LIFTING THE EGYPTIAN VEIL: A CONSTITUTIONAL ROAD MAP TO FEMALE MARITAL EMANCIPATION IN THE ISLAMIC WORLD

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The legal status of Egyptian women, especially in the domestic arena, has been the subject of considerable international academic and media interest. Nevertheless, the interplay between the legal regulation of marital dissolution and the Egyptian Constitution, and its influence on women's rights, has never been explored with any rigor. This article constitutes the first study to examine both the constitutional dimensions of Egyptian divorce law, and how the application of that constitutional scheme might better promote women's marital rights. The thesis underlying my study is that marital freedom is an elevated fundamental right, enjoying rigorous judicial protection. This constitutional guarantee, I argue, provides a powerful new strategy to tackle the gendered balance of power in Egyptian marriages, and to combat the Egyptian obsession with female sexuality that permeates the divorce regime.

A scholarly examination of a secure right to marital freedom is particularly critical for women because such a right is a prerequisite for, and a springboard to, their overall empowerment. An entitlement of this type may well transform the power hierarchies within the family and is the key to establishing women's status as full-fledged citizens in the public sphere. A secure right to marital freedom for Egyptian women is also particularly critical in the context of Muslim women, because Egypt's influence extends far beyond its national borders; it is carefully observed by its admiring Arab sister-states, enjoying a prominent status among Muslim nations as the leading role model for modernist legislation in the Islamic world. As I will conclude, the Egyptian constitutional regime offers a counterpoint to the widespread perception that Muslims are "behind the times". Most importantly, wedding together Islamic norms and Egyptian-style constitutional law may result in what has been regarded thus far as an impossible oxymoron: Improvement in the domestic lives of women throughout the Muslim world.

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I. INTRODUCING THE UNIQUE EGYPTIAN CASE – AN AMALGAMATION OF CONTRASTS AND CONTRADICTIONS

Islam and its followers are subjects of considerable domestic and international interest, in academia, politics, and the media.[1] Nevertheless, while the war on terror captures most of the attention, women's rights, and their domestic legal position, rarely make headline news.[2] Moreover, the interplay between Islamic and constitutional law, and its influence on women's status, seems to have completely escaped scholarly consideration. Egypt, in particular, is an ideal case study for the examination of women's marital freedom in light of the constitutional framework and an Islamic legal order in the Muslim world. Lying at the geographic center of the Middle East, Egypt enjoys a prominent status among Muslim nations – she is at the forefront of social and cultural transformation in the Middle East,[3] a leader in Islamic Jurisprudence, and the ultimate role model for modernist legislation in the Islamic world, carefully observed by her admiring Arab sister-states.[4]

1 Shaheen Sardar Ali, Ayesha Shahid & Mamman Lawan, *An Introduction to Islamic Family Law: A Teaching and Learning Manual* (2010), *available at* www.ukcle.ac.uk/files/downloads/794/797.9f094ef7.IntroductiontoIslamicFamilyLawFinalrevised151210.pdf.

2 Javaid Rehman, *The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq*, 21 INT. J. L. POL'Y. FAM. 108, 109 (2007).

3 LEILA AL-ATRAQCHI, THE WOMEN'S MOVEMENT AND THE MOBILIZATION FOR LEGAL CHANGE IN EGYPT: A CENTURY OF PERSONAL STATUS LAW REFORM 28 (2003).

4 *See, e.g.,* Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of all Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 1984 (1995); Martin Haars, *Summary and Concluding Remarks*, *in* THE SHARI'A IN THE CONSTITUTIONS OF AFGHANISTAN, IRAN AND EGYPT – IMPLICATIONS FOR PRIVATE LAW 181, 193 (Nadjma Yassari Ed., 2005). *See also* Nathan J. Brown & Adel Omar Sherif, *Inscribing the Islamic Sharia in Arab Constitutional*

Egypt is not only the ideal case study, she is also a uniquely fascinating one. Egyptian culture, the legal regime, the status of women, the highest judicial body, and even the Constitution itself, are all replete with intriguing contrasts and contradictions. As a result, a country which is the ancient center of Islam and learning, the "heart and mind" of the Arab world, is also notorious for being a "Land of Licentiousness".[5] Egypt's dual legal system, composed of Western-inspired legislation alongside age-old Shari'a-based laws, is yet another manifestation of her bifurcated identity.[6] While the lion's share of Egyptian legislation is secular, modern, and European,[7] Egyptian family affairs are persistently governed by classical Islamic law, permeated with traditional, highly patriarchal notions dating back to the inception of Islam.[8]

The status of Egyptian women is self-contradictory as well. Egypt is ranked as a country where women enjoy a remarkably advanced status, and full equality with men in public life and in civil law.[9] She is noted for being the first Arab nation ever

Law, *in* THE RULE OF LAW IN THE MIDDLE EAST AND IN THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS 55, 61, 67, 73 (Eugene Cotran & Mai Yamani eds., 2000) (noting that Egypt's constitutional enterprise has been an inspiration to the Arab world, and its strong Supreme Constitutional Court has proven most influential); Susan A. Dillon, *Healing the Sacred Yoni in the Land of Isis: Female Genital Mutilation is Banned (Again) in Egypt,* 22 HOUS. J. INT'L L. 289, 290 (2000) (noting the centrality of Egypt as a Muslim nation and as being the most populous Arab nation in the world). *See also* Sadiq Reza, *Endless Emergency: The Case of Egypt*, 10 NEW CRIM. L. R. 532, 533 (2007) (noting the advantage of choosing Egypt as a case study given that this country is "the most-studied and best-known Arab country in the West").

5 JAN GOODWIN, PRICE OF HONOR: MUSLIM WOMEN LIFT THE VEIL OF SILENCE ON THE ISLAMIC WORLD 321 (1994); AL-ATRAQCHI, *supra* note 3, at 28.

6 Brenda Oppermann*, The Impact of Legal Pluralism on Women's Status: An Examination of Marriage Laws in Egypt, South Africa, and the United States*, 17 HASTINGS WOMEN'S L. J. 65, 68 (2006).

7 NATHAN BROWN, THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF 29-31 (1997).

8 Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND J. TRANSNAT'L L. 1043, 1046-47, 1097 (2004). *See also* Daniel Crecelius, *The Course of Secularization in Modern Egypt*, *in* RELIGION AND POLITICAL MODERNIZATION 67, 73-89 (Donald Eugene Smith ed., 1974).

9 JOHN L. ESPOSITO & NATANA J. DELONG-BAS, WOMEN IN MUSLIM FAMILY LAW 61 (2nd ed. 2001) (hereinafter – ESPOSITO ON MUSLIM FAMILY LAW); Mohamed Younis, *Daughters of the Nile: The Evolution of Feminism in Egypt*, 13 WASH. & LEE. J. CIVIL RTS. & SOC. JUST. 463, 464-65 (2007) (acknowledging that "it is well known throughout the region that Egypt is a country with comparatively permissive attitudes towards a more public role for women in all

to ratify a women's rights convention,[10] for the longest history of contraceptive initiatives in the Middle East,[11] for being the "undisputed leader" of assisted reproductive technologies in the region,[12] for pioneering the articulation of feminist thinking and activism,[13] and for hosting one of the most flourishing, vocal feminist movements in the Islamic world.[14] Despite these facts, women within her boundaries are still mutilated, secluded, confined, veiled, raped, beaten, killed, and further humiliated.[15] The Egyptian family structure is still governed by a patriarch who may ban his woman from working outside the home and, in effect, from allowing her to make her own decisions in the domestic aspects of her life.[16] The starkest example of Egypt's oppressive personal status legislation is her discriminatory divorce system.[17]

The Supreme Constitutional Court of Egypt (SCC), entrusted with the exclusive power of safeguarding constitutional postulates, seems to suffer from this same

aspects of life", but that in the post 9/11 Middle-East "voices that are intolerant of an equal and meaningful role enjoyed by women in Egyptian society have acquired a body of followers that can hardly go unnoticed").

10 In 1981 Egypt ratified the Convention on the Elimination of All Forms of Discrimination Against Women. *See* Bahira Sherif, *Egypt: Multiple Perspectives on Women's Rights*, *in* WOMEN'S RIGHTS: A GLOBAL VIEW 71, 77 (Lynn Walter ed., 2001).

11 *Id*. at 72-75, 79-80.

12 Mary Rodgers Bundren, *The Influence of Catholicism, Islam and Judaism on the Assisted Reproductive Technologies ("ART") Bioethical and Legal Debate: A Comparative Study of ART In Italy, Egypt and Israel*, 84 U. DET. MERCY. L. REV. 715, 736-37, 739 (2007) (detailing Egypt's practices of Art technology and concluding that Egypt is in the forefront of IVF technologies). Such a development is of particular importance to women as it "saves" them from the "private suffering and public humiliation" of infertility. *id*. at 738-39 (detailing the dreadful social and private consequences of infertility).

13 AL-ATRAQCHI, *supra* note 3, at 92-93.

14 ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 61; AL-ATRAQCHI, *supra* note 3, at 28-29. On the Egyptian feminist movement, consult also Lama Abu-Odeh, *Egyptian Feminism: Trapped in the Identity Debate*, *in* ISLAMIC LAW AND THE CHALLENGES OF MODERNITY 183, 188 (Yvonne Yazbeck Haddad & Barbara Freyer Stowasser Eds., 2004) (hereinafter – Abu-Odeh, *Egyptian Feminism*).

15 *See* the discussion *infra* in chapter II.

16 Bundren, *supra* note 12, at 737 (women enjoy an advanced status in the "more visible realms of social life" while the "private structure of the family" is still governed by the patriarch, the husband); MARCIA C. INHORN, INFERTILITY AND PATRIARCHY: THE CULTURAL POLITCS OF GENDER AND FAMILY LIFE IN EGYPT 30 (1996) .*See also* the discussion *infra* in chapters II & IV.

17 *See, generally,* HUMAN RIGHTS WATCH, DIVORCED FROM JUSTICE: WOMEN'S UNEQUAL ACCESS TO DIVORCE IN EGYPT (2004) (hereinafter – HUMAN RIGHTS WATCH).

"spilt personality".[18] A Court known worldwide for its liberal constitutional philosophy and vehement defense of human rights, has proven conservative and reserved when women's rights are on the line.[19] Even its few achievements in their favor are sullied by stereotype-laden language.[20]

Finally, the conflicts at the very heart of the Egyptian constitutional enterprise fairly earn it the title "schizophrenic".[21] Fundamental, yet contradictory norms, paradoxically cohabitate under the same constitutional roof.[22] An impressive array of Western fundamental rights is a constitutional neighbor to the Islamic Shari'a.[23] While the Constitution's rhetoric insists on perfect equality between the sexes, yet to take one prominent example, men are, in the name of Islam, rendered the sole beneficiaries of an absolute, unilateral, irrevocable, no-fault right to repudiate their wives anytime, anywhere, for any or no reason, whereas women's way out of marriage is almost entirely blocked.[24]

The present work addresses Egypt's inner contradictions in its quest to enlist the Egyptian Constitution as an ally in the service of women's marital freedom. As the reader shall see, it is the confinement of women in an oppressive, nearly inescapable

18 The SCC derives its judicial status and authority from Articles 174-78 of the Egyptian Constitution. For a comprehensive review of the SCC's structure, authority, and procedures, see, generally, Awad Mohammaad El-Morr & Abd El-Rahman Nosier, *The Supreme Constitutional Court and its Role in the Egyptian Judicial System*, *in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 37 (Kevin Boyle & Adel Omar Sherif eds., 1996).

19 *See*, generally, the articles discussed in HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 37 (Kevin Boyle & Adel Omar Sherif, 1996).

20 *See* the discussion *infra* Chapter VI.

21 CLARK B. LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI'A INTO EGYPTIAN CONSTITUTIONAL LAW 151-52 (2006) (hereinafter – LOMBARDI'S new book); BROWN, *supra* note 7, at 119.

22 Brown & Sherif, *supra* note 4, at 72-73. One judicial opinion also acknowledged the "obscurity that may be mixed with [the Constitution] and the contradictions with which people may think it to be afflicted". *See* Baber Johansen, *Supra-Legislative Norms and Constitutional Courts: The Case of France and Egypt*, *in* THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS 347, 365-66 (Eugene Cotran & Adel Omar Sherif eds. 1996) (quoting from the Court's opinion).

23 It has been stated that "[t]he Constitution of Egypt is, in its essence, even more attentive to the protection of human rights than it is to the organization of the state's powers" (*Preface* in HUMAN RIGHTS AND HUMAN DEMOCRACY; THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT (Kevin Boyle & Adel Omar Sherif eds., 1996).

24 Karin Carmit Yefet, *The Constitution and Female Marital Dissolution in Pakistan: Western Liberalism in Islamic Garb* (on file with author).

marital bond, which is the ultimate mechanism to perpetuate a patriarchal social structure.[25] Hence the unique importance of securing a right to marital dissolution to women's overall empowerment. Such an entitlement may well transform the power hierarchies within the family, and is the key to establishing women's status as full-fledged partners with men in the public sphere.[26] A powerful testimony to that importance is the fact that divorce reform has been the central campaign for all arms of the Egyptian feminist movement since its inception,[27] and that Egyptian men have exhibited adamant resistance to divorce reform, perceiving their monopoly in this arena as the clearest sign of their "virility", supremacy, and control over women.[28]

Curiously, however, the legal literature has shied away from exploring the interaction between divorce issues and the constitutional framework, despite its enormous potential to aid in combating women's subordination. This study seeks to bridge the scholarly gap between these two hitherto unconnected fields of law and to put constitutional principles to work in the service of female marital emancipation. Specifically, I will suggest that marital freedom is an unenumerated fundamental right deserving of constitutional protection; scrutinize the divorce regime in light of its supreme normative status, and propose mechanisms imperative to the fulfillment of the new constitutional commitment to women's freedom to divorce. I will further discredit the myth that Islam is inherently oppressive toward women, and

25 Marital freedom has a profound effect on the domestic welfare of women, their social and economic well-being, daily lives, and entire legal status--Yefet, *supra* note 24; Diane Singerman, *Rewriting Divorce in Egypt: Reclaiming Islam, Legal Activism, and Coalition Politics*, *in* REMAKING MUSLIM POLITICS: PLURALISM, CONDENSATIONS, DEMOCRATIZATION 161, 163 (Robert W. Hefner ed., 2005); Lindsey E. Blenkhorn, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 194 (2002); Essam Fawzy, *Muslim Personal Status Law in Egypt: The Current Situation and Possibilities of Reform Through Internal Initiatives*, *in* WOMEN'S RIGHTS & ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM 17 (Lynn Welchman ed., 2004); AL-ATRAQCHI, *supra* note 3, at 161-64; The Hindu - Online edition of India's National Newspaper, *Triple* Talaq, Jul 13, 2004, *available at* www.hindu.com/2004/07/13/stories/2004071303270800.htm.

26 *See* the discussion *infra* in Chapters III & V. *Also see* Valentine M. Moghadam, *Reforming the Family Laws in the Middle East and North Africa*, *available at* http://portal.unesco.org/shs/en/files/7891/111581839311valentine_moghadam.pdf/valentine_moghadam.pdf, at 3. *See also* Valentine M. Moghadam, *Women's Empowerment: An Introduction and Overview*, *in* FROM PATRIARCHY TO EMPOWERMENT 1, 11(Valentine M. Moghadam ed., 2007).

27 *See, e.g.*, AL-ATRAQCHI, *supra* note 3, at 28-29, 358.

28 *See* the discussion *infra* on the *khul'* divorce. *Also see* the comprehensive and informative study of Nadia Sonneveld, *Reinterpretation of Khul' in Egypt: Intellectual Disputes, the Practice of Courts and Everyday Life* chapters 2.3, 3.4, 3.9 (forthcoming) (on file with author).

demonstrate that constitutional adherence to Islam supports, rather than curtails, female marital rights.

In order to achieve the deepest possible understanding of the analyzed themes, the methodological structure of the discussion is constructed as follows:

First, a general depiction of women's status in Egypt's male-dominated society is provided. This succinct overview will reveal the common thread running through the various discriminatory practices: An Egyptian obsession with female chastity and a desire to control women's sexuality. The purpose of this synopsis is threefold: It is designed to place the study of women's dissolution rights in the proper societal context, to assess their central importance in transforming the patriarchal power structure in Egyptian culture, and to gain an understanding of the inner motivations and complexities behind the development of divorce legislation.

Second, an outline of Egyptian constitutional jurisprudence is presented, and its dual fidelity to principles of both Islamic Shari'a and human rights norms, is highlighted. Against this backdrop, this chapter will put forward two main arguments: The first is that marital freedom is a fundamental right also demanding its constitutional due; and the second is that the seeming contradiction between equality and divorce rights on the one hand, and the Islamic Shari'a on the other, is in fact a harmonious wedding of constitutional norms which mutually complement and reinforce one another.

Third, a critical examination of the Egyptian version of classical Islamic divorce law will be presented, followed by a constitutional analysis of its fundamental principles. This examination will shed an incriminating light on two fascinating findings. To begin with, the same sexual forces that are at work in the regulation of the anti-woman laws are also woven throughout the legislative divorce regime and the judicial interpretive enterprise. Further, the Egyptian woman-unfriendly divorce rules do not stem from a desire to follow Islamic religious mandates, but rather from a desire to perpetuate male domination over women, cynically using the woman-favorable Shari'a as a pretext.

Fourth, reforms to the initially-formulated divorce rules will be discussed, and their constitutional validity evaluated. This chapter reviews the Court's halfhearted contribution to women's marital rights, and sets forth a theory to resolve the seeming contradiction between the Court's active, liberal jurisprudence in the service of human rights, and its passive, conservative approach to the advancement of women's rights. Essentially, I argue that the SCC's problematic reasoning and patriarchal tone are nothing but a stylistic nod to religious sentiments, freeing the Court to safeguard

the substance of women's interests. The Court is thus able to retain its legitimacy among the religious intelligentsia while protecting secular feminist reforms.

Finally, the last chapter will propose vehicles to implement the constitutional commitments to both Islamic law and women's fundamental rights in the context of divorce. Ultimately, I will conclude, Egypt's advanced constitutional and Islamic jurisprudence seems perfectly capable of securing women a liberal road to marital emancipation.

II. DIVORCED FROM REALITY: THE SOCIAL, CULTURAL, AND LEGAL STATUS OF WOMEN IN EGYPTIAN SOCIETY

Most accounts of Egyptian women seem to highlight their advanced status.[29] However, the aim of this chapter is to shine a revealing light on the dark side of women's lives in Egypt. It is imperative to trace the common threads underlying the Egyptian practices detrimental to women, as they are the same forces that are at work in the divorce domain. Of equal importance, understanding women's general position will place women's dissolution rights in the proper societal context; it will display the divorce regime as the key which locks women into a rigid patriarchal structure and preserves an ongoing system of female subordination. Thus, this chapter provides essential groundwork for delving into the intricacies of women's access to divorce. Let us take a closer look at the regime to which Egyptian women are subjected.

A. *The Oppression of Women's Sexuality – An Egyptian Obsession*

The Egyptian Constitutional Proclamation declares that:

> The dignity of every individual is a natural reflection of the dignity of his nation, for each individual is a cornerstone in the edifice of the homeland. This homeland derives its strength and prestige from the value of each individual, his activity and dignity.

29 Indeed, as far as the political and civil domains are concerned, Egyptian women enjoy the status of full citizens. For example, they are legally accorded equal access to employment and training opportunities, and they are entitled to own property and other possession exclusively, totally protected from their husbands' interference. *See* Mirvat Hatem, *The Enduring Alliance of Nationalism and Patriarchy in Muslim Personal Status Laws: The Case of Egypt*, 6 FEMINIST ISSUES 39 (1986); AL-ATRAQCHI, *supra* note 3, at 220 ("women's public rights, such as access to education, political participation and work, continued to gain legitimacy at the expense of women's rights in the so-called private sphere"); HUMAN RIGHTS WATCH, *supra* note 17, at 10-11; Younis, *supra* note 9, at 465.

As impressive as this acknowledgment may appear, Egyptian customary practices and legal norms are in serious conflict with the progressive constitutional rhetoric. As we shall observe, this conflict is so profound that only contradictory Egypt seems capable of sustaining it. Women's rights are a dirty word in Egyptian discourse; feminists are portrayed as man-hating, possibly lesbians, and most likely obsessed with sex.[30] Even the Egyptian rhetoric used to describe women in general calls attention to females only as sexual beings, contributing to the equation of a woman's worth with her sexual desirability in the Egyptian mind.[31] This treatment is compounded by severe censorship of women's sexuality and gender issues in print.[32] More than anything else, however, it is the suppression of female sexuality in the obsessive pursuit of chastity and virginity that is at the heart of the Arab patriarchy.[33]

30 NEMAT GUENENA & NADIA WASSEF, UNFULFILLED PROMISES: WOMEN'S RIGHTS IN EGYPT 4 (1999) *available at* www.popcouncil.org/pdfs/unfulfilled_promises.pdf; Younis, *supra* note 9, at 471-72 (noting that the male-dominated Egyptian society viewed feminism as "a festering social ailment polluting the minds of 'their' women" and resulted in the "degradation of Egyptian women's decency and chastity"); Margot Badran, *Competing Agenda: Feminists, Islam and the State in Nineteenth-and Twentieth-Century Egypt*, *in* WOMEN, ISLAM AND THE STATE 201, 217 (Deniz Kandiyoti ed., 1991) (noting the paradox that in the very same year Egypt granted its women the right to vote in 1956, it also started to ban feminist organizations and to suppress public expression of feminist views, completing its task by 1959).

31 GUENENA & WASSEF, *id.* at 47; Younis, *supra* note 9, at 482.

32 Sherifa Zuhur, *The Mixed Impact of Feminist Struggles in Egypt During the 1990s*, 5(1) MERIA (2001), *available at* http://meria.idc.ac.il/journal/2001/issue1/jv5n1a6.html.

33 Fatima Mernissi, *Virginity and Patriarchy*, in WOMEN AND ISLAM 183 (Azizah al-Hibri ed., 1982) (the Arab "insane patriarchy" is a system which "fears a woman's body and expends all its efforts on damaging it, on making it ugly, on hiding its beauty and its brilliant power"); Abu-Odeh, *Egyptian Feminism, supra* note 14, at 188; AL-ATRAQCHI, *supra* note 3, at 80 (noting that "most of the injustices from which women suffered were rooted in family, sexuality and reproduction…"); GUENENA & WASSEF, *supra* note 30, at 19. For the relationship between patriarchy and social control of sexuality see, e.g., Susan Mccooin, *Law and Sex Status: Implementing the Concept of Sexual Property*, 19 WOMEN'S RIGHTS L. REP. 237, 237-40 (1998). *See also* Gerda Lerner, *The Origin of Prostitution in Ancient Mesopotamia*, 11 SIGNS 236, 254 (1986) (the regulation of women's sexuality "underlies the formation of classes and is one of the foundations upon which the state rests"). For feminist writings that view the objectification of female sexuality as the fundamental means by which women are subordinated to men see Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 644 (1983) ("The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender, through its legitimizing norms, relation to society and substantive policies. It achieves this through embodying and ensuring male control over women's sexuality at every level…").

Thus, Egypt's male-dominated society perpetuates traditional gender roles, places men and women in separate societal spheres, and imposes different sexual standards on each sex.[34] Women must be untouched virgins, "untainted" and "undefiled" at all costs, even if this means resorting to trickery: Deflowered females might attain artificial virginity through the old-fashioned practice of sprinkling chicken's blood on underpants, or through gynecological surgery allowing men to penetrate stitched hymens.[35] A male virgin, trembling with purity, on the other hand, is perceived as the "height of absurdity".[36]

The disparate sexual norms are rooted in Muslim men's fear of women; they view females as "temptresses", who constantly exploit their "irresistible" sexual power to entice men.[37] Women's sexuality is perceived as so strong that it threatens

34 Jennifer Jewett, *The Recommendations of the International Conference on Population and Development: The Possibility of the Empowerment of Women in Egypt*, 9 CORNELL INT'L L. J. 191, 194, 214 (1996).

35 Mernissi, *supra* note 33, at 183-84, 187-88, 191. Indeed, the practice of "marriage defloration" is still alive and kicking in Egypt. *See* Dillon, *supra* note 4, at 312. One Commentator described the practice:

[C]hecking the genitals of a young woman at marriage to make sure her hymen is intact; breaking the hymen and showing a blood-stained towel to the public as a proof of her virginity. In many instances, the father kills the daughter if there is no blood shown on this towel….

See EFUA DORKENOO, CUTTING THE ROSE – FEMALE GENITAL MUTILATION: THE PRACTICE AND ITS PREVENTION 96 (1994).

36 *Id.* at 185, 187. This "double standard", which subjects women, but not men, to norms and values which promote chasteness and fidelity provides an "exaggerated view of the innate differences between the two sexes themselves", what Thomas calls the "desexualization of women". *See* Keith Thomas, *The Double Standard*, 20 J. HISTORY IDEAS 195-216 (1959) reprinted with revisions in IDEAS IN CULTURAL PERSPECTIVE 460, 465-66 (Philip P. Wiener & Aaron Noland eds., 1962). *See also id.* at 462, 467 (the subjugation of females through the social code of chastity is "found in the desire of men for absolute property in women, a desire which cannot be satisfied if the man has reason to believe that the woman has once been possessed by another man, no matter how momentarily and involuntarily and no matter how slight the consequences").

37 *Id.* at 186; Jewett, *supra* note 34, at 196. *Also see* Afshan Jafar, *Women, Islam, and the State in Pakistan*, 22 GENDER ISSUES 35, 41-42 (2005) ("Women's sexuality does not appear to be something that can be controlled by them – they are always sexual just by simply being. This omnipresent sexuality is also seen as a destructive force causing *fitna* – disorder and chaos. Women entice, seduce, and corrupt by the mere flash of a bare arm or a fly-away tuft of hair").

not only individuals and families, but the entire Egyptian nation.[38] The only way to neutralize this existential danger, in the Egyptian masculine mind, is to both satisfy the female libido and confine women within rigid and well-defined boundaries.[39]

This desire to control the so-called "over-sexed" female nature constitutes the driving force behind the myriad chauvinistic laws and social practices oppressing women. Women are mutilated, confined, veiled, and otherwise controlled in order to suppress their sexuality. They are even made to withdraw from school and forgo education in order to keep an untainted sexual reputation.[40] They are also unwelcome in the workplace as their presence there is perceived as subjecting them to sexual exploitation and leading to the loosening of public morals.[41] The control men exert over women's sexuality is in turn perceived as the ultimate symbol of their dominant position in society.[42]

Let us turn to address the main hallmarks of the Egyptian patriarchal system and demonstrate how its particulars constitute part of a greater calculated scheme to "combat" women's sex drives, and how restricting women's access to divorce is the highlight of this plan.

1. *Female Circumcision: Sexual Terrorism*

Female subjugation often starts at birth. As sociologists and anthropologists explain, over ninety percent of Egyptian women are brutally circumcised, in order to curb their sexual desire, assure their "purity and femininity", keep them from "chasing men", and maximize male sexual gratification.[43] Moreover, circumcision

38 ARLENE ELOWE MACLEOD, ACCOMMODATING PROTEST: WORKING WOMEN, THE NEW VEILING AND CHANGE IN CAIRO 83 (1991); AL-ATRAQCHI, *supra* note 3, at 264 (noting that Islam ascribes to women a seductive quality by which they entice men and distract them from their social and religious duties).

39 Jewett, *supra* note 34, at 196.

40 *Id.* at 196-97 and the discussion *infra*.

41 GUENENA & WASSEF, *supra* note 30, at 27.

42 Jewett, *supra* note 34, at 222.

43 *See, e.g.,* HAIFAA A. JAWAD, THE RIGHTS OF WOMEN IN ISLAM 57, 59-60 (1998); Anna Funder, *De Minimis Non Curat Lex: The Clitoris, Culture and the Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 417, 437 (1993); Egypt Not to Pass Anti-Circumcision Law, REUTERS, Oct. 19, 1994, available in WESTLAW, INT-NEWS Database; Badran, *supra* note 30, at 220 (the practice of circumcision is reflective of the obsession with female virginity); Dillon, *supra* note 4, at 294-96 (circumcision enhances male sexuality and makes women more aesthetically attractive to men, and is perceived as the remedy for women's "insatiable sexuality", preventing them from making "unreasonable sexual demands on their husbands". *id.* at 296).

("female genital cutting" (FGC) or "female genital mutilation" (FGM), as it is often dubbed in the international literature, or "purification" as is known in Egypt) is an "absolute prerequisite" to marriage; it is perceived as the physical marking of women's marriageability, symbolizing social control of their sexual pleasure and reproduction. An uncircumcised woman is considered "masculine" and her chances of winning or keeping a husband are deemed negligible.[44] This widespread, barbaric practice often takes place in unsanitary conditions and is frequently performed by butchers and midwives. Such unqualified practitioners may remove the clitoris and female genitals with no anesthesia, using scissors, knives, and even broken glass or bits of sharp tin, after which the girl's legs are bound together for 40 days.[45]

Unsurprisingly, female genital mutilation has proven "successful" in preserving female chastity: Due to surgical complications, many girls lose their lives without having the chance to taint their purity.[46] Nevertheless, those unlucky enough to survive sometimes wish they hadn't. They are doomed to suffer from horrific physical, sexual, and psychological problems, which only worsen upon marriage.[47] Sexual relations, in particular, become an agonizing experience; penetration may at times prove so difficult that men resort to knives to allow sexual access to their infibulated women.[48]

Ironically, the Islamic State foremost in backing progress and enlightenment[49] is accountable for the birth of this inhumane practice,[50] one of the most severe

44 Dillon, *id.* at 296, 309; JAWAD, *id.* at 57; Zuhur, *supra* note 32 (circumcision is perceived as an eligibility condition for marriage) .*See also* Omaima El-Gibaly et al., *The Decline of Female Circumcision in Egypt: Evidence and Interpretation*, 54 SOC. SCIENCE & MED. 205, 206-07 (2002) (observing that the practice persists in Egypt because of cultural convictions that it will moderate female sexuality, assure a girl's purity, femininity, and virginity by reducing or eliminating sexual pleasure, and thus, limiting their marriageability); Gerry Mackie, *Female Genital Cutting: The Beginning of the End*, *in* FEMALE CIRCUMCISION IN AFRICA: CULTURE, CONTROVERSY, AND CHANGE 253, 253-54 (Shell-Duncan et al. eds., 2000) (circumcision assures women's marriage prospects); NAHID TOUBIA, FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION 9 (1995).

45 Jewett, *supra* note 34, at 198-199; JAWAD, *supra* note 43. at 54. *See also* Robert Fisk, *World Population Conference: Women Pay Terrible Price For Tradition*, INDEPENDENT, Sept. 8, 1994, at 11.

46 Jewett, *id.* at 199 and the sources cited there.

47 JAWAD, *supra* note 43, at 52, 55-56; Dillon, *supra* note 4, at 297-98 (detailing the health risks of FGM).

48 GOODWIN, *supra* note 5, at 335.

49 *Tahanin Al GibaLI ... A Journey of Outstanding Success*, EGYPT MAGAZINE (2003), *available at* www.sis.gov.eg/en/Story.aspx?sid=2670.

violations of human rights in the world today.[51] More remarkably, though totally non-existent in nearly the entire Arab and Islamic worlds,[52] for many years Egypt consistently failed to outlaw female circumcision for fear of upsetting Muslim religious leaders.[53] It was only under tremendous international pressure that Egypt prohibited female circumcision by a 1996 ministerial decree.[54] The decree was instantly attacked as anti-Islamic and thus in violation of the Egyptian Constitution; the Administrative Court's decision agreed, only to be overturned by the Supreme Administrative Court. [55] In an ultimate irony, the Court concluded that the outright

50 JAWAD, *supra* note 43, at 54; Dillon, *supra* note 4, at 293-94; Karungari Kiragu, *Female Genital* Mutilation: A Reproductive Health Concern, POPULATION REPORTS, Meeting the Needs of Young Adults, Series J, No. 41, vol. XXIII, No. 3, (1995), *available at* www.k4health.org/system%252Ffiles%252F111404.PDF (all the soruces report that the practice of FGM dates back 2,000 years to ancient *Egypt*).

51 JAWAD, *id.* at 53.

52 *Id.* at 58 (quoting Sheikh Abbas, the Rector of the Muslim Institute at the Mosque in Paris). For example, in Saudi Arabia, where women cannot drive, hold most jobs, or even vote, the practice is viewed as abhorrent and a reflection of pre-Islamic traditions. *See* Michael Slackman, *Female circumcision focus of ferocious debate in Egypt,* THE NEW YORK TIMES, September 19, 2007, *available at* www.nytimes.com/2007/09/19/world/africa/19iht-egypt.5.7572375.html.

53 JAWAD*, id.* at 201. See also Note, *What's Culture Got to Do with it? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1951 (1993); Jennifer J. Rasmussen, Innocence Lost: The Evolution of a Successful Anti-Female Genital *Mutilation* Program, 41 VAL. U.L. REV. 919, 943 (2006) (criticizing Egypt for being "an alarming example of the ineptitude that government vacillation of FGM regulation presents". *id*. at 960-61); Siona Jenkins, *Egypt's Secret*, MONTREAL GAZETTE, Nov. 26, 1994, at B3.

54 Decree No. 261/1996 (promulgated by the Egyptian Minister of Health). The decree made it illegal to perform FGM except for medical necessity; this loophole, critics decried, was "so wide that it effectively rendered the ban meaningless". *See* Slackman, *supra* note 52; Kilian Balz, *Human Rights, the Rule of Law, and the Construction of Tradition*, *in* THE RULE OF LAW IN THE MIDDLE EAST AND IN THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS 35, 36 (Eugene Cotran & Mai Yamani eds., 2000). The long-awaited decree was a result of Egypt's massive humiliation and censorship by the international community in 1994, when the International Conference on Population and Development was held in Cairo and the Egyptian Health Minister was quoted saying "FGM is rarely practiced in Egypt". A day later, however, the CNN aired footage of FGM being performed by a Cairo barber on a ten-year old girl with her ankles tied to her wrists, screaming in pain. *See* Dillon, *supra* note 4, at 316-20 (describing the chain of events that led to the issuance of the decree); Jewett, *supra* note 34, at 200 (noting the humiliating media attention Egypt received for allowing FGM that was the impetus for the decree).

55 U.S. Department of State, *Egypt: Report on Female Genital Mutilation (Fgm) or Female Genital Cutting (Fgc)* [FMC Country Report] (2001), *available at*

ban of female circumcision not only conforms to the Islamic Shari'a, but is in fact required by its very principles.[56]

Unfortunately, to the great detriment of women, Islamists still continue to dismiss the decree as anti-Islamic, thus rendering it anything but effective. In what appears to be a bold affront to the Court's ruling and to Egypt's subsequent adoption of the 2003 Cairo Declaration for the Elimination of FGM, the reported percentage of circumcised females actually increased to a current extraordinarily high 96%.[57] In

www.web.archive.org/web/20080112051916/http://www.state.gov/g/wi/rls/rep/crfgm/10096.htm. For a detailed review of the circumcision decision, see Balz, *id.* at 39-41. *See also, generally,* Steven Barraclough, *Al-Azhar: Between the Government and the Islamists*, 52 MIDDLE E. J. 236 (1998); Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1828 (2004); Elizabeth A. Syer, *The Status of the Crusade to Eradicate Female Genital Mutilation: A Comparative Analysis of Laws and Programs in the United States and Egypt*, 22 PENN ST. INT'L L. REV. 843, 855 (2004). As to the lower court's decision, it should be emphasized that this administrative tribunal also had no illusion that FGM was in any way sanctioned by Islam. Rather, the court declared the decree illegal because it infringed on the doctor's authority to make medical decisions, not on the Islamic Shari'a, and opined that only Parliament (Maglis El Shaab) could outlaw the practice. *See* SEHAM ABD EL SALAM, A COMPREHENSIVE APPROACH FOR COMMUNICATION ABOUT FEMALE GENITAL MUTILATION IN EGYPT 10 (1998); Dillon, *supra* note 4, at 320.

56 Balz, *supra* note 54, at 39. Accordingly, at an 2006 Egyptian conference featuring Muslim scholars from around the world, two of *Egypt's* top clerics, Mohammed Sayed Tantawi, the Grand Sheik of Al-Azhar and Grand Mufti Ali Gomaa, issued an edict outlawing the practice of FGM as *haram*, or prohibited by Islam, *See* Patricia A. Broussard, *Female Genital Mutilation: Exploring Strategies for Ending Ritualized Torture; Shaming, Blaming, and Utilizing the Convention against Torture*, 15 DUKE J. GENDER L. & POL'Y 19, 30 n. 73 (2008).

57 The Court's ruling or the subsequent ratification of the Cairo Declaration for the Elimination of FGM: Afro-Arab Expert Consultation Legal Tools for the Prevention of Female Genital Mutilation, June 23, 2003, did not bring any change in practice, on the contrary. Fundamentalist proponents fiercely targeted the ruling, declaring, *inter alia,* that "[f]emale Circumcision and not mutilation – as those Westernized people like to call it – is meant to safeguard the dignity of women by checking their sexual drive and thus preserving their chastity…" *See* Dillon, *supra* note 4, at 321 (quoting Sheikeh Youssef El-Badri). *See also* Balz, *supra* note 54, at 36-37; Slackman, *supra* note 52 (reporting a 2005 government health survey findings that 96 percent of women had undergone FGM, concluding that the "practice of female circumcision is virtually universal among women of reproductive age in Egypt"); Sherif, *supra* note 10, at 81; Sherien Sultan*, Lost Between Rhetoric and Reality: Uncovering and Achieving True Gender Equality in Egypt* (2004), *available at* www.csidonline.org/documents/pdf/5th_Annual_Conference-Sultan_paper.pdf, at 6-7. *But see* El-Gibaly, *supra* note 44, at 218 (finding that at 2002 girls were ten percentage

2008, in wake of the death of a girl undergoing the procedure that shocked the international community's conscience, Egypt's century-long vacillation between prohibiting or supporting female genital mutilation finally came to a bitter end: Parliamentary law now replaces the administrative decree, turning the partial prohibition into a total ban. Regrettably, if anything can be garnered from recent statistics it is that the new law is a dead-letter, not the deeply-rooted practice. FGM is still alive and "well" in Egypt.[58] Yet the fact that the entire Egyptian population, *regardless of religious affiliation*, including Catholics, Protestants, Copts and

points less likely to undergo female circumcision than were their mothers, but qualify the findings with the observation that the uncircumcised girls may still be circumcised in the future).

58 Egypt has now joined the Islamic countries with legislation criminalizing FGM, prohibiting the practice even for medical reasons, which was an exception in the past under the administrative decree. *See* Center for Reproductive Rights, *Female Genital Mutilation (FGM): Legal Prohibitions Worldwide* (2008), *available at* www.reproductiverights.org/en/document/female-genital-mutilation-fgm-legal-prohibitions-worldwide. The new law banning the performance of FGM sentences offenders to a fine of 1,000 Egyptian pounds ($185) to 5,000 Egyptian pounds ($900) and a prison term of anywhere between three months and two years. *See The report of the Female Genital Education and Networking Project*, *available at* www.fgmnetwork.org/gonews.php?subaction=showfull&id=1251659133&archive=&start_from=&ucat=1&. *See also* Chi Mgbako et al., *Penetrating the Silence in Sierra Leone: A Blueprint for the Eradication of Female Genital Mutilation***,** 23 HARV. HUM. RTS. J. 111, 138 (2010) (noting reports of FGM-related arrests and prosecutions in Egypt). Still, recent survey evidence has shown the rates of FGM prevalent in Egypt continue to be the second-highest in the entire world, standing on 95.8%. *See* World Health Organization, ELIMINATING FEMALE GENITAL MUTILATION: AN INTERAGENCY STATEMENT-- OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO 4 (2008), *available at* http://www.who.int/reproductive-health/publications/fgm/fgm statement 2008.pdf. *See also* Tiffany Ballenger, *Female Genital Mutilation: Legal and Non-Legal Approaches to Eradication*, 9 J.L. & SOC. CHALLENGES 84, 99 (2008) ("Egypt has one of the highest incidences of FGM in the world, estimated at 97% of the female population "); Melanie A. Conroy, *Refugees Themselves: The Asylum Case for Parents of Children at Risk of Female Genital Mutilation*, 22 Harv. Hum. Rts. J. 109, 115 & n.40 (2009) (same); *Female Circumcision Common in Egypt Despite Ban*, *available at* http://www.newscientist.com/article/mg19926743.400-female-circumcision-common-in-egypt-despite-ban.html (finding 85% percent of girls has been subjected to FGM since it was outlawed, almost two-thirds of them by non-medical personnel, and reporting that the girls' parents admitted to defy the law "to comply with religious and traditional beliefs and curb the sexual drive of their daughters"). The most conservative estimates of FGM still suggest a very high rate of 66 percent. *See* Matt Bradley, *Egypt's Rate of Female Mutilation Drops to 66%*, THE NATIONAL (2010), *available at* www.thenational.ae/apps/pbcs.dll/article?AID=/20100316/FOREIGN/703159842/1002.

Animists, subject women to mutilation is a clear testimony that the real issue here is not Islam, but rather the general Egyptian fear that women will otherwise become "lesbians", "loose", or "always sexually aroused".[59]

2. *The Visible Symbol of Women's Oppression – The Veil Epidemic*

Veiling has always been strongly associated with sexual stereotypes and with standards of female modesty. The practice implies that women are sexually suspect and naturally suited to occupy the territory of the home alone.[60] While pre-modern Egypt witnessed only occasional veiling of women, since the 1970s forces of spreading Islamism have brought about an enormous increase of the veil epidemic, leaving women with only a small embroidered grille at eye level through which to view the world.[61] A woman's dress must cover her whole head and body, including neck, forearms, ears, and legs, as they are "nakedness;" her clothing should be loose, thick enough to conceal the skin, but not reminiscent of men's or non-Muslims' clothing, and without bright colors, perfume, or adornments that would attract men's attention.[62]

Yet some Islamists are still unsatisfied with the myriad of restrictions and minimal exposure of female flesh. They baselessly claim that "Islam allows women to show only half of one eye".[63] As a matter of fact, veiling is not a specifically

59 BRIAN KATULIS, WOMEN'S RIGHTS IN FOCUS: EGYPT 24-25 (2004), *available at* www.freedomhouse.org/uploads/special_report/21.pdf; Catherine Weibel, *A Complex Society Where the Integrity of the Family Comes First*, VOICES UNABRIDGED (2006), *available at* www.voices-unabridged.net/article.php?id_article=118&numero=8. *See also* EL SALAM, *supra* note 55, at 8 (FGM is not based on religion, but on "certain beliefs about female sexuality"); EFUA DORKENOO & SCILLA ELWORTHY, FEMALE GENITAL MUTILATION: PROPOSALS FOR CHANGE 13 (3 ed. 1992) (FGM is practiced under the pretext of adherence to religion); Dillon, *supra* note 4, at 295 (noting that Egyptians practice FGM regardless of their religious affiliation).

60 MACLEOD, *supra* note 38, at 99-100, 142; Mernissi, *supra* note 33, at 189.

61 ANDREA B. RUGH, REVEAL AND CONCEAL: DRESS IN CONTEMPORARY EGYPT 149-50 (1989).

62 Courtney W. Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis Under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271, 310, n. 170 (1997). *See also* SANDRA MACKEY, THE SAUDIS: INSIDE THE DESERT KINGDOM 142 (1990) (the Islamic dress code is designed so that "a woman cannot sexually arouse a man whom she casually passes on the street").

63 GOODWIN, *supra* note 5, at 332 (referring to Sheikh Bib Baz's book explaining why women must be completely covered).

Islamic custom, and it is certainly not a religious requirement.[64] Still, to date, three-quarters of the women in cosmopolitan Cairo have abandoned Western dress for the orientalist veil.[65] Even young, innocent schoolgirls are forced to attend school covered from head to toe, threatening to turn Egyptian schools into "a well of extremism and terrorism".[66]

Muslim and non-Muslim Egyptian women, especially married ones, cover themselves to avoid seducing men, but their main motivation is to avoid the insufferable life awaiting unveiled women.[67] Such women are simply considered "an open invitation to human flies".[68] As a result, the veil is a form of self-defense against the Egyptian male "tradition" of harassing women by "the most demeaning and undignified words, gestures and touching".[69] Tellingly, when a girl was brutally raped on a public bus, the judge castigated the poor victim for not wearing the veil.[70] Clearly, then, women's right to leave the home and secure freedom of movement, is

64 The only Qur'anic verse related to the subject stating: "say to the believing women that they lower their gaze and guard their modesty: that they should not display their beauty and ornaments" (QUR'AN 24:31, Abdullah Yusuf Ali trans), has not been read by Muslim jurists to offer support for the veil practice. *See* MACLEOD, *supra* note 38, at 98-99; Nawal El Saadawi, *Woman and Islam*, *in* WOMEN AND ISLAM 193, 202 (Azizah al-Hibri ed., 1982); Western, *supra* note 92, at 139-41. What is beyond cavil is that if there were indeed a Q'uranic duty to wear the veil, then it would be *equally applicable* to men as well; after all, the very same instruction is directed to men in the preceding verse. Hence "arguing that the veil requirement is based on 'not arousing a man's sexual desire' is folly, because men are required by Islamic law to control their own passions as well". Western, *id*. at 139.

65 Sultan, *supra* note 57; MACLEOD, *supra* note 38, at 137-38, 140; Jewett, *supra* note 34, at 197.

66 The words of the Minister of Education, quoted in Yasmine Abou el-Kheir, *Schoolgirls unveiled Without Consent*, MIDDLE EAST TIMES 1 (1994). The SCC came to the rescue of schoolgirls and protected them against the formidable social pressure to veil themselves. *See* the famous veil case: Case No. 8, 17th judicial year (18 May 1996). For an informative analysis of this case by the SCC's Chief Justice see Awad Mohammed El-Morr, *Judicial Sources For Supporting the Protection of Human Rights*, *in* THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS 5, 17 (Eugene Cotran & Adel Omar Sherif eds., 1996) (hereinafter – El-Morr, *Judicial Sources*).

67 Valerie J. Hoffman-Ladd, *Polemics on the Modesty and Segregation of Women in Contemporary Egypt*, 19 INT'L J. MIDDLE EAST STUD. 23, 33 (1987); Zuhur, *supra* note 32; MACLEOD, *supra* note 38, at 113-14, 139.

68 GUENENA & WASSEF, *supra* note 30, at 47.

69 Fadwa El Guindi, *Veiling Infitah with Muslim Ethic: Egypt's Contemporary Islamic Movement*, 28 SOC. PROBLEMS 465, 481 (1981).

70 Zuhur, *supra* note 32.

conditioned upon the blurring of their femininity and sexuality under the cover of the veil.[71]

The most alarming feature of veiling is the powerful role it plays in the service of patriarchy. It is because of men that women must cover themselves; men decide the particulars of women's attire, and the criterion on which that decision is based, is the garment's potential to arouse male lust: Women must be restrained and covered, as they constitute "a threat to the smooth functioning of society, and therefore it would be better if they were kept out of men's sights and in the seclusion of their homes".[72] Put simply, men are the source of the problem, but women are required to pay the price. Denying women their freedom of appearance (or denying unveiled women their freedom of movement) since their mere presence is perceived to incite sexual assaults regrettably perpetuates "one of the most insidious of the old myths about women – that women, wittingly or not, are seductive sexual objects".[73] Unsurprisingly, the symbolism of the veil is viewed by some as a "most prominent vehicle for debating women's rights".[74]

3. *Honoring Women to Death*

The perceived nature of women as uncontrollable, due to the disruptive potential of their sexuality, is also embodied in the Egyptian concept of "honor".[75] To be sure, honor in the traditional setting is a male prerogative; women have no honor of their own.[76] As their sexual reputation represents the most important element of family honor and social standing,[77] women − especially married women − must guard their

71 MACLEOD, *supra* note 38, at 151.

72 Alexandra J. Zolan, *The Effect of Islamization on the Legal and Social Status of Women in Iran*, 7 B.C. THIRD WORLD L. J. 183, 186 (1987).

73 *See* Dothard v. Rawlinson, 433 U.S. 321, 345 (1977) (Marshall J., concurring in part and dissenting in part).

74 GENEIVE ABDO, NO GOD BUT GOD: EGYPT AND THE TRIUMPH OF ISLAM 143-61 (2000).

75 *See* the following works: Eric Hooglund, *The Society and its Environment*, *in* EGYPT: A COUNTRY STUDY 91, 127-8 (Helen Chapin Metz ed., 1990); FATIMA MERNISSI, BEYOND THE VEIL: MALE-FEMALE DYNAMIC IN MODERN MUSLIM SOCIETY 44 (1987); RASHIDA MOHAMMAD HUSSAIN PATEL, WOMAN VERSUS MAN: SOCIO-LEGAL GENDER INEQUALITY IN PAKISTAN 148 (2003) (explaining that the practice of "honor" killing has evolved to control female sexuality outside marriage).

76 AMNESTY INTERNATIONAL, VIOLENCE AGAINST WOMEN IN THE NAME OF HONOUR 11 (1999); Rana Lehr-Lehnardt, *Treat Your Women Well: Comparisons and Lessons from an Imperfect Example Across the Waters*, 26 S. ILL. U. L. J. 403, 419 (2002).

77 Jewett, *supra* note 34, at 197.

chastity and sexual fidelity at all cost.[78] After all, "a man's honor lies between the legs of a woman",[79] and an unchaste woman is "worse than a murderer".[80]

In keeping with this worldview, the highest religious authority in the country has expressed its view that a girl who loses her virginity outside of marriage − even through rape − is condemned to death.[81] The Egyptian legal system follows suit; it usually proves itself harsh toward women and forgiving toward men. Until recently the penal code accorded a rapist the privilege of marrying his victim, thereby allowing him to evade any legal penalty and even exempting with him all other participants in the case of a gang-rape.[82] Due to the centrality of female virginity, this law put enormous social pressure on the victim to marry her attacker.[83] Not until the eve of the new millennium, after a particularly brutal case of gang rape had outraged the international community, was Egypt finally willing to abolish this abhorrent rapist's prerogative.[84]

Egyptian law, however, still winks at the murder of adulterous wives, thereby signaling that women are not valuable in their own right, but only as vessels of honor and virginity.[85] It is estimated that honor killers are sentenced to between 24 hours and three years in prison.[86] Compounding the problem, such murderers are often applauded by their peers and are given special treatment and respect.[87] The

78 Adrien Katherine Wing, *Custom, Religion, and Rights: The Future Legal Status of Palestinian Women*, 35 HARV. INT'L L. J. 149, 154 (1994).

79 Rachel A. Ruane, *Murder in the Name of Honor: Violence against Women in Jordan and Pakistan*, 14 EMORY INT'L L. REV. 1523, 1531 (2000) (quoting Lisa Beyer & Jo LeGood, The Price of Honor, Time (Can.), Jan. 18, 1999, at 19); Mernissi, *supra* note 33, at 183.

80 Lehr-Lehnardt, *supra* note 76, at 419.

81 Lilia Labidi, *Islamic Law, Feminism, and Family: The Reformulation of Hudud in Egypt and Tunisia*, *in* FROM PATRIARCHY TO EMPOWERMENT 278, 285-87 (Valentine M. Moghadam ed., 2007).

82 MONA ZULFICAR, THE EGYPTIAN WOMAN IN A CHANGING WORLD (The New Civic Forum ed., 1994).

83 *Id.*

84 Labidi, *supra* note 81, at 285-86; Soha Abdel Kader, *Hypocrisy and Sex Crimes*, MIDDLE EAST TIMES, 30 (1997).

85 Article 237 of Law No. 58 (1937) Promulgating the Penal Code (commuting the crime of murder to the level of misdemeanor). The statute restricts its applicability to murderer-husbands; however, fathers and brothers have also enjoyed light sentences for honor killings. In one example, a father who beheaded his daughter and paraded her head around his village for going on vacation with her boyfriend was released after the unbelievably short period of merely two months in prison. *See* Lehr-Lehnardt, *supra* note 76, at 423.

86 *Id.* at 423.

87 Patel, *supra* note 75, at 150.

Egyptian "compassion" for such murderers does not extend to women, however. The honor defense for women killing adulterous husbands and their mistresses is simply inapplicable.[88]

Finally, the sexual double standard also governs the punishment for adultery, and even its very definition. A man's adultery is punishable by a maximum jail sentence of merely six months, and that punishment is applied only if he is caught red-handed in the marital home.[89] On the other hand, an adulterous wife is imprisoned for no less than two years for *any* act of sexual infidelity.[90] The gendered difference in penalties reflects the Egyptian value system in which women's purity is assigned the utmost importance, and men's lusts are indulged.[91]

The clearest proof of the motivation behind the discriminatory criminal norms is their origin: none of them is Islamically-based; they were all exclusively derived from the nineteenth century French Penal Code.[92] Clearly, when it benefits men − they enjoy extremely loose standards of sexual morality −[93] and when it is to the detriment of women – their sexuality is controlled, and the notion that their bodies are the exclusive property of their husbands is perpetuated − cultural norms are hypocritically allowed to override religious norms.[94]

4. *Polygamous Marriage: An Exclusively Male Prerogative*

One of the chief pillars of a patriarchal society is the demeaning practice of polygamy. This practice, now taboo nearly the world over, is still alive and kicking in Egypt, abused by men to oppress women and to sate their own lust.[95] Polygyny is

88 *Id.*

89 *See* Article 277 of Law No. 58 (1937) Promulgating the Penal Code. *See also Id;* Zulficar, *supra* note 82.

90 Articles 274 & 277 of Law No. 58 (1937) Promulgating the Penal Code. *See also* Safia K. Mohsen, *Women and Criminal Justice in Egypt*, *in* LAW AND ISLAM IN THE MIDDLE EAST 15, 20 (Daisy Hill Dwyer ed., 1990).

91 GUENENA & WASSEF, *supra* note 30, at 38.

92 Melissa Spatz, *A "Lesser" Crime: A Comparative Study of Legal Defense for Men Who Kill Their Wives*, 24 COLUM. J. L. & SOC. PROBS. 597, 600 (1991); Jewett, *supra* note 34, at 206. For the Islamic law's unfavorable stance on honor killing see Major David J. Western, *Islamic "Purse Strings": The Key to the Amelioration of Women's Legal Rights in the Middle East*, 61 A.F. L. REV. 79, 104-07 (2008).

93 Spatz, *id.* at 600-01.

94 Jewett, *supra* note 35, at 206.

95 JAWAD, *supra* note 43, at 48, 50 ("polygamy has been terribly abused and … brought misery on countless vulnerable women"); INHORN, *supra* note 16, at 30 (referring to a men's general

reported to be perhaps "the greatest pain" a woman may encounter,[96] hindering her from leading a productive life.[97] Since a wife cannot legally divorce her husband for taking additional wives, she has no choice but to assume a subservient role in order to please him and avoid the anguish of sharing his resources and affection with another woman.[98] Men have quickly learned the potential embodied in their powerful polygamy right – they have soon abused it as an intimidation tactic and a blackmail device to secure their wives' obedience.[99]

Marrying multiple wives is so appealing to masculine sentiments that men have falsely understood polygamy to be the Shari'a's answer to their "insatiable" sex drive.[100] Such a hedonistic approach is characteristic of Muslim men's consistent perversion of Islamic ideals of justice and chastity, the most famous example of which is the view of heaven: "Through their prurient and orgiastic speculations, [Muslim men] have transformed even the Qur'an's view of paradise into … a 'heavenly whorehouse.'"[101]

"Islamically ordained right to ruin his wife's marriage"); LOMBARDI'S new book, *supra* note 21, at 226.

96 See the opinion of the great Muslim scholar Qasim Amin, as quoted in LOMBARDI'S new book, *supra* note 21, at 242 and authorities cited there.

97 Paul Vielle, *Iranian Women in Family Alliance and Sexual Politics*, *in* WOMEN IN THE MUSLIM WORLD 451, 471 (Lois Beck & Nikki Keddie eds., 1978); BARBARA FREYER STOWASSER, WOMEN IN THE QUR'AN, TRADITIONS, AND INTERPRETATION 21 (1994).

98 Michele Alexandre, *Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?*, 18 HASTINGS WOMEN'S L. J. 3, 16 (2007); Heather Johnson, *There are Worse Things than Being Alone: Polygamy in Islam, Past, Present, and Future*, 11 WM. & MARY J. OF WOMEN & L. 563, 593-94 (2005); Beth Baron, *The Making and Breaking of Marital Bonds in Modern Egypt*, *in* WOMEN IN MIDDLE EASTERN HISTORY: SHIFTING BOUNDARIES IN SEX AND GENDER 275, 283-84 (Nikki R. Keddie & Beth Baron eds., 1991).

99 Alexandre, *id;* Johnson, *id. at* 593-94.

100 Prominent traditional Muslim scholars have pointed to men's hyperactive libidos as the rationale for allowing them to marry multiple wives. *See* LAMIA RUSTUM SHEHADEH, THE IDEA OF WOMEN UNDER FUNDAMENTALIST ISLAM 65 (2003); ROBERT ROBERTS, THE SOCIAL LAWS OF THE QORAN 9 (1925); ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 136; Amira Mashhour, *Islamic Law and Gender Equality – Could There Be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 HUMAN RIGHTS QUART. 562, 571 (2005); SHIRKAT GAH, WOMEN'S RIGHTS IN MUSLIM FAMILY LAW IN PAKISTAN: 45 YEARS OF RECOMMENDATIONS VS. THE FSC JUDGMENT (JANUARY 2000) 25 (2000) ("Four wives have been allowed to save sex starved people from sex corruption, adultery, rape, forced sex etc").

101 ASMA BARLAS, "BELIEVING WOMEN" IN ISLAM: UNREADING PATRIARCHAL INTERPRETATIONS OF THE QUR'N 157 (2002).

Ironically enough, the opposite is true. Arguably, polygamy was instituted to answer the "voracious" *feminine* appetite for sex.[102] In a society where women outnumbered men, it has been posited, Islam sought to let women marry even an already-married man and thus enjoy a sexual life without the disgrace of extra-marital sex, or even prostitution.[103] Regardless of the historic truth of this rationale, its underlying assumption − placing women's interests at the focus − is indeed correct. The Qur'anic intention was to ensure justice for widows and orphans left with no masculine protector – especially in times of war − and not to satisfy male sexual urges.[104] It follows that the utilization of men's polygamy license to the detriment of women, and "to build harems in their homes", makes a mockery of the Qur'an's teachings and deepens the injustice it was intended to rectify.[105] As will be discussed later in this article, Egypt has defied the Qur'an's protective spirit, leaving polygamy largely intact, without any substantial effort to limit its scope for the benefit of women.[106]

5. *The (De)Meaning of Marriage: A Wife's Duty is to Obey*

The female duty of obedience is the firm basis of the patriarchal excesses underlying the Muslim marital relationship. An Egyptian Muslim wife must strictly "submit" herself to her husband's authority, maintain an attractive appearance for him,[107] and allow him uninhibited sexual access to her.[108] The concept of marital

102 LAMIA RUSTUM SHEHADEH, THE IDEA OF WOMEN UNDER FUNDAMENTALIST ISLAM 117 (2003); Johnson, *supra* note 98, at 570.

103 Johnson, *id*; Alexandre, *supra* note 98, at 14.

104 GOODWIN, *supra* note 5, at 33; BARLAS, *supra* note 101, at 191. *See also* Islamic World, Sister's Page, *The True Meaning of Polygyny*, *available at* www.islamic-world.net/sister/polygyny.htm (providing a father for orphans is the only specific circumstance in support of polygamy sanctioned in the Qur'an); Alexandre, *supra* note 98, at 11; Younis, *supra* note 9, at 487 ("polygamy was originally intended to protect the widowed and orphaned").

105 BARLAS, *supra* note 101, at 157; Johnson, *supra* note 98, at 585. Tellingly, Egyptian husbands' use of polygamy has little to do with religious sanction. In a 2004 study in Egypt, when male respondents were asked what would justify polygamy only 12.5 percent of the total sample said that it was justified because "religion allows it". *See* LYNN WELCHMAN, WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW 52 (2004).

106 LOMBARDI'S new book, *supra* note 21, at 228; Fawzy, *supra* note 25, at 87.

107 Yakare-Qule Jansen, *Muslim Brides and the Ghost of the Shari'a: Have The Recent Law Reforms in Egypt, Tunisia and Morocco Improved Women's Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make It Stick?*, 5 NW. U.J. INT'L HUM. RTS. 181, 187 (2007).

rape is accordingly an oxymoron in Egypt.[109] A wife is even required to guess her husband's desires,[110] but she must not second-guess his decisions controlling her every move.[111]

To a large extent, this duty of obedience derives its force from the perception of women as "at worst devils, at best a tool for the sexual gratification of their husbands…"[112] Thus, women must be locked up in marriage and controlled within that strict framework as a means of "reproduction and of entertainment for men".[113]

Egyptian men in turn are given vast powers to implement their marital prerogatives. It is their "right" to discipline their wives physically for trespasses and rebelliousness.[114] As a result, abuse of one's wife is so normalized in Egyptian society that it is "almost an institution".[115] Women themselves are taught to agree that talking back to a husband, the mere burning of dinner, and even refusal to have sex, are legitimate grounds for beating.[116] Such a belief system renders Egypt one of the few places on earth in which the beating of men is treated more harshly than the battering of women.[117]

In addition to physical discipline, a husband may deprive his "disobedient" wife of support and maintenance.[118] In the not-too-distant past he could also have used the state's police power to bring his "rebellious" wife back to him so he could lock her up in a small room with a bed until she was willing to pledge obedience to him

108 AFZALUR RAHMAN, ROLE OF MUSLIM WOMEN IN SOCIETY 192 (1986); Lehr-Lehnardt, *supra* note 76, at 409.

109 GUENENA & WASSEF, *supra* note 30, at 37.

110 Lehr-Lehnardt, *supra* note 76, at 409.

111 Thus, a wife cannot leave the matrimonial house without her husband's permission, even in order to work. Art. 1 of Law No. 25 of 1929. On that Article *see* Rana Lehr-Lehnardt, *supra* note 76, at 409; Jansen, *supra* note 107, at 187; Amina Chemais, *Obstacles to Divorce for Muslim Women in Egypt*, *in* SPECIAL DOSSIER: WOMEN LIVING UNDER MUSLIM LAWS 52, 56 (France Grabels ed., 1996).

112 *See* Fawzy, *supra* note 25, at 24-25.

113 *Id.*

114 Abu-Odeh, *supra* note 8, at 1105.

115 Brian Whitaker, *Legally Brutalized*, *available at* www.guardian.co.uk/elsewhere/journalist/story/0,7792,1362957,00.html; Lehr-Lehnardt, *supra* note 76, at 411-12; GOODWIN, *supra* note 5, at 338.

116 Whitaker, *id*; HUMAN RIGHTS WATCH, *supra* note 17, at 13.

117 GUENENA & WASSEF, *supra* note 30, at 37-38.

118 Art. 11 *bis* 2 of Law No. 25 of 1929 as amended by Law No. 100 of 1985; Abu-Odeh, *supra* note 8, at 1064.

again or risk surrendering her Shari'a financial rights.[119] The wife could be kept in this so-called "House of Obedience" by force, as long as her personal security was assured, the neighbors were near enough to hear her screams, and there was no obstacle to prevent her from enjoying sexual relations with her husband.[120]

Notwithstanding the total absence of any Islamic basis for this patriarchal procedure, it stained the Egyptian statute book for years, frequently exploited by men to abuse their wives, imprison them in the home, or otherwise torment them.[121] Not until the second half of the twentieth century, many decades after most other countries had outlawed this practice, did Egypt finally become receptive to feminist demands.[122] The "House of Obedience" was transformed into a more humane, yet still degrading procedure – a husband may call his wife into obedience by summoning her to return home via a court official, not the police, and the wife is given a chance to defend her "rebelliousness" in court.[123] This is not an easy task, however. Wives fleeing husbands who appropriated their money or forced them to relocate despite contractual stipulations to the contrary, or who engaged in homosexual practices, have all been declared disobedient.[124] Some decisions went so far as to suggest that battered women nonetheless owe their husbands an unqualified duty of obedience. The court's decisions tell us:

> [T]he husband has the right to his wife's obedience and to 'her enjoyment' by virtue of the marriage contract, and she does not have the right to withhold herself from him for reasons of harm and battery. She also has no right to leave the house for that reason, as long as she lives among good neighbors. If her husband beat her, she should complain to the judge, who would punish and discipline him.[125]

119 Sonneveld, *supra* note 28, at 6.4; RON SHAHAM, FAMILY AND THE COURTS IN MODERN EGYPT 95 (1997).

120 Chemais, *supra* note 111, at 55.

121 Chemais, *id.* at 54-56; Dawoud S. El Alami, *Law No. 100 of 1985 Amending Certain Provisions of Egypt's Personal Status Law*, 1 ISLAMIC L. & SOC'Y 116, 120, n. 4 (1994).

122 Carolyn Fluehr-Lobban & Lois Bardsley-Sirois, *Obedience (Ta'a) in Muslim Marriage: Religious Interpretation and Applied Law in Egypt*, 21 J. COMP. FAM. STUD. 39, 52 (1991).

123 Article 11 *bis 2* of Law No. 25 of 1929, as amended by Law No. 100 of 1985, and Abu-Odeh, *supra* note 8, at 1128-29; ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 60; Chemais, *supra* note 111, at 57-58.

124 *See* the cases cited in Abu-Odeh, *id.* at 1133-34 for support of these propositions, but the author rightly cautions that "the decisions of the Egyptian courts are contradictory and conflict…", *id.* at 1132.

125 *Id.* at 1133 (summarizing a representative judicial ruling). In another case it was also held that, The husband has the right to his wife's obedience and to "her enjoyment", and he cannot beat or discipline her. If he did, she should resort to court, which must then reprimand him and

To this day, this highly humiliating practice is anchored by legislation, sanctioned by society, and falsely ascribed to Islam.[126] Hence, in twenty-first century Egypt "the primary responsibility of the woman is still to obey her husband…"[127] Egyptian husbands still frequently use obedience notices as a means to rid themselves of their maintenance obligations, delay existing divorce proceedings, and further harass their wives.[128]

B. *Conclusion: The Importance of Female Marital Emancipation*

This chapter paints a distressing picture of the plight of women in the Egyptian family, society, and legal system. It also suggests a connecting, sexually-oriented link between the seemingly unrelated elements shaping women's lives. As observed, the above-discussed patriarchal excesses cannot be justified by, and even sometimes flagrantly contradict, Islamic law; they are merely culturally-rooted practices that are endorsed as religiously-mandated norms to serve men's interests.[129] Egyptian practices give Islam a bad name as a religion that brutalizes and enslaves its women,[130] while threatening their very lives.[131]

To be sure, all Egyptian females suffer, but married women are by far the worst off. The pervasive Egyptian obsession with female sexuality takes its most extreme form with regard to wives, inflicting on them higher standards of sexual purity and modesty of behavior and dress.[132] Even practices that are ostensibly unrelated to marriage, either anticipate matrimony (e.g. circumcision is meant to enhance women's fidelity and marriageability, and their husbands' sexual pleasure and control over their bodies), or are exacerbated by it (e.g. married women are the main victims of "honor" killings).

prevent him from hurting his wife. The wife, however, does not have the right to disobey him on the grounds that he beat her. *Id.* at 1132 (summarizing the court's holding).

126 GUENENA & WASSEF, *supra* note 30, at 22-23.

127 Abu-Odeh, *supra* note 8, at 1127. Unsurprisingly, male fundamentalists lament that "The most serious threat facing our society is the oriental woman's refusal to obey men"; Badran, *supra* note 30, at 214 (quoting Muhammad Atiya Khamis).

128 Human Rights Watch, *supra* note 17, at 31-32; Chemais, *supra* note 111, at 59.

129 Mashhour, *supra* note 100, at 564.

130 Johnson, *supra* note 98, at 565.

131 Naz K. Modirzadeh, *Taking Islamic Law Seriously: Ingos and the Battle for Muslim Hearts and Minds*, 19 HARV. HUM. RTS. J. 191, 213 (2006) (quoting LaShawn R. Jefferson).

132 *See, e.g.,* MACLEOD, *supra* note 38, at 120 and the discussion *supra.*

Compounding this insufferable situation, married women are further subject to a marital relationship wherein the husband exerts "the highest degree of authority over his wife;"[133] her life-long role is to "submit and serve", and his is to restrict her movements, confine her activities, make decisions on her behalf, and generally exercise his "ordained right to ruin his wife's marriage".[134] A married woman may effectively remain in the periphery of society, confined to the home and denied her right to create her own future and that of her country. Under such circumstances, the marital tie can soon prove to be quite stifling for countless women.

Placed in this context, the importance of securing women a way out of marriage is manifestly evident; the legal right to marital exit proves not merely an academic question, but rather a pressing existential necessity. This chapter has vividly demonstrated that, under the patriarchal conditions of Egyptian society, freedom to divorce amounts to freedom from fear, abuse, and humiliation. Freedom to divorce also means an escape from a living hell, or even from death. Understandably, for Egyptian women a dissolution right is perceived as the end of slavery and the beginning of equality between the sexes.[135] For men, it is perceived as the end of their supremacy over women, and the beginning of a new, unwelcome social order.[136]

Having located the divorce regime within the broader context of women's social status, realized the starring role it plays in dominating women and controlling their sexuality, and grasped the special value of female dissolution rights, we are now ready to examine the peculiar Egyptian constitutional framework in search of potential tools to pave women a free road to marital emancipation. The inherent tension between the constitutional commitments to Islamic law and to fundamental rights will be presented, along with strategies to mitigate the rivalry between these competing constitutional norms.

133 JAWAD, *supra* note 43, at 38 (quoting the Council of Ulama of South Africa).

134 INHORN, *supra* note 16, at 30; Bundren, *supra* note 12, at 737; JAWAD, *Id*; Sherif, *supra* note 10, at 75.

135 Jasimine Moussa, *The Reform of Shari'a-Derived Divorce Legislation in Egypt: International Standards and the Cultural Debate*, *available at* www.nottingham.ac.uk/shared/shared_hrlcpub/HRLC_Commentary_2005/MOUSSA.pdf, at 29; Sultan, *supra* note 57, at 12.

136 Sonneveld, *supra* note 28, at 2.3; KATULIS, *supra* note 59, at 23.

III. DIVORCED FROM COHERENCY: EGYPT'S CONSTITUTIONAL FRAMEWORK AT WORK − ACCOMMODATING CONFLICTING FUNDAMENTAL NORMS

The Arab Republic of Egypt has witnessed several constitutional enterprises throughout its existence; constitutions have been contemplated and promulgated only to be abandoned and replaced.[137] Egypt's continuous attempts at reaching a stable constitutional regime finally bore fruit on September 11, 1971, when the Permanent Constitution of the Arab Republic of Egypt was adopted by a nation-wide referendum.[138]

The Egyptian Constitution seconds the conventional wisdom that "opposites attract", as it attempts to accommodate a tangled web of contradictory norms. The two most ardent rivals for constitutional attention are Islamic mandates and fundamental rights. We will now look more closely at these two seemingly incompatible interests in an attempt to find a suitable constitutional equilibrium between them.

A. *Shari'a-Based Constitutionalism*

The Islamic Shari'a has always played a role in the Egyptian legal order. Article 2 of the 1971 Constitution officially recognized its tenets as a source of state legislation, ordaining that "Islam is the religion of the state, Arabic is its official language, and a principal source of legislation is Islamic Shari'a".[139] Under persistent pressure from Islamists, this Article was amended in 1980 to give Islamic law a place at the head of the entire normative hierarchy.[140] The amendment rendered Shari'a principles not only "a" but rather "*the*" principal source of legislation, and thus the underlying basis of all state law.[141] For the first time since independence,

137 A. Sheriff, *Constitutional Law*, *in* EGYPT AND ITS LAWS 315, 316 (Anthalie Bernard-Maugiron & Baudouin Dupret Eds., 2002).

138 Kevin Boyle & Adel Omar Sherif, *The Road to the 1971 Constitution – A Brief Constitutional History of Modern Egypt*, *in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 3, 12 (Kevin Boyle & Adel Omar Sherif eds., 1996).

139 For an English translation of the Constitution of 1971, see Appendix A in DEMOCRACY, THE RULE OF LAW AND ISLAM (Eugene Cotran & Adel Omar Sherif eds.,1999).

140 Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379, 386-7 (2006); Clark Benner Lombardi, *Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State*, 37 COLUM. J. TRANSNAT'L L. 81, 86 (1998) (hereinafter Lombardi's article).

141 The reconstructed Article 2 of the Constitution, as amended in May 22, 1980 (italics added).

the largely Western-minded, secular Egyptian law would thenceforth have to be consistent with "the principles of the Islamic Shari'a" as a primary condition of its constitutional validity.[142] To provide effective legal teeth to the amendment, the Constitution established a Supreme Constitutional Court (SCC) to safeguard its mandates, including its Islamic provisions, and to exercise exclusive judicial review of legislation.[143]

Surprisingly, Egypt welcomed such a potentially explosive clause into her Constitution without carefully defining what constituted the "principles of Islamic Sharia" that all laws must respect.[144] Consequently, the SCC was initially very reluctant to meddle in the tangled debates over the proper interpretation of Article 2

142 Nathan J. Brown, *Islamic Constitutionalism in Theory and Practice*, *in* DEMOCRACY, THE RULE OF LAW AND ISLAM 491, 494 (Eugene Cotran & Adel Omar Sherif eds., 1999). On the official committee report, see Hatem Laly Gabr, *The Interpretation of Article Two of the Egyptian Constitution by the Supreme Constitutional Court*, *in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 217, 219 (Kevin Boyle & Adel Omar Sherif eds., 1996).

143 Articles 174-178 of the Egyptian Const, and Law No. 48 of 1979 – Regarding the Promulgation of the Law on the Supreme Constitutional Court. For an English translation of the law, see Appendix B in DEMOCRACY, THE RULE OF LAW AND ISLAM (Eugene Cotran & Adel Omar Sherif eds., 1999).

144 CLARK BENNER LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT: THE AMENDMENT OF THE EGYPTIAN CONSTITUTION AND THE ARTICLE 2 JURISPRUDENCE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 159 (2001) (hereinafter – LOMBARDI's doctorate); Gabr, *supra* note 142, at 219; LOMBARDI'S new book, *supra* note 21, at 134-35. A clarification of the jurisprudential methodology of Islamic law is in order. Shari'a is the whole body of Islamic theology, referring to the general normative system of Islam as historically understood and developed by Muslim jurists, especially during the eighth to tenth centuries CE. The four primary sources of Islamic law are traditionally seen as; the Qur'an, believed by Muslims to be the living word of God revealed to His Prophet; the Sunna, the deeds and sayings of the Prophet Muhammed, recorded in *hadith; ijma* (consensus, which is the unanimous agreement of jurists on a specific issue); and *qiyas,* or reasoning by analogy. The prescriptions of the Qur'an are conclusive, and binding; the *hadith* of the Prophet is binding and attributed to divine revelation; but *ijma* and *qiyas* are less immutable. For a discussion of the primary and secondary sources of the Shari'a *see, e.g.,* Urfan Khaliq, *Beyond The Veil?: An Analysis of the Provisions of the Women's Convention in the Law As Stipulated in Shari'ah*, 2 BUFF. JOUR. INT'L L. 1, 8-12 (1995); Jason Morgan-Foster, *Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 8 YALE H. R. & DEV. L.J. 67, 102-04 (2005).

– for the Court, the wisest course of action was abstention.[145] In keeping with this approach, the SCC held in a pair of 1985 cases – the first of which is, tellingly, in the context of divorce law –[146] that Article 2's Islamic command was only prospective, thus immunizing the immense body of pre-existing legislation from judicial review as to its constitutionality. This seminal case, which intertwines fundamental constitutional issues with divorce arrangements, is to be discussed in greater detail later on.[147]

For over a decade the SCC zealously abstained from Article 2 challenges, notwithstanding the ever-growing list of cases awaiting ruling on its loaded docket.[148] Article 2's empty promise outraged Islamists; they embarked on a chain of riots and terrorist attacks in protest,[149] leading Egypt to the brink of civil war.[150] The Court had no choice but to take a deep breath and jump into the murky waters of Islamic review.[151] Interestingly enough, again, it first marked out a clear position on the meaning of Article 2 in the framework of divorce law.[152] The Court's sparsely-analyzed doctrine of Islamic interpretation was revolutionary. As a later chapter outlines, the SCC turned its back on classical Islamic law and instead endorsed a modernist view of a Shari'a-based legal order, allowing it to reconcile Islamic principles with other constitutional mandates and international human rights.[153] Tellingly, the SCC has hardly ever invalidated laws for being inconsistent with Article 2's constitutional Islamization demand.[154] Even when finally doing so, the Court took pains to propose additional grounds for the ill-fated laws' invalidation.[155]

145 Lombardi's article, *supra* note 140, at 88 (suggesting that as long as there was hope for legislative compromise on the proper implementation of the Islamization process, the SCC avoided becoming involved).

146 As will be elaborated *infra* chapter V. The other decision was the high-profile case of Al-Azhar regarding the issue of *riba* (usury) (Case No. 20, 1st judicial year (4 May 1985)).

147 *See* the discussion *infra* chapter VI.

148 *See, e.g.,* Lombardi & Brown, *supra* note 140, at 393.

149 LOMBARDI'S new book, *supra* note 21, at 136-39.

150 Lombardi's article, *supra* note 140, at 113; LOMBARDI'S new book, *supra* note 21, at 178, 260, n.1.

151 LOMBARDI'S new book, *id.* at 140; Lombardi's article, *id.* at 113-14.

152 *See* the discussion *infra* chapter VI.

153 Baber Johansen, *Supra-Legislative Norms and Constitutional Courts: The Case of France and Egypt*, *in* THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS 347, 369 (Eugene Cotran & Adel Omar Sherif eds., 1996).

154 Lombardi's article, *supra* note 140, at 118-19.

155 Frank E. Vogel, *Conformity with Islamic Shari'a and Constitutionality Under Article 2: Some Issues of Theory, Practice, and Comparison*, *in* DEMOCRACY, THE RULE OF LAW AND ISLAM 525, 543, n. 35 (Eugene Cotran & Adel Omar Sherif eds., 1999); LOMBARDI'S new book, *supra*

If when dealing with constitutional Islamic review under Article 2 the SCC is typified by extreme passivity,[156] when it is faced with constitutional fundamental rights review, the Court is characterized by "almost brutal activism", appearing "almost too willing" to invalidate legislation as in violation of the Constitution.[157] We now turn to the fundamental-rights side of the constitutional equation.

B. *Fundamental Human Rights Guarantees*

The Egyptian Constitution elevates the status of the Islamic Shari'a in the legal system. Nonetheless, it also provides, side by side with it, an impressive catalogue of fundamental rights, which would do credit to even the most liberal, human-rights conscious states.[158] In fact, the Egyptian Bill of Rights is said to be the most generous in scope and diversity of all civilized nations.[159] Some of these rights, however, may not align with − and may in fact straightforwardly conflict with − the strengthened constitutional pledge to Islamic law. Let us outline the fundamental guarantees pertinent to our discussion, examine their judicial implementation, and then offer techniques to harmonize the fundamental rights mandate with its Islamic Shari'a neighbor.

note 21, at 254 (writing in 2006, the author concluded that the Court "to date, has never struck down a law on Article 2 grounds unless it also violated some other, 'secular' provision of the constitution").

156 Abu-Odeh, *supra* note 8, at 1144, n. 444.

157 *Id. See also* Brown & Sherif, *supra* note 4, at 64.

158 *See*, especially, Chapters II and III of the Constitution incorporating an impressively broad array of second and third generation human rights, including social and economic rights. *Also see* A. Sheriff, *Constitutional Law*, *in* EGYPT AND ITS LAWS 315, 316 (Anthalie Bernard-Maugiron & Baudouin Dupret eds., 2002).

159 The SCC incorporates into the constitutional text all human rights that are recognized in international conventions. This judicial technique dramatically widens the spectrum of rights and liberties outlined in the Egyptian Constitution. *See also* Abd-El-Rahman Nosseir, *The Supreme Constitutional Court of Egypt and the Protection of Human Rights*, *in* THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS 47, 58 (Eugene Cotran & Adel Omar Sherif eds., 1996).

1. *On Explicit and Unenumerated Constitutional Rights*

There are several constitutional provisions which may potentially contribute to female marital emancipation. Article 8, the Equal Opportunities Clause, commands the state to "guarantee equality of opportunity to *all* Egyptians".[160] Article 11 further provides that,

> The state shall guarantee coordination between woman's duties towards her family and her work in the society, considering her equal to man in the political, social, cultural and economic spheres without detriment to the rules of Islamic jurisprudence (Shari'a).[161]

The Equal Protection Clause of Article 40 pronounces that "All citizens are equal before the law. They have equal public rights and duties without discrimination due to sex, ethnic origin, language, religion or creed".[162] Also of interest are Article 41's guarantee of personal liberty,[163] and Article 45's safeguard of the sanctity of private life and communications.[164]

It is the contention of this article that the right to marital freedom is also a fundamental, albeit unenumerated, constitutional right, of the same order as the guarantees explicitly protected. The SCC acknowledges the existence of unenumerated rights; it liberally deduces them from related explicit guarantees,[165] using criteria closely reminiscent of the *Griswold* penumbras language,[166] from the Islamic Shari'a, and even from international human rights law.[167]

160 Italics added.

161 On that article see Jewett, *supra* note 34, at 207.

162 *See* the discussion *infra* on the application of the equality principle.

163 According to Article 41, "Individual freedom is a natural right not subject to violation…".

164 On that Article see Adel Omar Sherif, *The Rule of Law in Egypt from a Judicial Perspective*, *in* THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS 1, 25 (Eugene Cotran & Mai Yamani eds., 2000) (hereinafter - Sherif, *The Rule of Law*); Awad Mohammed El Morr, *Human Rights in the Constitutional Systems of Egypt and Other Islamic Countries: International and Comparative Standards*, *in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 162, 212 (Kevin Boyle & Adel Omar Sherif eds., 1996) (the right to privacy).

165 Case No. 23, 16th judicial year (18 March 1995) (the right of association includes freedom of expression).

166 El-Morr, *Judicial Sources*, *supra* note 66, at 6-7.

167 John Murray & Mohamed El-Molla, *Islamic Shari'a and Constitutional Interpretation in Egypt*, *in* DEMOCRACY, THE RULE OF LAW AND ISLAM 507, 520, 523 (Eugene Cotran & Adel Omar Sherif eds., 1999).

For our purposes, the rights to marry and choose a spouse were recognized as constitutional rights enjoying the support of both Islamic and international law,[168] and constituting an integral part of the private sphere protected by Article 45 of the Constitution.[169] For the Court these rights are

> [E]mbodied in the spirit of the Constitution, reflecting its true intentions, in a similar manner to the United States Constitution which, although not explicitly mentioning the right to privacy, was interpreted by the American judiciary to encompass private life. The Egyptian Constitution, by providing for the right to privacy in Article 45, implicitly also guarantees the right to marry and choose a spouse as an essential component of upholding the sanctity of *private life.*[170]

The SCC went on to further associate these rights with the concepts of ordered liberty and personal freedom,[171] which in subsequent decisions would grow to encompass "the most intimate relationships of the individual, such as the rights to choose a spouse, to form a family, and to beget a child".[172] Such language is almost identical to that used in the American Fourteenth Amendment Due Process jurisprudence.[173]

By the same token, I argue, the decision to divorce is sheltered by both Article 41's guarantee of personal liberty and Article 45's concept of constitutional privacy. In fact, marital freedom is necessary to give these constitutional stipulations substance and meaning. The choice to terminate a marriage is one of the most crucial decisions of all, touching upon the most intimate, private, and pivotal aspects of an individual's existence. Having the freedom to choose whether to stay in one's

168 Adel Omar Sherif, *Unshakable Tendency in the Protection of Human Rights: Adherence to International Instruments on Human Rights by the Supreme Constitutional Court of Egypt*, *in* THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS 36, 41-42 (Eugene Cotran & Adel Omar Sherif eds., 1996) (hereinafter – Sherif, *Unshakable Tendency*) (the right to privacy and marriage is protected by Shari'a) and *id.* at 42 (the right is also protected by international law).

169 Case No. 23, 16th judicial year (18 March 1995).

170 *Id* (an excerpt translated in *Constitutional Jurisprudence on Fundamental Rights – A Digest of Selected Cases*, *in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 231, 236 (Kevin Boyle & Adel Omar Sherif eds., 1996)).

171 *Id. Also see* Enid Hill, *A System of Ordered Liberty*, *in* DEMOCRACY, THE RULE OF LAW AND ISLAM 309, 314-15 (Eugene Cotran & Adel Omar Sherif eds., 1999).

172 *See* the famous "veil case": Case No. 8 of the 18th judicial year (18 May 1996).

173 *See* the American Court's right to privacy jurisprudence, starting with Meyer v. Nebraska, 262 U.S. 390 (1923) (ruling that the constitutional liberty interest includes "the right of the individual… to marry, establish a home and bring up children"...).

marriage is indispensable for the definition of one's identity, and bears directly, and profoundly, on marriage, home, and family life.[174] The SCC acknowledged that

> Respect for the freedom of people to make critical value choices for themselves, when they prove to be central and not peripheral to their identity, are deserving of constitutional protection.[175]

In addition, perhaps ironically, recognition of the fundamental character of marriage itself entails equal recognition of divorce as a corollary which naturally follows: If individuals cannot obtain a divorce, clearly they cannot exercise their right to remarry; consequently, other (unmarried) individuals are also barred from marrying their chosen already married (however formally) partners.[176]

But there is more to divorce than the right to remarry. Marital dissolution has an additional, intrinsic value which is unrelated to marriage − the right to escape the misery of a dysfunctional family and to quit a life full of "polluting sadness and perpetual distemper".[177] Being trapped in a moribund marriage is so damaging to the individual's emotional and physical well-being that it may result in the "accomplishment of our destruction".[178] In Egyptian society in particular, we have observed, divorce functions as a crucial safeguard for women's most basic sense of identity, and even for their lives. Their very physical existence is often dependent on a viable means to end matrimonial bondage.[179] This additional quality − which the right to marry does not possess − serves to reinforce the constitutional value underlying the fundamental right to divorce, even above and beyond that of marriage.

Furthermore, like marriage, the right to divorce is accorded bilateral support from both the Islamic Shari'a and international human-rights law. Marital dissolution has been enshrined in Islam from its inception, and Muslims take pride in their advanced, liberal, and lenient right to divorce, independent of expensive and divisive

174 Yefet, *supra* note 24.

175 As the Chief Justice of the SCC explained in El Morr, *supra* note 164, at 214-15.

176 This is true even for men in Egypt since their polygamy license is limited both legally (up to four wives) and economically, and religiously (they must maintain equal treatment of all wives). See the discussion *infra* chapter V.B.3.

177 John Milton, *The Doctrine and Discipline of Divorce*, *in* II The Complete Prose Work of John Milton 258 (Don. M. Wolfe ed., 1959).

178 NELSON MANFORD BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 48 (1962) (quoting "An Essay on Marriage"). *See also* Karin Carmit Yefet, *Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom,* 20 YALE JOURNAL OF LAW & FEMINISM 101 (2009).

179 Yefet, *supra* note 24.

court hearings.[180] Marital freedom is also secured in major international conventions acknowledging its status as a protected human right.[181] It follows that the right to marital freedom is deserving of inclusion in the pantheon of fundamental guarantees and of special, particularly rigorous, constitutional protection.

In conclusion, the Egyptian bill of rights is well-equipped to do battle for women's marital freedom. The rights to equality, liberty, privacy, and above all, the right to divorce, carry a potent promise to release women from oppressive marital bonds. Still, in order to assess the true colors of this constitutional promise, let us examine the SCC's attempt to translate rights from rhetoric to reality, and analyze its efforts to strike a balance between a Shari'a-based constitutionalism and fundamental human rights.

2. *On the Judicial Enterprise: Infusing Fundamental Rights with Concrete Meaning*

The SCC has played a key role in developing a liberal interpretation of the Egyptian Constitution, defending democratic values, and implementing international human rights standards.[182] Its bold decisions have fairly earned the Egyptian regime its reputation as a "government of judges".[183] The Court is particularly famous for its long-standing dedication to international human rights norms. For example, it rendered international treaties a controlling principle of constitutional construction,[184] going so far as to equate international human rights with Egyptian

180 Mohamed Abdel Haleem, *Human Rights in Islam and the United Nations Instruments*, *in* DEMOCRACY, THE RULE OF LAW AND ISLAM 435, 452 (Eugene Cotran & Adel Omar Sherif eds., 1999).

181 *See, e.g.,* Article 12 and 16(a) of the Universal Declaration on Human Rights; Article 23(4) of the International Covenant on Civil and Political Rights; Article 6(2)(b) & 16(1) of the Declaration on the Elimination of Discrimination Against Women; Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

182 Hatem Aly Labib Gabr, *The Role of the Supreme Constitutional Court of Egypt in Upholding Democracy and the Rule of Law*, *in* DEMOCRACY, THE RULE OF LAW AND ISLAM 273-283 (Eugene Cotran & Adel Omar Sherif eds., 1999). For many decisions establishing the SCC's role as a custodian of human rights, and its liberal interpretive approach, see Awad Mohammed El-Morr, *Recent Landmark Decisions of the Supreme Constitutional Court of Egypt*, *in* DEMOCRACY, THE RULE OF LAW AND ISLAM 239-272 (Eugene Cotran & Adel Omar Sherif eds., 1999); Adel Omar Sherif, *Constitutional Adjudication*, *in* EGYPT AND ITS LAWS 325, 338-344 (Anthalie Bernard-Maugiron & Baudouin Dupret eds., 2002) (hereinafter – Sherif, *Constitutional Adjudication*).

183 Brown, *supra* note 142, at 495-96; Lombardi & Brown, *supra* note 140, at 416.

184 Ahmed Fathy Sorour, *Preface*, *in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT (Kevin Boyle & Adel Omar Sherif eds., 1996).

constitutional guarantees, while according them the same elevated normative status.[185] This makes the SCC even more advanced than its American counterpart; it admits to the Egyptian constitutional sanctum not only rights that are "deeply rooted in this Nation's history and tradition",[186] but also a sweepingly broad array of internationally recognized norms.[187]

The equal-protection jurisprudence of the SCC is very progressive as well.[188] The principle of equality is a paramount norm in the Egyptian constitutional scheme;[189] it is spelled out in two separate constitutional guarantees, which jointly reinforce a comprehensive right of equal protection of the laws.[190] The Court has widened the equality guarantees even further and views the specific list of classes protected from discrimination as open and evolving. Thus, the Court disallows disparate treatment based on grounds as diverse as birth, national origin, wealth, social status, and political affiliation, to name several examples.[191]

See also Sherif, *Constitutional Adjudication, supra* note 182, at 325, 338; and also, generally, Sherif, *Unshakable Tendency*, *supra* note 168.

185 *See* the seminal Case No. 22 of the 8th judicial year (4 January 1992), and its synopsis by Kevin Boyle, *Human Rights in Egypt: International Commitments*, *in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 88, 89-90 (Kevin Boyle & Adel Omar Sherif eds., 1996).

186 This formulation is the American Court's primary criterion for deciding whether an asserted right is fundamental. *See* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (Justice Powell).

187 Boyle, *id*, at 113; Sorour, *supra* note 184.

188 *See, e.g.,* Case No. 39, 15th judicial year (6 March 1995), and Sherif, *Constitutional Adjudication*, *supra* note 182, at 342.

189 On numerous occasions the SCC has stressed the key significance of equality before the law. *See, e.g.,* Case No. 23, 16th judicial year (18 March 1995).

190 On the relationship between Articles 8 & 40 see El Morr, *supra* note 164, at 191.

191 *See, e.g.,* Case No. 37, 9th judicial year (19 May 1990); Case No. 39, 15th judicial year (6 March 1995). *See also* the following works: Abd-El-Rahman Nosseir, *supra* note 159, at 51; El-Morr, *Judicial Sources, supra* note 66, at 19 (summarizing the SCC's case law). Significantly, while often inspired by U.S. constitutional jurisprudence (See, e.g., El-Morr, *Judicial Sources*, *supra* note 66, at 6-7. Case No. 41, of the 7th judicial year (1 February 1992), the SCC has refused to employ the three tiers of scrutiny governing American equal-protection analysis. For the Court, "time has not yet become ripe for intervening with the destructive test of strict scrutiny". Case No. 41, 7th judicial year (1 February 1992) (quoted in El-Morr, *Judicial Sources*, *supra* note 66, at 9). Instead, it has adhered to the "rational basis test" requiring legislative distinctions to be rationally related to a legitimate governmental interest. *id.*

The equal-protection jurisprudence has proven to be a working principle, rigorously put into use. By virtue of the principle's constitutional force, the Court has meticulously scrutinized and invalidated statutes discriminating against applicants to academic institutions, non-commercial lessors, electoral candidates, administrative employees, State Council members, ex-ministers, ex-counselors, university professors, students, professional syndicates' members, residents of certain areas, aliens, trainee lawyers, and various salaried workers.[192]

All this begs the question of how a liberal constitutional philosophy, and a rigorous enforcement of equality principles, can coexist with a Shari'a-based constitutionalism? This inquiry forms the subject of the next section.

C. *The Shari'a and Women's Fundamental Rights: Convergence and Reconciliation*

Contrary to conventional wisdom, the Islamic Shari'a proudly stands as a custodian of various human rights, impressively suited to secure women's freedom, equality, and dignity.[193] The Qur'an was largely designed to emancipate women; the promotion of their rights and social status is a leading aim underlying major Qur'anic reforms.[194] Indeed, the religious and social equality of women with men is a theme well-documented in the Qur'an, most notably in the divorce domain itself.[195]

The Qur'an stresses in the context of divorce that "[w]omen have such honorable rights as obligations;" "And women have rights equal to what is incumbent upon them according to what is just".[196] The divine command is pronounced in no

192 For a synopsis of such cases see *Constitutional Jurisprudence, supra* note 170, at 232-244; Adel Omar Sherif, *The Rule of Law, supra* note 164, at 10-15.

193 *See*, *generally,* Riffat Hassan, *Are Human Rights Compatible with Islam?: The Issue of the Rights of Women in Muslim Communities, available at* www.religiousconsultation.org/hassan2.htm; Haleem, *supra* note 180. For the right to privacy, see the following Qur'anic verses: 24:27; 49:11. For the right to marry, see verse 24:32.

194 Noor Mohammad, *An Introduction to Islamic Law*, in 5A MODERN LEGAL SYSTEMS CYCLOPEDIA 5A.100.7 (Kenneth Robert Redden ed., 1990); Ann Elizabeth Mayer, *Internationalizing the Conversation of Women's Rights: Arab Countries Face the CEDAW Committee*, *in* ISLAMIC LAW AND THE CHALLENGES OF MODERNITY 133, 150 (Yvonne Yazbeck Haddad & Barbara Freyer Stowasser eds., 2004); Riffat Hassan, *Members, One of Another: Gender Equality and Justice in Islam*, *available at* www.religiousconsultation.org/hassan.htm; ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 4, 61, 133; Dillon, *supra* note 4, at 325 ("one of the most important principles promulgated by the Shari'a is improving the status of women…").

195 ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 134.

196 Verses 2:227; 2:228 of the Qur'an.

uncertain terms: "Do not retain them [your wives] by force, to transgress [against their rights]".[197] Other Qur'anic verses have also been interpreted in the same liberating spirit as affording a woman equal rights with a man.[198] Under such interpretations she is allowed "to be separated from [her husband] if she no longer wishes to live with him, since love, mercy and cohabitation presuppose free choice rather than compulsion".[199]

Women's dissolution rights are further buttressed by the Sunna, the second principal pillar of Islam as recorded in *hadith* literature.[200] Prophetic traditions support equal divorce rights for women, as the Prophet himself ordered throughout his life,[201] further stating that "[m]en and women are equal as two teeth on a comb", and that "[w]omen are the full sisters (*shaqaiq*) of men".[202] As a natural progression of his belief in the equality of men and women, the Prophet considered a wife's disinclination to remain his wife as tantamount to a total dissolution of the marriage contract.[203]

If this overview can teach anything it is that women's right to marital freedom rests on the most solid normative foundation; it enjoys the combined support of the two most authoritative pillars of Islamic tradition, the Qur'an and Sunna.[204] Both pillars envision a generous spectrum of women's dissolution rights, even one paralleling their husbands' divorce powers.[205]

Perhaps counter-intuitively to popular belief, a constitutional commitment to Islam may live peacefully side by side with its equality- and divorce-rights

197 Verse 2:229 of the Qur'an.

198 Mashhour, *supra* note 100, at 576.

199 Saadawi, *supra* note 64, at 199-200; Abu-Odeh, *Egyptian Feminism, supra* note 14, at 188, n. 11; Khurshid Bibi v. Mohammad Amin, PLD 1967 SC 97, 144-45 ("The trend of Qur'anic legislation is clearly in favour of freeing of the wife, where the marriage tie cannot serve the objects of marriage, namely … peace of mind, love, kindness, sympathy and compassion…").

200 For the jurisprudential sources of Islamic law see, e.g., Khaliq, *supra* note 144, at 8-12; Jason Morgan-Foster, *Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement*, 8 YALE H. R. & DEV. L. J. 67, 102-04 (2005).

201 For such *hadiths* see M. MAZHERUDDIN SIDDIQI, WOMEN IN ISLAM 60, 80 (1971).

202 Quoted respectively in GOODWIN, *supra* note 5, at 75, and in Mai Yamani, *Muslim Women and Human Rights: The New Generation in Saudi Arabia*, *in* DEMOCRACY, THE RULE OF LAW AND ISLAM 477, 478 (Eugene Cotran & Adel Omar Sherif eds., 1999).

203 GERALDINE BROOKS, NINE PARTS OF DESIRE: THE HIDDEN WORLD OF ISLAMIC WOMEN 3-4 (1995).

204 Yefet, *supra* note 24.

205 *See* the discussion *supra* in Chapter IV.C.

neighbors, and may in fact serve to complement and reinforce them. The weightiest religious sources offer Muslim society enough leeway − if not a religious duty − to recognize a wife's right to decide her own fate in marriage. Indeed, Egypt's equally-Muslim sister, Tunisia, embodies such an egalitarian, Islamically-inspired vision: It equalized divorce law while still emphasizing fidelity to Islamic heritage.[206]

However, despite the clear Qur'anic spirit to the contrary, male Muslim scholars were influenced by the patriarchal societal ethos of their times and developed a perfectly polarized divorce regime.[207] Men were granted an all-encompassing right to divorce, unprecedented in any other religion or system of law, on the one hand..[208] On the other hand, women's right to dissolution is very limited and weak, allowing only a narrow, fault-based avenue to marital freedom.[209] Such a discriminatory divorce regime utterly fails to reflect both the revolutionary declaration of gender equality made at the inception of Islam and the Qur'anic verses supporting a significantly broader spectrum of female divorce rights.[210]

How would the Egyptian legislature take up the divorce challenge? Would it adhere to the classical Islamic divorce regime defining women as legally subordinate to men, or would it actualize the true Qur'anic intent so as to bring classical, male-made law into accord with modern ideas of fundamental rights and

206 On the Tunisian divorce reform consult Mounira Charrad, *Repudiation versus Divorce: Responses to State Policy in Tunisia*, *in* WOMEN, THE FAMILY, AND POLICY: A GLOBAL PERSPECTIVE 51, 55 (Esther Ngan-Ling Chow & Catherine White Berheide eds.,1993) (the Tunisian Code "establishes the principle of equal divorce rights and obligations for men and women").

207 Amardeep Singh, *Personal Law in India: Triple Talaq, Mehr, and Why it Doesn't Matter Anyways* (2004), *available at* www.lehigh.edu/~amsp/2004/07/personal-law-in-india-triple-talaq.html; Asra Nomani, *A Gender Jihad for Islam's Future*, THE WASHINGTON POST, Nov. 6, 2005, at B2 (challenges "the ways in which Islam has been distorted by sharia rulings issued mostly by ultraconservative men"); AL-ATRAQCHI, *supra* note 3, at 230-1 (lamenting the fact that the patriarchally-inflected Islamic jurisprudence has informed the various contemporary formulations of Shari'a).

208 *See, e.g.,* Vrinda Narain, *Women's Rights and the Accommodation of "Difference:" Muslim Women in India*, 8 S. CAL. REV. L. & WOMEN'S STUD. 43, 53 (1998); ASAF A.A. FYZEE, OUTLINES OF MUHAMMADAN LAW 148 (4th ed 1974) (invoking the metaphor of a "one-sided engine of oppression in the hands of the husband").

209 *See, e.g.*, ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 32; Yefet, *supra* note 24.

210 *Id. Also see* Alexandre, *supra* note 98, at 1; Abu-Odeh, *Egyptian Feminism, supra* note 14, at 188, n.11; Asghar Ali Engineer, *Islam vs Modernity: Ban Triple Talaq, It's a Sin*, EXPRESS INDIA, Jun 17, 2004, *available at* www.expressindia.com/fullstory.php?newsid=32655&spf=true.

social justice? After uncovering the potent mechanisms to influence the divorce regime offered by both Egyptian constitutional jurisprudence and the Islamic Shari'a, the stage is set to explore the specifics of Egyptian divorce law and to scrutinize them in light of this constitutional promise. This challenging inquiry is at the heart of the coming two chapters.

IV. DIVORCED FROM EQUALITY: THE EGYPTIAN DIVORCE DOUBLE STANDARD

This chapter focuses on the legislative and judicial incarnations of the discriminatory and oppressive classical Islamic law, manifested in two laws enacted in the 1920s.[211] These laws are still in force today, and together they constitute the core of the Egyptian divorce regime.[212] The discussion that follows is comprised of two parts. The first tackles the reform legislation governing women's dissolution rights; the second explores the male side of the divorce story and the legislative restraints imposed on husbands' tyrannical repudiation power. As this critical analysis will reveal, it was not so much a concern for the constraints of Islamic law that troubled the legislature, but rather the obsessive Egyptian concern for female chastity and male hegemony over women.[213]

A. *The Embryonic Female Right to Divorce: Its Birth Pangs and Challenges of Survival*

The architects of Egyptian divorce reform recognized an exhaustive list of four fault-based divorce grounds entitling a woman to freedom: failure to provide maintenance (but payment is sufficient to revoke the divorce);[214] dangerous or contagious disease (unless the woman knew of the defect prior to marriage or explicitly or implicitly accepted it afterwards);[215] desertion for at least one year

211 The full names of the laws are: Law No. 25 of 1920 Concerning Provisions on Maintenance and Certain Matters of Personal Status (hereinafter Law No. 25 of 1920) and Draft Law No. 25 of 1929 Concerning Certain Provisions on Personal Status (hereinafter Law No. 25 of 1929). For an English translation of these laws, see DAWOUD SUDQI EL ALAMI & DOREEN HINCHCLIFFE, ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD 52-62 (1996).

212 Y. Qassem, *Law of the Family (Personal Status Law*), *in* EGYPT AND ITS LAWS 19, 20 (Anthalie Bernard-Maugiron & Baudouin Dupret eds., 2002).

213 In his book, FAMILY AND THE COURTS IN MODERN EGYPT, *supra* note 119, SHAHAM thoroughly analyzed a wide sample of court cases illuminating the statutory grounds for divorce. The following discussion draws heavily on his valuable work.

214 Arts. 4-6 of Law No. 25 of 1920. For a detailed analysis of the maintenance ground, see ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 52-53.

215 Arts. 9-11 of Law No. 25 of 1920.

without justified cause, or imprisonment for three years;[216] and maltreatment, defined as, a harm which would make cohabitation impossible for a woman of equivalent social standing.[217]

The lawmakers behind the divorce reform did not undertake the formulation of these new divorce grounds with the prime aim of benefiting women. The dominant sexual forces that were at play in the shaping of all other aspects of women's legal status did not miss the critical divorce arena. We have already observed that satisfying women's libido is perceived as an ideal way to combat their frantic sexuality.[218] Accordingly, Egyptian reformers developed the divorce regime with an eye toward answering that weighty challenge. Thus, before the 1920s reform, the sole divorce ground for a woman was her husband's impotence − a potent testimony to the Egyptian obsession with female sexual urges.[219] The same rationale underlies the subsequent addition of other grounds for divorce. For example, the illness ground is essentially an extension of the impotence ground; any disease or impediment that can be shown to interfere with a husband's sexual function is a ticket to freedom; otherwise, a claim for divorce on the basis of illness is largely useless.[220]

This is the also the case with the maintenance ground. Given that the marriage contract is largely regarded as an exchange of husbandly support for sexual rights in a wife, the non-provision of maintenance deprives the husband of his wife's bed and may lead to a potentially dangerous situation where a woman is sexually unsatisfied.[221]

Moreover, the desertion and imprisonment grounds were not motivated by recognition of the centrality of conjugal life to the marital relation, but by the

216 Arts. 12-14 of Law No. 25 of 1929.

217 Art. 6 of the Law No. 25 of 1929.

218 *See supra* Chapter III.A.

219 Ron Shaham, *Judicial Divorce at the Wife's Initiative: The Shari'a Courts of Egypt*, 1920-1955, 1 ISLAMIC L. & SOC'Y. 217, 223, 235 (1994) (hereinafter – Shaham, *Judicial Divorce*); Sonneveld, *supra* note 28, at 1.2; Chemais, *supra* note 111, at 53.

220 Thus, of the petitions invoking the "illness" ground surveyed by Shaham, all but one were turned down. *See* SHAHAM, *supra* note 119, at 125.

221 Fluehr-Lobban & Bardsley-Sirois, *supra* note 122, at 40; Abu-Odeh, *supra* note 8, at 1064 (noting that the wife is entitled to maintenance from her husband "so long as she commits herself to him", such that if she proves "disobedient" by leaving the marital home or denying him sexual access, she loses her maintenance). The old deal of sex-for-support was also prevalent in the Western world, but today it is "a dead letter". *See* CAROLINE BIRD, THE TWO-PAYCHECK MARRIAGE 39 (1971).

framers' fear that the husband's prolonged absence would endanger his wife's chastity. They bluntly stated their apprehension that she would likely be tempted to go astray without a controlling male presence.[222] The courts proved even more conservative than the legislature; even when the latter viewed a husband's absence as justified, as in the case of leaving for work purposes, the court did not. The court feared it was just too morally dangerous to leave an unsatisfied wife alone with no male companion.[223] Paradoxically, patriarchal, sexist notions thus proved conducive to women's marital emancipation.

Egyptian wives soon learned the trick, and women's sexuality usually proved a divorce trump card.[224] Women advised each other to dress modestly for court sessions, always appear meek, never mention their desire to marry another man, and opt for the maintenance and desertion grounds.[225] This had led to an intriguing result: while maltreatment proved the most popular divorce ground in other Muslim countries, in sexually-obsessed Egypt the "loneliness of the marriage bed", and the fear of resulting female looseness, rendered long absence and desertion the most successful avenue to marital release.[226] Fascinatingly, the patriarchal fixation with sexuality was used as a feminist tool to win divorce and escape marital misery.

Exploiting male judges' traditional outlook, wives further construed most quests for freedom along chauvinistic lines − even the harm-based ground was primarily utilized in terms of women's sexual modesty. Wives often complained of their husbands' refusal to touch them and of the cessation of marital intercourse, purposely emphasizing their fears for their chastity, and their need for a regular sex life.[227] The court proved predictably receptive to arguments in this vein.[228]

222 *See* the explanatory memorandum of Law No. 25 of 1929. *See also* Shaham, *Judicial Divorce*, *supra* note 219, at 220, 225.

223 For the explanatory memorandum's legitimization of the husband's absence for business purposes, see SHAHAM, *supra* note 119, at 128, and the cases cited *id.* at 28, n.58. *See also* Shaham, *Judicial Divorce, supra* note 219, at 238-39.

224 The typical form of injury claimed by women, was tellingly, the deprivation of marital intercourse. *See* Shaham, *Judicial Divorce, supra* note 219, at 231.

225 MALA EL-HUSSEINI ZAALOUK, THE SOCIAL STRUCTURE OF DIVORCE ADJUDICATION IN EGYPT 152 (1975). Almost thirty years later, nothing has changed. *See* Sonneveld, *supra* note 28, at 4.5.

226 Shaham, *Judicial Divorce, supra* note 219, at 475, n. 44 (relying on the extensive research of Amina Shamis).

227 SHAHAM, *supra* note 119, at 119; Shaham, *Judicial Divorce, id*. at 228, 230-31. *See also* JUDITH E. TUCKER, WOMEN IN NINETEENTH CENTURY EGYPT 54 (1985); Chemais, *supra* note 111, at 65.

Women also frequently complained of the violation of their honor as a harm justifying divorce. After all, the Egyptian perception of women's honor has everything to do with their sexuality; their honor was consequently damaged when their husbands demanded unusual forms of sexual intercourse, forced their wives to work as dancers or even prostitutes, or called their virginity or fidelity into doubt. [229] This last insult is considered particularly humiliating in a society that cherishes chastity and constancy in women, and is therefore considered an especially harmful form of wife abuse.[230]

But when the courts did not see a threat to the wife's morals, their hidden aversion to women's freedom became vividly clear. The judicial desire to preserve male hegemony in marriage took center stage. Courts seemed to endorse the prevailing societal view of women as inherently irrational and child-like, prone to impulsive behavior, and in constant need of guidance and protection.[231] Outside the context of women's sexuality it was simply (nearly) impossible to persuade the court that an injury existed or that it justified the extreme remedy of a release from a husbandly authority.[232] Wives could accuse their husbands of serious immoral and illegal acts, but failure to link such acts to their vulnerable purity and respectability doomed their divorce petitions.[233] Courts absurdly refused to view a husband's serial adulteries as a direct injury to the wife, as long as his mistresses were kept out of the "pure" marital home.[234] The ubiquitousness of sin in modern times, the court cautioned, argues against allowing divorce based on men's immorality, as it would necessarily lead to the dissolution of most marriages.[235]

228 SHAHAM, *supra* note 119, at 122 and the cases cited there; Shaham, *Judicial Divorce, supra* note 219, at 241.

229 SHAHAM, *id.* at 123-24 and the cases cited there; Chemais, *supra* note 111, at 63, 72.

230 Fluehr-Lobban & Bardsley-Sirois, *supra* note 122, at 51.

231 HUMAN RIGHTS WATCH, *supra* note 17, at 27-8; Sultan, *supra* note 57, at 11; Mashhour, *supra* note 100, at 580.

232 Sultan, *supra* note 57, at 11.

233 SHAHAM, *supra* note 119, at 124; Shaham, *Judicial Divorce, supra* note 219, at 233 (explaining that wives who sued for divorce had to emphasize "that such an injury threatened their purity and respectable family background").

234 SHAHAM, *id*. at 134, n.79.

235 *Id.* at 134.

Further, a husband's heart-breaking decision to take a second wife against the will of his first sweetheart also was not perceived as going to the core of marriage and warranting a divorce decree.[236] Only if the first wife suffered harm, particularly sexual harm − that is, if the husband failed to frequent her bed equally to that of his new wife in violation of the Islamic system of sexual turns − was the neglected wife entitled to her freedom.[237] Even verbal and physical abuse, hurting a woman's body but not her sexuality, failed at times to constitute a freedom-winning ground.[238] Some Egyptian men audaciously countered abuse complaints by invoking their so-called Shari'a "right" to beat and chastise their wives.[239] When courts dismissed such arguments it was at times for the chauvinistic reason that "beating generally does not make women obedient, cowing the body but not the spirit".[240]

Egyptian courts raised the divorce bar even further. They insisted that a divorce-entitling harm be one that renders cohabitation impossible, but they also made it practically impossible to prove such harm.[241] For example, battered and otherwise injured women must support their divorce petitions with the testimony of two witnesses − that is, either two men, four women, or one man and two women, as a woman's testimony is worth half that of a man.[242] This discriminatory evidentiary barrier to liberation dooms most cases to failure due to a lack of witnesses.[243] The court has also proven formalistic, literalist, and rigid − it was not unusual for it to reject compelling complaints solely on the ground that they were accidentally based on the inappropriate article of the statutory legislation.[244] In one recent surreal case, the court rejected the otherwise justified claim of a battered wife for the bureaucratic reason that she had failed to attach a marriage contract to her suit.[245] The court explained:

236 While a number of Muslim countries recognized polygamy as a divorce ground in the 1950s, Egypt resisted such a provision until the promulgation of "Jihan's law" in 1979, which was replaced by law 100 of 1985. *See* discussion *infra.*

237 Alexandre, *supra* note 98, at 15; Sonneveld, *supra* note 28, at 4.6.

238 SHAHAM, *supra* note 119, at 122; Chemais, *supra* note 111, at 63, n. 4.

239 *Id.* at 123; Shaham, *Judicial Divorce, supra* note 219, at 233.

240 *See* the decision of the Court of Summary Justice, that was approved on appeal, in SHAHAM, *id.* at 132.

241 *See* the decisions of the Court of Cassation, Challenge No. 27, of 50th judicial year (31 March 1981); Court of Cassation, Challenge No. 19, 50th judicial year (16 June 1981). *See also* Chemais, *supra* note 111, at 63.

242 HUMAN RIGHTS WATCH, *supra* note 17, at 22; Chemais, *supra* note 111, at 53-54, n.2.

243 HUMAN RIGHTS WATCH, *id.* at 22; Chemais, *id*. at 73.

244 For an example of such cases see SHAHAM, *supra* note 119, at 126-27; Chemais, *supra* note 111, at 71.

245 This is a 2004 divorce case, reported in HUMAN RIGHTS WATCH, *supra* note 17, at 44.

> Whereas all the facts for the case were established by the petitioner demanding that the court grant her a divorce from the respondent based on physical abuse ... the documents used by the petitioner to prove her case were still lacking some supportive papers such as the original copy of the marriage contract.[246]

Unable to prove to the court's satisfaction that she was actually married, the woman was therefore refused a divorce and ordered to pay all legal costs.[247]

Unfortunately, the dismissal of cases due to a claimant's failure to list the most appropriate clause, or to follow strict documentation standards, were not the only obstacles placed in a woman's path to freedom. Courts further required wives to exhaust *all* other measures available, divorce being a last resort. Thus, the court held that a nonsupport-based petition is to be heard only after the wife has taken "less drastic" legal steps to obtain her maintenance, including distraint of her husband's property and imprisonment procedures.[248] But even when the wife tried to take such steps, the scandalous conduct of her husband who obstructed her attempts to distrain his property, and preferred prison to paying maintenance, was not perceived a harsh enough injury to warrant emancipation from marital chains.[249] Tellingly, the court views female-initiated divorce as an extreme remedy, even more radical than pressing criminal charges and getting one's husband incarcerated.

Perhaps the most disturbing aspect of women's odyssey in the divorce courts is the compounding of sex-discrimination with discrimination based on a woman's social status. For the court, "what is harm for a rich woman is not harm for a poor one",[250] and "what a woman of a certain social class finds tolerable another of a different social class does not".[251] For instance, courts view polygyny as less bearable for urban and wealthier women, but as a "natural" part of poor or illiterate women's existence, unworthy of marital dissolution.[252] Poor women are further denied divorce even if their husbands force them to work in indecent occupations −

246 Excerpt from the 2004 divorce case quoted *id.*

247 *Id.*

248 *See* the cases listed in SHAHAM, *supra* note 119, at 127, n. 51; Shaham, *Judicial Divorce, supra* note 219, at 237.

249 *See* the case cited in SHAHAM, *id.* at 127, n. 51.

250 Abu-Odeh, *supra* note 8, at 1136. The author also cites the Court of Cassation's ruling defining harm as "inflicting verbal or physical injury on the woman in a way that does not befit people of her social status". *id.*

251 Abu-Odeh, *id,* at 1136 (citing a decision of the Court of Appeals).

252 HUMAN RIGHTS WATCH, *supra* note 17, at 29.

it is simply not considered injurious to them, due to their low status.[253] Even worse, the court barefacedly held that only women of high social standing are injured by beating and cursing, whereas women of lower strata are "accustomed" to such practices, and thus barred from challenging their husbands' abusive treatment.[254] Ironically, even when women of the "right" social status seek to divorce their batterers, they may stand to lose from the bizarre judicial conviction that a husband who "comes from a high social class… cannot behave badly".[255]

The elitist social-standing rule also affects the assessment of immoral spousal behavior. A husband's adultery, addiction to drugs, or other flagrantly immoral acts have all been useless in securing some wives an escape-hatch to freedom. Such acts were deemed normative in the community to which the couple belonged, and thus conjugally bearable.[256]

Regrettably, even when the court was finally satisfied that a wife deserved marital release given her social status, her fate still lay in the hands of her husband. Armed with the right to an infinite number of appeals with no time limit to question his wife's divorce decree, a husband had a lifetime to abuse and fatigue his wife, and to drain her emotional and financial resources.[257] She might never become free to remarry and establish a family, listening bitterly as her biological clock ticked away between one court session and the next.

All in all, the strict legal prerequisites to setting women free, the rigid construction of the grounds for divorce, and the difficulty in establishing them, have turned the Egyptian divorce process into a "judicial jungle" and a "legal and bureaucratic nightmare".[258] Egyptian courts are "almost universally" notorious for being slow, inefficient, and complex, riddled with bias and corruption.[259] They compel women seeking a remedy to marital suffering to experience periods of eight to ten years, or more, of sluggish and draining court procedures.[260] Even worse, it is

253 *See* the authorities cited in SHAHAM, *supra* note 119, at 133. However, the author notes that some courts display a "pious attitude" granting such wives divorce based on the legislature's intention that all couples are to live a moral Islamic life. *id.*

254 Abu-Odeh, *supra* note 8, at 1136, n.404; SHAHAM, *supra* note 119, at 131-32.

255 Such was the case in the Court Order quoted in AL-ATRAQCHI, *supra* note 3, at 467; Chemais, *supra* note 111, at 64.

256 SHAHAM, *supra* note 119, at 134 and cases mentioned there.

257 ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 61; Susan Sachs, *Egypt's Women Win Equal Rights to Divorce*, N.Y. TIMES, Mar. 1, 2000, at A1.

258 HUMAN RIGHTS WATCH, *supra* note 17, at 2.

259 Sonneveld, *supra* note 28, at 5.7; BROWN, *supra* note 7, at 189.

260 Singerman, *supra* note 25, at 165.

estimated that a woman has to file from nine to twenty lawsuits to attain a final divorce ruling.[261] The legislature itself admitted to the "grave suffering" of Egyptian women and the "endless lawsuits" caused by its foot-dragging divorce procedure.[262]

On top of that, the expensive court proceedings make divorce virtually inaccessible to poor women.[263] Even the wives who can afford it stand to suffer from destitution as they languish in prolonged legal limbo. They are considered "disobedient" and thus not entitled to spousal support, yet they are still legally "married" and are therefore ineligible for any form of government-sponsored financial assistance.[264] In essence, this is the farcical Egyptian answer to women trapped in marital deadlock and arrested lives.

B. *Men's Prerogative of Repudiation – Limits and Boundaries?*

As observed, man-made classical Islamic law has granted husbands a surplus of powers in the marital battlefield, and a unilateral right to divorce unprecedented in any other religion or system of law: Men can shed their wives at will at anytime, for any or no reason, without resort to a court of law, and even without the presence or knowledge of the wife.[265] While the ideal method of divorce in Islam is *Talaq al-Sunna,* that is, when the husband pronounces a single repudiation during a period of *tuhr* (purity, when the wife is between two menstruations), such that divorce is frozen for a waiting period that lasts for three menstrual cycles,[266] a husband may alternatively pronounce *talaq* (divorce) three times in one sitting to permanently get rid of his marital ties.[267] The "shabby morals" of modern Egyptian men have led to frequent, often frivolous use of arbitrary divorce, finally prompting the legislature to take action.[268] Let us delve into the legislative response to the conspicuously tyrannical aspects of husbandly power over the marital relationship.

261 Gihan Shahine, *Breaking Up is (Very) Hard to Do*, AL-AHRAM, December 17-23, 1998, *available at* http://weekly.ahram.org.eg/1998/408/fe2.htm.

262 SHAHAM, *supra* note 119, at 116 (relying on the explanatory memorandum).

263 GUENENA & WASSEF, *supra* note 30, at 22.

264 HUMAN RIGHTS WATCH, *supra* note 17, at 2, 34.

265 *See, e.g.,* Narain, *supra* note 208, at 53.

266 Yefet, *supra* note 24.

267 For an informative discussion of several types of *talaq*, see ALAMI & HINCHCLIFFE, *supra* note 211, at 22-24.

268 *See* the introduction to the explanatory memorandum of Law No. 25 of 1929.

1. *The Invalidation of Problematic Types of* Talaq

While some streams of Islamic law recognize divorce pronounced in any state of mind, and even include conditional, contingent, or qualified repudiations,[269] the Egyptian legislature invalidated *talaq* pronouncements expressed under intoxication or coercion,[270] as well as conditional,[271] or ambiguously expressed *talaq*.[272] This legislative progress is not trivial and must not be underestimated. Prior to this reform, the injustice and hardship inflicted by these problematic types of *talaq* were literally immeasurable.[273] Sadly, it was the wives who had to pay the price for their husbands' frivolity or bad temper: the only way to undo such a divorce is for the wife to marry another man, share his bed, and be divorced by him after the consummation of their sham union.[274]

The conditional *talaq* in particular was frequently manipulated by Egyptian husbands to terrorize their wives and gain their obedience.[275] Husbands often used to condition divorce on their wives' leaving the house to visit relatives or having guests without permission.[276] In fact, the threat of divorce, and the use of it as a bargaining chip, became so frequent, sleazy, and cheap as to render it a common masculine figure of speech.[277] Men went so far as to use the conditional divorce formula in their dealings with unrelated third parties; wishing to establish their credibility, these men assured their creditors that they would divorce their wives if they failed to pay their debts.[278]

Nevertheless, the invalidation of this type of repudiation proved a mixed blessing. Given women's scant right to break away from oppressive marriages, suspended repudiations constituted a golden opportunity. Wives enthusiastically seized on their husbands' conditions, notifying courts of their declaration, or

269 ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 29.

270 Art. 1 of Law No. 25 of 1929.

271 Art. 2 of Law No. 25 of 1929. For Islamic sources for the invalidation of conditional divorce, see SHAHAM, *supra* note 119, at 102.

272 Art. 4 of Law No. 25 of 1929.

273 ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 56, n. 18.

274 For a study exploring the practice of intermediate (tahlil) marriage, see Barbara Freyer Stowasser & Zenab Abul-Magd, *Tahlil Marriage in Shari'a, Legal Codes, and the Contemporary Fatwa Literature*, *in* ISLAMIC LAW AND THE CHALLENGES OF MODERNITY 161, 163 (Yvonne Yazbeck Haddad & Barbara Freyer Stowasser eds., 2004).

275 AHARON LAYISH, WOMEN AND ISLAMIC LAW IN A NON-MUSLIM STATE 156 (1975).

276 SHAHAM, *supra* note 119, at 105-06 and court cases cited there.

277 SHAHAM, *id.* at 224.

278 *Id.* at 101.

deliberately fulfilling the given stipulations.[279] Unintentionally, then, the law served as a double-edged sword, as it blocked an important female avenue to marital emancipation.[280]

2. *Triple Talaq − The Peak of Oppressive Patriarchy*

Before the 1920s reform, the most popular form of divorce in Egypt was triple *talaq*, that is to say, the utterance of *talaq* thrice in one sitting, and the destruction of marital life in one demeaning breath.[281] To this day, men in the Islamic world resort to triple *talaq*, exploiting such modern technological advances as fax, phone, SMS, and even e-mail, to render marital termination all the more simple, impersonal, and instantaneous.[282] Muslim women, in response, are reported to refuse to perform ordinary activities such as answering phones or opening letters, for fear of a triple divorce lying in ambush.[283] Unsurprisingly, this unjust repudiation formula has been depicted as "the greatest black mark" against Islam's treatment of women,[284] giving Islam a reputation as the most misogynist religion in the world.[285]

Courageously, the Egyptian legislature put an end to this degradation of Egyptian women and to the frivolous treatment of divorce by men: it divorced triple-divorce from its statute book, thus eliminating a powerful patriarchal tool for perpetuating women's subordination within a domestic power hierarchy.[286]

279 *Id.* at 106; LAYISH, *supra* note 275, at 156-57.

280 SHAHAM, *id.* at 110, 226.

281 RUBYA MEHDI, THE ISLAMIZATION OF THE LAW IN PAKISTAN 166-67 (1994). *See also* Engineer, *supra* note 210.

282 Therefore, the digital age is cynically recruited to the service of the degrading, quickie divorce. As the government's adviser on religious affairs in Malaysia was quoted saying, "as long as the [text] message was clear and unambiguous it was valid under Islamic Sharia law". *See Malaysia Permits Text Message Divorce*, BBC NEWS, July 27, 2003, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/3100143.stm. *See also* Geeta Pandey, *Muslim Women Fight Instant Divorce*, BBC NEWS, August 4, 2004, *available at* http://news.bbc.co.uk/2/hi/south_asia/3530608.stm: Jyothi Kiran, *SMS: Short-cut to Marital Separation*, THE TRIBUNE, June 15, 2003, *available at* www.tribuneindia.com/2003/20030615/herworld.htm#1; Shahed Amanullah, *Indian Muslims Consider a Divorce from "Triple Talaq"*, ALTMUSLIM, July 16, 2004, *available at* www.altmuslim.com/perm.php?id=1252_0_26_0_C; ASHAR ALI ENGINEER, THE RIGHTS OF WOMEN IN ISLAM 147 (2004); Khaliq, *supra* note 144, at 35.

283 Leela Jacinto, *Dumped Muslim Wives Dump 'Instant' Divorces*, ABC NEWS, Aug. 31, 2004, *available at* www.abcnews.go.com/International/story?id=84587&page=1.

284 Pandey, *supra* note 282.

285 Syeda Saiyidain Hameed, *The Case of Triple Talaq: Going Against the Spirit of Islam*, *available at* www.islamawareness.net/Talaq/talaq1.html.

286 Arts. 3 & 5 of Law No. 25 of 1929.

3. *Extra-Judicial Divorce: Extra-Ordinary Male Prerogative*

The promising legislative sensitivity to women's plight failed to extend to the most dramatic aspect of men's repudiation power − their extra-judicial divorce privilege.[287] As we have observed, a husband may divorce his wife anywhere, privately and secretly, even without her knowledge. This lack of any judicial involvement was justified as a means

> to protect the home and the dignity and the honor of the parties involved. Any woman wishing to preserve her honor and dignity would not allow her privacy and reputation to be registered in official records for all to read.[288]

Stated differently, women's interests are paradoxically used as a means to justify *men*'s powers. But this rationale makes the barefaced double standard even more incomprehensible: it is a mystery how a woman's privacy and dignity can be safeguarded if it is always the wife who must resort to a court of law and air the marital dirty laundry in public. She must detail her allegations and support them with witnesses and intimately revealing evidence.[289] Ironically, if her privacy is not violated *enough*, she risks returning to her marital hell empty-handed. Indeed, many women avoid divorce, as they fear the shameful public exposure of their intimate lives imposed by court hearings.[290] As things stand, not only is women's right to equal access to divorce violated, so are their rights to dignity and privacy.

The true colors of this gender disparity in the repudiation power were finally revealed by a chief judge in the Egyptian court system. He bluntly stated that:

> The question of settling divorce should be in the hands of the wiser party, and that is men. Men are wise, which is why they do not have to go to court. Islamic law would consider the wise wife an exception and you cannot generalize an exception.[291]

Due to this Egyptian prejudice against women, the Middle East's leader in family law reform has still not been able to pass legislation requiring a husband to obtain court permission for repudiation.[292] Most other Muslim countries − equally devoted to Islamic law − have long been successful in invalidating divorce declared

287 In 1945 the Ministry of Social Affairs prepared a draft law that made divorce conditional upon a court's permission, but due to fierce opposition, this draft was abandoned. *See* F.J. ZIADEH, LAWYERS, THE RULE OF LAW AND LIBERALISM IN MODERN EGYPT 126, n. 52 (1968).

288 Qassem, *supra* note 212, at 25.

289 *See* the discussion *supra* chapter V.A.

290 Shaham, *Judicial Divorce, supra* note 219, at 250; Sonneveld, *supra* note 28, at 7.3.

291 AYMAN AMIN SHASH & CHIEF JUDGE, TECHNICAL BUREAU OF THE NATIONAL CENTER FOR JUDICIAL STUDIES (2004) (quoted in HUMAN RIGHTS WATCH, *supra* note 17, at 19).

292 Venkatraman, *supra* note 4, at 1984.

outside of the court's domain.[293] It is perhaps this concession to male might that is to blame for Egypt's achievement of the highest divorce rate in both the Islamic and the Western worlds.[294]

4. *The Universality of Male Divorce Power: Public Policy in Defense of a Unilateral Dissolution Right*

The stark injustice embodied in men's untrammeled divorce power also comes into play in matters involving non-Egyptian citizens and in public policy principles. According to Egyptian rules, all matters of personal status are to be governed exclusively by the national law of the husband.[295] Nevertheless, for the Egyptian legislature the unilateral no-fault right of a man to cast off his wife is so fundamental as to brand any foreign law limiting its extent contrary to Egyptian public policy.[296] In other words, a non-Egyptian Muslim man is granted a unilateral right to divorce by Egyptian courts, even if his own national law negates or curtails such a right.[297] Moreover, this male divorce power cannot be legally touched; it cannot be waived or amended, either by a third party or by the husband himself.[298]

In striking contrast to the complete set of rights granted to non-Egyptian men, public policy is completely indifferent toward non-Egyptian women's divorce rights. A non-Egyptian Muslim wife who enjoys little or no opportunity for dissolution under her own national law, cannot appeal to Egyptian public policy in order to benefit from the more liberal options accorded her Egyptian sisters.[299]

293 ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 94.

294 SHAHAM, *supra* note 119, at 103; A. Azer, *Law as an Instrument for Social Change: An Illustration from Population Policy*, *in* LAW AND SOCIAL CHANGE IN CONTEMPORARY EGYPT 60, 75 (Cynthia Nelson & K.F. Koch eds., 1979); Dina Abdel Mageed, *Divorce a Labyrinth for Arab Wives*, MIDDLE EAST TIMES, March 27, 2007, *available at* www.irfi.org/articles/articles_951_1000/divorce_a_labyrinth_for_arab_wiv.htm (divorce is granted every six minutes with an average of 240 divorces per day). *See* Shahine, *supra* note 261; Fawzy, *supra* note 25, at 17, 29 (the destruction of the family is usually caused by men).

295 *See* the conflict rules of the Egyptian Civil Code of 1949, Article 13 in particular.

296 Maurits S. Berger, *Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law through the Backdoor*, 50 AM. J. COMP. L. 555, 579 (2002).

297 For example, the Cairo Court of First Instance ruled in two cases that Muslim men of Turkish nationality enjoy the comprehensive right of *talaq*, even though Turkish law denies such divorce, for reasons of public policy. For these cases, see Berger, *id.* at 579, n.98.

298 *Id.*

299 *Id.*

Such discriminatory use of the conflict of laws area, especially the public policy doctrine, is compelling testimony that it is not fidelity to Islamic law that the Egyptian legislature is concerned with. If it were, the legislature would logically have preferred to apply its own Shari'a-based divorce law to a non-Egyptian Muslim woman – exactly as it would in the case of her husband – rather than her foreign, secular law. The only possible remaining explanation is that the Islamic Shari'a is merely a cover for the Egyptian desire to keep women in their place and under tight male control.

C. *Constitutionally and Islamically Flawed: A Critical Analysis of the Divorce Regime*

The statutorily crafted divorce regime of the 1920s, in its formulation of both wives' dissolution rights and husbands' divorce power, did not come anywhere close to meeting women's demands for legislative reform. When the 1979 Constitution was born, the divorce regime also failed to come anywhere near to satisfying constitutional demands. The so-called divorce "reform" runs counter to the Qur'anic egalitarian intent and to Islamic injunctions supporting female divorce rights, leaving the constitutional guarantees to both marital liberty and equality with no solace.[300] Not only are women discriminated against based on their sex, they are further subjected to inequality on account of their social standing. On the basis of their class, women may be beaten, cursed, cheated on, and even pimped. The class based element of the divorce regime makes a mockery of the painstaking effort of the SCC to define equality mandates in the broadest terms, including its specific condemnation of according citizens different treatment based on their social status.[301]

Moreover, the legislative reform of the brutal facets of husbandly *talaq* is at best halfhearted.[302] Examination of the Egyptian divorce regime yields the strong impression that Islamic Shari'a has been unjustifiably manipulated as a pretext to justify the continued subjugation of women and to benefit the males of the society.[303] Extra-judicial *talaq*, in particular, is supported by neither Islam nor the Egyptian Constitution. The practice is an excessive and draconian prerogative, manipulated by men to abuse women. Equally disturbing, it indulges an irresponsible exercise of the right to divorce, which is very degrading to the sanctity

300 *See t*he discussion *supra*. *See also* ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 32.

301 *See* the discussion *supra* Chapter IV.

302 Abu-Odeh, *supra* note 8, at 1113.

303 JAWAD, *supra* note 43, at 48.

of the institution of marriage.[304] It must be remembered, that a fundamental right to divorce, like all other human rights, does not mean an absolute and comprehensive freedom to be exercised without limitations of time and place, and without consideration of the rights of others and of that of society. In fact, it is precisely the imposition of "soft", temporary or procedural constraints on dissolution, such as waiting periods, divorce registration, and notification, that lead to a fuller and more meaningful, rather than a deficient and irresponsible, exercise of an individual's right to divorce.[305]

For the same reason, it is not only the legal license of extra-judicial *talaq*, but also the surprising omission of *talaq* uttered in jest or anger from the list of invalidated problematic types of *talaq*, that is constitutionally unacceptable.[306] Equality considerations aside,[307] the legal invalidity of *talaq* pronounced under problematic mental and psychological states also seems to promote, rather than restrict, men's constitutional right to divorce. Much like prohibiting extra-judicial divorce, this limitation only serves to assure a responsible exercise of one's fundamental rights in a matter of paramount importance to the individual and society; it allows transitory emotions to cool, due reflection, and attempts at reconciliation, and thus gives effect only to the true, free, and educated will of the individual.[308]

Clearly, both the male and female sides of the divorce equation are in utter disharmony with the Egyptian constitutional scheme. As decades have passed, the legislature has become uneasy about its decadent dissolution regime and it has sought to strike a balance between classical Islamic law and women's rights. The next chapter will grapple with Egypt's ongoing journey, along a road surprisingly rife with constitutional landmarks, toward a liberalized and equalized divorce regime.

304 ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 59; AL-ATRAQCHI, *supra* note 3, at 301 (quoting Mona Zulficar); Fawzy, *supra* note 25, at 37.

305 Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 88 (2004); Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L. J. 549, 568-69, 599-600 (2001).

306 *See supra* Chapter V.B.1.

307 Due to the current narrow shape of women's entitlement to divorce, one possible course of action for the legislature, in order to be faithful to fundamental equality postulates and to basic notions of dignity, is to exert its constitutional authority to narrow the gap between male and female rights to divorce. Any limitation on men's repudiation power is another step towards a more equitable and just divorce regime.

308 Yefet, *supra* note 24.

V. DIVORCE REFORM UNDER THE WATCHFUL EYE OF THE CONSTITUTION

This chapter explores the interplay between divorce rules and the Egyptian constitutional order. As constitutional and divorce law intersect, so too will our discussion intertwine divorce issues and constitutional developments. The 1979, 1985, and 2000 reforms made to the discriminatory divorce regime of the 1920s will be presented, their constitutional force examined, and subsequent proposals for respecting women's fundamental rights will be discussed.

For decades, Muslim women had to suffer under a reign of marital terror. While changes took place for women in all other realms of life, the patriarchal family structure was zealously guarded from any such progress.[309] This has earned family law the title of "the ultimate bastion of control" over women.[310] The divorce arena, in particular, has proven to be the subject of the "greatest contention and controversy for both men and women, conservatives and feminists alike",[311] resulting in many futile attempts at divorce reform.[312] Indeed, fully half a century had to pass before any legislative amendment successfully passed to supplement the archaic 1920s divorce rules.[313]

This reform was not legislated in a vacuum, however. The legislature had to take into account the monumental addition to the Egyptian legal order -- the 1971 Constitution. The interaction of the two has yielded some intriguing developments.

A. *The Daring Jihan's Law Reform − An Exercise of Feminist Resourcefulness*

The first significant step toward greater marital freedom occurred in 1979, when Egypt was under a state of emergency. The state of emergency meant that President Sadat could use his constitutional power to enact laws by presidential decree, thereby circumventing the delaying maneuvers of Islamists in the People's Assembly.[314] The President was concerned about the

> continuing misuse of religion as a mask behind which man hides his vindictive desire to maintain his absolute supremacy over woman by

309 GUENENA & WASSEF, *supra* note 30, at 21; Sonneveld, *supra* note 28, at 1.3.

310 GUENENA & WASSEF, *id.* at 38; Badran, *supra* note 30, at 215 (noting that the stalemate on the reform of personal status laws affirmed women's unequal positions within the family).

311 AL-ATRAQCHI, *supra* note 3, at 13.

312 *Id.* at 453.

313 *See, e.g.,* ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 57-59.

314 AL-ATRAQCHI, *supra* note 3, at 326.

> forcing her into servitude, making her the creature of his whim, a mere vessel and purchasable ware.[315]

Consequently, and supposedly under pressure from his wife Jihan – who not long before had headed the first United Nations conference on women – [316]Sadat introduced Law No. 44 of 1979, representing extensive reforms in personal status issues, many concerning divorce.[317] It was hoped that this law would improve Egypt's image internationally and, in particular, that it would facilitate American political and economic support.[318] This international consciousness would be conspicuously repeated – whenever a United Nations World Conference on Women appeared on the horizon, it would trigger Egyptian attempts at family law reform.[319]

Given the newly-adopted Constitution's commitment to Islam, Sadat sought and obtained the blessing of the three most influential Muslim leaders in Egypt for Law No. 44, which was subsequently ratified by an overwhelming majority of legislators.[320] According to the new divorce rules, a husband was obliged to notify his wife of a divorce and to register it publicly.[321] The wife's dissolution right was, in turn, greatly expanded to include "a second-chance" entitlement to divorce upon re-petition to the court, and after undergoing a court-arbitrated reconciliation process when her first divorce petition was denied.[322] Most significantly, a wife was also entitled to an *automatic* right to divorce if her husband took an additional wife.[323] The wife was further entitled to one year's maintenance in case of divorce, and

315 Jewett, *supra* note 34, at 203 (the quotation is taken from Mohamed Al-Nowaihi, Changing the Law on Personal Status within a Liberal Interpretation of the Sharia, in The Cairo Papers in Social Science).

316 Sonneveld, *supra* note 28, at 1.4.

317 JEHAN SADAT, A WOMAN OF EGYPT 362-63 (1987).

318 AL-ATRAQCHI, *supra* note 3, at 207; Mervat Hatem, *Economic and Political Liberation in Egypt and the Demise of State Feminism*, 24 INTER. J. MIDDLE EAST STU. 231, 242 (1992).

319 Ron Shaham, *State, Feminists and Islamists – The Debate over Stipulations in Marriage Contracts in Egypt*, 62 BULLETIN OF THE SCHOOL OF ORIENTAL AND AFRICAN STUDIES 462, 481(1999) (hereinafter – Shaham, *State, Feminists and Islamists*).

320 These three leaders were: The supreme head of the Al-Azhar mosque and university, the Grand Mufti, and the Minister for Waqf. *See* TOVE STANG DAHL, THE MUSLIM FAMILY: A STUDY OF WOMEN'S RIGHTS IN ISLAM 193 (1997). *See also* ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 58-59; Fauzi M. Najjar, *Egypt's Laws of Personal Status*, 10 ARAB STUD. Q. 319 (1988)

321 DAHL, *id*. at 193.

322 *See, e.g.,* KEVIN DWYER, ARAB VOICES: THE HUMAN RIGHTS DEBATE IN THE MIDDLE EAST 237 n.2 (1991); ESCHEL M. RHOODIE, DISCRIMINATION AGAINST WOMEN: A GLOBAL SURVEY 363 (1989).

323 *Id.*

compensation equivalent to two years' maintenance if the divorce had caused extra damage or the marriage had lasted a particularly long time.[324] Even the practice of the "House of Obedience" was dispensed with, and a wife was further allowed to work without her husband's permission.[325]

Unfortunately, this elevation of women's rights was a short-lived victory. Male resistance to the 1979 law, constructed in terms of chauvinistic interpretations of the Shari'a, spelled its doom.[326] Judges boycotted it, refusing to apply it in court.[327] Islamists savaged it, mocking Sadat for being his wife's puppet, and disdainfully entitling his reform initiative "Jihan's law".[328] Even the support of both the religious leaders and the legislature was in vain. Islamists rushed into court, anxious to bury the hated law for good.[329] They succeeded.

The SCC declared Jihan's law to be *ultra vires* the Constitution, and thus null and void.[330] According to the SCC, Sadat had unconstitutionally invoked his emergency presidential powers, due to the fact that family law was not a matter of national urgency; the subsequent ratification by the People's Assembly could not cure such a constitutional defect, the Court reasoned.[331] Interestingly enough, even though it was totally unnecessary, the SCC used this case as a catalyst to delineate, for the first time, the role and contours of the reconstructed Article 2 in the legal system. The Court denied the retroactive nature of Article 2 and limited its application to post-1980 legislation, thus awarding the 1979 law an effective umbrella of immunity from Islamic constitutional review.[332] This seminal decision is a truly unique exhibition of the connection between divorce law and the development of constitutional doctrines; it is in the context of marital dissolution

324 *Id.*

325 *Id. See also* AL-ATRAQCHI, *supra* note 3, at 15.

326 Fawzy, *supra* note 25, at 36-37; Nikki Keddie & Lois Beck, *Introduction*, in WOMEN IN THE MUSLIM WORLD 1, 28 (Nikki Keddie ed., 1978); Badran, *supra* note 30, at 224 (noting that Jihan's law curtailed the patriarchal privileges, outraging "many men, not only fundamentalists").

327 Sonneveld, *supra* note 28, at 1.4.

328 Wing, *supra* note 78, at 171; LOMBARDI'S new book, *supra* note 21, at 169-70.

329 El Alami, *supra* note 121, at 116-17.

330 Case No. 28, 2nd Judicial Year (4 May 1985). For a discussion of the case, see Awad Morr & Adel Omar Sherif, *Separation of Powers and Limits on Presidential Powers*, *in* HUMAN RIGHTS AND DEMOCRACY: THE ROLE OF THE SUPREME CONSTITUTIONAL COURT OF EGYPT 63, 68-69 (Kevin Boyle & Adel Omar Sherif eds., 1996).

331 *Id.*

332 *Id.*

that the Court finally decided what the impact of a central constitutional amendment would be on the legal system as a whole.

However, the adoption of this far-reaching constitutional doctrine was not only moot in the case at hand, but also peculiar in and of itself: the legislative deliberations surrounding Article 2's enactment easily supported a broad application, and, indeed, no other constitutional imperative has been construed as enforceable only vis-à-vis laws enacted after its promulgation.[333] Nevertheless, the Court launched into another superfluous examination, this time of the content of the protected 1979 law, voicing its doubts as to the law's conformity with the Islamic Shari'a.[334] The fact that the law was in harmony with the Shari'a according to senior Egyptian religious authorities and other Muslim countries, apparently did not impress the secular SCC.[335]

I contend that these judicial moves − the very invocation of Article 2, the adoption of its limited application doctrine, the substantial examination of the content of the already-invalid law, and the conclusion as to its un-Islamic character − are all interconnected and constitute a part of the Court's well-calculated plan to placate Islamists, while preserving the secular character of the Egyptian legal system. As indicated above, Islamists fiercely called for the prompt Islamization (defined as patriarchalization) of the entire legal system, flooding the Court's docket with Article 2 cases.[336] The contentious divorce provisions offered the modern, secular Court a perfect opportunity to solve this imbroglio: Since Jihan's law was already doomed to constitutional failure for uncontroversial procedural reasons, it was the perfect opportunity to "sneak" in a revolutionary doctrine resulting in the exemption of the lion's share of Egyptian legislation from the project of Islamization, but without practical implications in the immediate case.

To sweeten the pill even more, the Court deliberately engaged in a substantive assessment of the law's Islamic quality and found it against Islamic principles − a smooth trick designed to appeal to Islamists and to reassure them of the Court's

333 LOMBARDI'S doctorate, *supra* note 144, at 189; LOMBARDI'S new book, *supra* note 21, at 168.

334 The various changes introduced by Jihan's law were wide-ranging, picking and choosing from the interpretations of all four Sunni schools. *See* the comprehensive work of ABDULLAHI A AN-NA'IM, ISLAMIC FAMILY LAW IN A CHANGING WORLD: A GLOBAL RESOURCE BOOK 169-73 (2002).

335 This irrelevant and highly charged academic discussion came at the expense of a truly relevant examination of the equality provisions and the fundamental status of marital dissolution in the Constitution. These constitutional aspects, regrettably, were completely overlooked.

336 *See* the discussion *supra* Chapter IV.

Islamic credibility and suitability to safeguard the Shari'a.[337] Indeed, the Court's judgment was perceived as "a success to Islamists and blow to reformers".[338]

This phenomenon of using woman-unfriendly means – such as employing conservative and patriarchal rhetoric neglectful of women's interests, or unnecessarily defining, and thus limiting, the extent of woman-favorable legislation – in order to justify the end of an equitable rule outcome, is a recurring judicial strategy. In this case, the Court achieved its goal of immunizing nearly the entire body of legislation from Islamic influences, which is beneficial to women, while paying lip service to Islamists, assuring them of the marginalization of women's marital rights.[339] Indeed, the Court's Islamic assessment dooming the law proved no deterrent for the re-promulgation of divorce entitlements. Thus, the lost battle for the cause of women's rights in this round luckily did not mean the loss of the war for marital freedom.

B. *Reforming the Reform: The 1985 Law's Less-But-Still Divorce Regime*

The Court's ploy might have pacified the Islamists, but secularists and feminists were not yet prepared to forgo reform of the cardinal divorce arena. A storm of protest followed the SCC's decision and was effective enough to lead to the rapid enactment of a modified, inevitably watered-down version of the 1979 law, known as Law No. 100 of 1985.[340] The fact that this law was passed while the third United Nations Forum on Women was taking place in Nairobi was no coincidence.[341] Regrettably, a hostile male Parliament refused to reinstate some controversial articles of the 1979 law, leading critics to lament that Egypt had taken three steps forward in 1979, only to go two steps back again in 1985.[342]

337 Lombardi & Brown, *supra* note 140, at 392-93.

338 Moussa, *supra* note 135, at 15.

339 GUENENA & WASSEF, *supra* note 30, at 6; ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 59.

340 Law 100 of 1985 will be called the "1985 law ". The provisions of the 1985 law were incorporated into Law No. 25 of 1929. Thus, the Articles mentioned will be referred to as Article *bis* of Law No. 25 of 1929, as amended by Law No. 100 of 1985. For a discussion of the passage of the 1985 law, see Badran, *supra* note 30 at 225.

341 Sonneveld, *supra* note 28, at 1.4; Badran, *id*. at 225 (noting that the new law restored most of the benefits to women provided by Jihan's law, and that its enactment occurred just before a delegation of Egyptian feminists went to the United Nations Forum in Nairobi to mark the end of the Decade for Women).

342 Singerman, *supra* note 25, at 171; AL-ATRAQCHI, *supra* note 3, at 134, 213.

Indeed, a wife's right to work was again considerably curtailed, inevitably frustrating her economic independence, and consequently, her divorce options.[343] Alas, women's greatest victory of all − automatic divorce from a polygamous husband − was also gone with the re-reformed wind.[344] They now had to establish that the additional marriage caused material or moral harm, rendering conjugal life impossible.[345] This already-qualified divorce right is further limited in that it may only be exercised within one year of the new marriage, and may be forfeited even before that if the wife has explicitly or implicitly accepted the new marital fact.[346]

Despite the 1985 law's unquestionable discrimination against women, it does move women's right to divorce forward by retaining the option of divorce upon the failure of a complex arbitration procedure − also made available to "disobedient" wives − and possibly upon the wife's forfeit of financial rights and payment of compensation.[347] The 1985 law also reaffirmed the procedural prerequisites for repudiation – a husband is duty-bound to register a divorce within thirty days and to inform his wife of his decision.[348] Importantly, only when she learns of the divorce will its consequences, in terms of her financial and inheritance rights, become effective.[349] This provision was designed to curb men's atrocious practice of deliberately concealing divorce from their wives for the purpose of circumventing their wives' financial rights.[350] It is little wonder that divorce in absentia became a "constant fear for every Egyptian wife".[351] The 1985 law further preserved a wife's

343 Jansen, *supra* note 107, at 201.

344 *See,* respectively, Article 1 of Law No. 25 of 1920, as amended by Law 100 of 1985 (curtailing the right to work); Article 18 *bis* 3 of Law No. 25 of 1929, as amended by Law 100 of 1985 (basically establishing the husband's entitlement to reside in the matrimonial home); and Article 11 *bis* of Law No. 25 of 1929, as amended by Law 100 of 1985 (polygamy-based divorce). *See also* NADIA HIJAB, WOMANPOWER: THE ARAB DEBATE ON WOMEN AT WORK 35 (1988); Anna Jenefsky, *Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 15 MD. J. INT'L L. & TRADE 199, 219 (1991); Hooglund, *supra* note 75, at 129.

345 Article 11 *bis* of Law No. 25 of 1929, as amended by Law 100 of 1985.

346 *Id.*

347 Article 11 *bis* 2 Of Law No. 25 of 1929, as amended by Law No. 100 of 1985 (referencing in turn Articles 7-11 of the same law); Chemais, *supra* note 111, at 61-62.

348 Regardless, the incentive given to comply with the law is only minimal, and the divorce remains valid notwithstanding. (Article 23 *bis* of Law No. 25 of 1929, as amended by Law No. 100 of 1985).

349 Art. 5 *bis* of Law No. 25 of 1929, as amended by Law No. 100 of 1985.

350 ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 59; AL-ATRAQCHI, *supra* note 3, at 301 (quoting Mona Zulficar); Fawzy, *supra* note 25, at 37.

351 AL-ATRAQCHI, *supra* note 3, at 377 (interviewing an Egyptian homemaker).

entitlement for two years' maintenance when the divorce was against her will and without any fault of hers.[352] Perhaps symbolically, the legislature named this alimony right "*mut'a*", a highly demeaning term normally used to describe the compensation given in a prostitute-like relationship.[353]

The 1985 law's strange choice of words and watered-down content notwithstanding, men still could not accede to its modified existence. They sought to put Article 2 into use and fight this woman-friendly legislation through the active SCC.[354] Accordingly, the first case ever to lay out the bedrock Islamic principles of Egyptian constitutional theory was again in the context of divorce law.

The discussion that follows analyzes the landmark divorce decisions, which are also the most important cases in Egypt's Islamic-constitutional history. This phenomenon is striking. Granted that the lion's share of Egyptian laws are transplants of European civil law, with family law the *sole* area of law totally transplanted from the Islamic Shari'a,[355] we would have expected non-family law cases to be the building blocks in the development of Article 2 doctrine. Ironically, the secular-civil laws are largely left undisturbed, and the only field which is already based on Islamic law –the regulation of women's domestic rights - is attacked for non-conformity with Article 2.[356] The sole plausible explanation, as we have observed in other instances, is not a Muslim desire to be governed by Islamic law, but rather a male desire to govern women and to circumscribe their universe of rights.[357]

352 The *mut'a* compensations must take into account the financial situation of the husband, the circumstances of the divorce, and the length of the marriage. Art. 18 *bis* of Law No. 25 of 1929, as amended by Law No. 100 of 1985.

353 Tamilla F. Ghodsi, *Tying a Slipknot: Temporary Marriages in Iran*, 15 MICH. J. INT'L L. 645, 645 (1994); Brooke D. Rodgers-Miller, *Out of Jahiliyya: Historic and Modern Incarnations of Polygamy in the Islamic World*, 11 WM. & MARY J. WOMEN & L. 541, 552 (2005).

354 Indeed, taking heated issues to court has proven a popular strategy for Islamists, through which they have won numerous controversial cases. *See* Sonneveld, *supra* note 28, at 2.6.

355 Adel Omar Sherif, *Separation of Powers and Judicial Independence in Constitutional Democracies: The Egyptian and American Experiences*, *in* DEMOCRACY, THE RULE OF LAW AND ISLAM 25, 26-28 (Eugene Cotran & Adel Omar Sherif eds., 1999); Younis, *supra* note 9, at 464; Badran, *supra* note 30, at 228 (explaining that "[t]he last bastion of official Islam has been the regulation of family life … precisely the area where the state has allowed patriarchal control over women a free hand and where gender relations have been most unequal").

356 Abu-Odeh, *supra* note 8, at 1139.

357 *See, e.g.,* Nikki Keddie & Lois Beck, *Introduction*, WOMEN IN THE MUSLIM WORLD 1, 28 (Nikki Keddie ed., 1978).

How was the enlightened human-rights jurisprudence of the SCC to play out in the formulation of an Islamic legal theory, in the face of raging Islamists groups who identify Islam as patriarchal? Besides enriching the otherwise scant scholarly analysis of Article 2's doctrine,[358] the following section will display men's consistent efforts to sabotage the women-friendly legislation, and the seemingly inconsistent efforts of the SCC to help the cause of female marital emancipation. Of particular peculiarity, we will observe, while the Court always upholds the validity of legislative reforms in favor of women, no matter how revolutionary and controversial, it conspicuously fails to mention women's interests in its analysis. Even worse, the Court may at times couch its decisions in derogatory language, underscoring male supremacy and female inferior capacities, or it may hasten to engage in unnecessary and theoretical discussion that aims to limit the scope of women's legal rights. It may even go so far and use strained interpretations of Islamic law while other Islamic doctrines at its disposal would have yielded more egalitarian results for women.

What would bring a court, which is otherwise noted for its vehement defense of human rights and decidedly liberal, rights-oriented constitutional jurisprudence, to deviate from its general overt activism on behalf of egalitarian justice?[359] I will suggest that the inconsistency between the Court's rule outcome, and its methodology, is so blunt and so systematic, that its very consistency gives away the Court's ingenious judicial strategy. It must be remembered that family law is the most explosive area of law to regulate. In Egypt, this resulted in the secularization and Europeanization of all other legal fields, with family law being the sole remaining stronghold of the religious elite.[360] Hence, they perceive any reform of its particulars as a direct attack on their very livelihood and position in society, and as an assault on Islam by the secularist and the feminist.[361]

In order to appease Islamists, the secular SCC adopted a middle-ground strategy in the Egyptian battle of the sexes: it sustained the constitutional validity of woman-protective legislation, even when it was Islamically tricky to do so, while paying chauvinistic lip service to the anxious religious elite, preserving the status quo,

358 Megan L. McMillan, *Egypt's Interpretive Incorporation of Human Rights: The Supreme Constitutional Court's Use of International Sources and Prospects for its Article 2 Analysis*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 1089, 1113 (2007).

359 *See, e.g.,* LOMBARDI'S new book, *supra* note 21, at 253.

360 Badran, *supra* note 30, at 211 (noting that many Arab regimes, like Egypt, were not politically strong enough to change family law significantly, and in so doing, challenge patriarchal authority in the family as well as threaten the last legal bastion of the religious establishment).

361 Abu-Odeh, *supra* note 8, at 1097-99, n. 213.

without moving forward or beyond it. The Court's balancing act reassured Islamists that other, more far-reaching reforms were constitutionally impossible. At the same time, by artfully walking the line between Islamists on the one hand, and secularists and feminists on the other, the SCC was able to advance women's marital rights without creating a social upheaval and without destroying its legitimacy as the secular arbitrator of the Islamic Shari'a. Bearing this in mind, we turn to examine the Court's constitutional divorce jurisprudence.

1. *A Deterrent to Divorce: Female Maintenance Rights*

The pioneer protestor against the 1985 law's "un-Islamic" nature was a husband ordered to pay *mut'a* alimony for arbitrarily exercising his repudiation power.[362] The SCC was unreceptive to his challenge. For the first time, the Court proved willing to take up the constitutional gauntlet and give substance to the curiously general wording of Article 2. It interpreted its Islamic mandate as requiring a two-pronged test.

First, Egyptian law must not contravene those "definitive" or "certain" Shari'a rules that are laid down unambiguously in the Qur'an or Sunna, and that the meaning and authenticity of which are undisputed by all Muslim jurists.[363] Importantly, the standards imposed by the Court for verifying authenticity and meaning are so strict that only a small vanishing set of the most general rules may qualify as universally binding Shari'a principles.[364] The SCC thus elegantly washed its hands of centuries of Islamic legal scholarship, defining "Islamic law" in the narrowest of terms.[365] Second, Egyptian law must advance, or at least not hinder, the divinely-favored social goals of the Shari'a: both the specific goals, that is, goals that God wishes *particular* types of law to promote,[366] and the general Shari'a goals, that God wishes

362 Case No. 7, 8th Judicial Year (15 May 1993).

363 Shannon M. Roesler, *Modern Legal Reform in Egypt: Shifting Claims to Legal Authority*, 14 CARDOZO J. INT'L & COMP. L. 393, 420-21 (2006); Vogel, *supra* note 155, at 531; Lombardi & Brown, *supra* note 140, at 419.

364 Lombardi's article, *supra* note 140, at 101, 122; LOMBARDI'S new book, *supra* note 21, at 188.

365 Vogel, *supra* note 155*,* at 535; Oussama Arabi, *The Dawning of the Third Millennium on Shari'a: Egypt's Law No. 1 of 2000, or Women May Divorce at Will*, 16 ARAB L. Q. 2, 8 (2001).

366 For example, the Court found that custody laws are to promote the well-being of the child; divorce laws are to promote the well-being of the wife; and veiling laws are to promote modesty. *See* Lombardi & Brown, *supra* note 140, at 421.

all laws to serve.[367] Subsequent decisions would interpret this last particular to require that a law contribute to justice, human rights, and public welfare, or at the very minimum avoid harm, as a condition for its Islamic and constitutional validity.[368]

Applying the first prong of its novel test, the SCC found the Qur'an ambiguous as to the existence of a husband's *mut'a* obligation, and correspondingly, the alimony compensation as inoffensive to any "definitive" Islamic precepts.[369] Ironically, while the meaning of the Qur'anic text was not clear to the Court, it was crystal clear to *all* other jurists in the traditional Sunni schools: they admittedly dispute almost every topic of Islamic jurisprudence, such that "differences between them sometimes read like the difference between earth and sky",[370] but they unanimously agree that the Qur'an does not impose *mut'a*-alimony as an obligatory undertaking.[371] By ignoring this juridical consensus, the SCC manipulatively paved the way for the second, highly discretionary prong, of its Islamic formula.

In a cursory analysis, the SCC concluded from Qur'anic statements that divorce law aims to promote men's generosity and compassion toward their wives;[372] that the *mut'a* provision, providing for the support and welfare of divorced women, well serves that specific goal; and that it also meets the "general" Shari'a goal of advancing collective social welfare.[373] Consequently, the *mut'a* provision was within the permitted bounds of the Shari'a principles, and thus Islamically constitutional.

367 Brown & Sherif, *supra* note 4, at 71; LOMBARDI'S new book, *supra* note 21, at 257. The Court is to resort to the "general goals" only in cases where, for example, it fails to find specific goals. *See* Lombardi & Brown, *id.* at 422-23. For outlines of the SCC's interpretation of Article 2, delineating its Islamic legal theory, see LOMBARDI'S doctorate, *supra* note 144, at 234-54, 266-81. *See also* LOMBARDI'S new book, *supra* note 21, at 199-200.

368 *See, e.g.,* Case No. 7, 8th Judicial year (15 May 1993) (discussing rules of child custody); Case No. 6, 9th Judicial year (18 March 1995) (invalidating a law that heavily imposed on landowners' rights to maintain or dispose of their property). *See also* LOMBARDI'S new book, *id.* at 199, 239-40, 253; Roesler, *supra* note 363, at 423-24.

369 The relevant Qur'anic verses the SCC cited are verses 2:241, 2:236, & 33:29.

370 Abu-Odeh, *supra* note 8, at 1068.

371 NOEL COULSON, A HISTORY OF ISLAMIC LAW 31-32 (1964); LOMBARDI'S doctorate, *supra* note 144, at 245-46.

372 Based on verse 2:241, the SCC concluded that "being compassionate to [the divorced wife] is part of the generosity which is demanded by the Islamic *shari'a*" (excerpt from Case No. 7, 8th Judicial Year (15 May 1993)) (quoted in LOMBARDI'S new book, *supra* note 21, at 215).

373 *Id.* at 215-18.

The SCC's decision did more than simply extend protection to divorced women by alleviating their financial vulnerability, however. Most significantly, it also served as an impediment to hasty divorces, promoting women's right to enjoy marital life. Regardless, the Court's rhetoric deliberately neglected to celebrate, or even recognize, the important contribution of the *mut'a* provision to women's marital interests, or the limitation it placed on men's otherwise unbounded privilege to shed their wives - which was the real issue motivating male opposition to the legislation. Through this judicial sleight of hand, the SCC practically, though not rhetorically, stripped the husbands' absolute discretionary power of its impact, and de facto narrowed the discriminatory gap between male and female divorce rights.

In sum, the first ever substantial ruling on Article 2 proved beneficial to women, securing the legislative trend toward a more liberal and egalitarian feminist understanding of Islamic family law. But men could not let the 1985 law rest in peace. Islamists repeatedly appeared before the SCC to attempt to induce it to interpret its open-ended Islamic theory along conservative lines, and to apply such theory less liberally in the domestic arena.[374] Unsurprisingly, the second case to analyze Article 2 again touched upon women's interests in the divorce battle.

2. *Women's Right to Retroactive Child-Support*

A recalcitrant father refused to reimburse his ex-wife, the custodial parent, for all the years she had been the sole supporter of their child, claiming it was un-Islamic to order retroactive awards of child-support.[375] The SCC disagreed.

The Court predictably failed to find any Qur'anic passage relevant to its constitutional examination, and subsequently resorted to determining the goals of the Shari'a in the instant case.[376] It found that the "specific" Shari'a goal was to promote the child's welfare, that the "general" goal was to avoid hardship, and that both were actualized by providing for retroactive child-support.[377] The Court's analysis focused on the child's interests, explaining that a father's failure to maintain his child was unjust, and that a law that undid injustice was *ipso facto* beneficial to the general welfare.[378]

374 Lombardi & Brown, *supra* note 140, at 433.

375 The provision challenged was Article 18(4) of Law 25 of 1929, as amended by Law 100 of 1985.

376 Case No. 2, 11th Judicial year (26 March 1994).

377 *Id. See* Lombardi's article, *supra* note 140, at 105 n. 74.

378 LOMBARDI'S new book, *supra* note 21, at 223, translating an excerpt from the Court's decision.

Again, the SCC's Article 2 Islamic legal theory proved capable of producing worthy results for women, yet its reasoning found their marital welfare unworthy of mention. While the Court's analysis dealt primarily with the child's welfare and the father's hardship, women's interests in the parental equation were consigned to oblivion: the unjustifiable burdens innocent guardian mothers might face without an entitlement to retroactive child support payments were relegated to unimportance, and the contribution of such awards to female marital emancipation was utterly ignored. After all, absent such a provision, many mothers might feel compelled to remain in their marriages due to their inability to support their children by themselves.[379] Marital freedom would thus have been seriously jeopardized for numerous women, whereas the constitutional affirmation of this provision is highly conducive to the exercise of their fundamental right to divorce.

If in the first two cases the SCC's rhetoric disregarded women's marital liberty in order to protect it *de facto*, in the highly contentious cases that followed, the Court actively mentioned women, but in a way that either belittled them or emphasized men's superfluity of rights over them. The ink on the Court's child support decision had not yet dried when another challenge was leveled against the 1985 law, constituting the third time that Article 2's Islamic constitutional doctrine was put to the test. This time the threat of invalidation hovered over the law's core innovation in the realm of marital dissolution: the right to exit a polygamous union.[380]

3. *Polygamy-Based Divorce Right*

A husband had taken a second wife, despite his first wife's opposition. Bitterly upset, she sued for divorce; her husband sued as well, trying to enlist the Constitution to block her escape. He ultimately failed.[381]

The Court yet again upheld the wife's contested divorce right, but not without a price. For the first time the SCC was able to find a "certain" scriptural ruling, legitimizing polygamy.[382] It then went out of its way to celebrate men's polygamy privilege, stressing that it is a fundamental, absolute, and universal male right,

379 Indeed, many mothers decide to stay in marriage for the sake of children. *See* Karin Carmit Yefet, *Is Divorce Divorced From the Constitutional Sphere? Wedding Dissolution to the American Constitution* (on file with author). It is likely that the inability to provide financially for their children contributes to such a decision.

380 Art. 11 *bis* of Law 25 of 1929, as amended by Law 100 of 1985.

381 Case No. 35, 9th Judicial Year (15 August 1994).

382 Verse 4:3.

transcending time and space.[383] Its terminology warmly praised polygamy as a positive and beneficial solution to the evil of sexual promiscuity[384] - as argued by Islamists – even though the Qur'anic license was clearly not intended "for the satisfaction of anyone's sexual desires".[385]

Understanding that this would not sufficiently soften the blow dealt to the conservative religious intelligentsia, the SCC further made patriarchal pronouncements on the limits of feminist-secular legislative reform. The Court stated the constitutional status of polygamy and unnecessarily doomed any legislative acts attempting to tamper with its particulars, even though such laws were neither at issue in the case at hand, nor did they exist – even potentially – at the time.[386]

Against this backdrop, the stage was set to predicate a female divorce right on Islamic underpinnings. For the SCC, the putatively absolute, universal polygamy right could be limited after all, so long as such limitation satisfied the Shari'a goals' threshold. Inspired by Qur'anic verses,[387] the Court concluded that the Shari'a seeks to assure wives just treatment and to protect them from harm;[388] therefore, a wife's release from marriage, due to harm she suffers by her husband's second marriage, is in accord with Shari'a protective goals.[389] The Court hastened to affirm that this escape hatch is not hazardous to men's polygamy entitlement, since the freedom-

383 Case No. 35, 9th Judicial Year (15 August 1994) (as excerpted in Lama Abu-Odeh, *supra* note 8, at 1143).

384 *See* the analysis and relevant quotes from the Court's decision in Oussama Arabi, *Beyond Power: Neo-Shāfi'ism or the Islamic Constructive Metaphor in Egypt's High Constitutional Court Policy*, 17 ARAB L. Q. 323, 347 (2002) (hereinafter – Arabi, *Beyond Power*).

385 Mahmoud Hoballah, *Marriage, Divorce and Inheritance in Islamic Law*, 22 GEO. WASH. L. REV. 24, 27 (1954).

386 Such possible laws that the SCC mentioned were laws banning polygamy rights, laws conditioning their exercise (e.g., on the wife's consent), and even laws releasing a first wife due to due to a harm assumed from the incidence of polygamy. Case No. 35, Judicial Year 9 (15 August 1994) (cited in Abu-Odeh, *supra* note 8, at 1143). *See also* Abu-Odeh, *id.* at 1047 (noting that "[i]n order for the legislative reforms to be protected by constitutional judges, the outer limits had to be convincingly defined for a difficult-to-please religious audience").

387 Qur'an 4:19; Qur'an 4:3.

388 For the Court, the Qur'an prohibits "injustice and favoritism" as well as "the possibility of considering injustice lawful or harm to the wife who opposed the formation of a [marriage] contract between her husband and another woman …" (cited in LOMBARDI'S new book, *supra* note 21, at 231). *See also* Arabi, *Beyond Power, supra* note 383, at 349.

389 This analysis was attacked as seriously flawed. *See* Lombardi's doctorate, *supra* note 144, at 275.

buying "harm" is a difficult one to establish: It must be "real not illusory, actual not imagined, demonstrated not assumed, independent of the incident of the later marriage although occasioned by it".[390] In the same judicial breath, after severely limiting what may constitute polygamy-based harm, the only harm the Court was able to identify to satisfy this exacting criterion was not an external harm, but rather "the natural jealousy between two women who share one man when he is not faithful to either one of them… a jealousy that the human soul cannot be cleansed of".[391] However, this harm is *inherent* to polygamy, rendering its practice always injurious, and always entitling women to their marital freedom.[392] Perhaps mindful of its problematic, if not peculiar analysis, the SCC unprecedentedly concluded its opinion by "reminding" lower courts of their duty to defer to its theory of Islamic law and to apply it faithfully.[393]

Importantly, the SCC had at its disposal a far more elegant and persuasive, yet much more revolutionary, Islamic path to secure a marital outlet for women. The two primary sources of the Shari'a – and the only ones to be taken into constitutional account – both speak in the same woman-friendly voice. To begin with, the rationale underlying the Qur'anic polygamy license to wed up to a limit of four wives, provided they are all accorded equal treatment, was both to benefit unprotected women, and to put a severe limit on what had earlier been an Arab practice subject to no limits.[394] As with slavery and alcoholism, the greater Qur'anic agenda regarding polygamy was a gradual curtailment, leading to its ultimate eradication and the eventual attainment of complete equality and social justice. [395] The Qur'an gave an emphatic indication of this noble aspiration in the context of polygamy,

390 Case No. 35 (cited in Lama Abu-Odeh, *supra* note 8, at 1144).

391 *Id* (cited in LOMBARDI'S new book, *supra* note 21, at 234).

392 LOMBARDI'S doctorate, *supra* note 144, at 280-81 (noting the problematic and contradictory nature of the Court's analysis. The author points to the fact that the SCC's analysis suggests that polygamy is always harmful and this is irreconcilable with Court's own axiom that what is permitted in the Qur'an cannot be harmful).

393 For a translated text of this unprecedented paragraph ending the Court's analysis, see LOMBARDI'S new book, *supra* note 21, at 236.

394 The context and timing of this Qur'anic revelation is particularly telling – polygamy was permitted immediately following the bloody battle of Uhud, which left numerous widows and children destitute and alone. The Prophet himself set an unequivocal example − of his eleven wives, all but one were widows. *See* the analysis of the legality of polygamy in Islam, in ENGINEER, *supra* note 282, at 102-104; Alexandre, *supra* note 98, at 22-23; Rodgers-Miller, *supra* note 353, at 544-45; Johnson, *supra* note 98, at 577-79.

395 ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 101, 135-136; Mashhour, *supra* note 100, at 568-69, 588-89; Johnson, *id*. at 584.

informing men that "Allah has not made for any man two hearts…"[396] and that "You are never able to be fair and just as between women, even if it is your ardent desire".[397] These verses clearly establish that the already restricted Qur'anic polygamy license is merely illusory; it may be practiced only under the strictest terms of equal justice and impartiality, which are, for the Qur'an, a practical impossibility.[398]

Further evincing Islam's aversion towards polygamy, the Sunna of the Prophet admonishes that "He who has two wives and inclines to one and away from the other will come to the life hereafter with half of his body paralyzed".[399] No wonder it is the consensus of all Muslim reformers that the Qur'anic ideal is in fact monogamy.[400]

In spite of the evidence that Islam looks unfavorably upon polygamy, the SCC's analysis was completely unmindful of these Qur'anic verses – sources that are *crucial* for its constitutional analysis, that could have minimized the destructive effects of polygamy, and might have promoted gender equality and marital liberty. But what seems at first glance a defeat to feminism, liberal constitutional jurisprudence, and even, for modernist Muslim jurists, the true, refined principles of the Islamic Shari'a,[401] is at a closer look, part and parcel of the Court's strategy of sustaining the status quo, without risking it by going further or by invoking liberal, reformist legitimization discourse.[402] Indeed, the Court specifically disassociated itself from this form of argument.[403] By doing so, the Court was able to reach the desired result without jeopardizing its Islamic legitimacy, or going too far ahead of Egyptian society, which would have disrupted the fragile political movement to improve women's rights within the family.

396 Qur'an 33:4.

397 Qur'an 4:29.

398 Venkatraman, *supra* note 4, at 1966 ("the criteria imposed by the Qur'an for the practice of polygamy are virtually impossible to meet").

399 This Hadith is cited in ALAMI & HINCHCLIFFE, *supra* note 211, at 17.

400 ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 48; Rehman, *supra* note 2, at 114.

401 Abu-Odeh, *supra* note 8, at 1139. Indeed, such an understating of Islamic law led Tunisia to end polygamy altogether. *See* DIANA DARKE, TUNISIA 16 (1996); Western, *supra* note 92, at 120.

402 In that vein, see also Abu-Odeh, *id,* at 1145-46.

403 Abu-Odeh, *id.* at 1143 (noting that the Court's analysis "seemed to be distinguishing its position from those who argue that polygamy may be prohibited by law because the requirement of fairness associated with the Qur'anic license to be polygamous is impossible to achieve").

The war on the 1985 law's improvement of female access to marital dissolution was not yet over. The last bastion of women's divorce rights was soon attacked. A wife's ability to counter her husband's claim of disobedience by requesting divorce, and particularly the opportunity to go free once the court's arbitration process failed, was called into question.

4. *A Wife's Right to Marital Dissolution upon Failure of Reconciliation*

As we have observed, the 1985 law calls for a detailed reconciliation process, executed by arbitrators who are authorized to determine the couple's marital fate and to order divorce.[404] One such infuriated husband, whose "disobedient" wife used this divorce process successfully, protested against the constitutionality of her escape from his authority.[405]

The SCC put into use its now-familiar strategy of protecting women's legislatively- conferred marital liberty, while giving a rhetorical blow to their dignity and possibly to future options for modernist liberalist reform. The SCC recognized the Islamic constitutionality of releasing a woman from her marital chains following the failure of a court-mediated arbitration process. The Court mentioned the Qur'anic instruction to appoint arbitrators in case of marital discord, but was uncertain – as were the medieval schools of Islamic jurisprudence - as to the consequences of futile reconciliation attempts and the exact boundaries of the arbitrators' authority to divorce the couple.[406] Thus, for the SCC, the Islamic door was open for the legislature to empower arbitrators to investigate the causes of a dispute, apportion responsibility for it, and recommend divorce and attendant financial consequences.[407]

404 The husband attacked the constitutionality of Article 11 *bis* 2 of Law 25 of 1929, as amended by Law No. 100 of 1985 (including the arbitration procedure in Article 11, as incorporated by this new Article).

405 Case No. 82, Judicial Year 17 (5 July 1997).

406 *See* the excerpt from Case No. 82 cited in Abu-Odeh, *supra* note 8, at 1139, n. 420 & 1140, n. 421.

407 The Court states that:

> Since the legal provision under dispute-legislated within the power of the legislature to deduce Sharia rules taking into account Sharia proofs-has treated the arbitrators as having the power to study the cause of the dispute between the spouses and to recommend to the judge the reasons for it, the respective responsibility of the spouses, and whether separation should take place with (or without) compensation according to the assigned responsibility of each.. This rule does not contradict a determinate rule of the Sharia, but legislates an area that has been an object of controversy among the jurists ... and takes into account the general welfare of the people as Sharia has recognized it...

Deliberately presenting the dispute as merely a matter of the arbitrators' jurisdiction under the Qur'an, the SCC aimed to draw attention away from the fact that "granting the arbitrators and consequently the judge the respective powers of recommendation and divorce was tantamount to constricting the husband's absolute power to divorce his wife".[408] Blurring this implication even further, the SCC failed to avail itself of the highly discretionary platform of the Shari'a's-analysis goals to express sensitivity to women's rights, to stress the psychological, emotional, and even physical importance of female marital emancipation, and to acknowledge the grave harm caused to wives trapped in marital misery with no way out. Instead, the Court's rhetoric seemed to go out of its way to affront women, questioning their capacity to decide for themselves in such matters, and reaffirming men's control over the divorce decision.[409] In the Court's opinion, "men are more mindful – able to decide things rationally and with [more] foresight" than women.[410] Thus, the SCC secured wives their liberty, but felt obliged to sacrifice their dignity.

What's more, as it previously did with polygamy, the SCC unnecessarily stressed, in the context of divorce, that this right was the absolute and exclusive prerogative of men.[411] Since such a statement could not be true – after all, the Court's own decisions, and even the instant case, reaffirmed women's dissolution entitlements – the necessary explanation is that the chauvinistic cant was not an accidental slip of the judicial pen, but was meant for the anxious ears of the religious audience, reassuring them that further divorce reforms are Islamically unfeasible.

If this decision was not enough to make plain the judicial method of using problematic reasoning to reach equitable results, the following case, using liberal, egalitarian rationales simultaneously with sexist ones in the same opinion, made it crystal clear. The case below questioned a woman's basic marital freedom to secure her economic independence through work.[412]

*Id. (*quoted in Abu-Odea, *id*. at 1140, n. 423).

408 Abu-Odeh, *id*. at 1140.

409 Abu-Odeh, *id*. at 1139, n. 419.

410 Case No. 82, cited in Murray & El-Molla, *supra* note 167, at 514. This position is, troublingly, not unique to the SCC. Many authorities point the finger at women's highly emotional and "irrational" character. *See* Azizah al-Hibri, *Islam, Law and Custom*: *Redefining Muslim Women's Rights*, 12 AM. U.J. INT'L L. & POL'Y 1, 21 (1997); MUHAMMAD ABDUL RAUF, THE ISLAMIC FAMILY: A GENERAL VIEW 81 (1994).

411 *See* Case No. 82 and its analysis in Abu-Odeh, *supra* note 8, at 1139.

412 Art. 1 of Law No. 25 of 1920, as amended by Law No. 100 of 1985.

5. *Wife's Right to Work*

A husband gave his wife permission to work outside the home, but then he changed his mind. The wife refused to let go of her new freedom; he refused to let go of his power over her. They ended up in court.

It must be stressed that the right to work, perhaps more than any other right, is linked with a meaningful, effective, and accessible right to divorce. A woman who is barred from engaging in marketable work is denied the ability to accumulate wealth, acquire skills, and develop economic independence.[413] As a consequence, especially in the Egyptian reality, the right to work becomes a prerequisite for the right to divorce; its absence renders marital exit a merely theoretical, unviable option.[414]

The SCC was not oblivious to the importance of women's right to work. The Court protected this crucial prerequisite for women's welfare and divorce options, but at the same time it delineated a hierarchical gender regime which benefits the husband. Under Article 2 analysis, the SCC embraced what it interpreted as a wife's unreserved Qur'anic duty of obedience, from which point it was only a small jump to empowering a husband to control his wife's activities and to order her to stay at home.[415] A husband's entitlement to his wife's obedience, the Court went on to qualify, must respect Shari'a goals, meaning that she is entitled to work as long as her work is "legitimate and does not have any negative impact on the interest of the family".[416] For the purposes of the instant case, it means that once a husband permits his wife to work, he may not revoke his consent unless she abuses this right.[417] The SCC then immediately pandered to Islamists, hurrying to explain that "the wife's work does not end her husband's superiority over her…".[418]

413 Oppermann, *supra* note 6, at 71. Also in the most liberal western countries economic dependence is the single most formidable barrier to divorce. *See, e.g.,* MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE AND THE LAW 291 (1972); JOSEPH GUTTMANN, DIVORCE IN PSYCHOSOCIAL PERSPECTIVE: THEORY AND RESEARCH 69 (1993) (economic considerations constitute the "most important barriers to divorce").

414 Charrad, *supra* note 206, at 66.

415 Case No. 18, 14th judicial year (3 May 1997).

416 *Id.* (cited in Murray & El-Molla, *supra* note 167, at 517-18).

417 *Id.* See the language of Article 1 of Law No. 25 of 1920, as amended by Law No. 100 of 1985 (the law approves women's lawful work as long as "it does not appear that her use of this right is corrupted by abuse of the right, or that it is contrary to the interests of the family, and provided that her husband has not asked her to refrain from exercising her right").

418 *Id.* (cited in Murray & El-Molla, *supra* note 167, at 517-18).

Despite such pandering, the secular, human-rights conscious SCC this time gave away the true liberal, humanitarian colors of its enlightened constitutional philosophy – next to the sexist jargon, its analysis was concurrently informed by liberal constitutional provisions: the Court concluded from the Equal Rights Clause of Article 40, and from Article 11's guarantee of proper state coordination between women's duties at home and at work, that women are equal to men for purposes of society's interest in the family and the development of the nation.[419] Fantastically conflicting reasoning was thus woven into the same decision to ultimately yield a ruling favorable to women.

6. *Conclusion: The Judicial Contribution to Female Marital Dissolution*

The 1985 law's concessions to women's marital rights proved to be the major influence behind the evolution of Article 2's constitutional doctrine, and the dominant force delimiting the general project of Islamization. On a deeper level, the 1985 law cases brought before the Court did not simply involve the Islamic merits of the law; they also challenged the SCC to take an ideological stance on the war between the sexes and on the fate of patriarchy in Egypt.

Defending liberalist reforms in the area of women's domestic rights from the attacks of the watchful, difficult-to-please religious audience, is not an easy task. It is even more difficult for a secular court, especially against the backdrop of a cultural and political shift to an ultra-traditionalist, conservative atmosphere, and in the face of increasingly vocal Islamist movements in Egypt,[420] for whom "attachment to the Islamic" translates into "attachment to medieval patriarchy".[421] Facing down this challenge required an ingenious strategy that would serve to limit the impact of classical Islamic teachings on the legislative enterprise without jeopardizing the Court's jurisprudential creditability, and without threatening the long tradition of male patriarchal dominance over women.

419 *Id*. at 518.

420 Abu-Odeh, *supra* note 8, at 1136. The term "Islamist" is widely used in Western literature to describe those movements which envision a broader political role for Islam in the modern state. ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 161. In recent years this movement's agenda was "a general re-orientation of all aspects of Egyptian political and economic life with a particularly conservative and at times extremist outlook on Islam". *See* Younis, *supra* note 9, at 465, n.7 & 476; Badran, *supra* note 30, at 229 (noting that the "contemporary agenda of the state and Islamists promote extreme conservatism").

421 Abu Odeh, *supra* note 8, at 1046.

To achieve this objective, the activist Court's decisions have been typified by atypical passivism; it is usually hesitant to invalidate legislative provisions on account of the Shari'a, and equally hesitant to overtly promote women's marital interests. Instead, the Court maintained the legislative status quo - without even a single invalidation of the woman friendly legislation - while dressing up desirable outcomes in sexist jargon that cast doubt on women's mental capacities, relegating them to a secondary status, and making unnecessary patriarchal pronouncements on the limits of women's dissolution options, all in order to appease Islamists and to retain religious legitimacy and social tranquility. At the end of the day, the great achievement of the SCC lays in proving that the obstacle to women's empowerment was not Islam, but rather patriarchal voices which misrepresented Qur'anic verses in pursuit of their misogynistic agenda.

With this "green light" from the SCC, the road was clear for the legislature to continue its feminist reforms aimed at redefining the marital relationship, from one based on hierarchy to one between equals. Indeed, a dramatic legislative reform soon would shake the very foundations of the patriarchal power balance.

C. *The 2000 Law: A Feminist Message for the New Millennium*

In the dawn of the twenty-first century, the personal status legislation was clearly archaic, with an enormous number of pending divorce cases further making amending divorce law a matter of pressing necessity.[422] Startlingly, over 1.5 million female-initiated divorce cases had been pending indefinitely in the court system, a stark sign of a deeply troubled society.[423] Moreover, the 1985 law increasingly became more and more a "considerable embarrassment" on the international level for the Egyptian government, which was also threatened with penalties for its failure to implement the Agreement on Women and Population, which Egypt had vowed to do by the year 2000.[424]

After strenuous labor and lengthy deliberations, and after playing "fast and loose" with parliamentary procedure, the legislature was finally able to usher a

422 Fawzy, *supra* note 25, at 58; Singerman, *supra* note 25, at 165-66; Mashhour, *supra* note 100, at 582-83.

423 Susan Sachs, *Egypt's Women Win Equal Rights to Divorce*, N.Y. TIMES, Mar. 1, 2000, at A1; AL-ATRAQCHI, *supra* note 3, at 307 (relying on data from parliamentary sessions).

424 Jansen, *supra* note 107, at 201; Sonneveld, *supra* note 28, at 2.4.

highly protested law into its dusty collection of personal status legislation.[425] In the beginning of the new millennium, the frustrating, century-long struggle to draft a modernized family law has borne fruit at last.[426] Fittingly, the first law of the millennium was a "quantum leap" for feminism,[427] a symbolic expression of the importance the government attached to presenting the outside world with a vision of a modern and woman-friendly Egypt.[428] Let us now explore the core innovations of the 2000 law, which brings Egypt one step closer to living up to both her international and her constitutional obligations to women's rights.

1. *Appealing the Right to Appeal*

Under the twentieth century divorce regime, we may recall, women faced extremely long divorce proceedings, during which they were forced to remain in legal limbo with no financial support.[429] Furthermore, obtaining the long-awaited divorce decree failed to end their misery. It was not an uncommon occurrence for an Egyptian woman to remarry and bear children, only to learn later on that the appellate court had invalidated her divorce.[430] Such women were left to face dreadful social and religious dilemmas; they became sinners and bigamists, and lost any right to their children from the second marriage.[431] Thus, husbands' draconian right to an infinite number of appeals, with no time limit, was essentially a license to torment their hapless ex-wives indefinitely.[432]

The new 2000 law expressed sensitivity to women's plight, and restricted the husband's right to appeal a divorce to the ninety days following its declaration.[433]

425 AL-ATRAQCHI, *supra* note 3, at 17-18. The full name of the 2000 law is Law on Reorganization of Certain Terms and Procedures of Litigation in Personal Status Matters. Hereinafter it will be called "the 2000 law".

426 *Id.* at 136, 212; Zuhur, *supra* note 32 (describing feminist efforts to reform family law).

427 Moussa, *supra* note 135, at 17.

428 Sonneveld, *supra* note 28, at 1.1

429 It should be stressed that, to this day, the length of time it takes for a woman to obtain judicial divorce is still outrageous – it may take up to twelve years! *See* Fawzy, *supra* note 25, at 71.

430 Fawzy, *id.* at 40; Singerman, *supra* note 25, at 165.

431 Fawzy, *id.*; Singerman, *id*.

432 Shahine, *supra* note 261 (Women who initiate divorce "find themselves spending their days in court, unable to remarry, receive alimony payments, or lead a stable life until they receive a final divorce ruling").

433 ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 61.

Once that period has elapsed, the gates of the appellate court are sealed, and the wife is finally free to remarry without fear.[434]

2. *Dissolving the Indissoluble: An End for* Urfi *Marriage*

One of the most significant changes of the 2000 law is the official, albeit limited, recognition of *urfi* marriage. Such marriages are defined as unregistered customary marriage, traditionally associated with wealthy married men seeking to maintain a secret wife on the side.[435] Everything about *urfi* marriage was detrimental to women, but nonetheless, in an ultimate irony, it was women's so-called "loose" sexual morals which were indicted for the rapidly increasing number of *urfi* marriages.[436]

Before the 2000 law, *urfi* marriages were legally unacknowledged, leaving nearly all the husband's responsibilities to his wife unenforceable.[437] An *urfi* wife was deprived of all financial or other rights, and worse, she could never have her (religiously binding) marriage legally dissolved. [438] Paradoxically, while the family court refused to recognize the *urfi* union, the criminal court was more than willing to do so: if an *urfi* wife dared to contract another marriage she would soon find herself convicted of bigamy.[439] This situation incited men to opt for the *urfi* form of matrimony to be able to deny it when it served their interests, and to rob their wives of their entire universe of marital rights.[440] Thus, contrary to all norms of justice, Egyptian men were left free to abandon their wives with no legal consequences; their helpless wives, however, could do nothing to stop them or to stop the marriage − they were left "suspended forever", neither married nor divorced.[441]

434 It is noteworthy, however, that whereas the time to file an appeal is limited, the time within which the court must pass its final ruling is not limited. Equally troubling is the fact that divorce cases may go through three levels of litigation, and may even reach the Court of Cassation. Thus, even with the limited appeal right, women may still face a long road to freedom. *See* Fawzy, *supra* note 25, at 71.

435 AL-ATRAQCHI, *supra* note 3, at 20, n. 17; Sonneveld, *supra* note 28, at 8.2; Lynn Welchman, *Introduction*, WOMEN'S RIGHTS & ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM 1, 9-10 (Lynn Welchman ed., 2004).

436 Sonneveld, *supra* note 28, at 8.6.

437 Fawzy, *supra* note 25, at 42; Sonneveld, *supra* note 28, at 8.6.

438 *Urfi Marriage in Egypt: The Issues, available at* www.islamawareness.net/Marriage/Urfi/urfi3.html. *See also* Gihan Shahine, Illegitimate, Illegal or Just Ill-Advised?, *available at* www.islamawareness.net/Marriage/Urfi/urfi1.html.

439 AL-ATRAQCHI, *supra* note 3, at 20, n. 17.

440 SHAHAM, *supra* note 119, at 229; AL-ATRAQCHI, *supra* note 3, at 19.

441 SHAHAM, *id.* at 229; AL-ATRAQCHI, *id.*

Under the new 2000 law, such suspended women are still unable to realize any financial rights from their *urfi* marriage, but they were finally granted the ultimate relief – a right to exit the *urfi* matrimonial hell by way of divorce.[442]

3. *Fault-Free Divorce – But Not for Free*

The most essential feature of the 2000 reform is a wife's *khul'* right to obtain a no-fault divorce.[443] This provision was so controversial that its formulation alone was amended 80(!) times,[444] and the law itself, comprised of 78 other articles as well, became known as the "*khul'* law".[445] The heated parliamentary debates were highly misogynistic in tone, attesting to men's terror of women's marital rights and the possibility of women renouncing male authority.[446] As a precaution, the *khul'* proponents had to cast their arguments in a patriarchal tone, avoid the vocabulary of women's rights or gender equality, and "sell" their reform as upholding the rights of man and the family.[447]

Ultimately, a wife was allowed to divorce her husband without his consent, but only if she was willing to "buy" her ticket to freedom; she must return her prompt dower, gifts, and any property given to her by her husband, and forgo all financial and support rights.[448] Unfortunately, *khul'*-style divorce is an expensive liberty not only because women must pay for the exercise of their fundamental right, but also because they had to forgo another basic liberty in return – the right to travel. In a blow to feminists, the clause allowing women to obtain a passport without their husbands' consent was removed from the draft law as a concession to

442 Art. 17 of the 2000 law.

443 Art. 20 of the 2000 law.

444 AL-ATRAQCHI, *supra* note 3, at 299.

445 Sonneveld, *supra* note 28, at 2.1.

446 Singerman, *supra* note 25, at 177; Moussa, *supra* note 135, at 24.

447 Moussa, *id*. at 27; Sonneveld, *supra* note 28, at 2.

448 Upon marriage, a husband must pay his wife dower: a "prompt" dower which must be paid immediately upon marriage, and a deferred dower, which must be paid upon divorce. Art. 20 of the 2000 law requires the wife to pay her husband the prompt dower alone. See also: ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 60; Fawzy, *supra* note 25, at 60.

conservatives.[449] Put concisely, the right to exit the country was sacrificed for the right to exit marriage.[450]

In addition to its costliness, *khul'* is further complicated by a mandatory three-month arbitration period − six months if children are involved − even in cases of domestic violence.[451] The arbitration requirement turned out to be a substantial financial obstacle for numerous women; the cost of arbitrators proved very high, and in cases where the husband is unwilling to arrange for arbitrators from his side, the wife must shoulder their expenses as well.[452] The introduction of the new family court system in 2004 complicated matters even further – women are now subject to two sessions of mediation instead of one.[453] Even more disturbing is the law's discriminatory treatment; it unfairly exempts men, subjecting only female divorce-seekers to a compulsory mediation process, thereby suggesting that women are impulsive and incapable of making rational decisions in important life choices.[454] On the other hand, men who initiate divorce are apparently wise and rational and do not need time to reconsider their decision.[455]

Despite the drawbacks of the *khul'* provision, it was hailed as an ultimate feminist achievement, a powerful tool to reorder the balance of power between men and women, and transform the marital relationship from one between a "master and handmaiden" to one of equals.[456] Indeed, the law has turned out to be no empty gesture. Since its liberating promulgation, the number of women filing for divorce has increased dramatically: only two months after the 2000 law came into effect, the Personal Status Court in Cairo alone had received over 3,000 divorce petitions! The divorce-seekers ranged from grandmothers married for forty years to young women married for less than a year.[457]

449 HUMAN RIGHTS WATCH, *supra* note 17, at 7; AL-ATRAQCHI, *supra* note 3, at 138.

450 Later on, the SCC would rule that conditioning the grant of a wife's passport on her husband's consent was in violation of the right to freedom of movement, and thus unconstitutional. On that issue see Sonneveld, *supra* note 28, at 2.5.

451 *See* Article 20 of the 2000 law.

452 Sonneveld, *supra* note 28, at 5.2.

453 *Id.* at 5.3 (arguing that this was a concession to opponents, designed to curtail the *khul'* right by adding yet another condition).

454 HUMAN RIGHTS WATCH, *supra* note 17, at 27; Whitaker, *supra* note 115.

455 Sonneveld, *supra* note 28, at 5.3.

456 Mariz Tadors, *Khul' Law Passes Major Test*, AL-AHRAM, December 19-25, 2002, *available at* http://weekly.ahram.org.eg/2002/617/eg11.htm.

457 Anne K. Subourne, *Motivations for Mediation: An Examination of the Philosophies Governing Divorce Mediation in the International Context*, 38 TEX. INT'L L. J. 381, 393

The great contribution of *khul'* divorce is potently evident in cases of chained women who were not able to go free under the fault-based regime. Such was the case of a wife whose divorce petition had been pending for 46 years in court; only the passage of the 2000 law finally put an end to her marital misery.[458]

Unexpectedly, women's *khul'* right to divorce proved not only a beneficial female escape from the brutality of men,[459] but it also saved some men from experiencing a brutal end. Since it was extremely difficult to get a divorce under the Egyptian regime, many women had resorted to the "cleaver and the plastic bags", a surprisingly common practice of murdering husbands for the sake of marital freedom.[460] Consequently, " *khul'* has solved many problems of violence that may occur between couples".[461]

Regrettably, *khul'* divorce might appear a blessing in disguise for men in yet another respect. Husbands may now freely bully their wives into asking for *khul'*-divorce even when they are the ones seeking freedom, in order to win a divorce free from any financial obligation.[462] As late as 2004, Egyptian couples experiencing marital strife negotiated their way out of marriage in the following fairly typical dialogue:

> I told him "divorce me and leave, at least that way when I go to beg from people on the street, they'll know I have no one". He said "no, I'll kill you. Leave the house if you want a divorce. Give up the house, the children, the furniture, and the clothing that you're wearing… I will not give you anything… you will go to your family's house and they'll bring you back to lick my shoes".[463]

It is important to note that even the 2000 law's limited concession to women was unbearable to masculine sentiments. In fact, no other law in the entire history of

(2003); AN-NA'IM, *supra* note 334, at 159. *See also* Mariz Tadros, *The Beginning or the End?*, AL-AHRAM, Mar. 9-15 2000, *available at* http://weekly.ahram.org.eg/2000/472/fr2.htm.

458 *See* AL-ATRAQCHI, *supra* note 3, at 292.

459 *Id.* at 374.

460 Nadia Sonneveld, *If Only There Was Khul'…*, *available at* www.openaccess.leidenuniv.nl/bitstream/1887/17045/1/ISIM_17_If_only_there_was_khul.pdf.

461 AL-ATRAQCHI, *supra* note 3, at 371 (quoting a divorced Egyptian woman she interviewed, named Manal).

462 KATULIS, *supra* note 59, at 23; AL-ATRAQCHI, *id.* at 350-51 (quoting professor of Islamic jurisprudence Suad Saleh); al-Hibri, *supra* note 410, at 25; HUMAN RIGHTS WATCH, *supra* note 17, at 35).

463 HUMAN RIGHTS WATCH, *Id.* at 1 (quoting Amira Ahmad, Cairo, June 13, 2004).

Egypt has sparked as much controversy as the *khul'*-divorce provision.[464] Egyptian men reacted with shock and anger at the prospect of seeing their marital supremacy eroded.[465] They protested that *khul'* divorce changes the power hierarchy between men and women, placing control in women's hands and stripping the husband of his decision-making right and even of his personality and self-respect.[466] Men further proclaimed that women's marital freedom "victimized" them, turning men into "the weaker party which needs help and freedom", and "from a social lion to a humanitarian tiger who must plot and scheme so as not to fall into the 'traps' of [modern] marriage".[467] They claimed such emasculation in turn may end up leading to the total "extinction of men".[468] For Islamists, women are just too emotional, capricious, and irrational to be allowed access to divorce.[469] Therefore, they concluded, the province of divorce must be "par excellence man's. Women are made to be the sponge for men's anger".[470]

Newspapers were filled with cartoons featuring manly, brutish, and grotesque women dominating their insignificant, girly husbands, or female harridans pursuing frantic husbands with their brooms, or men donning women's clothes and headscarves while assuming domestic chores.[471] Some cartoons even depicted men being pregnant.[472] All of the cartoons aimed to convey the same 'dismaying' message: once women were given the right to unilateral divorce, the world would be turned upside down and proper gender-roles would be completely transformed; men would become women, and women would turn into men.[473]

464 AL-ATRAQCHI, *supra* note 3, at 305 & 382; Fawzy, *supra* note 25, at 67.

465 Caroline Hawley, *Egypt Women Start a Revolution in Divorce Laws*, *available at* http://chora.virtualave.net/egypt-divorce-laws.htm.

466 Fawzy, *supra* note 25, at 62.

467 Younis, *supra* note 9, at 479-80 (quoting AZZA HAIYKAL, TAHREER AL RAGUL [MEN'S LIBERATION] 13 (2006).

468 *See, e.g.,* the male reaction to the *khul* divorce as reported in Mariz Tadros, *What Price Freedom?*, AL-AHRAM, Mar.7-13, 2002, *available at* http://weekly.ahram.org.eg/2002/576/fe1.htm; AL-ATRAQCHI, *supra* note 3, at 317, 349 & 378.

469 Subourne, *supra* note 457, at 392; Fawzy, *supra* note 25, at 65.

470 AL-ATRAQCHI, *supra* note 3, at 332 (quoting the stance of the Islamist Dr. Yusuf Al-Qaradawi, among other similar opinions).

471 Zuhur, *supra* note 32.

472 Sonneveld, *supra* note 28, at 3.3.

473 *Id.*

Even the solid Islamic roots of *khul'* divorce – it is recognized by the most authoritative Shari'a sources,[474] approved by the highest religious authorities in Egypt,[475] and has been implemented for decades in some other Muslim countries[476] – did not satisfy Islamists.[477] They soon rushed into court – no less than sixty(!) petitions challenging *khul'* divorce confronted the SCC, asking it to eviscerate this woman-empowering piece of legislation.[478]

Quite predictably, the SCC approved the Islamic legitimacy of the *khul'* provision, again protecting the integrity of legislation favorable to women, no matter how contentious.[479] *Khul'* divorce constituted a rare situation in which the combined force of "certain" Qur'anic verses and definitive prophetic Sunna existed, supporting women's no-fault dissolution right.[480] The *khul'* provision thus successfully cleared the bar of the Court's Islamic legal theory.[481]

Disappointingly, the reaction of other courts in Egypt to *khul'*-style divorce was unfavorable at best.[482] The backlogged and inefficient courts soon countered the idea of *khul'* as a faster and less agonizing way to freedom,[483] exhibiting bias and sexism toward *khul'*-seeking women.[484] Judges often viewed wives' wish for *khul'* as so immoral and lewd, so surely motivated by a desire for another man, that they called such women "disobedient" and occasionally refused their requests.[485] The judges

474 *See t*he multitude of Qur'anic verses and *hadiths* establishing a *khul*-divorce right, in AL-ATRAQCHI, *supra* note 3, at 295.

475 *Id.* at 322; Singerman, *supra* note 25, at 176.

476 This is the case in many countries, including Morroco, Pakistan, Syria, Tunisia, and Yemen. *See* Yefet, *supra* note 24; AL-ATRAQCHI, *id.* at 307; Moussa, *supra* note 135, at 28.

477 AL-ATRAQCHI, *id*. at 299-300 (quoting experts on Islamic law).

478 Mona Zulficar, *Egypt: New Signs of Progress for Women in Egypt*, WLUML, Feb. 12, 2004, *available at* www.wluml.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-157-85801.

479 Case No. 52 (26 December 2002). On that case, see Hirschl, *supra* note 55, at 1829.

480 Verse 2:22 and the al-Bukhari version of the Habiba *hadith*. *See* Sonneveld, *supra* note 28, at 2.5. On the Islamic origins of *khul* divorce see Arabi, *supra* note 365, at 16-21.

481 Mariz Tadros, *Khul' Law Passes Major Test*, AL-AHRAM, Dec. 19-25 2002, *available at* http://weekly.ahram.org.eg/2002/617/eg11.htm.

482 Tadros, *What Price Freedom*, *supra* note 468; *Illusions of Emancipation*, AL-AHRAM, Aug. 25-31, 2005, *available at* http://weekly.ahram.org.eg/2005/757/li1.htm (the family courts have immeasurably complicated the procedure of *khul*).

483 HUMAN RIGHTS WATCH, *supra* note 17, at 24.

484 Singerman, *supra* note 25, at 181.

485 Sonneveld, *supra* note 28, at 4.5-4.7, 5.7, 6.4.

expressed their "pity" for the sad fate of stigmatized *khul'*-women's children, but showed no pity for the plight of the trapped wives.[486]

Moreover, legal procedures that should have been expeditious have proven cumbersome and dragged-out.[487] The main source of delays has often been the court's extraordinary attentiveness to male trickery, aimed at sabotaging the *khul'* proceedings. For example, ninety percent of all husbands pressured the court to conduct extensive investigations about the proper compensation they were entitled to in exchange for their wives' freedom.[488] Husbands also made claims that they registered a deliberately low amount of dower in the marriage contract in order to evade taxes, and thus insisted their wives pay much higher sums of money than the amount that was originally registered.[489]

The judges proved highly receptive to these arguments; they were undisturbed by the confessed violations of the penal tax code, and equally undisturbed by the frequent male attempts to obstruct the smooth proceedings of *khul'* divorce.[490] Eventually, wives were forced to pay dearly for their marital liberty, even beyond the law's requirements: They were made to return the prompt dower (oftentimes a higher amount than that written in the marriage contract), the *shabka* (engagement gifts), *'ayma* (wife's furniture and property), and even the deferred dower (which the husband had never paid at all!).[491] It is little wonder that even in the twenty-first century, the lawyerly advice for *khul'*-seekers is to use the good old ground of impotence, and its hazard to female chastity.[492]

In sum, Egyptian courts, motivated by patriarchal values, set a high price for a wife's freedom, and inconsiderately postpone procedures and prolong cases. Yet these courts could easily avoid such delays by implementing a two-step procedure, as in the Pakistani *khul'* system, wherein the divorce remedy is dealt with separately from its economic consequences. The husband may invoke his allegations as to the scope of the financial compensation due him only in an independent civil suit *after* the grant of a *khul'* divorce.[493] By refusing to implement the two-step procedure,

486 Tadros, *What Price Freedom*, *supra* note 468.

487 For example, of the 5,252 cases filed in a Cairo court in 2002, only 62 were finalized within a year. Some have easily taken as long as three years to resolve. HUMAN RIGHTS WATCH, *supra* note 17, at 50-51; AL-ATRAQCHI, *supra* note 3, at 383.

488 Sonneveld, *supra* note 28, at 4.4-4.5; 4.7, 5.7.

489 *Id.*

490 Singerman, *supra* note 25, at 181-82; Tadros, *What Price Freedom*, *supra* note 468.

491 *See* the illuminating discussion in Sonneveld, *supra* note 28, at 4.4-4.5, 4.7.

492 *Id.* at 3.2.

493 Yefet, *supra* note 24.

Egyptian courts failed to utilize an Islamic mechanism that could have equalized the unbalanced divorce power and paved a smooth road to female marital liberty. Instead, Egyptian women are now left with a rocky, uphill path to marital freedom.

VI. Quandaries and Proposals: Constitutional Outlets in the Service of Chained Wives

The Egyptian Constitution accords the utmost respect to fundamental human rights. Women's equality and marital liberty, in particular, are the most potent constitutional tools to combat their inferior status and oppressed sexuality. The additional value of an independent right to divorce, as distinct from a right to equality, serves to limit the legislative latitude in choosing the means to equalize the divorce regime. For example, Tunisia gave women dissolution rights equal to men's, but such rights are rather tightly, albeit equally, constrained; fault-based avenues offer only a limited relief to matrimonial misery.[494] Egyptian law differs from Tunisian law because the Egyptian Constitution limits the limitations which the legislature may impose on divorce. The legislature is accordingly obliged to craft a divorce regime that is not only equal, but also liberal. Any legislation needs to allow both husband and wife a relatively easy access to marital freedom. The scope and boundaries of these fundamental dissolution entitlements are in turn shaped by the constitutional commitment to Islamic law, as interpreted in the SCC's Article 2 Jurisprudence. While the Islamic Shari'a itself seems to side with women's rights – it is committed to nondiscrimination and is attentive to wives' calls for matrimonial liberty - the legislature and the court still curtail women's constitutional and Islamic rights in the name of Islam.[495]

I argue that the SCC's ingenious formula for defining (and thus confining) Islamic law for purposes of constitutional review is entirely capable of securing women's fundamental dissolution rights. The Court has devised a loose and flexible Islamic formula that pays heed exclusively to the equitable teachings of the Qur'an and Sunna, thereby allowing the legislature to discard the patriarchal heritage of generations of male Muslim jurists, and to incorporate western notions of a liberal, humanitarian, and even feminist, rule of law.[496] The two foundational sources of the Shari'a provide two chief approaches to the equalization and liberalization of divorce

494 Jansen, *supra* note 107, at 207; Charrad, *supra* note 206, at 55-56. Admittedly, no-fault divorce is allowed, but only in return for financial compensation, which substantially limits the accessibility of this legal option. Charrad, *id.* at 56.

495 *See* the discussion *supra* Chapters IV-VI.

496 Rehman, *supra* note 2, at 120, 123.

power, by both expanding women's grounds for divorce, and limiting men's abuse of it.

To start with, contrary to popular perceptions, no Qur'anic verse whatsoever supports or approves the broad license of divorce currently awarded to Muslim men.[497] On the contrary, the Qur'an condemns divorce,[498] and the Sunna literature further views it as "the most hateful in the sight of Allah".[499] There are certainly no definitive and universally applicable scriptural precepts restricting the legislature's latitude to limit men's comprehensive repudiation prerogative. As a consequence, men's current monstrous divorce power is by no means required, or even warranted, in a Muslim nation constitutionally committed to Islamic law as defined by the SCC. It remains the case, that in order to be true to its constitutional commitment to women's rights, Egypt must dispense with the husband's extra-judicial divorce power, and invalidate *talaq* pronounced in anger or jest, or in other problematic states of mind not currently covered by law. As previously discussed, such limitations do not violate or curtail, but rather protect and promote, men's own fundamental right to divorce, as they ensure a careful and thoughtful exercise thereof, as well as the couple's right to enjoy marital life.

In addition, I suggest that a formal process of reconciliation be made obligatory for both husband and wife before a divorce may be considered. Conditioning the husband's ability to rid himself of his marital responsibilities upon mediation will not only contribute to the further equalization of the divorce rights of the sexes – as of now, only women are subjected to such a requirement – but will also serve to follow Qur'anic injunctions more closely,[500] ensure that the divorce right is wisely exercised, and befit the constitutional respect accorded to the Egyptian family and the institution of marriage.[501] Indeed, in several other Muslim countries also constitutionally and ideologically committed to Islamic law, it is compulsory for both men and women to undergo arbitration, regardless of who initiates the divorce.[502]

497 Shaheen Sardar Ali, *Testing the Limits of Family Law Reform in Pakistan: A Critical Analysis of The Muslim Family Laws Ordinance 1961*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 317, 326 (Andrew Bainham ed., 2002); ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 134.

498 Verse 35; Verse 65:1. The Qur'an has a whole chapter, Sura 65, concerning the legal institution of divorce.

499 Quoted in THE MEANING OF THE HOLY QUR'AN 1482 (Ustadh Abdullah Yusef Ali ed., 1989).

500 Mashhour, *supra* note 100, at 571; Rehman, *supra* note 2, at 118; Jansen, *supra* note 107, at 187.

501 Jansen, *supra* note 107, at 191.

502 For example, this is the case in Morocco. *See* Sonneveld, *supra* note 28, at 5.3, n. 120.

Restraining men's unbridled unilateral dissolution right is still a constitutionally incomplete solution. We have already pointed out that if one may deduce anything at all from Qur'anic statements, it is that a basis of support exists for a significantly broader spectrum of female divorce rights.[503] While it is true that the medieval male jurists disagreed as to the exact scope of female marital dissolution,[504] this only means that in the relatively loose realm of divorce, which is not clearly governed by "certain" precepts, the Egyptian legislature enjoys much latitude − and, in fact a constitutional duty − to frame laws that safeguard and promote women's divorce rights and equalize them with men's. I offer two primary Islamic strategies to attain this constitutionally-mandated goal.

As has been sketched earlier, women's divorce rights were greatly improved by way of *khul′*, but the double arbitration requirement, and the immense financial burden it entails, rendered *khul′* a cumbersome and oftentimes inaccessible divorce technique. Through its poor implementation, *khul′* not only fails to cure the discrimination against women in the divorce arena, even worse, it generates discrimination against poor women based on their socio-economic status, a problem that already stains Egyptian divorce law.[505] While rich wives are often able to "purchase" their fundamental freedom, the majority of women are forced to choose between marital tyranny and destitution.[506] This economic doctrinal weakness is so central, and so destructive, that it constitutes the only point on which both opponents and proponents of *khul′* divorce are united in their criticism.[507]

However, the age-old Islamic roots of the *khul′* doctrine do not necessitate the cruel discrimination between women based on their socioeconomic status. Had the Egyptian legislature implemented an important weapon at its disposal, *khul′* could have been molded into a priceless relief, both literally and figuratively. To begin with, the foundational source of Islam, the Qur'an, sanctions the grant of *khul′* without any monetary compensation.[508] Indeed, the remedy of *khul′* traditionally did not involve any financial aspect whatsoever.[509] It is true that the Prophetic precedent outlining the *khul′* procedure did involve an economic element, but the Prophet

503 *See, e.g.,* ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 32, 4, 6 & 23; Patel, *supra* note 75, at 229.

504 Yefet, *supra* note 24.

505 See the discussion *supra* chapter V.A.

506 Moussa, *supra* note 135, at 25.

507 Sonneveld, *supra* note 28, at 4.2.

508 ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 32.

509 Abu-Odeh, *supra* note 8, at 1127, n. 376.

emphasized that only the restoration of the prompt dower is required, while all of the wife's other financial rights, including alimony, remain completely intact.[510]

If the primary sources of Islamic law eliminate, or at the very least minimize, *khul''*s financial penalty, there is no justification for impoverishing women on their way to emancipation. Therefore, the current *khul'* provision and the judicial handling of it are offensive to both the Court's Islamic constitutional theory and to women's equality and fundamental divorce rights. They only reinforce the suspicion that the patriarchal desire to control women and to punish their efforts to escape male authority, is the real motivation behind the current formulation and implementation of the *khul'* doctrine.

Islamic law provides yet another promising path to a payment-free exit. Shari'a rulings prohibit men from coercing their wives into requesting *khul'* divorce, if the request arose as a result of the husbands making their wives' lives so miserable that the wives would seek release at any price.[511] In such circumstances, Islamic law exempts the wife from any financial sacrifice, and even entitles her to compensation.[512] Generous utilization of this doctrinal twist is not only desirable, but may also be constitutionally mandatory, both in order to follow Islamic law more closely and in order to fully equalize the divorce rights of men and women. All but ignoring this Shari'a requirement, Egyptian judges never bother to examine the circumstances surrounding a wife's application for *khul',* though they concede the existence of the occurrence of husbands' bullying their wives into asking for *khul'*-style divorce.[513]

The ultimate means to free women, I propose, would be a legislative authorization to insert stipulations in the marriage contract protecting women from the patriarchal terms of Muslim marriage. By contractually securing a way out of marriage, the Egyptian wife may easily extricate herself from matrimonial chains, while avoiding complicated and costly legal battles.[514] This contractual technique is by no means new or foreign to classical Islamic law, which allows a wife to

510 Moussa, *supra* note 135, at 18, 27-28. On this *hadith,* see Vardit Rispler Chaim & Hasan Murad Manna*, Childbearing and the Rights of a Wife,* 2 ISLAMIC L. & SOC. 92-99 (1995).

511 Yefet, *supra* note 24.

512 This doctrine is well developed in the Maliki school of thought. *See* Fawzy, *supra* note 25, at 63; AMIRA EL AZHARY SONBOL, WOMEN, THE FAMILY AND DIVORCE LAWS IN ISLAMIC HISTORY 121 (1996). For women's financial rights upon divorce, see ESPOSITO ON MUSLIM FAMILY LAW, *supra* note 9, at 23.

513 Sonneveld, *supra* note 28, at 6.5.

514 Singerman, *supra* note 25, at 172.

construct a contractual, no-fault, extra-judicial, right to divorce,[515] and ranks such stipulations as among the most binding of promises.[516] The SCC itself has recognized the Islamic-constitutional validity of such stipulations.[517]

Unsurprisingly, throughout Islamic history, including in nineteenth-century Egypt, women of all social classes circumvented the rigid classical jurisprudence that existed in courtrooms by contracting their right to divorce.[518] Indeed, without an accessible dissolution right, women simply refused to get married.[519]Alas, the Egyptian legal system has inexplicably put an end to this indisputably Islamic solution; reforms along these lines never arose to challenge the patriarchal order.[520] Admittedly, in August 2000, women's right to insert substantive stipulations in the marriage contract was restored, but to date, the document that must be signed prior to marriage is limited to technical details alone.[521] Most unfortunately, the majority of women are unaware of this perfectly acceptable Islamic, and now legal, mechanism to save themselves the "interminable hassle and torture of Egyptian personal status courts",[522] and many others do not possess the foresight or the bargaining power to have such clauses inserted into the marriage contract.[523]

To make matters worse, the official marriage and divorce registrars vehemently oppose the inclusion of substantial stipulations; they have refused to register marriage contracts containing such stipulations, let alone have they informed women of this liberating option.[524] For them, women's right to divorce cannot be contractually stipulated, as it is a grave violation of the so-called Qur'anic superiority of men over women.[525]

515 Abdel Haleem, *supra* note 180, at 449.

516 Al-Hibri, *supra* note 410, at 23.

517 Case No. 35, 9th judicial year (14 August 1994). On that point, see also Arabi, *Beyond Power*, *supra* note 384, at 350.

518 AL-ATRAQCHI, *supra* note 3, at 125; Shaham, *State, Feminists and Islamists*, *supra* note 319, at 464.

519 *See* al-Hibri, *supra* note 410, at 23-24; Shaham, *id.*at 463.

520 Shaham, *id*. at 465-66, 480; Singerman, *supra* note 25, at 171-174.

521 Fawzy, *supra* note 25, at 70.

522 Azza M. Karam, *An Apostate, a Proposed New Marriage Contract and Egyptian Women, Where To Now?*, 8 WOMEN AGAINST FUNDAMENTALISM 29 (1996).

523 Al-Hibri, *supra* note 410, at 24, 33; Shaham, *State, Feminists and Islamists*, *supra* note 319, at 475-76.

524 Sonneveld, *supra* note 28, at 2.5.

525 Shaham, *State, Feminists and Islamists*, *supra* note 319, at 472.

Thus, a country under a trinity of Islamic, constitutional, and international obligations to improve women's status and to respect their human rights,[526] has refused to effectively implement the ideal tool to transform the power balance between the marital partners, and to achieve the ultimate eradication of injustices against women. The unaccountable failure to execute and apply this legitimately acceptable Islamic solution again seems motivated by nothing but a patriarchal desire to leave women at the mercy of their husbands. To render the Constitution truly effective, and to move equal rights from rhetoric to reality, the Egyptian legislature must utilize this minor contractual mechanism that promises major change − it will redress a principal injustice inherent in the discriminatory divorce process and substantially diminish men's authority over women.

VII. CONCLUDING REMARKS

One of the greatest contrasts of contradiction-plagued Egypt is the split composition of her legal system and its conflicting effects on women. The Egyptian legislature, which readily abandoned Islamic law in all fields of legislation, passionately insists on retaining Shari'a's rein in the domain of family law, precisely where it shores up traditional male prerogatives.[527] As a result, the legal status of women itself presents a dichotomy: In the context of civil and political rights women enjoy the status of full citizens, but in the eyes of personal status law they are an inferior second class.[528]

This study has focused on women's position in the divorce arena. It has demonstrated that the formulation of the dissolution regime, like all other practices detrimental to women, is impacted by the deeply-rooted Egyptian obsession with female sexuality, and that restricting access to divorce is effectively what keeps the entire Egyptian patriarchal structure alive and working. For that very reason, a female dissolution right is not merely a stepping-stone toward an improvement of women's rights in Egypt; it must be the cornerstone of their full citizenship status and is the ultimate means to shake the very foundations of the patriarchal system.[529]

With such a line of reasoning in mind, this study has sought to explore constitutional tools for combating women's oppression in the marital relationship,

526 Boyle, *supra* note 185, at 110.

527 Abu-Odeh, *Egyptian Feminism, supra* note 14, at 197-98, 200.

528 Hatem, *supra* note 29; AL-ATRAQCHI, *supra* note 3, at 220; HUMAN RIGHTS WATCH, *supra* note 17, at 10-11.

529 Moussa, *supra* note 135, at 29; Sultan, *supra* note 57, at 12; Sonneveld, *supra* note 28, at 2.3; KATULIS, *supra* note 59, at 23.

and for equalizing and liberalizing their divorce options. I have shown that the religious and constitutional discourses can both act as powerful mechanisms in the service of Egyptian women. However, notwithstanding the strong ties between the fundamental right to marital freedom and the constitutional principles of Islam,[530] the Shari'a is unjustifiably used as an excuse to deny women their due.

The Egyptian legislature has proven somewhat impotent in improving women's marital lot, and rather prone to clinging to corrupt practices and patriarchal religious interpretations highly detrimental to women.[531] It failed to fully utilize the generous latitude it was granted by the SCC's ingenious formula for reviewing the Islamic constitutionality of legislation. After all, this constitutional-Islamic legal theory beautifully integrates Islamic law into the fabric of a liberal legal order in a manner conducive to women's rights. Constrained by a culture of husbandly authority and male dominance, the SCC could do no more to promote female marital emancipation than sustain the legislative status-quo, and even that only by couching decisions in sexist language relegating women to subordinate positions. Egyptian family courts also have not gone out of their way to alleviate women's plight; quite to the contrary, they have exhibited considerable aversion to wives' desire to be freed from their husbands' tyranny, and have rendered marital liberty distant, complicated, and frequently unattainable.

Moreover, the introduction of a no-fault *khul'* form of divorce, regrettably, has not fundamentally altered the unequal divorce equation in Egypt. As this avenue requires the absolute renunciation of all of a woman's financial rights, it is unaffordable for countless Egyptian women. Female divorce seekers find themselves between a rock and a hard place: they must choose between the excruciatingly long procedures of fault-based divorce, which often results in years of uncertainty, or a quicker, no-fault avenue to marital freedom, which often results in destitution. Both options are complex, burdensome, agonizing ways to put a moribund marriage to its final rest.

To date, Egyptian men's marital rights still eclipse those of women; they may still effectively enjoy a unilateral and unquestioned right to divorce their wives, however arbitrarily, resulting in damage to women's dignity, liberty, and self-esteem.[532] The discriminatory divorce regime further serves to reinforce the

530 *See, e.g.,* Jewett, *supra* note 34, at 211.

531 Jewett, *id.* at 210; JAWAD, *supra* note 43, at 48.

532 Oppermann, *supra* note 6, at 74.

oppression of women and the notion of their inferiority, while assuring their ongoing economic dependency on their husbands.[533]

In conclusion, unless Egypt fully utilizes the Islamic breadth accorded her by the Shari'a to render women's marital rights equivalent to those of their husbands, men will keep oppressing their wives, and women will remain unempowered.[534] The fundamental guarantee of equality will continue to be neglected, and the fundamental right to marital freedom will remain a dead letter. Ironically enough, even the constitutional commitment to Islamic law, especially as defined by the SCC, will consequently be desecrated.

Egypt has indeed taken some brave legal steps -- the path recently cleared by the 1985 reforms, and their subsequent reaffirmation by the SCC, was widened into a highway in 2000, when *khul*' law became a fixture in the legal constellation -- but the road to female marital emancipation is still long and challenging.

533 Jewett, *supra* note 34, at 211.

534 *Id.* at 205. As one commentator concluded, "men and women can only move toward a social and political equality when women are allowed to become equal to men as civil individuals, and the Personal Status Law is the last standing legal impediment to the realization of this goal". *See* AL-ATRAQCHI, *supra* note 3, at 161.