need to forfeit both the rights to any marital assets and the rights to any future support, this option is limited to women with significant financial resources or those who are desperate for a divorce" (Human Rights Watch 2004: 24). It is true that, to the contrary, the UNDP report on human development of 2000 considered the *khul'* as representing a major victory for women's rights in Egypt: "The start of the 21st century witnessed a major victory for women's rights in Egypt – the passage of a law in February 2000 enabling a woman to obtain a divorce without her husband's consent" (UNDP 2000: 114), adding, rather inaccurately: "Egypt recently became the second of the Arab States after Tunisia to grant equal divorce rights to women" (UNDP 2000: 37).

Mona Zulficar welcomed the decision of the Supreme Constitutional Court, considering that it represented "a victory for human rights, women's rights and for all those working for social progress in this country" (Tadros, 2002),

adding that "the first turning point in Egyptian women's history was made by Qassem Amin a hundred years ago [by encouraging women's emergence into public society], and the second was made by the Supreme Constitutional Court when it ruled that the law is in full compliance with the shari'a and that it does not violate the right of appeal" (ibid).

Does article 20 represent or not a certain progress in favour of improving the status of women? It all, in fact, depends on what will happen when this law will be implemented by the judges dealing with substance. Unlike the Supreme Constitutional Court, they will be examining facts. Yet, like the constitutional judge, they too will proceed to a retrospective formalization *de jure* and *de facto* in order to satisfy the requirements of correct procedure and legal relevance. This may differ from one judge to another, since it will essentially have to do with an act of will.[50]

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12

INVESTIGATING AND PROSECUTING POLICE ABUSE IN EGYPT*

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Police Violence in Egypt

Ill-treatment of suspects and detainees in custody appears to have been a regular feature of Egyptian police and, more broadly, of officials' behaviour in general over the past two centuries.[1] Recurring attempts to regulate official violence (making it the exception and not the norm) were not inspired by humanitarian or legal considerations, but were rather part of the overall attempt to assert governmental authority over state officials.[2] British rule in Egypt (1882-1922) brought about an increasing militarization of the police.[3] After independence, Egyptian police were used as one of the instruments for crowd control, and often acted with excessive violence; in the criminal justice system, abuse of suspects remained part and parcel of police investigative techniques.[4] Despite several attempts to reform the police, improve performance and rebuilt trust,[5] Egyptian police remain under-trained and underpaid and still display few traits of a service institution. While there are no reliable data on how many persons have suffered abuse at the hands of Egyptian police, human rights groups have consistently reported tens of deaths in police custody per year, and many more incidents of abuse at police stations, mainly by sustained beatings, suspension from hand and feet, and electroshocks.[6]

Since the late 1990s, the media and the judiciary have picked up on complaints about police violence. The reasons for this increased attention appear numerous: Police brutality seems *de facto* to have increased and spread beyond the major cities. Whether this is related to impunity encouraging police

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