

Judicial Activism in the Context of the 2011 Egyptian Revolution: Emerging Conceptions of Femininity and Masculinity

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Abstract

This article investigates gender implications of judicial activism within the context of the 2011 revolution. Relying on analysis of a sample of judicial decisions in the field of divorce and child-rearing, I argue that individual judges used the family courts as a platform to articulate alternative legal discourses prior to the 2011 revolution. During the period between February 2011 and the military coup in July 2013 family legislation emerged as a controversial point. The period witnessed the mobilisation of small but vocal fathers' rights groups that called for a revolution in Egyptian family law and formed strategic alliances with a handful of judges. The latter became members of a legislative committee formed under the presidency of Muhammad Mursi. I investigate the gender implications of their activism against a background where old and new actors and institutions competed over the right to interpret *shari'a* in an authoritative way.

Keywords

Egypt; revolution; Islamic *shari'a*; gender; Muslim family law.

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Introduction

In the period between the ouster of former President Husni Mubarak in February 2011 and the forced removal of his successor Muhammad Mursi in July 2013 Muslim family law emerged as a contentious issue. It became a point of contestation about the definition of Islamic *shari'a* with individual judges, among

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others calling for 'a revolution in family law'. The calls targeted law reforms promulgated under the regime of Mubarak which marginalised male authority in the family, most particularly those pertaining to women's unilateral divorce rights, child custody, and visitation rights. In response to these calls, a legislative committee tasked with drafting a proposal for a unified family law was established by the Ministry of Justice in 2013 under the presidency of Muhammad Mursi. The discussions which took place inside it were conceptualised by some of its members as a 'war between man and woman'.

The aim of this article is to contribute to filling a gap in the scholarly literature on judicial activism in the field of *shari'a*-based family law. The article unfolds in two main parts. In the first part I highlight two functions performed by Egyptian family courts. First of all, it is argued that Egyptian family court judges enjoy considerable discretionary power in interpreting and implementing the personal status codes. Secondly, judges sometimes use the court as an arena for debate on divisive issues. As suggested by the title, the article seeks to shed light on the gender implication of judicial activism within the context of the 2011 revolution. I approach this question by exploring how individual judges used the family courts as a space to challenge prevailing legal discourses in the year prior to 2011. Among other things, they articulated new notions of child rearing which accorded the father a more prominent place through the promotion of joint care after divorce. My focus on these alternative discourses is further justified by events after the ouster of Mubarak when judges participated in public debate and became members of the above-mentioned legislative committee. At another level of analysis, the article's second part analyses their activism against a background in which old and new actors and institutions competed over the right to interpret *shari'a* in an authoritative way following the 2011 revolution. Taking this point of departure, I argue that what the 2011 revolution meant for gendered rights within Muslim family law was rather ambiguous. This ambiguity partly stemmed from the above-mentioned ideas about parenting. In addition, the topic of family law revision was fraught with uncertainty as it became entangled within the power dynamics of the transition period. Based on this, I argue that the period in question was more complex and open-ended than highly dichotomised views that portray revolutions in the Middle East as either restricting or expanding women's rights allow.

I begin by discussing the importance of the family for the Egyptian nationalist project and briefly examine important personal status reforms during the course of the 20th and 21st centuries. The following section examines how the marital relationship and parenting are construed by family court judges relying on a sample of 2000 cases from five family courts¹ in Cairo during the period 2008–2013 as well as interviews with 20 family court judges. 1,500 of the analyzed judicial decisions deal with divorce through *khul'* while 500 are on the subject of visitation. This is supplemented with a random sample of 200 rulings by the Cairo appeal court. Focusing on the period between the ouster of Mubarak in February 2011 and that of his successor Mursi in July 2013, I will then show how judges became participants in the public sphere and analyse the law proposal of a high-profile judge in some detail. I end by arguing that

¹ The analysis is based on records from the family courts of Misr al-Jedida, al-Salam, Ain Shams, al-Matariya, and al-Zaytun.

the discussions which took place within the above-mentioned legislative committee also provide a window on the dynamics of gender politics at a historical juncture characterised by social and political upheaval.

Egyptian Personal Status Law

In Egypt as in other Middle Eastern countries, the constitutional principle of equality among citizens is curtailed by *shari'a*-derived personal status codes, which embody gendered hierarchy (Joseph 2000: 3). In order to examine aspects of judicial activism in the field of family law which is the focus of this article it is important to grasp the significance attached to its articulation in modern Egyptian history. Following the formation of a modern Egyptian state in the 19th century, a centralised and hierarchical legal system was developed with the parallel promulgation of law codes based on European models. The jurisdiction of the *shari'a* courts was restricted to the domain of family law during the 19th century until 1955 when the *shari'a* courts were absorbed into the national court system. During the same period, the Egyptian family increasingly came to be considered central to the welfare of society as a whole and the 'family' – reconceptualised as the unit of the nuclear family (*al-'usra*) – became an object of state administration. Furthermore, nationalist discourse from the mid-19th century regarded the Western-derived ideal of companionate marriage and the nuclear family as fundamental in constituting the fledging Egyptian nation-state (Abu-Lughod 1998; Agrama 2010; Asad 2001; Kholoussy 2010).

In the 20th century the process of codification extended to the field of family law with the adoption of a series of personal status codes designed to make marriage a more permanent bond than envisioned by traditional Islamic jurisprudence. Among other matters, the laws curbed men's right to repudiation. It was also believed that providing women with more marital rights, including wider rights to petition for judicial divorce, would strengthen the marital bond (Kholoussy 2010: 95–96). In 1980, article 2 of the constitution was amended to state that the principles of Islamic *shari'a* are the main source of legislation. However, this did not prevent considerable reform. Personal status reforms enacted in a top-down fashion at the beginning of the 21st century under Mubarak's rule not only changed the husband-wife, but also the parent-child relationship considerably. As a strategy to counter accusations that the law codes violated *shari'a*, the regime aligned itself with al-Azhar and the High Constitutional Court (see below).

As state intervention increased in the domain of family law through legislation, the province of the courts expanded. It is important to bear in mind that the Egyptian judiciary is governed by a professional ethos whereby they distinguish sharply between the legislative and judicial branches of government (Abu-Odeh 2014; Sayyid 2013). However, in practice, the distinction between judicial lawmaking and discretion is blurred. It is well established in socio-legal scholarship that, by interpreting and applying the law, courts play an important role in developing it (Guarnieri 2002; Höland 2011). As a consequence, judicial decision making has an important political element. According to Giunchi (2013: xiv), the semi-legislative function performed by courts acquires considerable importance in areas where the legislature and executive are unable, or unwilling to reform

the law, such as with regard to personal status.² Her argument ties in well with my findings as reflected in court records. Even though the Egyptian personal status codes serve as an important constraint, they are vague, leaving considerable room for judicial interpretation. Besides issuing decisions in individual cases, some judges pursued more ambitious goals, using the court as a source for what Höland (2011) has termed 'value-related debates in society on justice and injustice'. In the years prior to the 2011 revolution, individual judges used the courts as a platform to articulate alternative discourses on gender, as will be shown in the following sections. I will first address how judges articulate notions of gender relations in relation to female-initiated divorce. Afterwards, I look at notions of post-divorce child rearing. In the aftermath of the 2011 revolution some judges clearly crossed the boundary between adjudication and legislation by proposing concrete legislative amendments and becoming participants in the political process.

*Judicial Divorce through *Khul'**

A centerpiece of Egyptian personal status law is the husband's right to repudiate his wife unilaterally (*talaq b-irada munfarida*). This has been justified on the basis of a presumed superior male rationality and his financial obligation.³ Conversely, this legal discourse has consequences for women who are considered more emotional and who were until recently obliged to petition a court for divorce on the basis of specific reasons.⁴ However, over the last decades the Egyptian legislature has eased women's access to judicial divorce by placing more emphasis on their desires and feelings (Lindbekk 2013). This is most clearly evident with regard to article 20 of law no. 1 from 2000 which entitled the wife the right to separate from her husband based on her unilateral expression of resentment (*al-bughd*). She should also renounce her outstanding financial rights, restore the prompt dower to her husband and go through reconciliation sessions. Rather than the husband, this provision located the source of authority located in the wife's interior, the heart. Furthermore, rulings of judicial divorce by *khul'* are not subject to appeal. Thus, Egyptian lawmakers encouraged the formation of women as more autonomous subjects and court records indicate that this provision has become a favoured procedure among women from many walks of life in pursuit of divorce.

Article 20 in the 2000 law provoked considerable controversy and its religious legitimacy was contested twice before the High Constitutional Court on the basis of contradiction with the principles of *shari'a* according to article 2 in

² Similarly, Tunisian family courts (Voorhoeve 2014) and shari'a courts in Malaysia (Peletz 2015) are important technologies of power which contribute to normalizing conjugal marriage.

³ High Constitutional Court, case no. 82, judicial year no. 17, 5 July 1997.

⁴ These grounds are: prolonged absence of the husband without legitimate cause for a period exceeding one year; imprisonment of the husband for a period exceeding three years; mental or grave and incurable sickness of the husband of which the wife had no knowledge at the time of contracting the marriage; a husband's failure to provide maintenance or a husband's harming of the wife.

the constitution.⁵ In 2002 the High Constitutional Court declared the constitutionality of the article on *khul'* by referring to *sura al-baqara* verse 229 and a Prophetic *hadith* reported by al-Bukhari about the wife of Thabit bin Qays who came to the Prophet. She told him that she did not hate her husband on account of his religion or morals, but feared being unfaithful to Islam. In the *hadith*, the Prophet ordered Thabit to repudiate his wife after she gave back an orchard he had given her.

During the first years the implementation of the *khul'* law was riddled with resistance and confusion over the exact steps to be followed (Al-Sharmani 2009; Bernard-Maugiron and Dupret 2008; Sonneveld 2012). Although it has become a more regularised procedure since its inception, several grey areas remain in the law. In light of the importance attached to the wife's assertion of resentment, it is noteworthy that judges have developed different approaches toward this oath. While some judges insist that wives appear in person to state it, others do not require this. In the view of other courts, this statement is not sufficient to establish hatred. As previously mentioned, judicial divorce through *khul'* also requires some material sacrifice on the part of the wife. Not infrequently husbands contested the amount of the prompt portion of the dower that is recorded in the marriage contract.⁶

In producing judgments, family court judges often provide elaborate justifications for their decisions. Aside from an exposition of the reasons justifying the decision reached, the style of reasoning was frequently characterised by additional judicial considerations (Dupret 2003; Lindbekk 2016). For example, it is worth mentioning that some judges believe that wives who resort to this legal mechanism take marriage lightly, as in a judgment rendered by the Cairo appeal court. In the view of the judges' panel, the woman in question was the epitome of an ungrateful wife because she had not supported her husband during his disease, but instead 'rushed to yank him'. The use of the word 'yanked' (*khala'at*) is noteworthy since it carries connotations of the wife removing her husband as if he were a piece of clothing. The appeal court then identified the West as the source of the current malady and the ruling reveals a hankering for the values of an imagined ordered past, when Egyptian society was authentic and 'women used to respect their husbands even if he were a bag of bones, as the popular proverb says'.⁷ Another judicial panel used the appeal court as an arena to address the media, pleading with it to solve the problem of divorce initiated by women (Lindbekk 2013: 88–89). By thus describing the state of affairs, the court echoed arguments frequently advanced in the press and other media where female-initiated divorce has been blamed for threatening the well-being of the family, and by extension the nation-state (Cuno 2008; Hasso 2011). It is significant that these judicial messages were delivered in connection with legal disputes which did not directly revolve around *khul'* (being unappealable) and thus clearly transcended the framework of the specific case. It is difficult to gauge with any degree of certainty the extent of these views. While such statements rarely figured in the court records, it is significant that they were issued

⁵ Constitutional case no. 20, judicial year 23, 15 December 2002.

⁶ Different judicial approaches have developed regarding the issue of dower (see Lindbekk 2013; Sonneveld 2012).

⁷ Cairo Appeal Court, case no. 8180 and 8210, judicial year 124, 27 July 2008.

by the Cairo court of appeal, which serves as the final authority on questions of personal status following the establishing of the family courts in 2004. In this way, judges used the court as an arena for communication with the wider judicial community and general public. A small minority of lower court judges also incorporated into their judgments a warning issued by the Prophet Muhammad to women who opt for divorce without good reason.⁸ In the next section, I discuss how the putative increase in divorce has also had implications for representations of post-divorce fatherhood.

Child-rearing in the Aftermath of Divorce

Nationalist discourse in the 20th century depicted women as 'the mothers of the nation' (Baron 2007). In their capacity as mothers, women were furthermore portrayed as the nucleus of the family and extolled as the primary parental authority; the nationalist duty of the father was merely to 'control the wife as educator within the family' (Kholoussy 2010: 102). The notion of women as nurturers of the nation had implications for the way in which notions of femininity and masculinity were construed within legal discourse in the area of child rearing. At the beginning of the 20th century, however, matters were different and bore a close resemblance to Islamic jurisprudence according to the Hanafi school: mothers were accorded custody rights of daughters and sons until they reached the ages of nine years and seven years, respectively, at which point the fathers would take custody and supervise the education of the children (Lombardi 2006: 203; Shakry 1998: 126). Kholoussy (2010: 100) notes that judges in the *shari'a* courts in Egypt consistently gave fathers the primary responsibility for raising physically independent children.

Legal reforms promulgated in the wake of the *khul'* law changed this situation considerably by marginalising the father in the family. In 2000, a ministerial decree was issued, declaring that the non-custodial parent was entitled to see his or her child(ren) for a minimum period of three hours a week.⁹ While this amendment was intended to protect the rights of the noncustodial parent, in practice, this led to children seeing their fathers three hours per week only, and sometimes even less.¹⁰ Since, it usually was, and is, the father who becomes the non-custodial parent upon divorce, this meant that many fathers were prevented from intensive engagement in the lives of their children. This proved even more difficult, when, in 2005, a law provided that in the event of divorce (and death) children would stay with their mother until the age of fifteen for both boys and girls (art. 1 of law no. 4 of 2005). After this age, the law provides the child with the right to choose whether to stay with the mother or the father. The girl may decide to remain with the mother until she marries and the boy until he reaches the age of majority (*sinn al-rushd*). The law was approved with consensus by al-Azhar's Research Academy (Al-Najjar 2003) and later upheld as constitutional by the High Constitutional Court.¹¹ I argue that these legislative

⁸ This *hadith* was incorporated in 13 out of a total of 1500 analysed *khul'*-cases (see also Lindbekk 2013).

⁹ Article 5 of ministerial decree no. 1087 of 2000.

¹⁰ This was the outcome in 450 out of 500 analyzed cases concerning seeing (*ru'ya*).

¹¹ See also High Constitutional Court, case no. 125, constitutional year 27.

developments concerning child rearing can only be understood within such contextualisation.

Family court judges have issued opposing rulings on this issue. While Egyptian judicial practice is multilayered, some discourses are more dominant than others. By way of example, the discourse which assigned the duty of childrearing to the mother appears to be strongly embedded in legal discourse, as can be seen from the following excerpt from a court ruling (case no. 874, 29 October 2008, Misr al-Jedida family court): '*Shari'a* accorded the right of custody (*hadana*) to the mother firstly, followed by the mother's mother due to her natural instinct and her relationship with the child, which makes her compassionate, and care for it and its hygiene'. In the above excerpt women, especially mothers, are presented as naturally linked with child caring. However, in later years some judges have moved away from these conceptions of mother- and fatherhood and instead seem to promote the ideal of both husband and wife taking care of their child(ren)'s upbringing. When looking at how mothering and fathering is construed by individual judges, evidence of this normative shift concerning practices of child rearing is reflected in judicial rulings which emphasise the importance of the father's unmediated relationship and affective ties with the children. It is difficult to trace the development of the term hosting (*istidafa*), but it is used to designate the ability of the non-custodial parent to host the child at his/her house instead of merely being given the right to see (*ru'ya*) them for a minimum of three hours per week in public places such as youth clubs.

In response to such requests from male litigants, Egyptian judges have delivered dissenting judgments. During phrasing of judgments and interviews with the author several Egyptian family court judges expressed sympathy with requests by fathers who wished to play a more active role in the care and upbringing of their children subsequent to divorce. Nonetheless, most judges in the sample interpreted the law in a manner according divorced fathers only three hours of contact a week. Only a minority of the judges were prepared to grant divorced fathers the right of hosting. By way of example, a judge promoted the ideal of both parents taking care of the children on the basis of mutual trust and consultation instead of delegating this task to the mother alone. Despite considerable continuity with the traditional Islamic doctrine of educational guardianship, this conception about proper parenting marked a rupture with the long-established trend in legislative developments which accorded the mother a primary role in child care and upbringing. In the conception of fatherhood outlined in the judgment, the judicial panel extolled the importance of the father's role in the child's upbringing for the sake of the child's psychological wellbeing. The goal behind visitation was to create a bond of trust between father (or person with visitation rights) and child whereby the child could 'pour out his/her feelings, whether positive or negative'.¹²

During an interview, Judge Muhammad al-Tanbuli, who headed the judicial panel responsible for the ruling, proudly told me that he had ruled for hosting (*istidafa*) not less than three times. The judge was careful to note that he had not ruled in contravention of the 2000 ministerial decree but had 'interpreted it expansively'.¹³ In March 2010, the Court of Cassation overturned a ruling by

¹² Case no. 326 for 2009, Family court of al-Matariya, 28 April 2009.

¹³ Interview with Muhammad al-Tanbuli, 15 June 2013.

Mansura appeal court which had granted a father the right to host his son. The appeal court in Mansura gave the father the right to accompany his son on the first and third Thursday every month and ruled that the son could spend the night at his house and stay with him until 6 pm the following day. The public prosecutor appealed the ruling to the Court of Cassation, something which is a rare occurrence. According to the Court of Cassation, the father had the right to see his son and that this was limited to 'looking' (*nadhar*) at the child in one of the public places designated by ministerial decree and posited a binary opposition between the roles of the respective genders in child rearing.¹⁴

Disagreement among judges also operated in other less starkly discernible ways. Another panel of the Cairo appeal court turned down a request for hosting, but expressed sympathy for fathers suffering under the particular provisions dealing with *ru'ya* by stating that 'the child strongly needs his father's care (*ri'aya*). It is unfair to deprive the father [of hosting] because the father has an innate sentiment of compassion (*shafaqa*) and kindness (*hunu*) toward the child. However, this right should be grounded in legislation'.¹⁵ Hence, the appeal court turned down the father's request for hosting in the absence of a legal provision. The above rulings reflect an ongoing debate among different levels of the judiciary concerning notions of parenting and the legitimacy of existing legislation. Although the divergent decisions did not establish a pattern, these ideas achieved greater salience in public debates after the 2011 revolution, to which I will now turn. Dissenting judges also gave important impulses to the development of Muslim family law as they joined the legislature.

Gender Politics in the Wake of the 25 January Revolution

During the period between the 25 January uprising against Mubarak and the military-backed ouster of Muhammad Mursi in June 2013, Egypt witnessed greater sociopolitical mobilisation and fluidity than that which had characterised the Mubarak era. Among others, vocal groups of divorced fathers staged numerous demonstrations in high-profile places such as al-Azhar, the Ministry of Justice, and the parliament where they called for family law reform. The groups of divorced fathers argued that they were 'oppressed' and that the previously discussed legislative provisions were a Western invention introduced to the country by the wife of the ex-president, Suzanne Mubarak in contravention of Islamic *shari'a*, and would lead to the disintegration of the Egyptian family. The family laws, they concluded were 'Suzanne's laws' and in need of a 'revolution' in order to purge them from any remnants of the authoritarian regime (Sonneveld and Lindbekk 2015). I am also going to show that the 2011 revolution caused a rupture in the sense that while lawmaking during Mubarak's presidency was controlled by a tightly-knit circle this partly changed during the period in question when more groups were given a legislative voice.

Family court judges, as already noted, challenged the prevailing legal discourses elaborated by the legislature, High Constitutional Court, and al-Azhar in the years preceding the revolution. They lamented what they perceived to be

¹⁴ Court of Cassation, case no. 10, judicial year 79, 9 March 2010.

¹⁵ Cairo appeal court, case no. 6808, judicial year 128, 24 January 2012.

abuse of the *khul'*-law and called for fathers to be accorded the right of hosting (*istidafa*) and attributed to fathers traits commonly associated with mothers, such as compassion and tenderness. Based on the previous section, it should perhaps not come as a surprise then that the interim period saw the confluence of interests between the groups of divorced fathers and individual judges who claimed a space in the public debate. The vocal manner in which they pressed their claims has to be viewed within the socio-political context of the post-uprising environment in which new and established actors and institutions contended over the authority to define *shari'a* in an authoritative manner. While the groups of divorced fathers had a direct and personal interest in changing or retaining the status quo, the judges were moved by other reasons. I am going to focus attention on a law proposal by the family court judge 'Abdullah al-Baja because it attracted considerable media attention and he became a member of the above-mentioned legislative committee. Conceiving the family as the cornerstone of the Egyptian nation-state, 'Abdullah al-Baja launched a campaign to amend Egypt's personal status laws with the aim of bringing about greater stability (*istikrar*) to the family, an institution which he believed was being threatened by high divorce rates. In the view of 'Abdullah al-Baja, the year 2000 marked a watershed after which the legislature promulgated several laws which contradicted Islamic *shari'a* and were bent on destroying Egyptian society. He accused the former first lady of enacting laws which contradicted Islamic *shari'a* as part of a retarded foreign agenda (*ajenda ajnabiya mutakhalifa*): 'We should not retain the laws of the old regime since they do not comply with Islamic *shari'a*. The regime promulgated the laws with the support of corrupt religious men'.¹⁶ In addition to castigating al-Azhar as a figurehead of the Mubarak regime, he contested the authority of the High Constitutional Court (HCC) to interpret the meaning of the principles of Islamic *shari'a*. In his opinion, 'the man owns the right of repudiation, but judicial dissolution through *khul'* placed men and women on an equal footing in effecting repudiation'. Along these lines, he argued that the HCC had misinterpreted the above-mentioned *hadith* reported by al-Bukhari. In his view, it was not permissible for the judge to grant a divorce to a wife by way of *khul'* against the husband's consent. According to al-Baja, the Prophet 'ordered him', but did not impose separation. In light of this, he criticised the law for placing too much emphasis on the wife's feelings.

While the groups of divorced fathers and judges such as 'Abdullah al-Baja sought to strengthen male authority in the family through reversal of the *khul'* law and lowering the age of custody to seven years for boys and nine years for girls in accordance with the Hanafi school, priority was given to changing the provisions regulating the age of visitation (see also Sonneveld and Lindbekk 2015). Significant for the purposes of this article, they strongly advocated the notion of hosting (*istidafa*). An important theme in their discourse was that of child-centered companionate marriage under mutual supervision and care from an early age (*ri'aya mushtaraka*) by both the mother and the father on the basis of mutual trust and consultation. They also believed that the nuclear family could continue to be strong in the event of divorce even if the parents had less contact. In addition to advancing the premise that laws could be a tool to lower

¹⁶ Interview by author with 'Abdullah al-Baja, 13 March 2012.

the divorce rate, al-Baja proposed what he called 'the successful divorce' (*al-talaq al-najih*) which aimed at minimising the negative consequences of divorce by creating happy families through child care. Along these lines, al-Baja called for providing to the non-custodial parent the right to host the child not less than one day per week in the event of divorce for children aged three years and older.¹⁷ He legitimated his views with reference to Islamic *shari'a* and the child's best interest based on the premise that the existing laws had transformed the father into a mere wallet (*hafedh nuqud*). With this, he broke with the dominant discourse of personal status law which portrays fathers as economic providers and downplays their affective ties with their children. In his view, this was psychologically harmful to the child who was in need of the father's care (*ri'aya*). In sum, they argued that the personal status laws in force promoted hostility among the family members who should be held together by bonds of affection. As we have seen the foundations of this discourse were laid in the 19th century. Thus, although the groups of divorced fathers and judges denounced the current laws for mimicry of the West, their concerns over female-initiated divorce and proper child-rearing practices must be situated within the context of the previously-mentioned prevailing definition of family.¹⁸ Elsewhere Sonneveld and I have also argued that these demands should be seen in light of a painful renegotiation of gender dynamics where many men are unable to discharge their economic obligations as dictated by classic Islamic law and modern personal status codes (Sonneveld and Lindbekk 2015).

The judges and divorced fathers established alliances with political actors who rose to political prominence after the ouster of Mubarak. Most noteworthy, these included female members of the Muslim Brotherhood's political wing the Freedom and Justice Party (FJP) which used the 2012 parliament as a platform to criticise the existing laws. In this, the divorced fathers and judges were fiercely opposed by a group of divorced mothers called 'Mothers, the Custody Holders of Egypt' who emphasised the role of the mother as being responsible for the development of children. The divorced mothers sought to retain the status quo, but also advocated an increase in the age of custody to eighteen years, by forging alliances with high-ranking religious scholars at al-Azhar's Islamic Research Academy and the High Constitutional Court who had provided the laws with Islamic legitimacy under Mubarak's presidency. Why, they asked, were the laws under discussion if al-Azhar had already decided on the matter?¹⁹ The Mothers Custody Holders also formed alliances with members of the National Council for Women, an entity which was originally established in 2000 and presided over by the former first lady Suzanne Mubarak until 2011 when it was restructured.²⁰ As will be shown below, the groups of divorced mothers and fathers succeeded in affecting the legislative agenda in the post-uprising environment.

¹⁷ 'Abdullah al-Baja's law proposal (on file with author).

¹⁸ This ideal has been reinforced by popular media and judicial discourse (see Abu-Lughod 2005 and Lindbekk 2013).

¹⁹ 'Makhatir al-istidafa'. Statement by 'Mothers, the Custody Holders of Egypt', on file with the author.

²⁰ In the wake of Mubarak's ouster, NCW was restructured to become more representative of society (see Ahram Online 2011).

Judges Becoming Legislators

The Muslim Brotherhood emerged as the best organised political force in the wake of the 2011 revolution. In 2012, the organisation's political wing The Freedom and Justice Party acceded to power based on an informal political settlement with the Supreme Council of Military Forces (SCAF). Together with the Salafist party al-Nur, the party gained the majority of seats in the 2012 parliamentary election, and a president was elected from its ranks in June of the same year. Following sustained demands to change the laws from Mothers Custody Holders of Egypt and groups of divorced fathers, the Minister of Justice Ahmed Mekki in the Islamist-led government formed a specialised committee to revise the family law provisions in March 2013. The work of the legislative committee offers a lens on the political dynamics of a period where family law legislation emerged as a front line in a struggle between Islamist and other elites to define Islamic *shari'a*.

A wide range of voices from opposite sides of the political spectrum was represented in the committee. The drafting committee was composed of, among others, six judges who included 'Abdullah al-Baja and Muhammad al-Tanbuli (Bakry 2013). Other voices represented ranged from prominent female members of the Freedom and Justice Party, members of al-Azhar, the National Council for Women, and representatives of women's organisations. Thus, the composition of the committee must be seen against the backdrop of the growing diversification of political actors with different power bases brought about by the 2011 uprising. It was surrounded by much controversy, and from the moment of its inception, the work of the committee was surrounded by many leaks and rumours. The work of the committee provides an interesting glimpse into the debates on family law and complexities of power configurations during the analysed period. The struggle between the groups of divorced mothers and fathers set the tone for discussions inside the committee. Reflective of pressure exerted by the groups of divorced fathers and mothers, interviewed members of the committee described the discussions as part of the tug of war between men and women. 'While we listen to each other, no one is willing to compromise', remarked a member of the National Council for Women (NCW). Illustrative of the heated atmosphere in which the draft law was discussed, is that according to an interviewed member of the committee, representatives of the opposing sides were about to 'attack each other's throats'.

I was allowed to attend a meeting held by one of the three sub-committees in June 2013. It became apparent that 'Abdullah al-Baja's views converged with those belonging to the female members of the FJP. Thus, they stressed that the consent of the husband is a prerequisite for a *khul'* divorce to be valid. However, as the debate heated up, it became clear that the most controversial issued revolved around child-rearing practices. Al-Baja and the female members of the FJP called for a return to the situation of the codes on personal status from the 1920s when the age of seven years and nine years for boys and girls respectively. Meanwhile, a prominent representative of al-Azhar named 'Abdullah al-Najjar along with a member of the NCW wished to increase the age of custody to 18 years for both sexes. All actors anchored their demands in religious authority. The above-mentioned viewpoints appeared to constitute two extremes. Between these extremes there was a wide spectrum of opinions. In terms of the

focus of this article, it is important to point out that experiences in the courtroom concerning the implementation of the law on *khul'* served as a point of reference. Muhammad al-Tanbuli sought to rectify what he considered to be abuse of the *khul'* law by introducing a level of appeal to discuss the reasons behind the requests with the aim of ensuring that the women truly resented their husbands and hence did not divorce for frivolous reasons. It is also worth mentioning that 'Abdullah al-Baja, who started out as a strong opponent of the '*khul'* law', moderated his position somewhat. During an interview in June 2013, he told me that amending it was 'not so important'. On a personal level, he appeared to have been affected by accusations of being against women (*didd al-mar'a*). 'It hurt me to be called an enemy of women. My aim is justice (*'adela*), not to destroy women'.²¹ Instead he demanded the introduction of mechanisms to ensure that the husband received all he had paid to the wife and not just a token dower of L.E 1 as often occurred in such cases. However, such mechanisms should not be used to deny women the right to *khul'* without the consent of the husband since this was considered an integral part of *shari'a*. Again, this appears to illustrate that judicial divorce through *khul'* has become less controversial than it was following its promulgation in 2000 and that the main debate revolves around custody and visitation.

The discussions inside the drafting committee took place during a period of mounting power struggle between entrenched institutions associated with the Mubarak regime and the rising Islamists elite. In light of this, an outstanding feature in interviews with representatives of the opposing sides was a strong sense of precariousness. Whereas al-Baja told me he valued the presence of different opinions and argued that they made the discussions richer and conducive to the public good, other actors found it difficult to maintain their authority. Despite the fact that the National Council for Women underwent restructuring after the revolution, the presence of its members along with high-ranking scholars from al-Azhar on the committee was taken by some members as an indication that substantial elements of the Mubarak regime were still prominent in state institutions and in the process of staging comebacks. Fearing that they were in a position to disrupt the initiative to revise the family law responsible for corrupting the family, a committee member allied with the Muslim Brotherhood stressed the need to rally behind the ruling Islamist regime: 'We need to give the new regime our support so it may assume power and bring about complete change, including the family!'²² During the parliament of 2012, three different law proposals dealing with judicial divorce through *khul'*, child custody, and visitation rights after divorce which were submitted by individual MPs were blocked due to the support of al-Azhar for the laws in force. However, during an interview, Abdalla al-Najjar of al-Azhar's Research Academy told me that al-Azhar found it difficult to influence discussions in the 2013 committee due to an often hostile attitude toward its members and decisions taken by majority vote. Therefore, he felt this was a critical moment for Egyptian women where gains made since the beginning of the 20th century were at risk of being repealed. The above statements provide greater insight into the dynamics of the debates over men and women's rights within the context of post-revolutionary Egypt.

²¹ Interview with 'Abdullah al-Baja, 3 June 2013.

²² Interview with committee member, 5 June 2013.

The committee was in the process of deliberating proposed changes to legislative provisions on divorce when the armed forces ousted Muhammad Mursi in July 2013. Following the 2013 coup, the work of the legislative committee was brought to an effective halt. In the words of 'Abdullah al-Najjar: 'The 2013 revolution rescued the Egyptian woman'.

The statement by the al-Azhar representative feeds into a narrative which holds that the period from 2011 until the July 2013 military coup was a critical moment in Egyptian history where women's hard-earned rights were in peril of being repealed. Along the same lines, there is a tendency in scholarly literature to cast revolutions in the Middle East as either emancipatory or restricting women's rights (Al-Ali 2012; Moghadam 2003). While this was partly the case, the above discussion indicated that what the 2011 revolution meant for gendered rights in relation to family law was highly fluid and open-ended due to political power configurations characteristic of the transition period and the diversity of opinions inside the legislative committee. Notwithstanding significant areas of divergence, interviews with former members of the committee also indicate that the gap between NCW members, al-Azhar and the female members of the Muslim Brotherhood was partly breached as a result of negotiation. According to interviewed members of the committee there appeared to be an emerging, but by no means unanimous consensus that divorced fathers should be allowed to host their children in return for extending the age of custody to eighteen years. Meanwhile, the NCW member emphasised that fathers who did not provide for their children should not be allowed to host them. In addition, safeguards should be put in place to prevent fathers from kidnapping their children.²³

We have seen that groups of divorced fathers attempted to capitalise on the opportunity structures offered by the 2011 revolution by campaigning intensely for family law reform and that a small number of judges took part in public debates. Among other actors, they forged alliances with female members of the Muslim Brotherhood. Following a violent campaign of repression at the hands of Egypt's military regime, the Muslim Brotherhood was excluded from the formal political sphere, and its female section accordingly switched its activities from advocacy of family law reform to survival. In October 2014, newly elected President Abd al-Fattah al-Sisi expressed the need to revise several laws, including the personal status laws (Basil 2014). At the time of writing this article, it remains to be seen if the political climate brought about by the monumental events of July 2013 also entailed the marginalisation of the alternative discourses represented by judges and groups of divorced fathers highlighted in this article.

Conclusion

This article has highlighted two functions performed by Egyptian family courts. First of all, they have played an important role in developing personal status law through their decisions. Beyond the decisional outcome, some judges were

²³ Interview with member of NCW 3 June 2013 and Muhammad Shahat al-Jindy, 10 February 2014.

shown to use the court as an arena for legal-political debate. The contribution started with an analysis of rulings, arguing that individual judges challenged the prevailing legal discourses prior to the 2011 revolution and ended with some judges entering the public debate and becoming legislators in its wake. During the period between February 2011 and the ouster of Muhammad Mursi in June 2013 personal status legislation promulgated at the beginning of the 21st century emerged as a controversial point. I explored the calls for family law revision in light of judicial discourse from two angles: the application of the so-called law on *khul'*, and the rules concerning visitation rights where court cases brought into view divergent views among judges who recast child rearing as a shared responsibility between both parents in the event of divorce. It was within the context of these developments I argued that one could place some of the arguments that erupted in the aftermath of the 2011 revolution.

In the foregoing discussion, I situated the demands of judges and other political actors for a revolution in family law against a historical background where gender and nation-building were inextricably intertwined. In addition to this, they were viewed in a political context where various social forces contended for religious authority. This was thrown into relief with the establishment of a committee tasked with revising the family laws under the presidency of Muhammad Mursi in 2013 and where judges were given a legislative voice. I explored some of the discussions which took place inside the legislative committee in light of the power struggle between elites representing institutions associated with the Mubarak regime and new political actors who gained ascendancy during the period in question. In line with this, I argued that the gender implications of the 2011 revolution within the context of *shari'a*-derived family law was rather fluid and open-ended. While the future of family law reform depends on emerging dynamics of Egyptian politics, it is worth noting that the alternative discourse promoted by individual family court judges appears to have gained more ground among some branches of the state. In a yet unpublished document on the rights of women in Egypt, al-Azhar emphasised the centrality of shared child care.²⁴ In a fatwa delivered in September 2013, the new mufti of Egypt endorsed the concept of hosting. In response, the group of divorced mothers addressed the grand shaykh al-Azhar with a letter where they voiced their fears that the fatwa would 'add fuel to the fire' of judges who issue divergent rulings granting fathers the right of hosting and thus snatch children from the custody of their mothers.²⁵ This suggests that child-rearing practices remain a subject of internal debate not only within the judiciary, but also among other state institutions tasked with defining Islam.

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²⁴ Al-Azhar's 'Document on the Woman in Egypt', on file with author.

²⁵ See fatwa no. 350 by the grand mufti of Egypt and letter of response from Mothers, the Custody Holders of Egypt (on file with author).

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