

Network of Women's Rights Organizations (NWRO)

Legal Guide

for developing a more just integrated family law



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Who We Are

The Network of Women's Rights Organizations (NWRO) is a network of NGOs working in the field of women and family rights. It was established in 2005 as an initiative that sought to build a joint vision and a framework for cooperation and coordinated action among NGOs interested in family rights. In the first phase, NWRO worked on eradicating the harmful implications of informal marriages on women and children. Its activities included advocacy, support, research, awareness-raising, and capacity building. Currently, NWRO focuses on contributing to the efforts aiming at issuing a new and just family law which reflects the needs of all members of the Egyptian family. NWRO aspires to build a sustainable platform of work that addresses issues of women and society at large.

Vision

A mindful community based on values of citizenship, social justice, human dignity, and respect for women's and family rights.

Mission

A strong, coherent and effective network of NGOs that works in collaboration with partners to create a favorable legal environment to achieve justice and women's human rights, particularly in the field of personal status and family relations.

Member NGOs

Badr Community Development Association for Comprehensive Development (BADR)
Society for Sinaii-Women Rights
Association for Women and Development (WaD)
Association for Women and Society
Egyptian Association for Comprehensive Development (EACD)
Egyptian Association for Community Participation Enhancement (EACPE)
Center for Egyptian Women's Legal Assistance (CEWLA)
Forum of Women in Development (FWID)
Coptic Evangelical Organization for Social Services (CEOSS)
Egyptian Association for Family Development
Care, Egypt

Foreword

This guide is produced to present NWRO's vision in reforming the Personal Status Law in Egypt. This falls within the remit of the main objective of the member NGOs which is to participate in making amendments to the family law to align it with contemporary developments and changes in Egyptian society, aiming to achieve security and stability for its members in the cases of marriage or its dissolution. The law should be based on the principles of citizenship and human rights, and inspired by the enlightened vision and right understanding of divine religions.

The NGOs' vision is, in brief, that the stability of the Egyptian family benefits the family and society as follows:

Family: for all family members to enjoy stability and serenity, whether within the marital bond or after its dissolution.

Society: for all family members to be able to fulfill their duties and roles; thus benefiting society at large. Also, to eliminate the psychological, social and economic problems resulting from the current law which have been proven by contemporary studies to be very serious and costly to society as a whole.

We all witness the negative impacts resulting from the fact that the current law is not entirely based on the principles of justice and equality, not only for women, but also for men and children, meaning the whole family. Therefore, the desire to reform all national legislation governing issues of personal status for the Egyptian family has emerged.

By means of this guide, member NGOs wish to contribute to 1) augment the legal views calling for more justice and equity in the field of family and personal status, 2) use this guide as a tool of communication with governmental bodies legislative as well as non-governmental organizations concerned with reforming the personal status law in Egypt, 3) rely on this guide as one of the reliable references used when drafting the provisions of this important law.

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Introduction

The Egyptian constitutional legislator highlighted four main social fundamentals, upon which society is built: 1) social solidarity, 2) family care, 3) right to work, and finally, 4) the right to education. In its article (9), the Egyptian constitution emphasized the importance of protecting the family. It stated that “the family is the basis of the society founded on religion, morality and patriotism. The State is keen to preserve the genuine character of the Egyptian family – with what it embodies of values and traditions– while affirming and developing this character in the relations within the Egyptian society”.

Based on this, the Egyptian legislator developed many laws and legislations that regulate family relations under the title “Personal Status Law”, with a view to achieving the aim of the constitutional legislator of preserving the Egyptian family.

The personal status law is a set of legal rules that regulate the legalities of establishing a family and the different relations amongst its members. Therefore, this law is uniquely important compared to all other laws, being the only one concerned with all family members in general; men, women and children; and regulating all the rights and duties they have towards each other.

The law, therefore, directly affects all family members, and women in particular, for their rights may be wasted or denied because of ineffective enforcement. This is one of the oldest laws promulgated by the Egyptian legislator and still valid until today. Such law directly derives its provisions from Islamic Law “*Shari’a*” and its sources. It is worth noting that such a religious reference is not the case of the Egyptian law only, but also of almost all other personal status laws in most Islamic countries. Though the source is the same, it is undeniable that there are evident differences in the provisions contained in the personal status laws of most Islamic countries, not only in the wording, but also in the application within one country. Such differences could be attributed to two main reasons:

- Different jurisprudential references used in each country, and the different provisions of different schools of thought (*madhab*) on any one question.
- Different understandings of the provisions of the law among those who apply it. Judges within one country may deal with a case in a certain way using a

certain interpretation; others may deal with it in a different way using other interpretations. Such disagreement may include different interpretations by legal jurists of the wording of the articles in their legal commentaries. All this results from the disagreement on understanding the stipulations of the law which referred most of its provisions to the broad body of Islamic jurisprudence (*fiqh*) instead of a specific text.

Since laws in general have a dynamic nature, they accordingly change and are amended to fulfill new needs and to bridge any gaps if existed. It is therefore important that the personal status law, given its significance as previously indicated, undergoes such change to respond to new needs and accommodate changing cultures. This is especially valid after reality has proven that the law’s articles have many shortcomings. So it was necessary to address this issue by seeking to amend this law, keeping in mind certain rules; including:

Holding fast to the principles of Islamic law and drawing from its enlightened interpretations, at the same time being able to discuss any topic without being limited by any taboos. We should also seek to find ways to address the issues and problems raised by the current law. Finally, no one should overrule the opinion of the other; especially that religious leaders take pride, for valid reason, in the fact that divine religions strongly encouraged and resorted to reason and argumentation, denying coercion or upholding any one single opinion. The maximum potentials of reason should be employed. Islam orders us to think, reason, and try our best to follow its instructions to reach a family legislation that lays down new foundations for family relations. These foundations should be based on the principles of mutual responsibility, respect, and understanding; also to ensure better safeguards for all family members, respecting their rights to equality, justice, freedom and rule of law. This legislation should aim to eliminate injustice and coercion, and curb all chances for exploitation and abuse. It should also ensure the reduction of domestic violence, particularly that Islam is a religion of comfort not hardship. The provisions derived from Islamic Law and included in the current law are made by jurists who are humans that may err or do right, and whose opinions may be valid for a certain time and place, but not for another. One would do injustice to their juristic work if taken out of the context of their respective time and place.

In order to reach the best draft of the reformed law, it is important to have broad deliberations amongst people of different opinions. Governmental bodies should not be the sole decision maker in this respect, given the necessity of having a dialogue amongst all stakeholders to address the negative aspects and further the positive ones in the reformed law. We may here follow the model of the Prophet, peace be upon him (*pbuh*): whenever he was preoccupied with a matter of concern, he used to seek the opinion of his companions, may *Allah* bless them all. This is an invitation to denounce disagreement, intolerance and holding fast to opinions that may not serve the current interests and needs of our society. Therefore, NWRO in Egypt decided to base its personal status law reforms on the following references:

- Current lived realities of the family and society, including the problems and issues that need to be addressed in a speedy and creative way;
- Enlightened interpretations of Islamic Law (*Shari'a*) that help address newly emerging issues;
- International legal treaties and conventions ratified by Egypt which ensure a decent life for all family members.

So, let us work together for a more just family law that contributes to building the family, and reducing domestic discord and disputes.



A recent study released by the Central Agency for Public Mobilization and Statistics (CAPMAS) shows that more than 240 divorces occur every day; which is a divorce every 6 minutes, amounting to 9000 divorces annually. Lived reality also shows an increase in the number of cases to prove paternity, which is a logical and inevitable consequence of wide-spread customary unregistered marriage (*'urfi*), the increased number of street children of unknown parentage as well as the diversified and increased number of child crimes and cases of domestic violence. This is in addition to the increasing social phenomena of sexual harassment against women and children, and the growing percentage of incest cases that has become a phenomenon in itself. There is also an increased number of households headed solely by women; taking into consideration the increased share by women in supporting the families, equally to men, within marriage. Accordingly, we should rearrange our new priority of issues to understand how far the current personal status laws system fulfills, or not, the needs and demands of the current Egyptian family, in order to envisage a better future for families in this country.

Objectives:

This guide contains direct and indirect objectives.

First: direct objectives

- To draw the attention of society and those interested in family issues to the importance of the personal status law.
- To highlight the issues and problems not addressed by the currently applied family laws.
- Shedding light on the problems emerging from the legal texts or applications of current laws concerned with the family.
- Offering relevant guiding legal frameworks and criteria that could be used by the appropriate governmental or non-governmental bodies while working on amending the personal status law.
- Offering reformers the experiences of other countries in addressing some of the shortcomings present in this important law, to take what suits our society in solving the problems of the Egyptian family.
- Compiling all legislation related to the personal status law to be in the hands of the reformers.

Second: Indirect objectives

- Drawing attention to the importance and potential of joint participatory work.
- Enacting dialogue as one of the best methods to solve complicated issues.
- Developing a culture of dialoguing in the mindsets of all those working on issues related to the family and society.
- Demonstrating the role that could be offered by civil society to unify visions and to express societal needs.
- Shedding light on the experiences of some Arab and Islamic countries in dealing with family related issues.

Personal status laws in Egypt: An overview

There are numerous laws dealing with personal status in Egypt today. They have undergone many amendments, and issued several executive explanatory memorandums. It is therefore important to list all these here in order to be familiar with the latest updates and what is currently applied in the courts at the time being. Personal status laws are divided into two categories:

- Procedural laws, regulating the procedures to be followed in litigation and enforcement;
- Substantive laws, regulating the legal provisions relevant to the subject itself.

We shall present such laws in chronological order.

First: procedural personal status laws and decisions

Law no. 1 of 2000 Regulating Some Conditions and Procedures of Personal Status Litigation, published in the Official Gazette in edition no. 4 (bis) dated 29/01/2000, and entered into force on 01/03/2000. It repealed the enforcement of the Regulation Governing Religious Courts issued by a decree law no. 78 of 1931; and the laws associated therewith stated in volume 4 of the Commercial and Civil Proceedings Code, added to law no. 77 of 1949, as well as laws no. 462 of 1955; 628 of 1955, and 62 of 1976. The Regulation on Procedures to be Followed in Regulating the Rulings of Religious Courts issued in 1907 was also repealed.

Subsequent amendments made to that law:

1. Law no. 91 of 2000, amending some provisions of the law Regulating Some Conditions and Procedures of Personal Status Litigation issued by law no. 1 of 2000, published in the Official Gazette in edition 20 (contd. a), dated 18/05/2000.
2. Law no. 10 of 2004 on Establishing Family Courts, published in the Official Gazette in edition no. (12 contd. a), dated 18/03/2004.
3. Law no. 11 of 2004 on Establishing the Family Insurance Fund System, published in the Official Gazette in edition no. 12 (contd. a), dated 18/03/2004.
4. Decree by the Minister of Justice no. 2 of 1955 on the Regulation on marriage officers "*ma'zoon*", published in the Egyptian Gazette, edition 3, annex, dated 10/01/1955; entered into force as of the same date

(enforced and amended), and many amendments have been made thereto.

Second: substantive personal status laws and decisions

- a. Law no. 25 of 1920 on Maintenance Rulings and some Personal Status Matters, published in the Egyptian Gazette in edition no. 61, dated 15/07/1920, entered into force as of the same date.

Subsequent amendments made to that law:

1. Law no. 33 of 1926 amending article (3) of law no. 25 of 1920, and adding another article; article 3 (bis).
 2. Law no. 25 of 1929 amending some provisions of the Personal Status Law.
 3. Law no. 44 of 1979 amending some provisions of the Personal Status Law.
 4. Law no. 100 of 1985 amending some provisions of the Personal Status Law.
- b. Law no. 25 of 1929 on some Personal Status Provisions, published in the Egyptian Gazette, edition no. 27, dated 25/03/1929, and entered into force as of the same date.

Subsequent amendments made to that law:

1. Law no. 103 of 1958 on amending articles 21 & 22 of Law Decree no. 25 of 1929 on some Provisions of the Personal Status Laws.
2. Law no. 100 of 1985, amending some Provisions of the Personal Status Laws.
3. Law no. 33 of 1992, amending some Provisions of the Law Decree on some Personal Status Provisions; and Armed Forces Retirement, Insurance and Pension Law.
4. Law no. 4 of 2005, amending article (20) of Law Decree no. 25 of 1929 on Maintenance Provisions and some Provisions of Personal Status Matters amended by Law no. 100 of 1985.
5. Law no. 2 of 2006, Amending some Provisions of Law Decree no. 25 of 1929 on some Provisions of Personal Status.
6. Ruling by the Constitutional Court 5 of year 8 q on the non-constitutionality of the third paragraph of article 18 (bis) – added by law no. 100 of 1985,

amending some Provisions of Personal Status Laws. Ruling of partial suspension.

Interpretations have been made to that decree law by the Justice Minister no. 2445 of 1979 – on the Conditions and Procedures of Declaring and Delivering the Divorce Certificate to the Divorcee, in an implementation of the law decree no. 52 of 1929 on some provisions of Personal Status.

- c. Law no. 118 of 1952 Determining the Cases of Removing Guardianship Over the Person (*wilaya ala al nafs*), published in the Egyptian Gazette, edition no. 118 (annex), dated 04/08/ 1952, entered into force as of the same date.
- d. Law no. 119 of 1952 on the Provisions of Guardianship over Wealth (*wilaya ala al mal*), published in the Egyptian Gazette, edition 118 (annex), dated 04/08/1952, entered into force as of the same date.
- e. Law no. 100 of 1985, Amending some Provisions of the Personal Status Laws, published in the Official Gazette, edition 27 (contd.), dated 04/07/1985, entered into force as of the same date (enforced and has the ruling of partial suspension).

Subsequent amendments made to that law:

1. Supplement by virtue of decision no. 4 of 1985, supplementing law no. 100 of 1985, amending some provisions on Personal Status.
 2. Ruling of Constitutional Court no. 5 of year 8 q on the non-constitutionality of article 18 (bis) – added by law no. 100 of 1985, Amending some Provisions of Personal Status Laws (ruling of partial suspension).
- f. Stipulations contained in the Civil Code no. 131 of 1948.
- Article 12:** in the substantive conditions establishing the soundness of marriage, reference shall be made to the respective law governing each spouse.
- Article 13 (1):** The law applicable in the State to which the husband belongs at the time of concluding the marriage shall apply to the consequences emanating from the marriage contract, including the consequences on money. As for divorce, the law applicable in the State to which the husband belongs at the time of divorce shall apply. The law of the State to which the

husband belongs at the time of filing the case of separation or divorcement by the woman to the husband shall apply to the separation or divorcement by the woman to the husband.

Article 14: in the cases stated in the two articles hereinabove, if one of the spouses is Egyptian at the time of concluding the marriage, only the Egyptian law shall apply, save for the condition of eligibility to marriage.

Article 15: the law governing maintenance cases is that governing the person who is obliged to maintenance amongst relatives.

Article 16: the law governing the person who should be protected shall apply to the substantive matters on guardianship (*wilaya*), guardianship over property of a child (*wisaya*), and economic support by men to women (*Qiwama*), and other systems established to protect the ones under guardianship and absentees.

Article 17 (1): the law governing the devisor or testator or whosoever makes the action at the time of death shall apply to the heir and the will and all actions to take effect after the death.

Notwithstanding, the law governing the testator at the time of testacy or the law of the State in which the testacy has taken effect shall apply to the form of the will. The same applies to all the actions to take effect after death.

The principals upon which the more just family law shall be built:

There is a set of principles that should be the main reference to whosoever would endeavor to amend or change personal status laws. These principles are:

A) Operationalisation and enforcement of the Egyptian Constitution articles in particular:

Article (10): stipulating that “The State shall guarantee the protection of motherhood and childhood, take care of children and youth and provide suitable conditions for the developments of their talents.”

Article (40) stipulating that: “all citizens are equal before the law. They have equal public rights and duties without discrimination between them due to race, ethnic origin, language, religion, or creed”.

B) Reference in the law clauses made to Islamic *Shari'a*:

By an enlightened reading of the text; meaning, to read with one eye on the text, its significances and interpretations, and the second eye on reality and the changes it experiences, given that the principles of *Shari'a* are valid to all places and all times, the following shall be observed:

1. Making a distinction between Islamic Law (*Shari'a*) and jurisprudence (*Fiqh*). *Shari'a* is obligatory because it is the revelation from *Allah* to his Prophet Mohamed (*pbh*), while *fiqh* is a human endeavor in interpreting the texts; an endeavor that may go right or wrong.
2. Being mindful not to be constrained by any of the *fiqh* schools of thought (*madhab*) solely, and to take the most facilitating of provisions within each school. Such a principle is not new to the Egyptian legislator when enacting Egyptian personal status laws. Despite the fact that the Egyptian Law follows the *Hanafi* school in some provisions, it follows views in disagreement with the *Hanafi* school taken from other schools. For example: following the *Hanbali* school concerning the conditions to be added to the marriage contract; and following the *Maliki* school in obliging the husband to bear the costs of the wife's medical treatment, as well as other clauses within the Egyptian law.
3. Relying on religiously established rules, and interpreting them in a manner achieving the best interest for the family; including for example, to mention but a few: “harm is to be eradicated, harm is not to be removed

by a similar harm, need is at the same rank as necessity, and no harm and no harming “

C) International instruments ratified by Egyptian government and are in conformity with the Law:

When considering with a neutral eye international instruments on the family and its members ratified by Egypt, one shall find that they establish the principles of Islamic *Shari'a* and are not contravening with them. Such a principle has a constitutional and legal reference:

The constitutional reference: is to be found in article (15)1 of the constitution which stipulates that “the President of the republic shall conclude treaties and communicate them to the People’s Assembly, accompanied with a suitable clarification. They shall have the force of law after their conclusion, ratification and publication according to the established procedure.”

The legal reference: is to be found in article (1) of the Child Law no. 12 of 1996 amended by law no. 126 of 2008, which stipulates that “the State shall ensure, as a minimum, the rights of the child contained the Convention on the Rights of the Child, and other relevant international instrument enforceable in Egypt”. All such instruments included an article obliging the ratifying state to amend its laws to be in agreement with the provisions contained in them. It is noteworthy here that before Egypt ratifies any of these international instruments, they are forwarded to the competent bodies, including the national religious institutions, to give their opinions. In case of objecting to any of its provisions, a reservation is made on the questionable clause. This means, unless a reservation is made, the provisions are deemed officially acceptable, both religiously and socially.

D) Use of clear and easy words and phrases:

Care should be taken to avoid controversial, confusing, or ambiguous terms and words, or those which imply derogatory meanings that underestimate any of the family members. Also the use of improper uncommon words in contemporary society should be avoided. Examples are: (“confining her”, “enjoying her”, “surrendering herself to him”, “getting his pleasure from her” ...etc).

E) Laying down standards and criteria to the judge’s use of his discretionary powers:

If the discretionary power enjoyed by the judge is a privilege for the litigants to benefit from, yet, some judicial rulings prove otherwise. For instance, the legislator gave the judge the authority to determine the value of *Mut’a* compensation not to be less than the alimony of two years. Therefore we find the majority of the judges make a ruling of the two year alimony with no consideration to the duration of marriage before divorce. Accordingly, standards and criteria for such an authority should be laid down. Additionally it is recommended to provide judges with intensive trainings to ensure that the use of such an authority serves the purpose behind its creation.

F) Giving priority to common good:

This should be in the cases when it could be achieved, as when the Egyptian legislator did in relation to the necessity of registering marriage contracts to make them recognized. Such a provision has no religious reference, but rather a common good one.

G) International and regional legal endeavors in the fields of family and personal status laws:

There are some important personal status laws in other countries that should be taken into consideration whilst reforming the Egyptian one, such as: the Tunisian law of 1956 amended in 1999 (*Tunisian family journal*), and the new Moroccan Code of 2004 (*Mudawana of Morocco*).

H) Enlightened Egyptian jurisprudential and judicial precedences in the fields of family and personal status laws:

There are rulings by the court of cassation that should be used as guidance here, for instance the ruling made in 1931 on the right of the husband to discipline his wife, and criminalizing the act if it left behind any effect.

I) Reference of reality:

Such a reference should be taken into consideration because it clearly reflects society’s needs as seen through statistics and academic studies on the current Egyptian reality.

J) The family law should aim at achieving the following:

Equality and non-discrimination, justice and equity, mutual respect, shared responsibility, placing the child’s best interest at the forefront in cases of parents’ disputes, and protection of the rights of all parties in the marital relationship.

Examples of issues to be taken into consideration when making the amendments

While NWRO seeks to change the personal status law as a whole, it preferred not to be the sole reformer, but rather to help those who desire to make similar work by providing this guide, in the hope that it would help facilitate what they aspire to achieve. To make it a practical guide, some issues have been adopted because they raised considerable legal and social controversy. Some of these issues require amendment, and can serve here as practical examples one can refer to when proceeding with making the necessary reforms:

- Engagement
- Marriage
- Obedience (*taa'a*)
- Maintenance/ Alimony
- Custody
- Visitation
- Divorce and processing divorce by a third party (*Tatliq*)
- *Khul'*
- Polygamy
- Joint wealth

Each issue will be examined and addressed by providing the following:

- Definition
- The current legal situation
- Problems raised
- Proposed solutions
- Examples of Arab laws containing provisions that could be used in addressing this situation.

(1) Engagement

Definition

Engagement is an unbinding promise of marriage between a man and a woman, whom he can lawfully marry; it is a precursor to marriage. *Allah* has permitted it before the conclusion of the marriage contract for the spouses to know each other, and for the proceeding with the marriage to be informed and guided.

Provision in the current law

The current personal status law has not explicitly addressed the issue of engagement which raised question marks regarding any legal dispute that might arise in this respect. Among the few provisions indirectly touching on engagement and the results ensued is article (9) of law no. 1 of 2000, which stipulates that “the summary court shall consider the matters contained in this article, in observation of the provisions of Article (52) herein. The rulings made by such a court shall, as follows, be challengeable by appeal, unless stipulated by the law that it shall be final. The text of the article mentions the cases of dower, trousseau, jewelry, and the equivalent thereto”.

Issues with the current law

The fact that the current laws fails to regulate the provisions of engagement and the consequences emanating there-from led to subjecting it to differing judicial discretions according to the mindset and culture of the one dealing with the matter (judge or lawyer, reconciler, arbitrator,...etc). Amongst the issues and questions that arise from the lack of legal regulation of engagement issues are:

- Legal definition of engagement; the consequences and commitments entailed,
- To what extent is the engagement binding on the two parties,
- Effects resulting from the termination of the engagement, be it by unilateral will of one of the two parties, or upon the agreement of the two,
- The competent body to consider the relevant legal dispute. Should it be the personal status judiciary? Or should it be the civil court, deeming it a civil dispute?
- The effect of the engagement of a woman in the waiting period from a previous marriage (*Idda*). Are there commitments resulting from the breaking up such an engagement?

Proposals to address the issue

The personal status law should contain provisions on the following:

- The legal definition of engagement as an unbinding promise of marriage, and not a binding contract. Going back on this promise is a right enjoyed by both parties to the engagement.
- Regulating the returning of gifts and jewelry when the engagement has been terminated.
- Regulating the matter of compensating the party materially and morally harmed by the termination of the engagement without his/her consent, or for a reason solely perceived by the terminating party.
- Determining that Family Courts shall be the competent bodies to consider cases on engagement and the consequences thereof.

Examples of legal texts from Arab and Muslim countries laws addressing the issue

Kuwaiti Family Law

Article (2): Engagement shall not be an obligation to marriage. The same shall apply to the promise of engagement, receiving the dower, and taking or exchanging presents.

Article (3):

- a. Each of the two parties to the engagement has the right to discontinue it.
- b. In case of discontinuation, and the fiancée married another man, the marriage shall not be annulled.

Article (4):

- a. In case one of the two parties to the engagement discontinued it, the fiancé has the right to recover the dower he has paid. In case it is impossible to recover it, the value thereof as of the day on making the payment shall be returned.
- b. Presents known by norms to constitute a component of the dower shall be deemed of the dower.
- c. In case the fiancée used her dower or part of it in purchasing her trousseau, and the fiancé discontinued the engagement, she shall have the option either to return the dower, or return the equivalent thereof, in whole or in part, from the trousseau at the time of the purchase.

Article (5): In case any of the two parties to the engagement discontinued it, and no conditions or norms are applied:

- a. If the discontinuation is groundless, the discontinuing party shall not recover any of the gifts presented to the other.
- b. If the discontinuation is grounded, the discontinuing party shall recover the gifts presented, if still available, or, if perished or consumed, the value thereof as of the day of presenting.

Article (6):

- a. If the engagement is terminated by the two parties, if caused by one of them, the discontinuation by the other shall be deemed grounded, and paragraph (b) of the Article (5) hereinbefore shall be applied, else each shall recover the gifts presented to the other, if still existing.
- b. If the engagement is terminated by death, or an incident prevented the marriage, none of the gifts shall be recovered.

Article (7): In all cases, perishable gifts shall not be returned.



Engagement related Lawsuits are piled up in the courts, and the judges differ on the way to deal with them. Some may decide to return the jewelry the groom presented as a gift to the bride always, and others refer the case to investigations to verify who discontinued the engagement, and accordingly decides on the entitlement; thus leading to great disparity in the decisions on this matter.

While we find some 2007 judgments of the *Masr Al-Qadima* Court returning the jewelry presented by the groom as a gift to the bride to the plaintiff with no verification, based on the right of the fiancé to recover it in all cases, we find also that in the *Shebeen Al-Kom* Court, the majority of its 2009 judgments ruling, before deciding on the matter, to refer the case to verify the one who caused the discontinuation of the engagement. This demonstrates a serious disparity in judgments which undoubtedly raises confusion amongst the parties concerned, and the ones following their case, alike.

Some real examples of this:

- The fiancé presented to his fiancée gold jewelry as a gift, then he discovered that a defect in the fiancée has been deliberately hidden from him, accordingly, upon knowing of that defect, he terminated the engagement and filed a lawsuit to recover the gift, since the reason behind the termination of the engagement lies with the fiancée who has hidden her defect from the fiancé. The case was dismissed.
- Lawsuit no. 532 of 2006, family – *al-Omraneya*, filed by a fiancé claiming to recover his gift (jewelry). The case was dismissed.
- Lawsuit no. 629 of 2008, family, *Masr Al-Gadida*, the claimant requested to oblige the respondent to return the jewelry and the expenses he paid during the engagement, a ruling was made to his favor.
- Lawsuit no. 301 of 2009, family, *Masr Al-Gadida*, filed by a divorcee petitioning to oblige the divorcer to give back to her the jewelry he seized before the divorce.

(2) Marriage

Definition

Marriage is a consensual lasting contract entered between an adult male and female, where no religious impediments exist, to build a family, the utmost goal of which is procreation and maintaining humankind; and establishing a stable family, with the care of the two spouses. *Allah* mentioned in a verse in the munificent *Quran*: (and among His signs in this, that He created from you mates from amongst yourselves, that you may find repose in them, and He put between you affection and mercy. Verily, in that are indeed signs for people who reflect.) *Ar-Rum*, 21. The scholar and *Imam Abu-Zahra* defined marriage in his book, *Personal Status*, p.19, as a “contract implying the cohabitation and cooperation between the man and the woman. It defines their rights and duties.”

Provisions in the Current Law

The current law does not contain any text defining marriage, its rules, and conditions. It employs the preponderant opinion in the *Hanafi* school, as stipulated in Article (3) of law no. 1 of 2000.

Issues with the current law

Despite the fact that marriage constitutes a key subject of the personal status law, the law has not sufficiently covered it. Therefore, marriage must be an area of interest tackled in details from the legislative perspective:

- The law contains no definition of marriage; thus leading to the spread of many kinds of marriage not regulated by the law (customary unregistered (*'urfi*), *tribal*, *sunni*...etc.)
- The law has not clearly defined the effects emanating from failing to register marriage contracts; thus leading to further problems with inheritance, paternity, marital rights...etc. Instead, the law does not allow the hearing of all lawsuits emanating from a marriage unregistered in official records but would only hear the divorce cases emanating there-from.
- The absence of an explicit text on the obligation or non-obligation of the woman to have guardianship whilst concluding the contract (*wilaya*) of marriage; thus leading to disagreements among marriage officers whether to abide by it or no.

While in the year 2000, a marriage contract was issued, containing a blank area for the spouses to list any conditions they may wish, this area is not used in the majority of cases by the majority of husbands and wives, for the following reasons:

1. Lack of adequate legal awareness of these conditions and their significance,
2. The social culture rejecting such conditions,
3. Reluctance on the part of marriage officers to sensitize the spouses of the importance of such conditions for both of them and their parents, to remove any possible embarrassment between the spouses-to-be and encourage them to express their desires to include the conditions they deem appropriate.

Proposals to address these issues

The current law should:

- Provide a stipulation defining marriage and its conditions.
- Provide a legal way to address the phenomenon of unofficial unregistered marriage (customary (*'urfi*), *tribal*, *sunni*...etc) in a manner consistent with the law.
- Maintain the minimum age for marriage at 18, and impose a deterring criminal punishment against those who breach that law.
- Ensure that neither the man nor the woman be subjected to pressure or external interference in order to get married. Also to ensure that any marriage contract entered by coercion or pressure shall be null and void. The law shall punish the parties exercising such pressure, including the payment of remedies to the party injured.
- Conditioning polygamy: to be permitted only according to controls determined by the discretion of the judiciary (for further details, please refer to the part on polygamy).



The increase of marriage age for girls to 20.4 is one of the positive indicators mentioned in the 2008 Human Development Report.

It is important to note that the percentage of women who married before the age of 18 was (44%) in 1992, and declined to (34%) in 2005. The previous figures demonstrate some progress towards observing the age of marriage, however some surveys indicated that such progress owes to poor economic conditions, not to change in societal trends, or adoption of positions opposing early marriage, given its negative impacts on the health of mothers and children (Human Development Report 2008).

- Remove the condition of guardianship (*wilaya*), especially after raising the age of marriage to an age where the two parties have legal capacity, in concordance with the *Hanafi* school.
- Specify the cases in which the marriage shall be null and void, and the consequences built thereon.
- Stipulate that a wife shall not be returned after revocable divorce without her consent, since consent is one of the main conditions to marriage.
- Stipulate that the would-be-spouses should be notified, in a facilitated, free from moral impediments manner, about their respective rights to include conditions in the marriage contract regarding the right to work and education; the status of children in case of separation, sharing of wealth acquired during the marriage, or any other condition that does not make unlawful thing lawful (*hala*) or any lawful thing unlawful (*haram*).
- List the rights and duties of the two parties in case of separation.
- Regulate the spouses' shared guardianship over the person, and money (*wilaya ala al nafs wa al mal*) of the minor during marriage and after divorce.
- Legally regulate, and disseminate the culture of sharing the wealth accumulated during the marriage, where each has contributed in the accumulation of such wealth (here, housework carried out by the woman is deemed as work of financial value that should be calculated as her contribution to the wealth accumulated during the period of marriage).

Examples of legal texts from Arab and Muslim countries laws addressing the issue:

Kuwaiti family law:

Article (40):

- a. If the marriage contract is associated with a condition that contravenes with the origin thereof, the contract shall be null and void.
 - If associated with a condition not contravening with the origin thereof, but contravening with the requisite thereof, or was religiously unlawful, the condition shall be invalidated, and the contract shall be valid.
 - If associated with a condition not contravening with neither the origin nor requisite thereof, and it is not religiously unlawful, the condition shall be valid and fulfilled. If not fulfilled, the party, to whose favor

the condition is made, shall enjoy the right to terminate the contract.

- The provision contained in the paragraph hereinbefore stated shall apply when the named statement conditioned in one of the spouses ceases to exist.

Article (41): the conditions must be noted in the contract document.



- Lawsuit no. 58 of 2009, family – *Agouza*, filed by an Egyptian wife married to a Saudi man by a customary (*'urfi*) contract and wanted to prove the marriage. The case was dismissed pursuant to Article (551) of the civil code stipulating that matters pertaining to personal status may not be subject to reconciliation.
- Lawsuit no. 878 of 2007, family – *Helwan*, filed by a claimant requesting to prove his customary (*'urfi*) marriage with the respondent – as he has known of her marriage to another man, so he filed an adultery case. The criminal court asked him to prove the marriage first.
- Lawsuit no. 588 of 2008, family – *Al-Khaleefa*, filed by a claimant requesting to assert her customary (*'urfi*) marriage to the respondent who denied it.
- Lawsuit 874 of 2007, family – *Masr Al-Gadida*, filed by a claimant requesting to oblige the respondent to pay her the amount of two hundred thousand Egyptian Pounds, the value of the dower. She availed the witnesses. A decision was made to her favor, and endorsed by the appeal, despite the denial on the part of the respondent and the witnesses he has availed. In another instance, *Madinet Nasr* court dismissed such a claim.
- The prosecution general proceeded with many lawsuits against some marriage officers (*ma'dhun*) for marrying children below the legal age. The marriage officers argued that they have obtained permission from the judge, claiming that the judge serves as a guardian (*wali*) for those who have no guardian.
- Al-Ahram newspaper, in its edition no. 44973 on 18th of December 2009, p.9, published a statement by the prosecutor general on finding out about 9351 incidents of child marriage registered by marriage officers in the period from January to November 2009, though this is criminalized by the Penal Code and Child Law. The press covered the judgments made against the violators, which were a fine of one hundred Egyptian Pounds only.

(3) Obedience (*Taa'a*)

Definition

Obedience is a legal obligation since Islamic *Shari'a* has made marital rights and duties mutual and complementary. While the husband is obliged to provide for the wife within his capabilities, the wife is obliged to obey him. Obedience is manifested in the wife's dwelling in the matrimonial house made for her by the husband, provided that she feels that her person and money are safe there. The law decided that when any of the two parties fails to fulfill their duties in that respect, they shall, accordingly, lose their corresponding right. If the wife failed to dwell in the safe matrimonial house, she would lose her right to the husband's maintenance. Dwelling in the matrimonial house is called obedience (*taa'a*), and failing to do so labels her disobedient (*nashez*). In the first case, the husband is obliged to provide for the wife, in the second, he is not. It is important to note that before the enactment of law no. 100 of 1985, the husband could file a lawsuit against the wife who abandons the matrimonial house to force her to return to him, and the decisions would be executed by force. Such a legal stipulation is now repealed for being unjust and in contravention with the religion and culture.

The provisions in the current law

Obedience (*Taa'a*) is regulated by article (11 m, second) of law no. 25 of 1929, amended by law no. 100 of 1985, stating that: "if the wife unduly refrained from obeying the husband, the husband would hold the maintenance as of the date of refrain. A wife shall be deemed as unduly refrained if she failed to return to the matrimonial house after having received an invitation from the husband to return delivered by a clerk to her or whosoever represents her in the form of a notification. The husband shall indicate the house in such notification."

Issues with the current law

- Obedience (*Taa'a*) has been maliciously abused by the husbands against their wives to evade fulfilling their financial obligations towards them.
- Challenging the "obedience warrant" by the wife shall be made within 30 days as of the date of receiving the notification. The challenge requires that the matter be presented to the Mediation Office which shall decide on the

matter in 15 days; thus many related lawsuits may be dismissed for being filed after the deadline. One should note that the period of 30 days includes the receipt by the wife of the notification, accessing a lawyer, and seeking the Mediation Office.

- Difficulty to prove the failure on the part of the husband to keep safe the person and money of the wife called for obedience.
- Difficulty to prove that the obedience house is, if replaced by the matrimonial house, improper.
- Addressing the notification to a wrong address for the wife by the husband, for the court to decide, irrevocably, in favor of the husband that the wife is "*nashez*"; thus enabling him to evade fulfilling his financial obligations towards her.
- Sending many notifications to the wife within short intervals, as the husband would send a second notification before a decision on the first one is made.
- The sense of humiliation felt by the woman at being labeled "*nashez*", especially that society has not forgotten the previous negative enforcement effects arranged by the law against the woman deemed "*nashez*". The same applies to the word "Obedience" which may diminish the woman's dignity. There are other words which serve the same purpose but have no negative impact, like: "mutual commitments".

Proposals to address these issues

- Using the term "mutual commitments" instead of the word "*Taa'a*"; and the word "failure to comply" instead of *noshooz*, while maintaining the effects rendered by both terms.
- Stipulating that objection to the warrant in thirty days shall start as of the end date of the period specified for the Mediation Office.
- Stipulating that a warrant addressed by the husband shall not be accepted as long as there is a warrant already being deliberated in the courts and no final decision is made thereon, or the deadline specified for the renewal thereof has elapsed if it had been written off.
- Associating the dismissal of such a lawsuit with financial fines on the husband to prevent any abuse of the said right.



Lawsuit 201/2009, family, *Masr Al-Gadida*, filed by a wife to object to an “obedience warrant”. She proved that she used to live in *Al-Agouza* area, and the house where she is required to execute the warrant is located in deserted place in *Al-Obour* area; thus driving her to petition for divorcing herself for the irrevocability of her resentful affections towards her husband.

Examples of legal texts from Arab and Muslim countries laws addressing the issue

Moroccan Family Code (*Mudawana*)

Article (51): The mutual rights and duties between spouses are:

1. Lawful cohabitation on the basis of good conjugal relations, justice, equality in case of polygamy, mutual fidelity, virtue, and the maintenance of chastity, and preservation of honour and offspring;
2. Amicable cohabitation, mutual respect, affection, and mercy; and the preservation of the family interest;
3. The wife’s assuming with the husband the responsibility for managing and caring for the household and children’s affairs;
4. Consultation on decisions concerning the management of family affairs, children, and family planning;
5. Kind treatment, respecting, visiting, and amicably desiring the visit of each other’s parents and mahram (the ones with whom one cannot consummate marriage);
6. The right to inherit from each other.



(4) Maintenance / Alimony

Definition

Maintenance is what people need of food, clothing, shelter and services that enables them to exist and saves them the embarrassment of asking others. Spousal maintenance is an obligation on the husband towards the wife during the marital relation as long as there is no reason to withhold it – the father is also obliged to maintain his children.

Provision in the current law:

The provisions on maintenance are regulated in the codes 25 of 1920 and 25 of 1929, as follows:

Code no. 25 of 1920:

Article (1): the husband should provide spousal maintenance for his wife as of the date of concluding a valid contract if she surrendered herself to him, or even if per provision, even if she is affluent, or embracing a different religion. The ailment of the wife shall not be a barrier against her entitled to the maintenance. The maintenance shall include food, cloth, shelter, costs of medical treatment, and other things required by *Shari`a*. The wife should not deserve the maintenance if she apostatized, or refrained from duly surrendering herself to the husband, by her choice, or was obliged to do so for reasons not emanating from the husband, or went out without his permission.

Following are reasons which do not drop the right of the wife to maintenance:

- If she went out of the house without the permission of her husband in the cases lawfully permitted as per a provision or norm or necessity.
- If she went out for legitimate work unless it becomes evident that her use of such a conditioned right is combined with abuse of such right, or contravening with the family’s interest and the husband asked her to leave the work.

The wife’s maintenance is deemed a debt on the husband as of the date of his abstention from providing for her when he was obliged to do so. Such debt shall drop only if paid or excused. A maintenance case shall be

considered only if filed for a lapsed period not longer than a year, the end of which is the date of filing the case. A husband's upholding to make a clearance between the wife's maintenance and a debt she owes him shall be accepted only if it is beyond the fulfillment of her basic necessities. The money of the wife's maintenance shall have superiority over all the husband's funds, and comes above other maintenance debts.

Article (2): as in the article hereinbefore, the alimony entitled by a divorcee shall be a debt as of the date of divorce.

Article (4): if the husband failed to provide maintenance for the wife, and if he possessed apparent money, the spousal maintenance judgment shall be enforced using that money. If he possessed no apparent money, nor has he stated his situation as being affluent or unable to pay, but insisted on not paying the spousal maintenance, the judge shall divorce the wife instantly. If the husband claimed poverty but failed to prove so, the enforcement of the divorce judgment shall be deferred; and if he proved so, a period not exceeding one month shall be given. If he failed to provide, divorce shall be enforced.

Article (5): if the husband is away for a short period, and if he possessed apparent money, the judgment on provision of spousal maintenance shall be enforced using such money. If he possessed no apparent money, the judge shall, following the ways known, excuse and give him a grace period, if he failed to send the money the wife can use to support herself, or be present to support her, the judge shall enforce the divorce judgment after the lapse of the given period. If the husband is away for a long time, inaccessible, in unknown residence, or missing, and it is proven that he possessed no money for the wife to use in supporting herself, the judge shall make a divorce judgment. The provisions contained in such an article shall apply to the imprisoned husband unable to provide spousal maintenance.

Article (6): the divorce ruled by the judge for failure to provide for spousal support is revocable. The husband may return his wife if proven of financial capacity and willing to provide during the waiting period after divorce (*Idda*). If his financial capacity to provide is not established, and he is not

willing to provide maintenance, returning the wife shall be invalid.

Law no. 25 of 1929

Articles 16 & 18 (bis), second, regulated the spousal maintenance as they stipulated that:

- The amount of a wife's maintenance shall be determined according to the financial situation of the husband at the time of entitlement in terms of being capable or incapable of paying, provided that in case of incapability of paying, the maintenance amount shall not be less than what would fulfill the basic needs.
- In case the grounds and conditions for the maintenance entitlement are not yet established, the judge may rule for the provision of temporary maintenance for the wife and her children from the husband, with an uncaused judgment to be enforced immediately within two weeks maximum (for her basic needs) until an enforceable maintenance judgment is made.
- The husband may make a clearance between the temporary maintenance already paid and the final specified amount, provided that the amount received by the wife and her children shall not be less than what would fulfill their basic needs.
- If the children own no money, their father should provide for them. Such provision shall continue until the daughter gets married or earns what would sufficiently cover her expenses, and until the son reaches the age of 15 and becomes able to decently earn his own living. If the son reached that age and was unable to earn his living for a physical or mental disease, or for seeking and preparing for proper education like his peers, or for difficulty in earning that living, the father shall continue to provide for him.
- The father shall be obliged to provide maintenance and housing for his children according to his capability and in the manner ensuring that the children live in a decent standard like their peers.
- Children maintenance shall be entitled as of the date of the father's abstention from providing for them.
- Law no. 11 of 2004 on the Family Insurance Fund shall regulate the disbursement of maintenance money from the Family Insurance Fund.

Issues in the current law

- Putting the legal condition that a maintenance case shall be accepted only for the one year preceding the initiation of the case by the wife wastes the wife's rights; especially that in such a case, the wife would have to expediently recourse to the court once the husband fails to provide. It's known that when a dispute is speedily brought to court, it would reduce the chances of reconciliation.
- Difficulty of enforcing the maintenance judgments; especially if the husband is self-employed, given the bureaucratic procedures followed within the Family Insurance Fund, or when the amount determined in the judgment exceeds the amount adopted by the Family Insurance Fund.
- Rejection by the Family Insurance Fund to implement the reconciliation order issued from the Mediation Office.
- Ruling very little amounts of money insufficient to address basic life needs.
- Difficulty in establishing the financial assets owned or the income earned by the husband, and failure to operationalize the role of the Family Prosecution in this respect despite being set forth in the Family Courts Law.
- Filing an arrest case for failure to pay the lump-sum of the maintenance/alimony necessitates the repetition of the same procedures of the maintenance/alimony judgment; thus constituting a financial and psychological burden on the wife and children; and prolonging the litigation process, especially that arrest cases may not end up with a judgment of arrest if the investigations proved that the husband has the capacity to pay on installments.
- Lack of recognition of the implementation force implied in the maintenance arrest warrants issued by the Mediation Office.
- A Prolonged litigation process to offer reconciliation, and repeating the notification process, which is unjustifiable in the maintenance arrest cases.
- Dismissal of maintenance cases if filed by someone other than the child who has turned 15.
- Failure on the part of the legislator to explicitly state the expenses of education, treatment, marriage, furniture, and cover to avoid confusion and contradiction among the judges' rulings. The legislator mentioned only the cost of treatment in article (1) of law no. 52 of 1929. Yet, the wording of such text is ambiguous and vaguely understood as if the legislator has

meant that the treatment expenses constitute an element in the husband's maintenance for the wife, while this has not been in any way the meaning

This led to the following:

- Increased number of women heading households.
- Many women, especially that the majority of them are poor, illiterate, and unqualified to work, had to work in marginal informal jobs outside the legal protection umbrella (i.e. without social or health insurance). They are also subjected to risks and violence; thus negatively affecting their performance of work; or adversely impacting the psychology and health of these women and their children, and consequently the society at large. This would ultimately lead to serious set-backs in achieving the aspired development.
- The widely spread phenomenon of street and homeless children, as it is established that the majority of these children come from broken homes.
- Increased percentage of drop-outs from the education system, as it is established that family fragmentation leads to difficulties in school achievement; and subsequently to drop out from education.
- Child labor, as the failure of the husband to provide, and the postponed enforcement of alimony maintenance judgments force children to work, even if in risky occupations, to support themselves and the rest of the family.
- The maintenance amounts decided are minimal and insufficient to fulfill the basic and educational needs of the child, so consequently forcing him/her to work to be able to continue the education. This does not exempt the need for the father's provision. But when the father submits papers proving the child's work, the court drops the maintenance due by the father without any study or examination; forcing these children to drop out from education.
- Raising suspicions about the role assumed by the Mediation Office after the rejection to implement the agreed mediation/reconciliation orders; thus undermining the objective behind its establishment.
- Many judges and litigants confuse maintenance on the one hand, with the expenses of treatment, education, marriage, furniture and cover allowance on the other hand. In many cases, the rights are wasted because of such confusion and non-existing explicit provision covering all these items. Therefore, the legislator's interference is necessary.
- In imprisonment cases of husbands failing to pay maintenance, confusion

abounds on the criteria concerning the “capability to pay”. If investigations proved the incapability to make one full payment by the husband, but to pay on installments, he will not be arrested, as if we are rewarding husbands who declined to pay in full, but proven by the investigation to be able to pay on installments, by not arresting him; accordingly, undermining the provision. The same applies to the cases when judgment to pay on installments is made, and the respondent pays the first installment then refrains from paying the rest, where the respondent will not be arrested.

- The husband or divorcer may involve his parents or any of them, or his new wife in a fabricated judicial dispute by having them file for a maintenance case to divide his finances, when the amount of maintenance/alimony is determined, between them and the divorcee and her children.

Proposals to address these issues:

- Stipulating that the wife shall enjoy the right to file for maintenance for a period exceeding one year prior to filing the case, as is the case applied to the child petitioning for maintenance for a period exceeding one year as of the date of filing the case.
- Exempting maintenance/alimony cases from the reconciliation condition stipulated in maintenance/alimony lawsuits.
- Establishing temporary maintenance/alimony as obligatory when filing a case “even if such is not claimed”. The Family Insurance Fund may undertake the payment until maintenance/alimony is established by a judgment.
- Establishing the minimum amount of maintenance/alimony to be equivalent to the level of subsistence, with no consideration to the capabilities of the party committed, provided that the Family Insurance Fund shall pay the balance between the financial capability of the committed party and the level of subsistence. Such shall be stated in the judgment.
- Eliminating the possibility of resending the notification to avoid prolongation of the litigation process.
- The maintenance/alimony judgment should include obligation to pay or arrest in case of abstention. Adjusting the period of arrest against the continuation in failing to pay shall be regulated.
- A claim to increase, or decrease the maintenance/alimony amount agreed or judicially determined shall be accepted only after the lapse of one year from the date of agreement or judgment.

Examples of legal texts from Arab and Muslim countries laws addressing the issue

Moroccan Family Code (*Mudawana*):

Article (51): mutual rights and duties between spouses are:

- a. The wife shall, with the husband, assume the responsibility for managing and caring for the household and children’s affairs.

Kuwaiti Family Law:

Article (77):

- a. The maintenance/ alimony amount may be increased or decreased according to the change in the situation of the husband or the prices prevailing in the country.
 - Cases claiming to increase/decrease the maintenance/alimony shall be considered before the lapse of one year since the judgment has been made only in emergency exceptional cases.
 - The increase or decrease shall come into effect as of the date of the judgment.

Article (78): A case for a lapsed period exceeding two years ending at the date of filing the case shall be heard only if consensually obligated.



- While we find that the majority of judgments made by *Masr Al-Qadima* court in 2007 rule that the respondent should be arrested even in case of failing to pay one of the installments, we also find many other courts dismissing the case because the investigation has simply implied a capability to pay on installments.
- Sahar is married to a man working as a sales tax officer who earns a monthly salary of about LE 2000, owns two apartments and rents them, in addition to a commercial store in the Cairo downtown area, meaning he is affluent. The court has, though, specified in its judgment the amount of LE 250 only for the claimant and her children.
- Kawthar had a judicial maintenance judgment against her husband. The enforcement warrant has been delivered stating that the judgment shall take effect through Bank Nasser. The Bank asked her to bring a certificate from the clerks stating that the notification has already been completed.
- Case no. 670 of 2006, Family Court, Maadi, ended up with a judgment stating that the child maintenance shall be LE 30 (approximately 6 USD/month), and custody maintenance shall be LE 10 (approximately 2 USD/month).

(5) Custody

Definition

Custody is the guardianship for raising, with a view to preserving, rearing the child who needs care, including food, drink, cleaning, and protection from harms. Custody is a duty of the two parents together as long as the marital relation exists. The main pillar is the interest of the child.

Provisions in the current law

The current law regulated custody in Article (20) of law 25 of 1929, replaced by law no. 100 of 1985, and law no. 4 of 2005, stipulating that:

“the right to custody shall fall once the child turns fifteen. After reaching that age, the judge shall let the child choose to stay with the custodian without support till the boy reaches the age of legal majority and the girl gets married. The right to custody shall be given to the mother, then women mahrem (kin relatives with whom marriage cannot be consummated) from the maternal side before the paternal side. The women mehrem from the two sides are ordered as follows: the mother, then the maternal (great) grandmother(s), then the paternal (great) grandmother(s), then sisters, then maternal sisters, then paternal sisters, then the of full-sister’s daughter, then the maternal sister’s daughter, then the maternal aunts as per the their order among the sisters, then the paternal sister’s daughter, then the brother’s daughters in the stated order, then the parental aunts in the stated order, then the mother’s maternal aunts in the sated order, then the father’s maternal aunts in the stated order, then the mother’s parental aunts in the stated order, then the father’s paternal aunts in the stated order.”

If no custodian is found among those women, or none of them is eligible to custody, or the period for women custodianship has lapsed, the right to custody shall be transferred to the male blood relatives as per the order of entitlement to inheritance, observing that a sound grandfather shall come superior to the brothers. If none of the aforementioned is found, the right to custody shall be transferred to non-blood male mahram, in the following order:

Maternal Grandfather, then maternal brother, then the maternal brother’s son, then the paternal uncle, then the maternal blood-uncle, then maternal uncle who is mother’s paternal half-brother, then the maternal uncle who is mother’s maternal half-brother.

Issues in the current law

- Child custody warrants issued by the prosecution are met in many cases with quarrels and manipulation by the party having the child’s custody to prevent the other party from executing the warrant.
- The father comes very late in the order of custodians; thus violating the right of the father to care for his child.
- The mother is deprived of the child’s custody when she re-marries. She gets it back when she gets divorced, with no observation to the interest of or the acceptance of the child.
- Once the mother gets married to a stranger to the child, the child ceases to be in her custody, with no observation to his need for her, or his special conditions, like being of young age and sickness...etc.

Proposals to address these issues

All the aforementioned issues require intervention by the legislator to make amendments including the following:

- The marriage of the custodian mother shall not prevent her from having custody over her children, if this is in the interest of the child, especially in special conditions like being with disability, as young as 7 years old, sick needing her care...etc, provided that in such a case, she shall not be entitled to the custodial house payment, else, the matter shall be left to the discretion of the judge and determination of the interest of the child.
- Reconsidering the father’s placement in the order of those who are to be awarded the custody over the child, to come right after the mother; thus achieving the best interest for the child.
- Enforcing the provisions contained in Article (292) of the Penal Code stipulating that any of the parents or grandparents shall, if failing to deliver back the child or grandchild to the one entrusted with the custody as per the warrant issued from the judicial body on the custody or preservation of the child, and any of the parents or the grandparents who kidnapped, by himself/herself or by others, from the ones who, by a warrant issued from a judicial body, are entitled to have custody or preservation of the child, even if such is done with no manipulation or coercion, be penalized by no more than one year imprisonment, or no more than five hundred Egyptian Pounds fine (the maximum threshold for the fine has been raised by virtue of law no. 29 of 1982. Earlier, it has not exceeded fifty Egyptian Pounds).

Examples of legal texts from Arab and Muslim countries laws addressing the issue

Bahraini Family Code

Article (89):

- a. The judge shall decide to award the child custody to the mother as necessitated by the child's interest.
- b. The custody shall be rewarded to the one, from whom it has dropped, once the reason for dropping ceased to exist.

Article (91):

- c. In observation of the best interest of the child, the judge may seek psychological and social specialists and experts when making a custody judgment.

The Law of the United Arab Emirates:

Article (146)

The right to child custody shall be awarded to the mother, then to women *mahram*, where priority shall be given to those from the maternal side over those from the paternal side, and the closest kin from the two sides, except for the father, in the following order; provided that the judge should, while deciding on the matter, take into consideration the interest of the child under custody:

- a. The mother,
- b. The father,
- c. The maternal (great) grandmother(s),
- d. The paternal (great) grandmother(s),
- e. Sisters, full sister first, then maternal half sister, then paternal half sister,
- f. Daughter of a full sister,
- g. Daughter of a maternal half-sister,
- h. Maternal aunts, as per their order among sisters,
- i. Daughter of paternal half-sister,
- j. Daughters of brother as per order among brothers,
- k. Paternal aunts in the order mentioned,
- l. Mother's maternal aunts in the order mentioned,

- m. Father's maternal aunts in the order mentioned,
- n. Mother's paternal aunts in the order mentioned,
- o. Father's paternal aunts in the order mentioned.



- Judgments settling disputes on giving the child to the party awarded the right to custody usually experience obstacles when being implemented; thus requiring that the implementation be undertaken for the prosecution "by the police", until the child is handed to the party, to whose favor the judgment has been made. The clerk department should not be the entity enforcing the judgment.
- In many cases, the father might be shocked by the death of his wife, then another shock when the children are taken away from him to be under the guardianship of the maternal grandmother or whosoever following her in the order till his turn comes. Mostly, given the current order, the children reach the time when the custody could be given to the father in very rare cases.
- In many instances, the mother would be divorced from the husband who is a stranger to the child with a view to regaining the child; which might be harmful to the child, whose stay with the new custodian may be to their interest. It may be disturbing to the child to be raised in different environments at different times and could have negative impacts on their upbringing.
- Case no. 36 of 2008, family-*Masr Al-Gadida*, filed by a wife of foreign nationality against her Egyptian husband, petitioning for custody of her child with him. Despite the fact that the Prosecution issued a warrant establishing her entitlement, the court overruled her claim.

(6) Visitation

Definition

It is defined as enabling the non-custodian party by the custodian to visit the child. The objective of visitation is to strengthen kinship relations which are a right towards origin and branch relatives.

Provision in the current Law

Article 20 of Law No. 25 of 1929 regulates visitation as follows:

“Each parent has the right to visit their male or female child, and when parents do not exist, grandparents shall enjoy a similar right. In the event an agreement could not be reached for organizing visitation, the judge shall organize thereof. Nevertheless, it should take place in a location that is not psychologically harmful to the child. Further, visitation judgments should not be executed by force. But if the person keeping the child refrained from executing the judgment for no obvious reason, the judge shall give them a warning. The judge may, in case this attitude recurred, transfer custody, on a temporary basis, to the successor among those who own this right for a termed period according to his discretion by virtue of an enforceable judgment”.

Issues in the current law

- Obduracy of the child guardian in terms of preventing the other party from visiting the child for vengeful reasons.
- Obduracy of child custodian by objecting to the location of visitation selected by the other party, even though, it could be the best and most adequate to the child’s psychological status.
- Social workers who attend the execution of the visitation judgment are not properly qualified. Such elements may play an important role in mitigating tension among both parties of visitation in a manner that communicates joy and sense of security to the child.
- The grandfather, grandmother and relatives are not entitled to visit the child which breaks inter-kinship relations.
- Either party might use visitation judgments in order to plot against the other. For example, a party may obtain a visitation judgment obliging the custodian to go to the assigned location. However, out of harmful intentions, the party

who obtained this judgment fails to show up or shows up few minutes before the end of time in order to prove that the custodian has left.

Proposals to address these issues

- Regulating monitoring of and supervision over the execution of visitation judgments and locations of execution.
- Adjudicating visitation cases through a one court level (i.e. with no recourse to appeal) or placing them under the jurisdiction of the Judge of Urgent Matters.
- Stipulating the right of grandparents, uncles, and aunts (paternal and maternal) to visit the child even at the presence of parents taking into consideration the best interests of the child.
- Making the General Prosecution the body having jurisdiction in making urgent decisions until a judgment is made thereof. This procedure is similar to the ones applied in possession disputes and child delivery orders.
- Imposing penalties the majority of which are financial on the party that refrains from executing visitation decision or judgment in addition to other punishments stipulated by the Law.
- Stipulating the right of the non-custodian to host the child under custody during long and short holidays. In this regard, the best interest of child must be observed, as well as providing sufficient guarantees to ensure that the non custodian party shall not keep the child after termination of this term. In addition, aggravating the punishment, currently applied according to Article 292 of the Penal Code, over one who hosted a child and failed to give it back to custodian.
- In case of hosting, the child should not travel without permission from the custodian.

Examples of legal texts from Arab and Muslim countries laws addressing the issue

Bahraini Family Law:

Article (93):

- a. A non custodian parent has the right to visit and be visited by the child according to the judge’s discretion or in a manner that does not inflict psychological harm on the child.

- b. Visitation judgment shall not be executed by force. In case the party having the child refrained from executing the judgment without an obvious reason, the judge shall give warning. In case this action recurred, the court may urgently transfer custody to the successor among those who own the right for a term to be decided by the court. This judgment shall be immediately self-executing.

Emirates' Family Code:

Article (154): In case the child is in the custody of either of the parents, the other shall be entitled to visit the child, be visited by the child and accompany him/her according to the judge's decision, provided that the place, time and assigned person to escort the child shall be assigned by the judge.



- Many cases being examined in courts resulted from obduracy of either parties. This clearly manifests in objections made against visitation locations just for mere objection.
- In the lawsuit number 401 of 2009, *Markaz Shebeen*, filed by a father petitioning for visiting his child, the mother appeared and did not make one single claim. The lawsuit had been postponed for judgment. Why an agreement about visitation had not been possible instead of taking the lawsuit to court according to this assumption? It is worth noting that the lawsuit had been referred to the Mediation Office before Court. However, settlement had not been reached although location of visitation was the same in both the lawsuit and before the reconciliation office.



(7) Divorce (*Talaq*) and processing divorce by third party (*Tatliq*)

Definition

According to *Shari`a*, divorce is defined as dissolving the marital bond by pronouncing the explicit divorce word or a legally accepted phrase serving the same purpose. It should be pronounced by the party who owns this right, i.e. the husband or his deputy. Terms used in describing this type of divorce in the present time, among others, are:

- Divorce by unilateral will.
- Arbitrary divorce.

Processing divorce by a third party (*Tatliq*) is when the wife requests to be divorced from her husband by resorting to court. However, this type is bound by certain conditions. Divorce or processing divorce by a third party is classified under three types: revocable, minor irrevocable, and major irrevocable.

- **Revocable divorce:** It is applied for a single divorce only, nevertheless, the husband, after enforcing this divorce, owns the right to take back his divorced wife to the marital bond during her waiting period (*Idda*). In this event, a new contract shall not be necessary whether or not the wife accepts.
- **Minor irrevocable:** This type of divorce is when husband is incapable of taking back the wife except with her consent, and under a new contract and dower (*Mahr*) either during or after the end of the waiting period.
- **Major irrevocable:** It is when divorce is pronounced for the third time whereby husband is not entitled to take back the wife unless she enters into another sound and physically consummated marriage. Then this marriage ends by divorce and termination of waiting period or death of the new husband.

Provision and issues in the current law

(A) Divorce:

Provision of the current law

The currently applied law lacks a straightforward provision defining divorce with the exception of the drunken divorce (Article 1) and conditional divorce (Article 2) of Law No. 25 of 1929. Therefore, divorce matters are referred to

the most relevant opinions in the *Hanafi* school of thought in enforcement to Article 3 of the clauses enacting Law No. 1 of 2000. Others refer to some of the Islamic legal opinions (*Fatwas*) issued by Muslim scholars.

Issues

- The husband's obduracy and abuse in using his right to divorce.
- Although the law had obliged the husband to register the divorce in a maximum of 30 days of the divorce utterance, yet, husbands, in some cases, deliberately fail to register verbal divorce whereby wives have to resort to filing a lawsuit for establishing the divorce. The minimum evidence of proof is testimony of witnesses. She might not be able to identify witnesses for such an incident which usually occurs behind closed doors.
- The woman shall be subjected to two waiting periods upon registering and verbal divorce (the Islamic *Shari'a*'s waiting period is calculated as of the divorce's pronouncement date and the legal divorce's waiting period is calculated as of the divorce's registration date).
- Some husbands deliberately do not inform the wife of her divorce which she discovers after his death. In such a case, she is deprived of inheritance although he might have continued having sexual intercourse with her despite the divorce without her knowledge.
- Inventing issues about the type and effect of divorce according to the wording used whereby *Fatwas*, which differ from one scholar to another, become the reference.

(B) Processing divorce by third party (*Tatliq*):

The relevant position of the law as well as the consequent issues, differs according to the type of divorce by a third party as follows:

1st: Processing divorce due to imprisonment: Article 14 of Law No. 25 of 1929

"The wife of a detainee, who is judged by a final, liberty-restricting sentence to three years and more, shall be entitled to request from the judge after one year of imprisonment to apply a minor irrevocable divorce from this husband due to being subject to harm even if the husband owns money sufficient for her to spend from".

Issues

- The condition defining a 3 year sentence, and the lapse of one year thereafter, is unjust to women; especially to those who are unable to bear such a long period which might extend to many years until the husband is caught or executes the sentence. "*O`mar Ibn Alkhattab* (3rd Muslim *Khalifa* and companion of the Prophet *PBUH*) asked his daughter *Hafsa* about how long a wife might bear her husband's absence. She replied: 4 months". Noting that the Law ignored cases when husbands are detained for long periods.
- The Law failed to consider wives whose husbands are sentenced with multiple judgments during successive periods, yet, none of those periods extend to three years.

2nd: Processing divorce by third party (*Tatliq*) for harm: Article 6 of Law No. 52 of 1929

"If the wife claimed being victim of harm by her husband whereby continuing the cohabitation becomes impossible, she may request the judge to separate them. In this event, the judge applies a minor irrevocable divorce if harm is proved and he has exhausted all means for reconciliation in vain. In case the claim had been dismissed, yet, the complaint had been recurrent and still harm had not been proved, the judge shall send two arbitrators and rule as indicated in Articles (7, 8, 9, 10, 11)".

Issue

- It is hard to prove harm such as in case of beating incidents because the Law stipulates the necessity of two witnesses thereof. Usually, beating takes place in locations where only the spouses are available. Moreover, the Law does not consider the testimony of children and parents.
- There is discrimination inflicted on different women who are exposed to similar harm. Article 6 of Law No. 20 of 1925 stipulated that harm should be of the type that renders the continuation of cohabitation between such spouses impossible. To this effect, it discriminated between women exposed to beating, humiliation and insult by their husbands, as all this shall be deemed harmful only according to the level of awareness of rights and other psycho-social factors.

3rd: Processing divorce by third party (*Tatliq*) for illness “defect”: Article 9 of Law No. 52 of 1920

“A wife is entitled to petition for separation from her husband if she discovered he suffers incurable chronic disease (defect) or might be cured after a long period, such as madness or leprosy. Under such conditions, by cohabiting with him, she shall certainly be exposed to harm whether the husband had been inflicted with this defect before the conclusion of the marriage contract and she was not aware thereof or occurred after the contract’s conclusion and she is unsatisfied therewith. Separation is inadmissible in case she entered into marriage with prior knowledge of the defect or the defect occurred after the contract and she accepted it after being aware of it either explicitly or implicitly.”

Issues

- Setting a condition or expectation of long term patience in order to ensure whether or not the disease might be cured is unjust to some women who are unable to endure such a situation. This in turn shall expose those women to psychological and health pressures or they may adopt behavior displeasing to *Allah*.
- Setting a condition that the woman should not be knowledgeable of the disease or defect prior to contract, or was aware and accepted is also a prejudice against the woman who shall discover by physical interaction and cohabitation that she is unable to continue with the marriage. This shall also result into the aforementioned consequences.

4th: Processing divorce by third party (*Tatliq*) for absence

- Article 21 of Law 52 of 1929 stipulates: “In the event of the husband’s absence for one year or more without an acceptable excuse, it is permissible for the wife to petition for the judge to process a minor irrevocable divorce if harm befell her due to the husband’s absence, even if he had sufficient money she could use to cover her expenses”.
- Article 31 of the same Law stipulates: “if it is possible to send the absent husband messages, the judge shall send to him setting forth a time period and warning him that the judge shall process her divorce if the husband failed to return and live with her, bring her to live where he does, or divorce her.”

In the event that this time period ended, and the husband failed to comply and express an acceptable excuse, the judge shall separate between them by means of a minor irrevocable divorce. Otherwise, if the absent husband is inaccessible by messages, the judge shall process her divorce from the husband without giving any warning or setting terms.

Issues:

- The long time period stipulated in the law to establish the husband’s absence as a justification for processing divorce by a third party.
- The Law defined conditions for processing divorce by the third party due to absence (that absence had been for one year or more-husband must be in another country-absence without a valid reason-women endured physical harm because of the husband’s absence).
- In some cases, such conditions might be unjust as the husband might be living in the same country, however, does not go to her place, or what the husband sees as a valid reason might not be the same to her (such as a husband who works overseas for tens of years under the pretext of securing the children’s future...). The first aspect is regulated by divorce for abandonment, as for the second, judges rule with processing divorce by third party.
- The Court allows the husband a grace period to restore his relation with his wife, or bring her to his place of residence. However, this part is not subject to the rulings of the Procedural Law which leads to the prolongation of the litigation process.

5th: Processing divorce by third party (*Tatliq*) for taking another wife

Article 11 bis: “A husband should declare his marital status in the marriage contract, in case he is married he should state his wife/wives names who are in a marriage bond with him, and their place of residence and the marriage officer should notify them with the new marriage by an acknowledged registered mail. It is permissible for the wife whose husband took another wife to petition for divorce if she had been subjected to physical or moral harm whereby life becomes impossible between them. This shall apply even if she did not stipulate in the marriage contract that the husband should not take a second wife. In case the judge failed to reconcile between them, she would receive a minor irrevocable divorce.

But a wife who becomes aware of her husband's remarriage for over one year shall not be entitled to enjoy this right as long as she has accepted the situation either explicitly or implicitly. Her right to petition for divorce shall be renewed every time her husband re-marries. In the event that the new wife was unaware that he is married to another woman, and it was revealed that he is married, she is entitled to seek divorce thereof".

Issues

- It is difficult to prove the husband's other marriage if it was a customary unregistered marriage (*`urfi*).
- The condition defining one year as of the date of the wife's knowledge to file the lawsuit is also denying the woman's right. In many cases, customs require the woman to practice patience with her husband hoping he improves. This shall waste the one year time period set forth by the Law.
- Discrimination between different women according to their respective social and educational status. In this respect, the second marriage of a husband is deemed sheer harm to one kind of woman and not another.
- A man is incapable of being completely just between the two wives or his children from them, or providing necessary financial means to support both families, whereby a generation of psychologically disordered children will emerge. In many cases, hatred, and disputes might prevail among half brothers and sisters. Other consequences might include child labor, and dropping out of schools as previously mentioned.

Proposals for addressing such issues

Divorce:

It is necessary to define divorce as the dissolution of the marital covenant that could be practiced by both husband and wife, each according to their own conditions, under the supervision of the judiciary and according to the provisions contained in this law. In this respect, the following must be underlined:

- Divorce is an inherent husband's right, however, when he wishes to proceed with it, he should resort to court for establishing and registering the divorce. To this effect, all established entitlements of the wife and children consequent to the marriage contract and the divorce by a third

party shall be ruled for.

- Applying a penalty for the failure to register the divorce before the judge.
- Facilitating the procedures of establishing verbal divorce by virtue of witnesses' testimony and endorsing the testimony thereof by hearing the husband.
- Deeming any breach to the conditions contained in the marriage contract a harm that justifies requesting to process divorce by a third party.

Processing divorce by a third party (*Tatliq*):

Processing divorce by third party for marrying another woman:

A wife may petition for divorce immediately upon the husband's taking of another wife notwithstanding the establishment of harm, rather, harm shall be deemed established instantly when the husband takes another wife without requesting to prove this harm.

Divorce for absence:

- Decreasing the time period stipulated by the legislator, during which, the wife may resort to court and request divorce to only six months.
- Subjecting the husband's warning to return and live with his wife or bring her to live where he does to the rulings of Procedural Law.
- Considering the wife's resorting to petition for a divorce, as a decisive evidence of suffering harm.

Processing divorce by a third party because of illness "defect":

A wife who married an ill man and knew about this illness before marriage should not be deprived of the right to request divorce subsequently because of illness as long as she managed to prove, using general legal rules that she is unable to continue with the marriage due to this illness. In other words, prior knowledge should not serve as grounds to deprive her from seeking divorce.

Processing divorce by a third party because of husband's detention:

- One single condition should be sufficient for a wife to resort to court and request divorce because of the husband's imprisonment; it is when the husband is judged with a final, liberty-restricting punishment notwithstanding the execution thereof, in the event the husband has

escaped from the matrimonial house.

- Applying this kind of divorce against the husband who is sentenced by distinct imprisonment penalties that are less than three years over varied periods (or is classified a dangerous criminal..etc).

Processing divorce by a third party due to harm:

- Proving unproved harm by virtue of a final judgment through an investigation conducted by a prosecution member immediately upon recording the lawsuit and before deliberation in Court.
- Allowing father, mother and children to give their testimony as a means of reference. However, at the end, the matter should be left to the discretion of the judge.



- Lawsuit number 1092 of 2007, Family-Boulaq, filed by the claimant to prove that her husband divorced her and she provided witnesses. The husband took oath that he did not pronounce divorce. Therefore, the lawsuit had been dismissed. In case the divorce had been actually pronounced, should marital life continue between them in violation to *Sha`ra* (Islamic law)?
- Lawsuit number 1593 of 2004 Family-A`yn Shams, filed by the female claimant petitioning for divorce because of her suffering harm. She explained that the husband beat her after thirty years of marriage. A ruling had been made in 2005 for divorce. But the respondent appealed the judgment which remained under deliberations in Courts of Appeal until 2009. It had not been settled yet because of a set of procedures taken by the attorney of the party sentenced including writing off, renewal, alteration and investigation of the case.
- Lawsuit number 201 of 2009, Family-Heliopolis filed by the wife against the husband requesting to be divorced because of suffering harm after three months of marriage. During this period, he used to assault her by beating. In less than three months, a ruling had been made for divorce.



(8) *Khul`* (Woman redeeming herself from the husband)

Definition

According to law, *Khul`* is a type of processing divorce that is established for the wife who had been deeply suffering and unable to continue with the marriage. If she chooses not to disclosing secrets of her marriage by recording it in judiciary records-by virtue of this type of divorce, she can file for a divorce without having to do that. The husband shall be reimbursed for the money he paid. He shall be also relieved from incurring the financial rights due to the wife normally (explanatory notes of Law No. 1 of 2000). The reference to this point is the saying of *Allah* may He be Glorified: "Then if you fear that they would not be able to keep the limits ordained by *Allah*, then there is no sin on either of them if she gives back [the bridal money of part of it] for her divorce" (*Quran* 2:229)

This approach had been applied during the life of the Messenger PBUH. Narrated under the authority of *Abdullah Ibn Abbas*, he said: The wife of *Thabet Bin Shammas* came to the Messenger, PBUH, she said: O Messenger of *Allah*, I have nothing against him in terms of morals or religion, however, I hate Kufur (disbelief) in Islam. The Messenger, may the peace and blessings of *Allah* be upon him said "Would you give him back his garden" she said: yes, the Messenger PBUH, said to the husband: "accept the garden and divorce her once". This was the first *Khul`* case in Islam.

Its provision in the current law

Article 20 of Law No. 1 of 2000 on Regulating some of the Litigation Conditions and Procedures in regard to Personal Status Matters serves as the legal basis to the *Khul`* system, it stipulates the following:

"Spouses may, by mutual consent, agree among themselves on *Khul`*, in case they failed to do so, and consequently the wife filed a lawsuit claiming it, redeemed herself and surrendered all of her financial lawful rights, refunded to him the advanced dowry he gave her before, then the Court shall judge by divorcing her from him. The Court, though, shall not rule by divorce via *Khul`* unless after attempting to reconcile between spouses, seconding two arbitrators who would

assume reconciliation efforts within maximum three months as indicated in Clause Two of Article (18) and Clauses One and Two of Article (19) herein. Such shall take place after the wife has explicitly declared that she hates living with her husband; whereby there is no way to continue their marital life and she fears that she would not be able to keep the limits of Allah because of this hatred”.

It is not acceptable nor needed that the wife drop the right to the children’s custody, their expenses or any of their rights in return for *Khul`*. In all cases, the divorce processed via *Khul`* is irrevocable and not subject to appeal using any of the means of appeal. By virtue of this article, the *Khul`* system had been established as a sound legal basis regulated by provisions and procedures.

Issues in the current law

- Some of the judgments passed by courts conditioned that the wife should waive full legal rights including the list of trousseau (movables) contributed to the matrimonial house, though such a list is not part of the lawful rights to be waived, but rather, civil rights.
- Some judiciary circuits insist on calling the claimant to appear by herself to discuss with her the reasons for *Khul`*. This defeats the purpose of *Khul`*, and is in violation to Islamic *Shria`a*. According to the relevant *Hadith* (traditions of the Messenger *PBUH*, she did not have anything against his morals, but she was concerned about not being able to keep Allah’s limits. Such per se is the only needed justification to apply *Khul`* in all cases.
- Difference around the right of a wife whose marriage had not been consummated to file this type of lawsuit.
- Difference around if the wife who had been divorced via *Khul`* is entitled for children’s custody and custodial housing expenses.
- Difference around the entitlement of the claimant for divorce via *Khul`* to spousal maintenance during the time of filing the *Khul`* lawsuit.

Proposals to address such issues

- Establishing proper legal principles and concepts about what is deemed as *Mahr* (dower) that should be refunded to allow ruling for *Khul`*.
- Decreasing the litigation period in *Khul`* matters. This shall be done through:
 - Cancelling the re-notification process.

- Stating that it is not necessary that the claimant appears in Court herself and replacing this prerequisite with her ability to give a special proxy delegating others instead.
 - Cancelling the reconciliation offer as the matter had been already introduced before the Mediation Office.
- Underlining that the lawsuit involving divorce by *Khul`* is procedural one whereby the Court’s role is confined only to proving the elements thereof including the wife’s petition for a *Khul`* divorce: fearing not to keep *Allah’s* limits, refunding the dower established in writing, and waiving all of her legal and financial rights, that is without considering the court’s belief in the lack of errors on the husband’s part according to the court’s belief.
 - Confirming the right of the wife whose marriage had not been consummated to file such a lawsuit.
 - Stressing the right of a wife who is divorced by *Khul`* to custody and custodial housing expenses entitlements.
 - Stressing the entitlement of the claimant of *Khul`* divorce to spousal maintenance during the *Khul`* lawsuit processing time until judgment is made.

Examples of legal texts from Arab and Muslim countries laws addressing the issue

Kuwaiti Family law:

Article 69: In the event that the spouses disagreed on the amount of the named dower, the wife shall bear the responsibility to introduce proof. In case she failed to do so, the husband shall be obliged to state the amount under oath, unless he claimed an amount that could be adequate for women in her status according to customs applying the rule of dower of similar status. However, it should not be more than the amount claimed by the wife. This shall apply in the event of conflict between one of the spouses and heirs of the other or among their respective heirs.

Moroccan Family Code (*Mudawana*):

Article 116: A woman of legal age shall be entitled to petition for *Khul`* by herself. In case *Khul`* had been requested on behalf of a minor woman, the divorce shall be established, and she shall be obliged to undergo the

Khul` case only with the approval of the legal agent.

Article 118: All that is considered permissible to be given in compensation for *Khul`* according to Islamic *Shari'a*, becomes suitable to be used in *Khul`*, however, not arbitrarily nor with exaggeration.

Article 119: In case the mother lacks financial capability, it is not permissible to obtain *Khul`* in return for matters related to the children's rights or the maintenance thereof.

Article 20: In the event that the couple agreed on the principle of *Khul`*, however, they differed on the exchanged item, the matter should be introduced before court for an attempt of reconciliation. When reconciliation becomes impossible, the court shall rule for enforcing *Khul`* after assessing the exchanged item, in observation, in this respect, to the amount of the advanced dowry, marriage duration, reasons for petitioning for *Khul`*, and the wife's financial position.



- There is a evident regression in the rate of divorce cases, which might be due to changing most of divorce cases into *Khul`* cases. In this respect, divorce rates declined in Egypt in 2004-when *Khul`* Law was enacted- 0.9% against 1.1% from 2000 to 2004. This decrease might be attributed to easy procedures of *Khul`* compared to processing divorce by a third party whereby many women resort to it in order to evade the courts' routine and complications.
- Sahar is a plaintiff who filed a lawsuit to obtain a *Khul`* divorce. The lawsuit had been deliberated during hearings. During the hearing devoted to pronounce the judgment, she was surprised to find the defendant appearing and claiming that the advanced dowry recorded in the marriage contract is false while he paid an amount much larger than what is recorded in the contract. He intended to extend the period of litigation. However, the Court responded to this step and postponed the lawsuit in order to have relevant evidence introduced.
- Another plaintiff filed a *Khul`* divorce lawsuit which had been deliberated in hearings. The court requested for the plaintiff to appear in order to ask her about waiving her rights (i.e. her advanced dowry). She responded



that it is the amount recorded in the marriage contract. The Court then asked her about movables brought by the husband to furnish the matrimonial house. She responded naming the movables brought by husband. The Court obliged her to return back those movables which it deemed as the advanced dowry recorded in the marriage contract.

- Lawsuit number 155 of 2006, family-*Bab Alsha`ria*, contained the plaintiff's request to be divorced by *Khul`*. She refunded only one Egyptian Pound according to the advanced dowry recorded in the marriage contract. Although the husband argued that this amount is false claiming paying eight thousand Egyptian Pounds, the Court processed a *Khul`* divorce. In response, the husband filed a civil lawsuit number 49 of 2007, Family-*Bab Alsha`ria* to restore the real amount of advanced dowry. The Family Court ruled with its lack of jurisdiction and referred it to the Civil Court. The plaintiff appealed the judgment which had been dismissed and the *Bab Alsha`ria* Court, on January, 25th 2009, ruled with inadmissibility of considering the lawsuit as it had been already settled. To this effect, it considered settling the *Khul`* and accepting the one Egyptian Pound as advanced dowry as settling the amount of advanced dowry. Therefore, it becomes inadmissible to reintroduce the matter thereof to Court.
- Judicial judgments are contradictory with regard to the extent to which the wife is entitled to have spousal maintenance as of the date of filing the *khul`*s lawsuit and having a decision made thereon.
- Judicial judgments are contradictory with regard to whether or not custody expenses, nursing and custodial housing are considered part of the rights waived by the wife so that it rules for taking them away or allowing them.

(9) Polygamy

Definition

It is for a man to take more than one wife at the same time with a maximum of four.

Provision in the current law

Polygamy is not regulated, save for Article 11 (bis) of Law No. 25 of 1929 stipulating that:

“A woman whose husband has taken another wife may petition for divorce from him if she had been inflicted with physical or moral harm whereby continuation of cohabitation becomes impossible, even if she did not set forth a condition in her marriage contract to the effect that the husband may not take another wife. In case the judge failed to reconcile between them, he shall award her a single irrevocable divorce. The wife’s right to petition for divorce for this reason shall drop if one year has elapsed after her knowledge of the second marriage of her husband, or if she had accepted this situation explicitly or implicitly. Her right to petition for divorce shall be renewed each time the husband takes another wife. In case the new wife had not been aware that he is married to another woman which had been the case, she is entitled to request divorce as well”.

Issues in the current law

- A husband may take a second wife and ceases to provide for his first wife and his children with her or provide someone who can support them although he is affluent.
- A husband may take a second wife and ceases to provide for his first wife and his children with her or provide someone who can support them although he is incapable of providing for more than one family; thus adversely affecting the two families.
- Practical reality has proved that, in many cases, the first wife adopts deviant behavior due to her need for money and because the husband had left her without a source of income sufficient to cover hers and her children expenses.
- A man who takes another wife and moves to another place, abandoning his children with the first one, exposes them to deviation because of lack of

sufficient supervision.

- Dropping out of school as a result of men’s re-marriage with another wife, abandoning his first one, and neglecting her children.
- Animosity and hatred which develop usually among half-brothers and half-sisters from different marriages; thus negatively affecting the cohesion of society, in case this phenomenon breaks out.

Proposals to address the issues

Permitting polygamous marriages should only be granted via the court which should observe the following:

- A written application should be submitted including the objective exceptional reasons that motivated the requestor to seek the marriage. The husband should attach therewith supporting documents on his financial situation and health condition.
- Polygamy should be prevented if failure to achieve justice between wives is feared.
- In case the requestor does not possess sufficient resources to support two families, and secure all rights including maintenance, housing, and equality in all life aspects, polygamy should be prevented.
- If polygamy is inevitable, the husband should be obliged with fulfilling the financial rights of the first wife before permitting him to take another wife.
- If the first wife did not accept her husband taking another wife and sought divorce, she should be granted the divorce. The judgment of divorce should also cover ruling for her and her children’s financial entitlements.

Examples of legal texts from Arab and Muslim countries laws addressing the issue

Moroccan Family Code (*Mudawana*):

Article 40: Polygamy should be prevented where injustice by the husband between the wives is feared, it should also be prevented if the wife stipulated in her marriage contract that the husband may not take another wife.

Article 41: The court shall not permit polygamy:

- If the objective exceptional justification had not been established.
- If the requestor lacks the sufficient resources to support the two families

and to secure all the rights including maintenance, housing, and equality in all aspects of life.

Tunisian Family Code:

Clause (18): Any man who marries while he is married before dissolving the bond of the first marriage shall be punished by one year imprisonment and/or financial penalty of two hundred and four thousand Franc, even if the new marriage had not been concluded according to law provisions.



- Scholars were inconsistent about the time when a wife becomes entitled for divorce because of her husband taking a second wife and whether or not the second marriage should be consummated-and what is the legal position towards the husband's engagement to another woman.
- The current law does not entitle the wife the right to divorce because of her husband taking another wife unless material or moral harm is proved. This requires much time and effort, furthermore, its assessment differs between judges as revealed from practical experience in courts. For example, judgment passed on lawsuit number 422 of 102 q whereby it ruled for dismissing the lawsuit because harm had not been proved. The Court of Cassation stated that the husband who consummated his marriage to his other wife in the same house of the first wife by using her movables is not deemed harmful to the wife requesting a divorce (Appeal number 683 of 57 Judicial, hearing dated April, 28th 2007).
- The right of the first wife for divorce is dropped if the husband divorced his new wife either willingly or deceptively (see the judgment passed on lawsuit number 2222 of 2891, hearing dated January, 25th 1983, North Cairo Court).



(10) Shared Wealth

Definition

It is the money or assets accumulated during the existence of the marital relation as a result of the husband or the wife's work (even in the case where she is a house wife) and their investments. Any money or assets that developed outside the marital relation like inheritance is exempted there-from.

Provision in the current law

This point is not regulated, however, Article 33 of the Marriage Officers Regulation added in 2005, allows both parties to agree on such matters in the conditions inserted in the marriage contract.

Issues in the current law

- There are no legal provisions regulating the matter of shared wealth ownership to the wife after marriage.
- The wife who gets divorced but has no custody over children is not provided with housing.
- Either spouse may endure harm because the other party took hold of the other's fruit of work or money during marriage.
- Failure to consider the monetary value of the women's house work and bringing up of children.

Proposals to address these issues

The legislator should intervene by enacting legal articles and texts regulating such issues. However, for this purpose the following principles should be taken in consideration:

- The husband and wife should enjoy separate financial capacities, and any mixing between the wealth that accumulated before the time of marriage and the shared wealth should be prevented. Examples include family inheritance, work and investment prior to the marriage...).
- Agreement should be made on the method of owning shared wealth and the percentage owed to each of the spouses of this wealth. This agreement may be part of the marriage contract or any other contract.
- The wife arbitrarily divorced by her husband, while her marriage contract

or any other independent contract did not stipulate the application of the sharedwealth system, is entitled to obtain her right which shall be collected from the wealth developed by the husband during marriage.

- The legislator should adjust and synchronize between the provisions of sharing shared wealth and other financial commitments consequent to divorce, especially in terms of the children's financial rights, in order to ensure preventing injustice befalling any party.

Examples of legal texts from Arab and Muslim countries laws addressing the issue

Moroccan Family Code, Article 49:

- Each party of the spouses has their own separate financial capacity and estate. However, they may, in the context of managing the funds earned during the marital life, agree on ways of its investment and distribution.
- This agreement should be incorporated in a document separate from the marriage contract.
- The two notary officers (*A`dlan*) shall inform both parties upon their marriage with the aforementioned provisions.
- In case an agreement was lacking, reference should be made to the general rules for evidence, taking into consideration the occupations of spouses, contributions and burdens incurred for developing the family's money and assets.

NWRO Publications

Egyptian Foundation for Family Development

- The Egyptian Family and Personal Status Cases (an analytical statistical study)
- Stories of Women from Egypt...on the Personal Status Law...Narrated by Women

Egyptian Association for Comprehensive Development (EACD)

- *Khul'* between Politics and Media

Center for Egyptian Women's Legal Aid (CEWLA)

- Of women's cases
Guardianship
Superiority (*Qiwama*) in Islam
Polygamy
Divorce in Absentia
Women Testimony

Association for Women and Development (WaD)

- Men and Women Towards a New Family Law

Forum for Women in Development (FWID)

- Family Court and Women's Needs, Empirical Study
- Trends of the Egyptian Press and Readers towards Personal Status matters
- Press File on Women and Personal Status Cases

Society for Sinaii-Women's Rights

- Role of Customary Judiciary in Preserving the Sinaii-Women Rights

Association for Women and Society

- Media and Personal Status
- Role of the Media in Forming the Audience's Trends Towards a Personal Status Law, Field Analytical Study

Badr Community Development Association for Comprehensive Development (BADR)

- Personal Status Law, Study on the Personal Status Law and other laws

Coptic Evangelical Organization for Social Services (CEOSS)

- It is happening.....But true, a simplified book on violence against women



NWRO

Network of Women's Rights Organizations

NWRO is a network of NGOs operating in the field of women and family rights, established in 2005 as an initiative seeking to build a joint vision and a framework for cooperation and joint action among NGOs interested in family rights. NWRO seeks to establish a sustainable framework that serves the issues of women and society based on the values of citizenship, social, justice, and human dignity.

Badr Community Development Association for Comprehensive Development (BADR)

Society for Sinai-Women Rights

Association for Women and Development (WaD)

Association for Women and Society

Egyptian Association for Comprehensive Development (EACD)

Egyptian Association for Community Participation Enhancement (EACPE)

Center for Egyptian Women's Legal Assistance (CEWLA)

Forum of Women in Development (FWID)

Coptic Evangelical Organization for Social Services (CEOSS)

The Egyptian Foundation for Family Development

Care, Egypt

