

## CHAPTER 6

# The Right to Divorce for Women (*khul'*) in Islam:

## Comparative Practices in Mauritania and Egypt

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In recent years, several Muslim countries have instituted significant legislative reforms, especially with respect to marriage (*nikâh* or *zawaj*) and divorce (*talâq*). In Mauritania, the government introduced the first personal status code in 2001. This code recognizes women's right to divorce (art. 92) or *khul'*. But this personal status code has not brought about a sociojuridical revolution, because this right has long been recognized and enforced in the Moorish society of Mauritania.<sup>1</sup> This right is juridically and religiously legitimized in the classic Maliki legal texts that govern Moorish juridical practice. Indeed, the right to divorce initiated by women (*khul'*), while generally little known or practised in Muslim societies, is found in the classical texts of Islamic law (*Shari'a*), which form the legal basis of these societies.

Moorish women did not wait for the introduction of a personal status code that guaranteed their right to divorce. The situation of Moorish women in this regard is different from that of Moroccan or Egyptian women who rediscovered this right through the new legislative reforms concerning personal status. Thus, in Morocco the reform of the family code of 2004, the "New *Mudawanna*", permits a woman to add a clause to her marriage contract giving her the right to divorce if her husband takes another wife. Furthermore, in Egypt, the personal status code of 2000 gives women the right to divorce (*khul'*) even without the consent of her husband.

1. In Mauritania, alongside the Arabophone Moorish society one finds Halpulaaren and Soninke communities.

Also, if on the one hand in Egypt and Morocco, legislative advances most often concern only urban zones and certain social milieus, and are not always implemented, given the weight of tradition and the persistence of certain types of gender relations, on the other hand, Moorish women know how to exploit the social importance of their right to divorce, supported as they are by their own families (Fortier 2010a). A comparison of the Mauritanian situation with that of other countries of Africa and the Middle East, and more specifically, with the Egyptian position on women initiating divorce will clearly show the uniqueness of the status of women in Moorish society compared to that of other Muslim societies, like Egypt.

### The Practical Application of Legal Sources (*fiqh*)

Moorish women in Mauritania function in a unique sociocultural context. Mauritanian Moorish society, made up of speakers of *Hassāniyya*, a dialect of Arabic, is culturally highly homogenous. This region has been Muslim for centuries. Almoravids introduced the Maliki school of jurisprudence into this region in the eleventh century.

Moorish society is made up of Bedouin tribes, many of which are now sedentary and concentrated mainly in the capital city of Nouakchott. Nevertheless, their members generally do not have recourse to state tribunals to arbitrate their lawsuits, which are thus settled internally, sometimes by a local judge or *qadi* (*qādī*). If the French colonisation of Mauritania modified the local political landscape, it did not fundamentally change the local judicial structure, especially in the area of the family, where reference to Islamic jurisprudence remained primary.

The Mauritanian code of the family of 2001, based on Islamic jurisprudence, is in conformity with the classical Islamic texts used locally, while it also takes into account conventional social practice in Moorish society. The Moors have habitually used Maliki texts as their legal basis.<sup>2</sup> These included

2. On the subject of legal texts known and taught in Mauritania, see C. Fortier (1997, 2003a). On an elementary level the first work of Islamic jurisprudence studied in Qur'anic school is *al-Akhḍarī* (Algeria, 16<sup>th</sup> century). Then comes *Ibn 'Ashir* (Morocco, 17<sup>th</sup> century) in which the first chapter treats dogma (*'aqida*), the second, law (*fiqh*), and the third, mysticism (*taṣawwuf*). Also, girls are initiated to a slim collection of hadith (*aḥādīth*), called *Dalā'il al-khayrāt* ("Les voies menant aux bonnes uvres") of ad-Djazūlī (Morocco, 15<sup>th</sup> century). Between the ages of 10 and 15 years students first study the *Risāla* of al-Qayrawānī (Tunisia, 10<sup>th</sup> century). Then, between

the *Risâla* of Qayrawânî dating from the tenth century and the *Mukhtaṣar* of Khalîl from the fourteenth century, and the '*Āṣmiyya* of Ibn 'Āṣim dating from the end of the fourteenth century.

Moorish judicial practice, which has long recognised women's right to divorce, contradicts the widespread notion that a society's use of classical Islamic judicial sources must necessarily be detrimental to women. This belief underestimates the importance of the social context in which these texts are used. My research shows that knowledge of these sources as well as local gender relations are the main determining factors of both the use made of the legal texts and their application in social practice.

The Moorish population displays a familiarity with religious texts. In addition to showing an awareness of the subtleties of Maliki jurisprudence, Moorish society reveals a grasp of '*uṣūl al-fiqh*, or the foundations of jurisprudence; that is, they demonstrate an understanding of how *fiqh* is constructed and applied. Knowledge of the letter of the law, and the spirit of the law, facilitates the application of the texts in daily life in a dynamic and enlightened manner.<sup>3</sup>

Moorish society is a nomadic society in which oral memorisation is highly developed, especially in the area of religious knowledge, which is greatly valued.<sup>4</sup> In general, men from *maraboutic* tribes (*zwāya*) in Mauritania have more knowledge of Islamic jurisprudence than others. However, the legal

ages 15 and 20 they study the *Mukhtaṣar* of Khalîl (Egypt, 14<sup>th</sup> century) and, after age 20, the '*Āṣmiyya* of Ibn 'Āṣim (Andalusia, end of the 14<sup>th</sup>, beginning of the 15<sup>th</sup> century). Next, more profound legal works are gradually added to this corpus, such as that of az-Zaqqâq (Morocco, 16<sup>th</sup> century), as well as commentaries (*shurūḥ*) on fundamental legal texts. The explanations of *Ibn 'Ashir* frequently consulted are those of Mayyâra (Morocco, 17<sup>th</sup> century) and in Chinguetti (Adrar), those of Aḥmad Bashîr wuld Ḥanshî, a learned Moor of the 19<sup>th</sup> century belonging to the Laghlâl tribe. In Mauritania the best known commentaries of *Khalîl* are those of ad-Dasûqî (Egypt, end of the 18<sup>th</sup>, beginning of the 19<sup>th</sup> century) Abdal al-Bâqî (Egypt, 17<sup>th</sup> century), of al-Ḥattâb (Libya, 16<sup>th</sup> century), of al-Bannânî (Morocco, 18<sup>th</sup> century), of Ibn Ghâzî (Egypt, 15<sup>th</sup> century), of al-Mawwaq (Andalusia, 15<sup>th</sup> century) and of at-Tatâ'i (Egypt, 16<sup>th</sup> century).

3. On this subject see C. Fortier (2003c, 2010b).
4. In Moorish society, Islamic scholarship is still an extremely important value although in some milieus money is becoming an even greater value. An ignorant person sets out to acquire knowledge from one who knows more, rather than remaining ignorant or pretending to know. Unfortunately, this attitude is not always shared by certain members of other Muslim societies who are considered well versed in Islam though their knowledge of it is, in reality, fragmentary and rigid, a situation contributing sometimes to perpetuating false ideas and even a certain obscurantism.

codes related to the obligations of daily life are known through oral tradition by all members of society, including the women, as well as by specialists in Islamic jurisprudence, who are called for only in cases of litigation.

It is neither necessary, nor indeed customary, to engage a judge to effect the legal-religious marriage ceremony, which essentially involves agreeing to the contract (*'aqd*) before the marriage feast. The marriage contract can be purely oral. Because testimony by witnesses (*'shuhûd*) serves as legal proof in Islamic jurisprudence, the oral nature of the marriage contract does not diminish its legally binding character.<sup>5</sup>

In Mauritania, boys and girls do not have equal access to learning. Traditionally, girls and boys attended Qur'anic schools, where they mainly learned by rote verses of the Qur'an necessary for prayers. But mothers instill in their daughters an awareness of their rights, especially with respect to divorce.

Moorish women display an understanding, passed down orally from mother to daughter, of certain principles and provisions of *fiqh* as understood in the Maliki school, that enables them to take initiatives to protect their wishes and interests when contracting and dissolving a marriage. Their ability to claim these rights does not owe to the influence of any local feminist movement but to a careful balancing of their knowledge of the relevant Islamic jurisprudence related to divorce and of their culture's social realities. Most Moorish women are unaware of the existence of a feminist movement within Islam or in the West. However, they can be seen as engaging in everyday acts of feminism or "everyday feminism", without the label or necessarily a "feminist consciousness".

In Moorish society, women know how to assert themselves in dealings with men. It is indeed easier for women to make their voices heard in a society, like the Moorish one, in which segregation by gender is not absolute and where women are not threatened by physical violence from men, than in a society in which women are totally excluded from discussion and where the threat of confrontation and coercion by men hangs over them. In Moorish society, women participate in discussions with their husbands. Men also respect

5. This is also the case in other Muslim countries where the administration is more developed than in Mauritania: "Formal procedures of registration have generally been legislated in Muslim states, but do not necessarily affect the validity of marriage or divorce not so registered, in deference to the continuing currency of the "classical rules" (Fawzy 2004: 9).

an ancient code of Arab chivalry (*futûwwa*) called *murûwwa*, which commends courtly behaviour toward women.<sup>6</sup>

Also, it is easier for a married woman to consider standing up to her husband when she can count on the support of her own family, as is the case in Moorish society, than if she knew it would be difficult if not impossible to find emotional and financial support outside of her conjugal union as is sometimes the case in other societies. For, in Moorish society, even a married woman belongs less to her in-laws than to her own family whose honour she represents so that her family will always afford her the protection which is rightfully hers even when, and especially, when, she is in conflict with her husband and his family. In Moorish society there is a certain rivalry between the family giving its daughter and the family receiving her, which means that any declared conflict between spouses is cause for conflict between the two families. One must remember that in Mauritania, tension between men and women exists within the context of an equally important structural tension between families united by marriage.

## Khul` versus Repudiation

Studies on marriage and divorce in Islam generally address repudiation by the husband, divorce initiated by the wife being much less well-known. It is true that this kind of divorce is rare in Muslim societies even though it is authorised by the majority of Islamic legal schools, not only by the Maliki, for example, but also by other schools of Sunni Islamic law, whether Shâfi`î, Ḥanbalî and Ḥanafî as well as by the Shi`i.<sup>7</sup>

In practice, in Moorish society for a long time *khul`* is found in the ancient juridical texts serving as reference in this society as well as in the new Mauritanian Family Law. For many jurists, the practice of *khul`* finds its source in the Qur'an (II, 229): "It is not lawful for you to take of what you have given them unless the couple fear they may not maintain God's bounds; if you fear they may not maintain God's bounds, it is no fault in them for her to redeem herself (*iftadat bihi*)" (Arberry Transl. 1980: 46). *Khul`* allows the wife to ob-

6. Concerning the courtly tradition in Arab culture see E. Farès (1932). This ancient Arab value has been adopted by Islam – "*murûwwa* is the sister of the faith" (*murûwwa akhtu dîn*). For more details on the courtly tradition of the Moors see C. Fortier (2003b).

7. On this subject, see O. Arabi (2001 :180 and ssq). On the particular subject of divorce in Shi`i Iran, see Z. Mir-Hosseini (1993).

tain a divorce from her husband, if he consents, and upon payment of a certain sum.

The most subversive aspect of this legal procedure is the fact that it allows the woman to divorce without having to provide justification. For, unlike divorce initiated by the woman for just cause (*darar*), whether the motive be a contagious disease or the man's impotence, conditions of which the woman was uninformed at the time of the marriage, or the failure to provide for the family or domestic abuse or the husband's prolonged absence from the home, the woman who initiates divorce by *khul'* is not obligated to state the reasons for her action. But, whereas divorce for just cause can be pronounced by the *qadi* without the husband's consent, *khul'* does require his consent.

This is, then, an institution that gives the woman freedom of decision regarding her wish to remain with her husband or not, even if in the final analysis, the final decision to accept or reject this divorce procedure is the husband's. However, it is important to remember that the margin of maneuver allowed the wife in this case is not at all comparable to the absolute right a man has to repudiate his wife not only without cause but also without her consent.

Divorce initiated by the woman is much more restrictive than that initiated by the man. As the Qur'an states concerning repudiation, purely a male prerogative: "Women have such honourable rights as obligations, but their men have a degree above them" (Arberry Transl. 1980: 45). Thus, divorce initiated by the man, unlike that initiated by the woman, does not require the consent of the other party and does not necessarily include financial compensation.

The Qur'an does mention the possibility of a compensation (*'iwad*) given to the repudiated wife by the husband (II, 236): "There is no fault in you, if you divorce women while as yet you have not touched them nor appointed any marriage-portion for them; yet make provision for them, the affluent man according to his means, and according to his means the needy man, honourably – an obligation on the good-doers" (Arberry Transl. 1980: 61). In conformity with this verse, Maliki jurisprudence stipulates that the compensation vary according to the husband's means (Khalil, 1995: 238).

Maliki jurisprudence calls this gift *mut'a*, a term built on the same root as *mut'a* which means contentment, indicating that this gift functions as a form of consolation for the repudiated woman. This gift is in no way mandatory. Debates among Maliki jurists (*fuqahâ'*) have been held to determine if the *mut'a* is obligatory (*wâjiba*) or simply recommended (*mustahabba*) (Ascha, 1997: 166). For the Maliki jurist Qayrawânî (1968: 186), it is discretionary. And if a woman demands it of her husband, according to Moorish jurists, the *qadi* is sole judge of whether this indemnity will be given, in view of the situ-

ation of each of the spouses. Generally, Moorish women do not take legal action before the *qadi* to claim this consolation gift.

Moreover, repudiated Moorish women do not demand any remaining unpaid bridewealth (*sadâq*)<sup>8</sup> to which they have a right according to the Qur'anic verse (II, 229). For in Moorish society, as in other societies, very often the man, in agreement with his in-laws, has paid only part of the bride-wealth agreed upon at the time of the marriage. But whereas in other societies this measure is a dissuasive factor for the husband, since he would have to pay the remaining bridewealth should he repudiate his wife, Moorish women do not demand this for fear of making their family appear needy. If the obligations binding the husband in regard to the repudiated wife are designed by Islamic jurists to limit divorce considered morally as blameworthy (*makrûh*) (Bousquet, 1935: 66), they are moot in Moorish society because of the nature of relations between families united by marriage.

Everything concerning the bridewealth is extremely important from a judicial point of view as it governs the management of the procreative sexuality of a woman, and from a social point of view as its value constitutes a gauge of prestige between the two families. On the one hand, the value of the bridewealth is indicative of the value of the girl and of her family, and the greater it is, the greater their nobility. At the same time, in addition to the amount of the bridewealth, this exchange puts the receiving family in a position of dependency and inferiority towards the family to whom their daughter has been given. On the other hand, for the members of the repudiated wife's family, her repudiation is an opportunity to refuse the remaining bridewealth to which they are entitled, thus demonstrating their superiority and showing that they do not depend economically on the family to whom they had given their daughter.

If questions of honour prevent the wife – who continues, even married, to represent the honour of her family – from receiving the totality of the bride-wealth to which she is legally entitled, these same questions of honour do allow her to claim another of her rights, that of initiating herself a divorce (*khul`*). This type of divorce is however made difficult if not impossible in other cultural contexts where the woman is not supported financially by her family. This is the case, for example, in Egypt, a fact which has made certain

8. After Evans Pritchard (1931), I use the term of bridewealth to underline the social and economic dimension of the exchange between two families, and the term of bride-price when this exchange concerns more strictly two individuals.

feminists there seek the abolition of the financial compensation allowing a woman to buy a divorce from her husband.

### ”Dispossession” (*al-khul'*)

The Arabic term *khul'* derives from the verb *khala'a* meaning “to dispossess”, and in effect this legal procedure allows the woman to remove herself from the ties of possession that bind her to her husband. According to Islamic jurisprudence, if the husband accepts the financial compensation offered by his wife to end their marriage, the marriage is dissolved immediately. The legal result of this procedure is irrevocable repudiation (Ibn 'Āṣim, 1958: 323).

A hadith (*ḥadīth*) of the *Saḥīḥ*, “The Authentic” of Būkhārī (t. 2, 400, n° 1878) – a collection of hadith considered by Sunni as the most authentic book after the Qur'an – attests that the Prophet gave a woman the right to divorce in exchange that she would give a part of her bridewealth back; according to the narration of Ibn Abbas: “The wife of Thâbit bîn Qays al-Anṣârî came to the Prophet and said, "O Allah's Prophet ! I do not blame Thâbit for any defects in his temper or his faith, but I am afraid that I may become unthankful for Allah's blessings." Mahomet said to her, "Will you give his garden back?" She said, "Yes." So she returned the garden and the Prophet told him to divorce her”.

The sum given to the husband by the wife in this type of divorce is not specified in Maliki jurisprudence, but it is suggested that it might be equal to the amount of the bridewealth (*mahr*) (Ascha, 1997: 158). In this matter, many jurists cite the Prophet's reply to a woman seeking a divorce; he approved her decision on the condition that she returns to her husband the garden she had received as bridewealth (Ascha, 1997: 157).

The legal procedure of repayment of the bridewealth is also known in a number of other Muslim societies: in Kabylia, the price of repayment, called *lafdi*, consists usually of rendering to the husband the balance of the bridewealth that was not yet paid (Charnay, 1965: 53); in Mzab, the woman must return half of the bridewealth, or the entire sum if she has committed a serious fault (Goichon, 1927: 182).

Traditionally, in Moorish society, the legal term *khul'* is not used, but is replaced by the expression “She gave back the bridewealth” (*rad as-sadâq*) or “She gave back the livestock” (*rad al-ḥaywân*), as livestock makes up a major part of the bridewealth in this nomadic society. This expression is more metaphorical than literal, however, as the woman cannot give back something she does not own herself. The bridewealth would have been collected by her

father who spent it, primarily on the costs of the marriage ceremony which took place in his encampment or in his city. Actually, this expression signifies more that the woman is breaking the ties of marriage symbolised by the bridewealth.

In contrast to all other types of divorce where the wife has the right to take back all of her possessions, in the case of *khul'*, the wife leaves the furnishings she brought when she moved in, the livestock given by her family, and the goods given to her by her husband. In Mauritania, the woman gives up all her possessions, which act is the condition of her autonomy, the affirmation of her dignity as well as of her family's honour. A *Hassāniyya* expression shows that in this case the woman dispossesses herself of everything she owns, including the needle which holds her hair in place: "She points the needle" (*tirsha glu labra*). This warrior-like expression aptly renders the wife's victorious challenge to her husband and her in-laws. For in this gesture of complete dispossession (*sallab*), the woman restores honour to her own family and shows that she is not economically dependent on her husband's family.

A comparison of the Mauritanian and Egyptian cases shows how differently the *khul'* can be practised and interpreted in different societies. In urban Egyptian society, it is the man who must demand of the wife the possessions given her during their married life.<sup>9</sup> Whereas in Mauritanian society, a man would lose his honour, which is defined by generosity, should he make this request of his wife, even if she has decided to leave him.

Moreover, in Egypt, a woman who does not wait for the husband to present the proof of what he has given her before returning it to him, is considered to be a depraved woman wishing to be rid of her husband as quickly as possible in order to join her lover (Tadros, 2002a). But in Mauritania, a woman who suddenly returns all her possessions to her husband gives evidence of her autonomy and the prestige of her family.

Furthermore, in urban Egyptian society the woman's family generally does not support her decision to have recourse to *khul'* as that constitutes social dishonour for them as well as economic impoverishment, since they must reimburse the bridewealth (Anonymous, 2002). In Mauritania, the wife's family helps her financially and even encourages her to separate from her husband. By acting this way, the family shows to one and all that they in no

9. The husband must present to the court written proof of possessions purchased from his wife (Leila, 2005).

way depend economically on the family to whom they had given their daughter.

*Khul'* can take the legal form not only of financial compensation but also of the giving up of certain rights (Khalil, 1995: 22); for example the right to keep custody of the children (*haddâna*), or the right to remuneration for their support (*nafâqa*) or for breastfeeding. In Moorish society, the latter does not generally take place as a divorced woman does not usually demand remuneration from her ex-husband for the breastfeeding of his child.<sup>10</sup> On the other hand, even though extremely rare, it sometimes happens that as a result of this type of divorce the man, whose pride has been injured, demands to keep the children who in principle would stay with their mother. This decision applies mainly to male children, as girls, in Moorish society as well as in Maliki jurisprudence (Qayrawânî, 1968: 199), must remain with their mother until they marry.

Women who divorce according to *khul'* sometimes risk having to renounce certain rights because their husbands make other demands. Egyptian women are protected from this threat by the new personal status code in Egypt, that stipulates that compensation paid by the woman to the husband can be only financial and he cannot require that she obtain a divorce in exchange for renouncing a right such as custody of their children (Tadros, 2002a).

### Divorce (*khul'*) Initiated by Women Without any Justification

Relative though it may be, it is nevertheless this freedom of decision, accorded to the woman that made the legal recognition of *khul'* so problematic in a country like Egypt. Practised for a long time in Moorish society, where this right to divorce is found in classical treatises of Islamic jurisprudence, which serve as legal references, it does not have the subversive connotation that it has in Egypt where it has been recently legally recognised through the personal status law of 2000.<sup>11</sup>

Though inspired by Islamic jurisprudence, the reform of divorce in Egypt differs from it in that the woman has the right to divorce with the judge's

10. On the subject of breastfeeding and its implications for kinship in Moorish society and in Sunni Islam, see C. Fortier (2001, 2007a).

11. In regard to this legal disposition, Egypt lags behind other Muslim countries such as Morocco, Algeria or Iran where divorce initiated by the woman has been legalized by the personal status code for a longer time.

consent but without her husband's consent. This divergence from the Islamic jurisprudence was a key argument for those who opposed this law in the name of religion, thus denouncing its illegal character, even though shaykh Muḥammad Tanṭāwī from the Cairo Islamic University of al-Azhar justified the reform by arguing that it does not contradict the *Shari'a* (Tadros, 2002a). The opponents of this reform highly criticised shaykh Muḥammad Tanṭāwī, calling him *kāfir*, or non-believer, as Mubarak president and his wife who were at the origin of this reform. The *khul'* reform which allows women to divorce her husband without his consent was imposed by the government and not by the Muslim jurists or civil society.

Other Muslim countries introduced, almost at the same time as Egypt, this reform in their personal status code. It is the case for example in Jordania that added amendments in 2002 to the law of 2001, allowing women to demand divorce without any justification and without their husband's authorisation. In Qatar, the law of 2004 about *khul'* is very similar to Egyptian law. In Pakistan, in 1967, the decision of the Supreme Court to give a woman the right to divorce without her husband's agreement, after having unsuccessfully tried to make a reconciliation, set a precedent (Anderson, 1970: 47). In Algeria, in 2005, amendments of the law of 1984 used to give women right to divorce by *khul'* by the means of a financial compensation without their husband's consent. Tunisia since 1956, and Morocco since 2004, had gone further in *khul'* procedure, since they allowed women to divorce just as men, without any justification and any financial compensation.

On the other hand, the opponents of this law in Egypt advance an argument that is well-known in other societies as soon as women are granted a new right: the argument that sees there the seed of social disorder.<sup>12</sup> The Egyptian law of 2000 has just granted women a power, that of divorcing,

12. The remarks of an Egyptian Islamic scholar, Yehia Halboush, cited by M. Tadros (2002b), are telling in this regard: "As it stands now, *Khul'* may be granted to a woman, but only after a judge attempts and fails to reconcile the couple – and with the intervention of a mediator from each side of the family. The divorce, which will be irrevocable, will be granted in three months. He insisted that giving women the right to divorce themselves without the consent of the husband is in violation of the *Shari'a*. He contested the legitimacy of the position in favour of the law taken by the Grand Sheikh of Al-Azhar, arguing that he did not have the full consensus of Al-Azhar's Ulama (scholars). Still, he rejected the new law, arguing that "the government's proposed deal, which tries to please everyone, is unacceptable and won't work so long as *khul'* is permitted. Giving women the right to divorce themselves is an explosive bomb in Egyptian homes". A woman with upright morals would never resort to *khul'*". See also Nadia Sonneveld (2006: 51).

formerly exercised exclusively by men. These latter feel threatened, dispossessed as they are of a prerogative that only they enjoyed until recently. This blow to male domination leads, as it does in France as soon as a law in favour of women is voted, to the pejorative accusation of the “feminisation” of society, perceived as a threat to social order.

Instead of this change being seen as a greater equality of rights between the sexes, it is viewed through a hierarchical prism that prevails in Egypt and elsewhere. This non-egalitarian perspective is binary in essence: if men no longer dominate then women will. Every reform in favour of women is seen as a threat in that it reverses the hierarchy between the sexes. At the same time, since the dominant pole of this hierarchy could only be of masculine gender, the hierarchical polarity between the genders remains in spite of the hierarchical reversal of the sexes as attests the representation according to which women are “masculinised” and men, “feminised”.

Another argument put forth by the opponents of this reform of divorce in Egypt, is the affirmation that giving the right of divorce to women would result in the destruction of the family (Fawzy 2004: 63; Tadros, 2000a, 2002b; Sonneveld, 2006: 51). One could just as well use this argument in the case of men repudiating their wives, but this reversal of perspective is never envisaged, because the aim sought here is to question the wisdom of decisions made by women. For, women, considered irresponsible, are presumed to use their right of divorce in the heat of emotion, thus destroying their homes. Not giving the right of divorce to women is then the best way of protecting them from themselves and from the mistakes they could make in using this right irrationally. This argument justifies *a contrario* the right of divorce remaining exclusively in the hands of men, who alone are capable, unlike women, of controlling their emotions.

A study of adolescents, done in Egypt by the Population Council in 2000, shows that most girls think that divorce initiated by women can be detrimental to conjugal life, convinced as they are that women are more emotional than men. These girls believe that giving married women this right would encourage them to divorce at the slightest disagreement with their husbands. This study proves – if indeed proof is needed, so unfortunately banal is this situation – that many women buy into the feminine stereotypes elaborated by men.

The argument that holds that women would misuse power given them is not new, as it exists in many societies to justify male domination. In certain societies there are myths presenting an original matriarchy serving to justify *a*

*contrario* the legitimacy of the patriarchy because had women retained power, society would have been destroyed.<sup>13</sup>

However, many people feared that Egyptian women would mass divorce their husband for any reason, for instance that they would not physically please them anymore (Abdel-Fadil, n.d.). The argument that women would divorce in an irrational way is not realistic since female divorce, unlike male divorce, is not effective at the same time it is pronounced, but is going through different steps, the first one is a reconciliation attempt, or *sulh* between spouses. It lasts three months and that usually mobilises two relatives or two family friends representing the couple.

This reconciliation attempt conform to Maliki jurisprudence that authorises the qadi to name two mediators (*hukkâm*) to try to reconcile the couple, during a period no longer than three months. The Egyptian jurists did not hesitate in this case to get inspiration from another Sunni school of jurisprudence, specifically Maliki, to combine (*talfiq*) different juridical opinions in this matter ending up to a new reform (Arabi, 2001a: 20; Bernard-Maugiron, 2005: 92). But this practice may also be directly inspired from the Qur'an (IV, 35) which recommends that an attempt at reconciliation be made by the representatives of the spouses' respective families in case of litigation: "And if you fear a breach between the two, bring forth an arbiter from his people and from her people an arbiter, if they desire to set things right" (Transl. Arberry, 1980).

Since it takes courage for a woman to ask for a divorce in a society where it is depreciated, this three months delay aiming the woman to get back on her decision, among others, due to the influence of her relatives who don't agree with her divorce. The fact that this reconciliation period does not exist in men's divorce cases, or *talâq* shows that this procedure aims to influence women's decisions as if it was less reasonable and more easily influenced than men's decisions.

This attempt at reconciliation, called as well *sulh*, exists also in Moorish society, where the husband will send mediators to her family to convince her to return to the conjugal home. As the conflict is not limited solely to the spouses but extends to their families, it is necessary not only to reconcile the spouses but also the families related by marriage.

13. This myth is found among the Baruya of New Guinea studied by Maurice Godelier (1982).

## The Shadow of the Lover

In the Egyptian case, when the juridical reconciliation fails, jurists foresee that the woman has to formally declare her decision to leave her husband. This declaration is peculiar to Egyptian law and is not required by Islamic jurisprudence. In this declaration, the woman is not supposed to justify the reasons of her divorce, but she must definitely declare that she dislikes (*ikrah*) her husband and consequently that she cannot continue to live with him because it could lead her to transgress her duties concerning God, formula that takes up the Qur'anic formulation related to *khul'* quoted before (II, 229) and also the woman's formulation who came to ask divorce to the Prophet in the hadith quoted before (Bûkhârî, t. 2: 400, n° 1878). It suggested the threat of women's adultery which is supposed to hang over the marriage until it is not dissolved. This declaration presupposes a certain vision of women and of their sexuality. Thus, it reveals what seems to justify the divorce from the point of view of the jurists, the fact that it will prevent women to fall into fornication or *zinâ*. Also, women's divorce appears to jurists like a lesser evil to prevent a bigger one, women's adultery.

Furthermore, jurists consider that a woman who has aversion (*karahia*) towards her husband would be tempted to have adulterous sexual relations, which presupposes a certain idea of women's sexuality that would inexorably search to be satisfied even illegally. Therefore, this idea that a woman who does not like her husband anymore would necessarily get a lover, justified women's divorce as much as it discredits it. This argument throws a doubt over women who are doing *khul'* because they are supposed to leave their husband for their lover.

Given the social condemnation she would suffer, it is difficult for an Egyptian woman to seek divorce.<sup>14</sup> However, the moral condemnation of the

14. Tadros (2000) sums up the situation quite well: "Before the law was passed, many sociologists, criminologists, religious and political figures and prominent writers warned that granting women the right to *khul'* would lead to the complete breakdown and disintegration of the Egyptian family. The outcome, they argued, would be social instability. Giving women the right to *khul'* would emasculate men. Women, the argument went, would rush to *khul'* at the first sign of trouble (being the highly emotional, irrational beings that they are) thus breaking up their own homes, later to regret it miserably. Families would be fragmented. Women would be enticed by rich businessmen who would offer to buy them out of their marriages. The image of a woman who files for *khul'* portrayed in the newspapers – selfish, greedy, disrespectful to her husband and a bad mother – hardly helps women out in this department...

woman asking for *khul'* is neither new nor peculiar to Egypt. Certain famous Islamic theologians have morally condemned women who have had recourse to this procedure. This is the case for Ghazâlî, who considered that a woman was in the wrong if she demanded a divorce by repayment and had nothing for which to reproach her husband. In this regard he cited a number of hadith including: "When a woman demands that her husband repudiate her without real grievances she will not breathe the perfumes of paradise" and "Those who seek *khul'* are those who have only the appearances of true faith" (Ghazâlî, 1989: 100). This argument casts a veil of suspicion on women who seek *khul'* in that it implies that they want to leave their husbands in order to join their lovers.

The doubts held by certain theologians, as shown in these arguments about the reasons that push a woman to resort to this legal procedure, are reflected in part in a tendency in Islamic jurisprudence to forbid a woman from marrying her lover. This is shown in the following legal principle: "It is strictly forbidden to marry the lover" (*al-mukhababatu lâ tahîlu abadan*). The lover guilty of introducing discord into the home is called by the specific term *khabâb* or *mukhabib*.

In urban Egyptian society, it seems that suspicion concerning a woman who has recourse to *khul'* is omnipresent. In such a context it is difficult for a woman to use this legal procedure without being stigmatised as an unfaithful woman. It is even more difficult for her to remarry some time after her divorce because such a remarriage would only confirm her bad reputation in the eyes of society.

The situation in Mauritania, in this regard, is very different because a woman who has recourse to *khul'* is celebrated by her family and courted by new suitors without her reputation suffering. On the contrary, the fact that a woman uses this procedure demonstrates her strong character, a feminine quality appreciated in Moorish society unlike many societies that promote the idea of a submissive woman.

Moreover, in Moorish society, unlike other societies, a divorced woman is not condemned to celibacy, to "secret" marriages or to the status of second wife. Moorish men, who do not attach much importance to virginity, as is the case in other societies, often prefer to marry an experienced divorced woman rather than an inexperienced virgin. *Khul'*, far from representing some sort of infamy for the woman, is cause for a ritual of liberation in certain regions of

Every woman has her day in court: women going through the *khul'* divorce procedure are finding it difficult, and sometimes nearly impossible".

Mauritania. In this ritual, the mother has a crucial role as guarantee of her daughter's right of divorce, just as she defended her daughter's right to monogamy on the occasion of her marriage (Fortier, 2011: 218).<sup>15</sup> For example, in the *maraboutic* tribe of the Tashûmsha in the Trarza region in the southwest of Mauritania, a woman's repurchase of her freedom is extremely ritualised.

According to the local expression, "The woman leaves to gather money" (*mra mshât lam*) in a neighbouring encampment with her mother and a servant. The latter cries at the top of her voice that her mistress is doing *lam*, meaning gather, which refers specifically to the act of gathering money in order to buy her freedom from her husband (*tamlîk*). All of the men of the same age grade as the woman, including the married ones, offer her a gift and recite poetic quatrains (*givân*) in her honour.<sup>16</sup> The men of her age grade, by offering her these gifts, help her to regain her freedom, and show her that she has not lost her powers of seduction. The young men not only contribute to bringing about her divorce, but also declare themselves possible candidates for her future remarriage.

The importance and value of the gifts are proof of her nobility and also signify that she is still desirable. All the gifts collected are taken to the woman's husband's place of residence, and delivered to the *qadi* in this tribe of Muslim religious specialists. The *qadi* calls for the husband and asks in the presence of two witnesses if he accepts the sum; his acceptance means that the woman may dissolve the marriage. A husband who agrees to his wife's divorce receives this payment, but as he cannot use this money without losing his honour, he distributes it to his servants or gives it to his father if he is elderly.

Moreover, despite the legal interdiction "to marry her lover", in Moorish society, a woman who wants to end a marriage imposed by her parents in order to marry a man of her choice may be helped financially by her lover for repurchasing her liberty. This man may even give money directly to the husband if he accepts the request of his wife.<sup>17</sup> This transaction, which is rare, is

15. In Libya, also, the woman that divorces by *khul'* comes to the court with her mother, that shows women's own agency to undertake negotiations to recover their freedom (Layish, 1988: 430).

16. On the subject of love poetry and seduction in Moorish society see C. Fortier (2004a, 2004b).

17. This procedure is described in the chronicles of the ancient city of Chinguetti: A.L. Ech-Chinguetti, "El Wasit: littérature, histoire, géographie, mœurs et coutumes des habitants de Mauritanie". M. Teffahi, Transl. *Études Mauritaniennes*, vol. 5 (Saint-

however possible because *khul`* requires the consent of both marriage partners and does not necessarily require the intervention of a judge or the presence of two witnesses (Ascha, 1997: 159).

The procedure of *khul`* may also be used by a woman who has been irrevocably repudiated and wants to remarry her ex-husband. In this case, the woman marries a man called *muhallil* in Maliki jurisprudence, or *shawtar* in *Hassâniyya*, making a union with her previous husband permissible. Juridically, the *muhallil* is a person who marries a woman who has been irrevocably divorced and can thus no longer lawfully marry the man who has divorced her until she has undergone marriage to another man. In Mauritania, this may be done without the knowledge of the man serving as an intermediary or with his complicity as he knows he will receive a financial compensation in the sum of the *khul`*. After a certain amount of time, the woman proposes to this man that they divorce in this manner so that she can remarry her ex-husband.

When this intermediate marriage is contracted for the sole reason of making the re-marriage of the ex-spouses legal, Islamic jurisprudence considers it illegal: "The man may not marry a woman with the intention of making her legitimate for the one who repudiated her by the triple formula, and this intermediate marriage does not make her legitimate for the repudiating husband" (Qayrawânî, 1968: 181 & 183).

This interdiction derives from the juridical principle according to which an act is validated by its intention and conversely each intention is validated by its actualization (*al-'amalu bi niyâti wa likuli mri-in mânawâ*). However, the *qadi* can judge only by appearances (*zâhir*) and not by hidden intentions (*bâ-tîn*), known only to God: "Judge only by appearances, God is the One who knows mysteries" (*'alaykum bi zawâhiri wallâhu yatawala sarâiri*).<sup>18</sup> Since

Louis, Sénégal: IFAN, 1953), pp. 121-122. Libya since 1972 allows a woman to divorce her husband with his consent at the condition she will pay back the bridewealth amount, even if this payment can be delayed at the moment she will receive a new brideprice in case she gets married again (Layish, 1988: 429). Aharon Layish (1988: 429) describes in detail this procedure: "... the wife said: ' I redeem myself (*khala'tu*) from my husband for my whole dower, the prompt and the deferred, specified in my marriage contract, and I undertake to pay him ... when I am able to marry someone else ... I have delivered to him all I have received of the prompt dower and the clothing (*kiswa*), and there is nothing left of my financial liability (*dhimma*) but these ... so that he may divorce me in return'. The 'husband' consented to this and agreed to wait for the said payment"

18. As the motivations of an act are known only to God, They do not fall under the judicial order but rather under the moral order. As B. Johansen (1990: 5) explains: "Mus-

the *qadi* is not obliged to discover that which is imperceptible, in rendering his judgement he considers only the declarations (*qaul/raqwâl*) presumed to be sincere (*sidq*) of witnesses known to be honorable (*'udûl*).

In conclusion, the example of Moorish society shows that the interaction between Islamic jurisprudence and social practice is constantly renegotiated in Muslim societies, especially where questions of gender are concerned. This is seen, for example, in the comparison between Moorish society and urban Egyptian society as concerns *khul'*. While the woman's right to initiate divorce is found in the texts of Islamic law to which these societies refer, Moorish society has practised it openly whereas Egyptian society has tended to ignore it. And since Egypt has recently added this right to the family code, its application has remained problematic and the woman who invokes it is still viewed as morally suspect. Analysis of the situation reveals that the differential use of this same right is essentially a function of the gender's social relations peculiar to each society.

This study shows more generally that although scriptural sources serve as the foundation of social and religious organisation for numerous Muslim societies, how these sources are put to use is often tied to local customs. This method of appropriating Islamic jurisprudence does not contradict the spirit of Islamic law which integrates into its sources practices specific to the society where it is meant to be applied. Finally, it is clear that the corpus of Islamic jurisprudence, as it has been constituted since its origins, grants a rather large margin of freedom to the members of Muslim societies who refer to it, allowing them to compromise with it, most often doing so within the bounds of legality.

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lim jurists themselves establish a difference between the evaluation of behavior by the jurisdiction of the *qâdî* (*qaqâ'an*) and that of the same behavior from the point of view of religious ethics (*diyânatan*). The first is decided by the *qâdî* and the second, as jurists repeat incessantly, is "an affair between the believer and his Lord".

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