6 Courts and the Reform of Personal Status Law in Egypt

Judicial divorce for injury and polygamy

Nathalie Bernard-Maugiron

Introduction

From the twentieth century onward, Egyptian lawmakers strived to reinstate a balance between men and women in their access to marriage dissolution.[1] Among other reforms, they limited the male prerogative to end marriage unilaterally[2] and expanded women's grounds to file for judicial divorce. The right to divorce was elaborated in three stages: first of all, laws in 1920 and 1929 allowed divorce for various forms of harm;[3] then, in 1979 and 1985 the law dealt with the particular case of divorce due to damage caused by the husband's polygamy; finally, a law adopted in 2000 introduced a judicial procedure for the breakup of marriage without harm (*khul'*). These reforms were introduced as a result of an internal renovation process and were made legitimate by reference to shari'a principles, as disclosed by the explanatory memorandums to the laws.

If the codification process led to improvements in women's status, implementation of the reforms could not however be achieved without the active support of judges. Whatever the grounds, but in particular in cases of requests for divorce based on injury or polygamy, judicial divorce requires the assessment by a court of the nature and the degree of harm suffered by the wife, and judges enjoy a great deal of discretion in making their decisions. If no specific provision in the law can be found on a particular point, Law No 1/2000 further stipulates that the judge shall follow the most prevalent opinion within the Hanafi school.[4] This means that if a legal provision exists, the judge has to apply it; however, if the law is silent, it will be up to the court to seek, identify and implement non-codified Islamic shari'a norms.

Different courts may be involved in requests for divorce. At first, family courts will decide on the substance of the case.[5] These courts were established in 2004 to bring relief to an over-burdened judicial system by consolidating all aspects of a divorce dispute into a single case and thereby speeding up the legal process.[6] Each court is run by a panel of three judges and their decisions, except in *khul'* cases where the ruling of the judge is final,[7] can be appealed before appeal courts. Since 2004, rulings in family law cases are no longer challengeable before the Court of Cassation.[8] The rulings of the Court of Cassation mentioned in this chapter were issued before the entry into force of that law. Finally, the law providing women with the right to file for divorce in cases of polygamy was challenged before the Supreme Constitutional Court for unconstitutionality, as was the *khul'* law. The Court had to decide whether the provisions

violated Article 2 of the Constitution, according to which 'Egypt is an Arab state, its official language is Arabic and shari'a is the main source of legislation'.

Although Egyptian judges have demonstrated liberalism by fighting for compliance with the rule of law and for the independence of the judiciary (Bernard-Maugiron 2008), they are often perceived as being rather conservative in the field of family rights. An analysis of court rulings of different branches of the Egyptian judiciary involved in requests for divorce for injury and polygamy, however, shows that this perception may not be accurate.

Egyptian courts and divorce due to injury

Divorce for injury (*darar*) was introduced by Law No 25/1929, with certain conditions. When granting divorce due to injury, the Court of Cassation and lower courts gave general definitions of injury, but the interpretation of what constitutes an injury varied according to the social class of the spouses.

A broad definition of injury

According to Article 6 of Law No 25/1929, if a wife alleges that she suffered an injury caused by her husband and that the injury is such that it makes the continuation of the marriage relationship between persons of their social class impossible, she may file for divorce. She will be granted an irrevocable divorce, provided maltreatment is established and the judge fails to achieve a reconciliation between the couple.

The explanatory memorandum to the law emphasizes that this ground for divorce was inspired by the Maliki School. The Hanafi school of law, traditionally applied in Egypt for more than four centuries, only acknowledges a husband's impotency[9] and apostasy as grounds for the legal annulment of a union. That school does not consider any injury that the husband causes the wife a reason for divorce because this could be dealt with by other means, such as reprimanding the husband, putting him in jail or releasing the wife from her duty of obedience. As the memorandum reminded people: 'No opinion in the Abu Hanifa doctrine provides women with the means to exit marriage or foresees any way to bring the husband back to the right path. Each one can harm the other out of vengeance.' This discord between spouses 'is a source of harm which hurts not only the spouses, but also their offspring, parents, and in-laws. ... [T]he welfare commands the adoption of Imam Malik's doctrine in case of discord between spouses.'[10]

It is the wife's responsibility to prove to the judge that the injury inflicted upon her by her husband renders the continuation of the marriage relationship impossible. She will have to convince him of the validity of her claim by proving that her husband mistreated her and that his behaviour caused her so much harm that continued cohabitation is impossible. The judge will, on an *ad hoc* basis, have to characterize the facts under review and decide whether they fit into the definition of harm within the meaning of Article 6.

Trial courts are bound by the rulings of the Court of Cassation, but the definition that the Supreme Court gave to injury is so broad that is leaves them with almost full discretion. The Court of Cassation decided to consult the legal literature of the Maliki

school to interpret the concept of injury because the explanatory memorandum to Law No 25/1929 stated that the provision was based on that school. This decision of the Court may appear surprising because, according to Law No 1/2000, where the law is silent the judge should refer to the prevalent opinion in the Hanafi school. However, reference to the Hanafi school makes little sense because that school, as we have seen, does not recognize injury of a wife as grounds for divorce.

The Court of Cassation defined injury as damage caused by the husband, by either words or deeds, to his wife, and which is inappropriate for people of their status and is considered by customs (*fi al-'urf*) to be abnormal, harmful treatment, and that the wife complains she cannot stand anymore because it makes continuation of a life together impossible.[11] In their decisions, courts of merits (trial courts) usually refer to this definition of injury, though they often do not refer to the same rulings.[12]

The Court of Cassation decided that the wife is entitled to sue for separation if her husband harms her, whether through violence in words or actions, or by abandoning her bed.[13] The wrongful action does not need to have occurred several times: once is enough.[14] The fact that the wrong has stopped at the time of examination of the case does not matter, as long as it occurred in the past.[15] It is not clear in the Court of Cassation rulings whether harm must be intentional or whether unintentional harm is sufficient.[16] The Court of Cassation has recognized, on the basis of a Qur'anic verse, the right of the husband to punish his wife by beating her, but the husband may resort to this means only after having tried, by way of exhortation and desertion of her bed, to convince her to obey him. Beating should only be used by the husband if absolutely necessary to discipline the wife, and is considered as a detestable permissible act (*halal makruh*). The Court of Cassation established that lower courts should evaluate, on an *ad hoc* basis, whether beating is justifiable or not.[17]

The Court of Cassation considered as injury various kinds of behaviour on the part of the husband. It considered the abandonment of the wife by a husband[18] and his abstention from marital intercourse as damage[19] because the wife was 'suspended', neither living with her husband like a proper wife, nor being divorced. The Court's view was that the absence of a husband renders his wife vulnerable to seduction and there is a risk of her committing infidelity. In one case a wife, insulted by her husband who threw her out of the marital home in her nightdress and broke her furniture, was granted a divorce.[20] The Court decided that if the wife returns to the conjugal residence after having suffered damage she is not deprived of her right to claim divorce on the basis of harm.[21] However, sterility of the husband is not enough to justify a divorce because procreation is not the sole purpose of marriage and the absence of children does not prevent a couple from feeling mutual tenderness and compassion.[22]

Wives often refer to several types of harms, including polygamy and its effects, in their request for divorce based on injury. For instance, a wife was granted a divorce for injury because her husband failed to pay her maintenance,[23] confiscated her salary and married another wife without her agreement.[24] Another wife was granted divorce because her husband expelled her from the marital home, entered a polygamous union and stopped fulfilling his financial duties toward her.[25]

A family court granted a divorce to a wife on the grounds of injury because her husband had beaten and insulted her, and accused her of being a liar and a thief.[26]

In another case, a court of first instance in Giza decided to grant a divorce to a wife who had been beaten and insulted by her husband, who married a second wife and stopped providing for her financially.[27] The decision was confirmed by the Cairo Appeal Court. The Mansoura court of first instance granted a divorce to a wife whose husband abandoned her, married another wife and tried to tarnish the first wife's reputation by reporting her to the police.[28] Other grounds of divorce for injury include the non-payment of the dower, abusive behaviour, taking control of the wife's private property, inducing her into prostitution or causing her humiliation. The legislature also provided special grounds for divorce where the husband is imprisoned[29] and where the husband suffers from a serious and incurable defect, if this defect makes life together harmful to the woman.[30] The wife could not, however, invoke this last ground were it present before marriage and she was aware of it, or if such a disease appeared after marriage but she accepted it, expressly or tacitly.[31]

Definition of injury based on social status

The husband's wrong must be such as to make marriage relations between persons of that status impossible. The Court of Cassation repeatedly stated that the criteria was subjective and not objective, and could change according to the environment of the spouses, their level of education and their social milieu.[32] The Court added that adjudication on the substance of the case and the assessment of the criteria was left to the discretion of the judge.[33]

Lower court judges therefore have to decide what kinds of ill-treatment should be considered unbearable and to what kinds of people. The definition therefore relies on the presumption that the ability of women to endure a certain threshold of violence depends on their rank within society. Moderate physical violence could be deemed acceptable for poor or illiterate rural women, on the assumption that violence is widespread and natural in lower social strata, while it would be considered excessive and unacceptable in upper social classes, where wealthier women are well-educated and expected to be accustomed to better treatment.

To assess the level of abuse and violence women can tolerate, judges will take into consideration what they perceive to be the accepted norms of the community in which the spouses live. Their appreciation of the wrong will therefore vary according to their subjective assessment of the environment, the culture, the socio-economic background, the profession and the social status of the couple. Very few cases give a detailed account of this assessment process by the lower court judge.

For instance, in one case the Court of Cassation held that when considering the environment to which the two parties belonged, the lower court judge had correctly characterized as harmful, the behaviour of a husband who assaulted his wife in the street, broke her necklace, soiled her clothes while passers-by congregated to watch what was going on.[34] In another case, the Court of Cassation confirmed a decision of the lower court judge who had considered the attempt by a husband to prevent his wife from entering the house and insulting her in from of two men as damaging because the two spouses came from a respectful family, both enjoyed an advanced level of education, came from a high social status where people are not used to such

treatment. This behaviour, the court decided, should be considered as damage to the honour of the wife and a wrong that is not acceptable to people of her status.[35]

In another case, a court of first instance took an opposite view and rejected a request for divorce from a wife who claimed that she felt ashamed because her husband had been jailed. The court argued that the wife belonged to a social stratum where it is not a disgrace for a wife to have her husband in prison. The court noted the fact that the wife had waited six months before applying for divorce: if the husband's conviction had really been shameful for the wife, why had she not sued for divorce immediately?[36] Another court of first instance turned down a request for divorce from a wife who claimed that her husband had beaten her. Although the court heard the testimony of several witnesses who supported the wife's claims, it took the view that as the wife belonged to a lower social class where such behaviour does not constitute a detriment that would make continuing in the marriage impossible, she should not succeed in her claim for divorce.[37]

If a court takes into consideration the social standing of the person harmed when it is assessing prejudice, this may reinforce stereotypes and lead to different standards and discrimination on the basis of class, as well as contradictory rulings and a lack of certainty for women who have been injured.

Burden of proof

The burden of providing evidence of injury rests on the wife's shoulders. The Court of Cassation allows judges to use their discretion when deciding on the veracity of the evidence and does not require them to justify the decisions they take, including those relating to witnesses' testimony and giving precedence to one witness over another.[38]

The burden of proof is very difficult to meet. To substantiate the injury she allegedly suffered, the woman must bring witnesses to court. The Court of Cassation has ruled that the principles of the Hanafi school, and not those of the Maliki school, should be applied to determine whether the witnesses are acceptable.[39] Pursuant to the prevailing opinion in the doctrine of Abu Hanifa, the Court of Cassation requires the testimony of two men, or two women and a man.[40] They must be Muslims,[41] because a non-Muslim cannot testify in support of a Muslim.[42] The testimonies relating to the alleged injury should be first-hand evidence and not hearsay (*tasammu'*) evidence.[43] Testimony about overhearing a marital dispute without witnessing the physical or verbal abuse will not be acceptable as proof. If the wife fails to bring witnesses, her request for a divorce will be turned down.[44]

The need for witnesses represents a huge barrier for wives to obtain divorce on the basis of injury. Physical violence and psychological abuse often take place in the bedroom, far from outsiders. Besides, women may be reluctant to disclose intimate details of their private lives and, in particular, of sexual abuse, and witnesses may be reluctant to testify in court. The Court of Cassation has decided that a wife can establish harm using documentary or other types of evidence, for example documents that prove her husband stole her properties;[45] letters from a father to his son in which he accuses his wife of having betrayed him and of having lost her morals;[46] or the fact that the husband has received a criminal conviction for assault and battery.[47] A medical certificate or a police report can also prove that a husband beat his wife.[48]

Divorce for polygamy

Egyptian law allows a wife to sue for divorce in case of polygamy, if she can prove she suffered a significant wrong or harm because of her husband's new marriage. This provision has been used in Egyptian courts, including the Supreme Constitutional Court.

Evolution of the statutory provisions

In 1979, President Sadat issued a far-reaching reform amending laws No 25/1920 and 25/1929 that had remained unchanged for more than half a century. Among the new provisions introduced was a requirement whereby a husband marrying another wife without the first wife's (or first wives') consent could be considered as harming the first wife, who could be granted automatic divorce by the judge, provided she so requested within a year from the day she first knew about his marriage.[49] The simple fact that a husband married another woman was thus presumed harmful to the first wife (or earlier wives), and a wife could obtain a divorce without needing to prove the harm. The explanatory memorandum referred to Maliki and Hanbali precedents, a Qur'anic verse (4: 35) and the saying attributed to the Prophet – *'la darar wa la dirar'* (no harm, no injury) – to justify this new provision.

The provision led to heated debate in the press and was challenged as constituting an indirect restriction on polygamy, whereas there should not be a presumption of injury because polygamy is legal and religiously legitimate. Many judges refused to apply the provision and attacked the law as being unconstitutional, considering it to be contrary to the shari'a. The Supreme Constitutional Court had to assess a considerable number of petitions claiming that the law was unconstitutional. Law No 44/1979 was finally declared unconstitutional in 1985, but due to procedural error and not on substantive grounds. The decree had been passed by the President while Parliament was suspended. It was argued now that this procedure could not be resorted to when seeking to amend laws dating back to 1920 and 1929, which had the consequence of invalidating Sadat's decree.[50]

Law No 100/1985, adopted two months after the decision that Law No 44/1979 was unconstitutional, authorized a wife to divorce her husband for polygamy even if the marriage contract did not stipulate that he may not marry another,[51] but required the wife to prove that her husband's remarriage had caused her physical or moral harm of a type that made continued marital life between them difficult.[52] The explanatory memorandum emphasized that the provision did not seek to restrict the husband's right to polygamy, but was intended to provide a remedy for the first wife who was injured by her husband's remarriage. It also referred to the Maliki school, the same *hadith* and the same verse as did the earlier law, as well as to the Hanbali school and the *fiqh* elaborated in Medina.

The new provision removed the presumption of injury. A wife no longer has an automatic right to divorce her polygamous husband, but has to prove that she suffered

a physical or moral injury. She has a one-year grace period from the date she first knew of her husband's remarriage to request divorce, unless she has consented explicitly or tacitly.[53]

Although Law No 100/1985 mentions polygamy as a possible source of harm, the situation is close to that which was prevailing under Law No 25/1929: a woman is entitled to sue for divorce for the harm inflicted by her polygamous husband, but the burden of proof lies on her to substantiate the harm suffered. The judge enjoys wide discretion in the evaluation of evidence that is provided by witnesses. The harm must result from the remarriage of the husband and should be of a type that would make continued conjugal relations 'difficult' between people of their status, whereas the condition for divorce for injury is that a continued life together would be 'impossible'. Law No 100 departs from Law No 25 when it states that the wife will lose her right to petition the court for divorce after one year and that the damage may be physical or moral. The appreciation of the damage will depend on the social strata of the spouses. This provision was challenged before the Supreme Constitutional Court on the basis of having violated Article 2 of the Constitution.

The Supreme Constitutional Court rules that divorce for polygamy is constitutional

In 1994 the Supreme Constitutional Court (SCC) refused to considerer that a wife's right to request divorce in case of polygamy had violated the shari'a.[54] A bigamous man, whose first wife had asked for a divorce on this ground, referred this provision to the constitutional judge, asking the Court to declare it unconstitutional as it jeopardized the shari'a right to marry up to four women.

In a ruling based on a basic principle established for the first time in 1993,[55] and systematically repeated in all its decisions dealing with the conformity of laws with Article 2 of the Constitution, the constitutional judge made a distinction between absolute and relative principles of the Islamic shari'a. In his opinion, only the principles 'whose origin and significance are absolute' (*al-ahkam al-shar'iyya al-qat'iyya fi thubutiha wa dalalatiha*), i.e. which represent incontestable Islamic norms, be it because of their source or their meaning, must be applied. They are fixed, they cannot be subject to interpretative reasoning (*ijtihad*) and cannot evolve over time. They represent the fundamental principles and the fixed foundation (*thawabit*) of Islamic Law.

Relative rules (*ahkam zanniyya*), conversely, can evolve over time and in different places, are dynamic, give rise to different interpretations and are adaptable to the nature of, and the changing needs in, society. It is up to the person in authority (*wali al-amr*), i.e. the legislator, to interpret and establish 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.[56]

After having referred to this distinction, the SCC argued that whereas the man's right to have more than one wife was guaranteed by a Qur'anic verse, immutable in time and space,[57] polygamy was not obligatory. Moreover, the right to marry up to four women was granted in respect of each individual's needs and its exercise was subordinate to fair and equal treatment of all wives. Law No 100/1985 had not forbidden

the practice of polygamy, the SCC argued, which indeed would have violated an absolute principle in the shari'a, but had only referred to objective grounds, taking into consideration the physical and moral suffering of the first wife that would render it impossible to maintain an amicable life between the couple. In addition, the wife's request for divorce was not based merely upon dislike of her husband – she had to prove that she had been harmed by the second marriage – and the judge had a discretionary power to assess the wrong and had to try to effect a reconciliation between the spouses. Accordingly, the SCC refused to consider that the provision had violated Article 2 of the 1971 Constitution.

In 2004 the SCC applied the same distinction when considering the constitutionality of the 2000 *khul'* law.[58] The law makes it possible for a wife to go to court to obtain an automatic dissolution of their marriage, and the judge is without power to turn down the request, even when husband opposes it. A declaration by a wife that she detests living with her husband, that continuation of married life between them has become impossible and that she fears she would transgress the 'limits of God' due to this hatred[59] if she were compelled to remain with him, is sufficient. She neither has to justify her request by proving injury, nor substantiate its accuracy. As compensation for the husband, however, she has to forfeit her alimony (*nafaqa*),[60] her financial compensation (*muta'*),[61] return to him the dower she received at the time of marriage,[62] and give up the deferred part of the dower (*mu'akhkhar al-sadaq*).[63] This procedure, which allows women to buy their way out of the marriage in exchange for financial compensation, was known in Egyptian law prior to 2000. However, at that time the procedure of *khul'* took place before a civil state officer rather than before a judge and was contingent on the husband's express agreement and was a type of amicable separation agreement or joint application for divorce.[64] The revolutionary nature of the 2000 law was the fact that it did not require the agreement of the husband for *khul'*.

In its 2004 decision the SCC declared that *khul'* did not contradict the rules of the shari'a. It stressed that the woman's right to resort to *khul'* and to set herself free in exchange for repudiation figured in a Qur'anic text and was therefore an absolute principle and, as such, uncontestable. However, the details of the procedure to follow for *khul'* had not been provided by the Sacred Text. This led Islamic scholars to give their own interpretations. Some of them held that the husband's agreement was required for the woman to divorce through *khul'*. Others, however, deemed that it unnecessary for the couple to be in agreement. The statutory provision was founded on the Maliki school's authorization for the wife to resort to *khul'* in case of necessity, if she could no longer bear to live with her husband. This was a logical solution, argued the SCC, which in no way contradicted the rules of the shari'a. One cannot force a woman to live with a man. The challenge of unconstitutionality was rejected.

The definition of injury

According to the Court of Cassation, the definition in Law No 100/1985 requires that the harm occasioned by the second marriage be real, not illusory, actual, not imagined and proved, not assumed.[65] If a husband takes another wife, the first wife can request divorce only if she can prove that she suffered such a physical and moral harm that it is

difficult to continue cohabitation. The mere hatred she feels toward her husband or her repulsion toward him because of his marriage to another are not sufficient grounds to justify dissolution of the marriage.[66] The purpose behind the second marriage does not need to be legitimate.[67]

The Court of Cassation quashed a ruling by a first instance court that had granted divorce to a wife who claimed she was full of sadness and jealousy and felt depressed because of her husband's marriage to another woman. The Court deemed that these feelings were not sufficient to prove damage that was independent from the marriage itself. Jealousy is a natural feeling between a man's two wives, the Court argued.[68] The mere psychological suffering engendered by the new marriage is not considered as harm within the meaning of the 1985 law.

Even before the laws of 1979 and 1985, a wife could be granted a divorce in a case of polygamy, if she could prove injury within the definition of Article 6 of Law 25/1929, for example, by proving that the husband did not treat his wives in the same way (a condition for polygamy to be valid is that the husband treats all his wives in the same way), desertion by her husband of the conjugal bed, or the cessation of financial provision by the husband.[69] For example, the Court of Cassation confirmed a judgment by a first instance court that had granted a wife divorce on the ground that if polygamy is allowed by the shari'a, the husband has to be fair. In that case, the husband had abandoned his first wife for more than two years and had stopped providing for her financially, which was unfair.[70] A wife who cannot prove that her husband's second marriage has been detrimental to her may request a divorce for injury, on the basis of Article 6 of Law 25/1929.[71] The wife could also be granted a divorce on the ground of the absence of her husband.

A husband taking his new wife to the marital home was considered to constitute a moral and physical harm justifying divorce for polygamy.[72] A wife was also granted a divorce because after marrying again, her husband had abandoned her and stopped providing her with maintenance.[73] In a 1999 decision the Cairo Appeal Court confirmed the decision of the Giza first instance court[74] to divorce a wife because she suffered physical and moral harm due to the second marriage of her husband who expelled her from the matrimonial home in order to house his second wife, stopped providing for her financially, beat and insulted her and repudiated her before taking her back.[75] Judges also granted a divorce to a wife whose husband was refraining from cohabitation and from sexual intercourse after having married another wife;[76] to a woman for abandonment by her husband for more than ten months and for the husband's non-provision of her maintenance and that for her children after his remarriage;[77] and to a wife whose husband had brought his new bride to the marital home after having expelled the earlier wife from it.[78]

Conclusion

If the provisions of Egyptian personal status law are marked by their Islamic inspiration, the Egyptian legislator, supported by judges, has been able to reform Islamic law to proceed with its – limited – adaptation to the modern needs of society and with its improvement of the legal status of women within the family. Lawmakers referred to the

shari'a to legitimate the provisions they were adopting and presented their reforms as the products of an internal renovation process legitimized by reference to shari'a principles. To bypass the often rigid rules of Hanafism, the reformers referred to rulings from other schools or reputable authorities, in particular the Maliki *mudhhab*. This enabled the reforms to be presented as taking place within the shari'a and avoided strong attacks from the conservative religious circles.

Personal status law reform in Egypt has however been limited in its scope and constrained by the political context, the survival of patriarchy and the role played by conservative and religious opposition. Experience shows that it is not easy to amend these laws because of resistance by society and conservative religious groups. Amendments to family law are unpopular in the Egyptian patriarchal society and therefore they are politically costly. Although further reforms are needed to improve the status of women within the family, Egyptian women reformists now rather fear for their vested rights after Islamist parties won the 2012 parliamentary and presidential elections. The *khul'* law, in particular, known as one of the 'Suzanne laws', is the target of Islamist groups who attempt to discredit it by associating it with the wife of the ousted president and claiming that these laws were designed to break up Egyptian families and impose Western values.

If the Egyptian legislature has allowed women to obtain a divorce on grounds of various grievances, women's requests for divorce remain subject to the judge's discretion. Judges are an important element in the process of social regulation and in the evolution of family practices. Far from simply being 'the mouth of the law', the judge interprets the legal norms and exercises creative discretion. This is the case even in a field traditionally presented as pertaining to Islamic law, such as personal status law. In the period analysed, Egyptian judges paid little attention to Islamic law and hardly mentioned shari'a norms. When they could not find a provision in the current personal status laws, or in a ruling of the Court of Cassation, they referred to the Hanafi school, although they did so in very few instances.[79] Reference by judges to Islamic law had legislative authorization: Article 3 of Law No 1/2000. As for the SCC, it used different means to limit the place of the shari'a within the Egyptian legal system. Lower judges interpreted injury rather broadly, and wives managed to obtain a divorce for a wide range of harms. Courts are quite open to women and ready to examine their cases with sympathy, but they exercise their discretion on the basis of the social status of the couple. They seem to take social factors more into consideration than religious ones. Their alleged conservatism vis-à-vis women and requests for marriage dissolution might be explained by the fact that, until the beginning of 2007, not one woman sat in Egyptian ordinary courts and the SCC was the only court that included a woman, and she was only nominated in 2003.[80]

Even if judges are not the main obstacle to women's access to divorce, wives face a huge number of social and economic difficulties in using the rights to which they are entitled in divorce matters. The prevailing opinion is still that the family, as the basic unit of society, must be preserved and protected even at the expense of the woman's personal feelings. A wife fighting to break up a marriage will be considered responsible for destroying her home, even if her request is the result of bad treatment inflicted upon her by the husband. She will be stigmatized and sometimes rejected by her own

family. Financial difficulties are added to social criticism. Lawsuits involve financial burden, whatever the type of dissolution, and women will face economic difficulties in most cases, in particular, in collecting child support because a great number of ex-husbands do not pay alimony or maintenance and litigation against them continues for years. Most women do not have any independent source of income and will depend on the financial support of their family and relatives in order to survive. A faithful assessment of access to judicial divorce for injury and polygamy must take all of these issues into consideration.

Notes

1 This article deals only with personal status law for Muslims. For personal status law for non-Muslims see Bernard-Maugiron 2011. Cases from the Court of Cassation, the Supreme Constitutional Court, appeal courts, courts of first instance (until 2004) and family courts (after 2004) were looked at. Most of the cases were after after the 1970s.
2 The legislature put up many barriers to repudiation. However, it neither went as far as abolishing it, nor demanded that the repudiation be pronounced before the judge and justified by legitimate grounds. A simple, blame-free, unilateral declaration by the husband before a civil servant remains enough to break spousal bonds.
3 Law No 25 of 1920 regarding Maintenance and some Questions of Personal Status and Law No. 25 of 1929 regarding certain Personal Status Provisions.
4 Art. 3 of Law No 1 of 2000 that reasserted Art. 280 of the 1931 Sharia Courts Regulations, repealed by that same law.
5 Shari'a courts that ruled in Muslim personal status matters were abolished by Laws No 461 and No 462 of 1955 and their powers transferred to the ordinary courts in which there are judges dealing specifically with personal status cases.
6 Law No 10 of 2004 Establishing Family Courts. Family courts were annexed to the more than 200 summary courts and eight appeal courts in which there are judges dealing specifically with personal status cases.
7 Art. 20 of Law No 1 of 2000.
8 Law No 10 of 2004, Art. 14. The explanatory memorandum of the law justified this measure by the special nature of personal status cases and the necessity to rule in as short a time period as possible in order to fix the legal status of some of the most important questions regarding individuals and the family. Only the public prosecution is allowed to bring a personal status case before the Court of Cassation, and only on certain conditions.
9 On the basis of the predominant view in the Hanafi school, the Court of Cassation gives the husband one year to consummate the marriage before undertaking an investigation. See for instance, Court of Cassation, No 20/46, 14 December 1977. To save time and protect privacy, some women prefer to file a request for divorce for injury instead of sexual incapacity.
10 The explanatory memorandum to Law No 25 of 1929 was published with the law itself and can be found in al-Chazli, 1987.
11 Cassation, No 23/57, 28 June 1988, or Cassation, No 369/68, 9 March 2002.
12 See Family Court of Shubra, No 256/2008, 29 July 2008, which refers to Cassation No 99/59, 5 December 1991 and Family Court of Badrashin, No 465/2006, 31 May 2007, which refers to Cassation, No 337/67, 13 October 2001.
13 Cassation, No 15/47, 2 April 1980.
14 Cassation, No 23/57, 28 June 1981, or Giza First Instance Court, No 3322/2000, 29 January 2001, that refers to the case law of the Court of Cassation with regard to injury.
15 Cassation, No 19/48, 21 February 1979.
16 Cassation, No 640/66, 11 June 2001, or Cassation, No 163/59, 19 May 1992, where the Court stated that injury must be willful; and Cassation, No 19/48, 21 February 1979, where the Court decided, on the basis of the Maliki school, that the wife was injured even if the husband did not intend to hurt her by abandoning her.
17 Cassation, No 85/66, 10 February 2001.
18 Absence of the husband is considered as a special ground for divorce by Arts 12 and 13 of Law No. 25 of 1929, out of concern for the abandoned wife's honour and chastity. The wife can claim divorce on that ground if the husband's absence is longer than a year without any justified excuse, even if he has left goods or investments that can be sold to provide money for maintenance, or property that she could rent, but the judge shall grant divorce if after a month the husband has not resumed maintenance. The explanatory memorandum defines absence of the husband as his residence in a town other than that of the matrimonial residence, and considers travel for the purpose of study or trade justifiable, as is lack of communication if there are other reasons why the husband cannot be in touch. Absence within the meaning of Art. 6 of Law No. 25 of 1929 does not require that the residence of the husband be in a different city.
19 Cassation, No 50/52, 28 June 1983, or Cassation, No 92/58, 18 December 1990.
20 Port Said First Instance Court, No 127/1990, 22 December 1992, confirmed by Cassation, No 398/63, 27 January 1998.
21 Cassation, No 82/63, 28 January 1997.
22 Cassation, No 357/63, 29 December 1997.
23 The husband has an obligation to financially support his wife for the duration of the marriage, even if she has personal resources. Failure to provide maintenance is considered as a special ground for divorce by Art. 4 of Law No. 25 of 1920: if the husband proves his insolvency, the judge shall grant him a period not exceeding one month after which, if he fails to pay maintenance, divorce shall be granted. The husband then retains the right to reinstate his wife during the waiting period if he pays the arrears of maintenance (Art. 6).
24 South Cairo First Instance Court, No 1193/1919, 31 December 1992.
25 Tanta Appeal Court, No 233/26, 7 February 1994, as confirmed by Cassation, No 175/64, 21stApril 1998.
26 Family Court of al-Badrashin, No 806/2006, 28 June 2007.
27 Giza Court of First Instance, No 561/97, 25 August 1997.
28 Mansoura First Instance Court, No 1115/1983, 31st March 1985.
29 The wife can also get a divorce if her husband has been condemned to jail for more than three years, even if he has property that can be rented or sold and from which she could get maintenance. She can ask for divorce after at least one year of separation (Law No. 25 of 1929, Art. 14).
30 The Court of Cassation decided that the list of defects enumerated in Article 9 was not exhaustive. Cassation, No 13/44, 11 February 1976.
31 Law No. 25 of 1920, Art. 9.
32 Cassation, 665/68, 9 March 2002. See also Cassation, No 135/63, 17 March 1997.
33 Cassation, No 96/56, 24 January 1989.
34 Cassation, No 5/46, 9 November 1977.
35 Cassation, No 19/44, 24 March 1976.
36 Sayyida Court, No 355/33, quoted in Ahmed Nasr Al-Guindi, *Mabadi al-Qada fi-l-ahwal al-shakhsiyya*, p. 446.
37 South Cairo Court of First Instance, 1973. Full citation not available.
38 Cassation, No 133/64, 13 April 1998.
39 Cassation, No 15/47, 2 April 1980. In their decisions, lower court judges regularly refer to decisions of the Court of Cassation that establish this principle. Giza Court, No 3322/2000, 29 January 2011, referring to Cassation, No 62/63, 24 February 1997.
40 Cassation, No 15/47, 2 April 1980. See also, Family Court of Badrashin, No 1070/2006, 31 January 2008, where the court refused to grant divorce because only two women had been present when the husband was beating and insulting his wife.
41 Cassation, No 16/38, 5 June 1974, where the request for divorce was rejected because the witnesses were non-Muslim Austrians.
42 Cassation, No 16/38, 5 June 1974.

43 Cassation, No 11/47, 25 April 1979. In Cassation, No 509/65, 26 June 2000, the court refused to grant divorce because the two witnesses had described actions that the wife claimed had taken place but which they had not seen and heard themselves. See also, Family Court of Shubra, No 196/2008, 2 August 2008, where the testimonies did not corroborate her statements.
44 See Shubra Family Court, No 162/2008, where the wife did not bring witnesses to testify that her husband had abandoned her for five years.
45 Cassation, No 11/47, 25 April 1979.
46 Cassation, No 202/62, 25 March 1996.
47 Cassation, No 101/64, 28 December 1998, or Cassation, No 60/8, 14 December 1939.
48 Giza First Instance Court, No 3322/2000, 29 January 2001.
49 Art. 6 bis 1§2 added to Law No 25 of 1929.
50 Supreme Constitutional Court, No 28, 24 May 1985.
51 Spouses can agree on stipulations to add to their marriage contract at the time of marriage, in particular, the right of the wife to repudiate herself whenever she wants or in specific circumstances, for instance, if her husband engages in polygamy. She will retain her financial rights.
52 Law No 25 of 1929, Art. 11 bis 1, as added by Law No 100 of 1985.
53 Any new marriage must be registered and the previous wife must be notified by the public notary. If the husband is already married, he must state the name of his wife and her place of domicile. If the new wife did not know that he was already married, she is entitled to apply for divorce.
54 Supreme Constitutional Court, No 35/9, 14 August 1994.
55 Supreme Constitutional Court, No 7/8, 15 May 1993.
56 Supreme Constitutional Court, No 29/11, 26 March 1994.
57 Sura IV, verse 3.
58 Law No 1 of 2000 Concerning some Rules and Procedures of Litigation in Matters of Personal Status, Art. 20.
59 The law drew its terminology from Surat *al-Baqara* (The Cow), verse 229.
60 This alimony is paid for a maximum of one year after the divorce is issued; see Law No. 25 of 1929, Arts 17 and 18. The alimony is due to the wife, whether the marriage ended by means of repudiation or by a judicial decision. It must cover her food, clothing, housing and medical expenses.
61 Since 1985 (Art. 18 bis 1), the wife is entitled to financial compensation (*muta'*), the amount of which should not be less than two years of maintenance, and should be evaluated according to the husband's financial means, the circumstances of the divorce and the length of marriage. This compensation is only due if the marriage was broken without the wife's consent and without her being responsible for the breakdown. The wife can apply for *muta'* whether the marriage was dissolved through repudiation or judicial divorce (Cassation, No 40/54, 26 May 1987).
62 The husband-groom must pay his bride a dowry – an amount of money that is totally hers. In Egypt the custom is to divide the dowry in two parts; the first part is paid at the time of marriage, while the second is paid when the marriage is dissolved (upon the husband's death or divorce).
63 Other legal rights enjoyed by women – such as her right to custody of the children and to the marital house during the period of custody – were not reappraised by the judges (Law No 1 of 2000, Art. 20 para. 3).
64 Cassation, 28 October 1937, which *defines khul'* as an agreement to obtain final separation in exchange for a financial compensation paid to the husband.
65 Cassation, No 256/61, 8 January 1996.
66 Cassation, No 465/68, 18 March 2002.
67 Cassation, No 225/59, 24 November 1992.
68 Cassation, No 256/61, 8 January 1996.
69 Courts have allowed wives to request both divorce for injury and divorce for polygamy. See Badrashin Family Court, No 1070/2006, 31 January 2008, where the two applications were included in the same claim.
70 Cassation, No 34/48, 13 June 1979.
71 Cassation, No 341/63, 27 October 1997. The court allows wives to request divorce for injury if their request for divorce for polygamy has failed (Cassation, No 553/65, 20 November 2000).

72 Cassation, No 129/59, 5 March 1991.
73 Cassation, No 504/65, 30 October 2000, and Cassation, No 422/64, 29 September 1998.
74 Giza First Instance Court, No 281/1998, 20 September 1998.
75 Cairo Court of Appeal, No 1133/110, 4 February 1999.
76 Cassation, No 114/95, 24 March 1992.
77 Cassation, No 212/63, 5 January 1998.
78 Cairo Court of Appeal, 4 February 1999.
79 For example, Egyptian judges referred to the Hanafi school to allow divorce because of the husband's impotence, to fix the amount of the dower and the way it should be paid, to recognize the wife's right to consent to marriage if she is of majority age, to determine impediments to marriage, and to affirm the existence of the wife's obligation of obedience.
80 The lack of female representation in courts has no legal basis. In fact, neither the Judicial Authority Law nor the State Council Law establishes any discrimination based on gender in the recruitment of judges. It has turned out that, in practice, no woman had ever passed the recruitment examination ... In the beginning of 2007, after years of struggle by feminist groups and due to international pressure, 30 women were finally appointed as judges in the ordinary judiciary.

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7 The Potential Within

Adjudications on *shiqaq* (discord) divorce by Moroccan judges

Fatima Sadiqi

Introduction

Linguistically, the Arabic word *ijtihad* means 'striving, exerting'. Classical Muslim Sunni jurists transposed this meaning to the realm of Islamic jurisprudence and defined *ijtihad* as the exertion of the maximum 'mental energy' to first comprehend and then apply *fiqh* (legal theory) with the aim of discovering the 'law of God' (Sell, 1907; Hallaq, 1984; Karamali, Ali and Dunne, 1994). This 'law of God' is shari'a, defined as the 'all-encompassing law of Islam' that is based on the Qur'an (Muslim's holy book), the Sunna (Prophet Muhammad's sayings and behaviour) and *ijtihad* (Coulson 1964). This complex relationship between shari'a, *fiqh* and *ijtihad* is not stagnant, as Muslim societies constantly change over time and the mutability of shari'a, in particular, has been a point of contention for many centuries, resulting in a rich tradition of legal theory and *ijtihad* in Islam. A characteristic of classical Muslim Sunni jurisprudence is that it reserves the right of *ijtihad* to a few *'ulama'* (religious scholars) alone, who are considered well versed in shari'a (divine law) and *fiqh* (human legal theorization).

As for modern jurists, they are in two main categories: (i) conservatives who, while accepting reform and *ijtihad*, tend to prefer classical jurisprudence, and (ii) modernists who while accepting classical jurisprudence as fundamental, refer more to *maqasid al-shari'a* (the goals or spirit of shari'a) in their practice of *ijtihad*. The latter category of jurists may go beyond *fiqh* and consider the sociological, psychological and even human rights aspects of the issues at hand. The 2004 Moroccan Family Law is a good example of modernist *ijtihad* whereby, on the recommendation of the Royal Commission (composed of *'ulama'*, sociologists, medical doctors and other lay figures and subject to the arbitration of the king in his capacity as *Amir al-mu'minin*), it allows judges and magistrates to practice *ijtihad* in accordance with the foundational principles of the Sunni Maliki school, the various changes that Moroccan society is undergoing, as well as the relevant international conventions that Morocco has ratified.

A good amount of research has been conducted on the influences of modern *ijtihad* on Moroccan family law (see Mernissi 1984; Mir-Hosseini 1993; Sadiqi and Ennaji 2006; Badran 2008; and Ennaji 2011). For example, the fact that both the husband and wife are heads of the family and that both of them can initiate and obtain a legal divorce is a consequence of interpreting *ijtihad* as a flexible instrument that responds to the sociocultural context in which it is used. However, serious work on the practice

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