Development of *Khul'* Law:
Legal, Judicial and Interpretive Trends in Pakistan

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Table of Contents

Abstract

This dissertation analyzes the concept of *khul‘* in Pakistan and its impact on contemporary religious debates in the country. Combining the multiple fields of Islamic legal thought, historical analysis, and contemporary court cases, the dissertation tracks the development of *khul‘* from its beginnings to its integration into the Pakistani legal system through the methods of neo-*ijtihād* by the judiciary. Additionally, the dissertation focuses on the diverse reactions of the *‘ulamā’* to the judges, and in particular the response by the Deobandi Mufti Taqi Usmani, to show the religious dilemma faced by Pakistani Muslim women, with their court-obtained *khul‘* orders not accepted as in accordance with the *sharīʿa*. Ultimately, this dissertation argues that there is a need for wider collaboration and coordination between Pakistani *‘ulamā’,* the judiciary and legislature to carefully apply alternative methods of interpretation within Islamic law, solving the dilemma created by the contradictory approach to *khul‘* and ensuring both the preservation of women’s rights and *sharīʿa* legitimacy.

Résumé

Cette thèse analyse le concept de *khul‘* au Pakistan et son impact sur les débats religieux contemporains dans le pays. Combinant les différents champs de la réflexion juridique islamique, de l’analyse historique et d’affaires judiciaires contemporaines, la thèse suit le développement du *khul‘* de ses débuts jusqu’à son intégration au sein du système judiciaire pakistanais via l’emploi de méthodes de néo-*ijtihād* par le judiciaire. En outre, la thèse se concentre sur les diverses réactions des *‘ulamā’* vis-à-vis des juges, et, en particulier, l’intervention du mufti déobandi Taqi Usmani, visant à montrer le dilemme religieux dans lequel des femmes musulmanes pakistanaises se trouvent avec les ordres de *khul‘* obtenus en cour non acceptés comme étant en accord avec la *sharīʿa*. Ultimement, la thèse soutient qu’il y a un besoin pour une plus grande collaboration et coordination entre les *‘ulamā’* pakistanais, le judiciaire et le législatif en vue d’appliquer soigneusement des méthodes alternatives d’interprétation au sein du droit islamique, résolvant le dilemme généré par l’approche contradictoire vis-à-vis du *khul‘* et assurant ainsi à la fois la préservation des droits des femmes et la légitimité de la *sharīʿa*.

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A Note on Transliteration

This dissertation uses the transliteration system of the *International Journal of Middle East Studies (IJMES)* with the exception that the Arabic technical terms and names found in Merriam-Webster's Dictionary are fully transliterated with diacritical marks (macrons and dots) and italicized where necessary–for example, *sharīʿa*, Qur'ān, *ḥadīth,* ʻAlī. The word *khul*ʻ is frequently used in the dissertation and I have kept its transliteration as is. However, in Pakistan the word is rendered into Urdu and pronounced and written as *khula* and *khula*ʻ, with a *fatḥa* on the lām. This alternative spelling will only be utilized when providing quotations from Pakistani law and caselaw.

In the bibliography, the definite article al- is placed at the end of the first name, rather than at the beginning of the last name.

Introduction

In 2010 a woman named Saima Noreen was married to Muhammad Arif. Soon after their marriage, however, Saima approached the Family Court of Peshawar requesting a divorce based on the 1939 Dissolution of Muslim Marriages Act (DMMA). She claimed that her husband had treated her with cruelty, constantly abusing her and therefore she had the right to a divorce and that, since it was due to the actions of her husband, she should have the full amount of her dower (*mahr*) paid to her. Upon investigation of the evidence presented, the Family Court judge ruled in her favor, granting her divorce and ordering the payment of her dower.

Her husband, feeling that this was an unfair judgment, appealed the Family Court's ruling and failed twice until he reached the Supreme Court of Pakistan. In this instance, his lawyer argued that the wife

> nowhere displays even an iota of cruelty perpetuated upon her by the petitioner. To the contrary the respondent admits under cross-examination that she was living very happily with the petitioner...so also are other witnesses who were produced by the respondent...could not establish that the petitioner was guilty of cruelty.

Her attorney, on the other hand, responded that cruelty, as defined by the DMMA, does not specifically mean physical torment but

> can also be by way of mental torture...The respondent had stated on oath that the petitioner as well as his family members used to torture her day in and day out as a result of which she was forced to leave her martial home.

The Supreme Court agreed that they could accept any evidence of either physical or mental cruelty, however that evidence must be from a registered medical doctor and reflect treatment obtained for the claimed injuries. The wife had no such evidence and no cruelty could be proven with the exception of her sworn testimony. The Supreme Court, therefore, believed that the true way to dissolve her marriage should have been through the method of *khul'*, or a divorce issued by the wife that was no fault of the husband. As a result, she should be forced to give up her dower to her husband and would subsequently be released from her marriage while the husband would lose his ability to order her back to the marital home. The Supreme Court therefore dismissed the husband's claim and ordered the wife to give up her rights to the plot of land that she had received as dower.

Although *khul‘* existed in classical Islamic legal discourse, its implementation in the Pakistani legal system showed significant differences from that which developed in the premodern period. For example, classical discourse often required that *khul‘* could only be completed with the consent of the husband, a factor no longer present in the contemporary Pakistani system. Ever since the 1960s judges have taken it upon themselves to re-interpret the traditional understandings of Islamic Law to grant *khul‘* to women who cannot prove any grounds of fault by the husband, releasing them from a marriage simply because they no longer desire to live with their husband.[1] In academic literature, this move is often interpreted as a major step forward in women's rights in the Muslim World.[2]

This dissertation seeks to show how the concept of *khul‘* developed in the Pakistani context. Beginning with a discussion of *khul‘* in the classical period and then moving chronologically through the colonial period and to the modern day, the chapters of this dissertation chart how the concept of *khul‘* was eventually re-interpreted by the Pakistani judiciary, moving beyond the definitions created by the classical schools of jurisprudence (*fiqh*) and towards a new understanding of the law. This dissertation argues that, through the example of *khul‘*, the Pakistani judiciary, in concert with legislation, exercised a new form of legal interpretation, known as *neo-ijtihād* and based on the classical Islamic concept of *ijtihād*, and applied it to the contemporary context.

However, the implementation of *khul‘* has resulted in the exacerbation of two larger conflicts brewing in Pakistan since its founding: the place of Islam in the country's legal system and the struggle between the authority of Pakistan's religious scholars (*‘ulamā’*) and the modern

[1] Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi, PLD 1959 Lahore 566; Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97.

[2] Oussama Arabi, "The Dawning of the Third Millennium on Shari‘a: Egypt's Law No. 1 of 2000, or Women May Divorce at Will," *Arab Law Quarterly* 16, no. 1 (2001): 2–21; Nadia Sonneveld, Khul‘ *Divorce in Egypt: Public Debates, Judicial Practices, and Everyday Life* (Cairo: The American University in Cairo Press, 2012); Elisa Giunchi, "Islamization and Judicial Activism in Pakistan: What Šarī῾ah?," *Oriente Moderno* 93, no. 1 (2013): 188–204; Lucy Carroll, "Qur᾽an 2:229: 'A Charter Granted to the Wife'? Judicial *Khul‘* in Pakistan," *Islamic Law and Society* 3, no. 1 (1996): 91–126; Muhammad Zubair Abbasi, "Women's Right to Unilateral No-Fault Based Divorce in Pakistan and India," *Jindal Global Law Review* 7, no. 1 (April 1, 2016): 81–95; Muhammad Zubair Abbasi, "Judicial *Ijtihād* as a Tool for Legal Reform: Extending Women's Right to Divorce Under Islamic Law in Pakistan," *Islamic Law and Society* 24, no. 4 (October 3, 2017): 384–411; Muhammad Munir, "The Law of *Khul‘* in Islamic Law and the Legal System of Pakistan," *LUMS Law Journal* 2 (2015): 33–63; Muhammad Munir, "Judicial Law-Making: An Analysis of Case Law on *Khul‘* In Pakistan," *Islamabad Law Review* 1, no. 1 (2014): 7–24.

Islamic state. Pakistani *'ulamā'* have used the Ḥanafī school to reject the Pakistani court system's no-fault based decree of *khul'*, arguing that it is not possible within the *sharī'a* that a wife seek separation from her husband if there is no harm inflicted upon her. The Pakistani judiciary, on the other hand, has reinterpreted the *khul'* right of women, embodied in later legislative changes in 2002 and 2015, to guarantee that the concept of *khul'* is sufficient for the state to exercise its authority against all those who challenge it. The dissertation therefore intends to engage with the classical sources of the *sharī'a* to show how a no-fault based court-issued decree of *khul'* against the consent of the husband could be viewed as acceptable and valid, and that the opinion of the *'ulamā'* who are against the *sharī'a* legitimacy of the law is only a *partial* representation of the *sharī'a.*

In order to do so, the dissertation has first dealt with the classical position of four Sunni schools where previously the consent of the husband had been maintained as a *sine qua non* condition for *khul'* separation. At the same time, an alternative provided by Mālikī school allowed arbiters to separate the couple if they deemed it appropriate. Likewise, the role of the *'ulamā'* who participated in the drafting of the Dissolution of Muslim Marriages Act (1939), provides us with significant guidance as to the potential for legal reform. Therefore, this has also been made part of the dissertation's discussion. Ashraf 'Alī Thānavī, a traditional Ḥanafī scholar of the Indian subcontinent and extremely respected in pre-Partition Indian society, changed his approach and gave a *fatwā* that diverged from the classical juristic position when he realized the needs of his changing society. He saw Muslim women committing apostacy to remove themselves from unwanted marriages, a concept allowed according to the Ḥanafī school.[3] In 1931, Ashraf 'Alī Thānavī changed this ruling and stated that such marriages will remain intact as apostacy was merely a *ḥīla* (legal device or trick) to break the marriage.[4] He further ensured that the later Dissolution of Muslim Marriages Act incorporated his new *fatwā* and legally blocked conversion by overtly changing the long-standing Ḥanafī position on apostasy. Therefore, I argue that time, space and changing circumstances may convince *'ulamā'* to change school opinions. In the case of *khul'*, the law of the land has already been changed,

[3] Previously Thānavī has been issuing *fatwā*s as per the established opinion of the Ḥanafī school where the marriage contract of an apostating woman shall stand annulled, see Ashraf 'Alī Thānavī, *Imdād al-Fatāwā*, ed. Muftī Muḥammad Shafī', vol. 2 (Karachi: Dār al-'Ulūm, 2010), 392–93.

[4] Ashraf 'Alī Thānavī, *Ḥīla-i Nājiza Ya'nī 'Auratōṇ Kā Ḥaqq-i Tansīkh-i Nikāḥ (The Successful Legal Stratagem: Women's Right to Abrogating the Marital Contract)* (Karachi: Dār al-Ishā'at, 2017), 117–19.

making it imperative upon Muslim clergy to support the legal foundations of a Muslim society where they are responsible for the moral and spiritual guidance of Muslims. Their position should not be to simply defend their authority in comparison to the authority of the state.

One of the main objections of the *'ulamā'* to the 2002 *khul'* legislation is that the judiciary has intervened in the realm which is beyond their expertise and scope, namely directly interpreting Qur'ān and Sunna to deduce rulings.[5] The judges who initiated and established the *khul'* precedent in Pakistani case law were of the opinion that being the judges of a newly established Muslim state where "Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah,"[6] it is their responsibility to provide adequate solutions to the problems of Muslims living in Pakistan. Although they never went so far as to claim themselves as the sole representatives of *ijtihād*, their methodology saw them using the methods of original Islamic legal interpretation, which, in contemporary scholarship, is termed as judicial *ijtihād*; "a form of collective *ijtihād* that falls under the broad category of neo-*ijtihād*"[7] Judges further distanced themselves from the already existing schools' opinions and declared that they are not bound to the opinions of earlier *fuqahā'* because "the learned Imams never claimed finality for their opinions."[8] The judiciary further exploited Muhammad Iqbal's (d. 1939) idea of collective *ijtihād* or *ijtihād* through "a Muslim legislative assembly."[9] This judicial activism was not welcomed by all the *'ulamā'* and they immediately challenged the ability of judges in entering the realm of *ijtihād*. To fully understand the position of judiciary and the *'ulamā'* it is important that first we see how *ijtihād* has been understood in Islamic law, how it was exercised, what were the qualifications for a *mujtahid* and can it be still exercised? If yes, who is qualified to do so?

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[5] See Uthmani's rebuttal to the Supreme Court's ruling in Khurshid Bibi v. Muhammad Amin case, Muhammad Taqi Usmani, *Islām Mēn Khul' Kī Ḥaqīqat [The Reality of Khul' in Islam] (Printed along with Ḥīla-i Nājiza of Thānawī)* (Karachi: Dār al-Ishā'at, 2017).

[6] Preamble to the Constitution of the Islamic Republic of Pakistan, accessed May 15, 2019, http://www.pakistani.org/pakistan/constitution/preamble.html

[7] Abbasi, "Judicial *Ijtihād* as a Tool for Legal Reform," 387; Serajuddin uses the term "judicial activism" to suggest that the law is sometimes adapted "to meet the challenge of social justice by giving it a liberal interpretation." Alamgir Muhammad Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study in Judicial Activism* (Oxford; New York: Oxford University Press, 2011), 1.

[8] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97.

[9] Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam*, ed. M. Saeed Sheikh (Stanford: Stanford University Press, 2013), 138.

The Question of *Ijtihād*: What is *Ijtihād*?

According to the Pakistani judiciary, *ijtihād* meant a critical engagement with the Qur'ān and Sunna to develop rulings that were suitable for the needs of society. According to Judge Muhammad Shafi in the case of Rashida Begum v. Shahab Din in 1960, "Reading and understanding the Qur'an implies the interpretation of it and the interpretation in its turn includes the application of it which must be in the light of the existing circumstance and the changing needs of the world."[10] This definition also implies that the jurist must not be bound by opinions developed by previous scholars, and that their commentaries and understandings of the previous texts are not to represent the last word in any legal question. In another case, the Full Bench of the Lahore High Court stated specifically that the court is not bound to rules or opinions laid down by the classical jurists, stating:

> We are really dealing with the interpretation of the Holy Qur'an and on a question of interpretation we are not bound by the opinions of jurists. If we be clear as to what the meaning of a verse in the Qur'an is, it will be our duty to give effect to that interpretation irrespective of what has been stated by jurists.[11]

For the Full Bench, the *aḥādīth* of the Prophet are to be treated in the same way, and if minds of judges are clear as to the order of Allah Almighty or the Prophet then we have to rule accordingly.[12]

Ijtihād for the Pakistani judiciary, therefore, implies a sense of religious authority and freedom to construct an independent direction of interpretation and inquiry, as long as it is still held within the framework of the Qur'ān and Sunna. Classically, this understanding coincides with a *Ḥadīth* of the Prophet who, when sending his Companion Mu'ādh ibn Jabal to Yemen as a judge, questioned him as to how he will rule. Mu'ādh responded, "I will rule according to the Book of God (the Qur'ān)." The Prophet then asked, "And if you do not find it (the answer) in the Book of God?" to which Mu'ādh responded, "Then by the practice of the Prophet of God." The Prophet then asked, "And if you do not find it (the answer) in the Sunna of the Prophet, nor in the Book of God?" Mu'ādh responded, "Then I will interpret (*ajtahid*) with my opinion, and I will not spare any effort." The Prophet then struck his chest in approval saying, "Praise to God who

[10] Mst. Rashida Begum v. Shahab Din and Others, PLD 1960 Lahore 1142.
[11] Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi, PLD 1959 Lahore 566.
[12] Ibid.

has made successful the messenger of the Messenger of God in finding that which pleases the Messenger of God."[13] For classical jurists *Ijtihād* is the exertion of mental energy in the search for a legal opinion to the extent that the faculties of the jurist become incapable of further effort.[14] The principles for *ijtihād* were discussed in detail in the works of legal theory, the primary objective of which was to lay down a coherent system of principles through which a qualified jurist could extract rulings for novel cases.[15]

However, the use of a classical term such as *ijtihād* in the modern period raises many questions as to its religious and legal validity, and therefore a more detailed discussion of the classical doctrine is necessary. According to Wael Hallaq, the first complete list of the requirements for the performance of *ijtihād* can be found in the work of Abū Ḥusayn al-Baṣrī (d. 436/1034). His requirements were firstly the knowledge of the Qur'ān, the Sunna of the Prophet, the principles of inference (*istidlāl*), and analogy (*qiyās*). The *mujtahid* must also be able to investigate the paths of *Ḥadīth* transmission and determine the trustworthiness of the transmitters to verify their credibility. For al-Baṣrī, the most important of all of these factors was analogy, particularly the ability to deduce the common *ratio legis* (*'illa*) present in a ruling and apply that common *'illa* to a new situation for which a ruling has not yet been developed. During the process of determining this *'illa*, a *mujtahid* must be fully aware of and analyze the complexities of the language and their legal meaning. Additionally, a *mujtahid* must also be aware of the customs of their locality (*'urf*). Finally, the *mujtahid* must know that the situation in front of him has not been dealt with before, as if a ruling had already been derived by another jurist then it should be followed.[16]

The qualifications presented by al-Baṣrī are a rundown of the principles within the field of the fundamentals of Islamic jurisprudence (*uṣūl al-fiqh*). However, in the area of inheritance al-Baṣrī provides an important exception. If an individual is brought an issue of inheritance

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[13] Abū Dāwūd Sulaymān b. al-Ashʿath al-Sijistānī, *Sunan Abī Dāwūd*, ed. Muḥammad Muḥy al-Dīn ʿAbd al-Ḥamīd (Beirut: al-Maktaba al-ʿAṣriyya, n.d.), 3:303, hadith no. 3592.

[14] ʿAlī b. Muḥammad al-Āmidī, *Al-Iḥkām Fī Uṣūl al-Aḥkām*, ed. ʿAbd al-Razzāq ʿAfīfī, 1st ed. (Riyadh: Dār al-Ṣumayʿī, 2003), 2:379-81; Muḥammad b. ʿAlī b. Muḥammad al-Shawkānī, *Irshād Al-Fuḥūl Ilā Taḥqīq al-Ḥaqq Min ʿIlm al-Uṣūl*, ed. Aḥmad 'Izzū 'Ināya, 1st ed., vol. 2 (Beirut: Dār al-Kitāb al-ʿArabī, 1999), 232–33.

[15] Al-Āmidī, *Al-Iḥkām Fī Uṣūl Al-Aḥkām*, 1:6; Abū Ḥāmid Muḥammad b. Muḥammad b. Muḥammad al-Ghazālī, *al-Mustaṣfā min ʿIlm al-Uṣūl*, 1st ed. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1993), 1:5; al-Shawkānī, *Irshād Al-Fuḥūl Ilā Taḥqīq Al-Ḥaqq Min ʿIlm Al-Uṣūl*, 1:3.

[16] Wael B. Hallaq, "Was the Gate of Ijtihad Closed?," *International Journal of Middle East Studies* 16, no. 1 (1984): 5–6.

distribution and he does not fulfill the requirements mentioned above, then he is still able to issue a valid and legitimate ruling. This shows that earlier scholars, although interested in developing some special requirements for those interested in performing *ijtihād*, the main requirements were simply to have studied a basic curriculum of Islamic law. Additionally, they were open to the idea that an individual could perform *ijtihād* even though he had not completed this simple form of study.

Throughout the following centuries the qualifications for becoming a practitioner of *ijtihād* (*mujtahid*) were made more difficult. Al-Ghazālī (d. 505/1111), for example, gave seven requirements that a person must achieve in order to become a *mujtahid*:

1. Knowledge (not memorization) of the 500 verses of the Qur'ān relating to legal matters;
2. Knowledge of the *Ḥadīth* literature relating to legal matters, particularly the Sunan of Abū Dāwūd, Sunan of Aḥmad and al-Bayhaqī;
3. Knowledge of the substance of juristic works (*furū'*) and the points subject to consensus (*ijmā'*) so that he does not deviate from established precedent. At the very least, he must know that his *ijtihād* does not contradict the rulings of any known jurist;
4. Knowledge of the methods through which legal evidence is derived from the texts;
5. Knowledge of the Arabic language (although complete mastery is not a pre-requisite);
6. Knowledge of the rules governing the concept of abrogation (*naskh*) or, at the very least, he must know that the particular verses and *Ḥadīth*s he is referring to are not abrogated;
7. Investigate the authenticity of the *Ḥadīth*s referred to. If they have been accepted by the Muslim community as reliable then they cannot be questioned. If this process has been completed by a previous scholar then there is no need to redo it, and if a narrator is considered as acceptable, then all of his *Ḥadīth*s are to be accepted.[17]

These requirements are more stringent and detailed than those of al-Baṣrī. However, in each of the points above al-Ghazālī is willing to loosen the requirements when necessary, particularly in specific areas of the law that the jurist felt needed more flexibility. For al-Baṣrī, as was seen

[17] al-Ghazālī, *al-Mustaṣfā fī 'Ilm al-Uṣūl*, 342–43.

above, this area was inheritance.[18] For al-Ghazālī, on the other hand, it was issues of family law such as divorce. [19]

This piecemeal acceptance of *ijtihād* by premodern jurists and its limitation to certain areas of the law has been discussed by Wael Hallaq.[20] Challenging the concept of the "closing of the gate of *ijtihād*" established by Joseph Schacht,[21] further confirmed by J. N. D. Anderson[22] and declared a *fait accompli* by H. A. R. Gibb,[23] Hallaq argued that these openings and exceptions to the requirements of *ijtihād* kept the "gate" open and allowed for new interpretation.[24] The method behind this process has been elaborated on by others such as Mohammad Fadel, who when observing the development of abridged (*Mukhtaṣar*) literature showed that the creation of digests of legal rulings were not meant to reduce the ability of a jurist to act, but rather were meant to give a greater degree of stability to the overall legal system.[25] Additionally, according to Ahmed Fekry Ibrahim, jurists and judges were always able to use the circumstances of the cases that they were ruling in to "forum shop," pragmatically choosing rulings from other schools and developing rulings that were more suitable for individual cases.[26]

During the pre-modern period, however, new scholars suggested that the practice of *taqlīd* and the processes of the classical period to limit *ijtihād* had resulted in the stagnation of Islamic law and, subsequently, Muslim society as a whole. In South Asia, this can be seen most clearly in the writings of Shāh Walī Allāh Dehlawī (d. 1762) who, in his work entitled *'Iqd al-Jīd fī Aḥkām al-Ijtihād wa-l-Taqlīd* (Chaplet for the Neck concerning the Rules of *Ijtihād* and *Taqlīd*),[27] lamented the loss of independent reasoning and called for its re-application. For Walī Allāh it is

[18] Hallaq, "Was the Gate of Ijtihad Closed?," 6.
[19] Ibid., 6–7.
[20] Hallaq, "Was the Gate of Ijtihad Closed?"
[21] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 70–71.
[22] J N D Anderson, *Law Reform in the Muslim World*, 7.
[23] H. A. R Gibb, *Modern Trends in Islam,* (Chicago, Ill.: University of Chicago Press, 1947), 13.
[24] Hallaq, "Was the Gate of Ijtihad Closed?," 4–7.
[25] Mohammad Fadel, "The Social Logic of *Taqlīd* and the Rise of the *Mukhtaṣar*," *Islamic Law and Society* 3, no. 2 (1996): 193–233.
[26] Ahmed Fekry Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History* (Syracuse: Syracuse University Press, 2015), 16–17.
[27] Shāh Walī Allāh al-Dihlawī, *Shāh Walī Allāh's Treatises on Juristic Disagreement and Taqlīd: Al-Inṣāf Fī Bayān Sabab al-Ikhtilāf and 'Iqd al-Jīd Fī Aḥkām al-Ijtihād Wa-l-Taqlīd*, trans. Marcia K. Hermansen (Louisville, Ky.: Fons Vitae, 2011).

false to suggest that no *mujtahid* exists in these times.[28] He was not entirely against following the traditional schools of law like the reformers who would come after him or his contemporaries in the Wahhābī Movement in the Arabian Peninsula, but rather felt that the Muslim world had reached a degree of stagnation and was unable to produce rulings that fulfilled the needs of the people and society of the time.

For Shāh Walī Allāh, the basic knowledge required for a person to become a *mujtahid* was to know the basics of the Arabic language, have a working familiarity with the principles of the Qur'ān and the narrators of the *Ḥadīth*, the issues upon which there is absolute consensus amongst the scholars (*ijmā'*), the basic parameters of analogy (*qiyās*), and the underlying principles of the religious legal system that lead to a proper *ijtihād*. The *mujtahid* does not need specific or advanced knowledge of the schools of jurisprudence (*fiqh*) nor theology (*kalām*), as these would only lead to following the opinions of previous scholars and is too advanced for a scholar needing to apply general principles to a specific contemporary case.[29]

In the late 19th and early 20th centuries this call to expand the definition of *ijtihād* would be furthered by new reformers such as Muhammad Iqbal (d. 1938) and Abū 'l-Ḥassan 'Alī Nadwī (d. 1999). Muhammad Iqbal, for example, believed that *ijtihād* should be expanded to become a mechanism of wider society and not exclusively in the hands of a closed elite. Following the establishment of the Sunni schools of jurisprudence (*madhhabs*), the doors of *ijtihād* were closed in the eyes of Iqbal, and the requirements necessary for an individual to become a *mujtahid* were so stringent and demanding that no person could ever reach that point of understanding.

The solution to this problem was for *ijtihād* to turn to the collective. A body of individuals that represent wider society, each possessing one or more of the requirements of *ijtihād*, could come together and act as a whole in the creation of new *ijtihād*. This body, for Iqbal, was the modern legislative assembly. "Ulama must be a part of the Muslim legislative assemblies," argued Iqbal, "so that they can help and guide the open discussion regarding the questions of law."[30]

Nadwī, on the other hand, argued that the revival and renaissance of Islam must be done through the process of *ijtihād*, utilizing the intellectual capabilities of the scholars of our time,

[28] Ibid., 78.
[29] Ibid., 78–79.
[30] Iqbal, *The Reconstruction of Religious Thought in Islam*, 139.

both individually and collectively. This also includes Muslim political and intellectual leaders, not just those with religious qualifications. These scholars should have a familiarity with the spirit of Islam and the Islamic legal system, able to deduce and search for the solutions to the problems faced by the Muslim Umma, and to guide the Muslim world in cases of doubt.[31]

The vision of Nadwī, therefore, was one of an intellectual elite that held the responsibility for guiding the Muslim world towards a better future, not the open *ijtihād* of individual Muslims. This elite should "have the wisdom, knowledge, and capacity, and be ready for hard work to utilize the natural forces activated in the universe and hidden assets of wealth and power hidden in the earth for Islam in a beneficial way."[32]

It was the inspiration gathered from the reform efforts of the 20th century that the Pakistani judiciary used to take up the reigns of reform and introduce new forms of legal interpretation, although they never defined it explicitly as *ijtihād*. They believed that, as the times had changed and the authority of the new Islamic state had been placed (partially) in their hands, they had the ability and increasingly the duty to intervene in the interpretation of the law. Following the opinion of writers like Walī Allāh and Iqbal, they stepped beyond the boundaries of their dominant school (Ḥanafī) and returned to the texts of the Qur'ān and Sunna.

This dissertation takes the position that the work of the Pakistani judiciary can rightly be called *ijtihād*, however as something different than what came before it, or a "neo-*ijtihād*" that exhibits a number of important characteristics that create a stark divergence from the past. For example, the conventional education of the judiciary does not include a detailed understanding of Arabic nor knowledge of the jurisprudence of the four Sunni schools, all requirements for classical interpretations (and even pre-modern interpretations) of *ijtihād*.[33] As a result, most

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[31] Abū 'l-Ḥassan 'Alī Nadwī, *Mā Dhā Khasir Al-'Ālam Bi-Inhiṭāṭ al-Muslimīn* (Manṣūra: Maktabat al-Īmān, 1420), 240–57.

[32] Ibid., 256.

[33] The syllabus for standard law degree in Pakistan does not offer reading of primary sources of Islamic law, however, fundamental principles of Islamic law are taught through secondary sources such as a book by D. F. Mulla, for its details see Dinshah Fardunji Mulla, *Principles of Mahomedan Law* (Bombay: Thacker & Company, 1905). However, International Islamic University, Islamabad offers a unique law degree that combines *sharī'a* with conventional law and is called "LLB Shariah & Law". This degree is not offered elsewhere in Pakistan hence number of graduates is also limited. Moreover, the International Islamic University and its "Faculty of Shariah & Law" was established only in 1980, therefore, its graduates have recently started to enter into workforce and to take key positions such as judges of the High Courts and Supreme Court. See https://www.iiu.edu.pk/wp-content/uploads/downloads/faculties/fsl/scheme/BA_LLB_2010.pdf accessed August 15, 2019.

judges when approaching the Qur'ān, Sunna, or juristic opinions are doing so through English or Urdu translations. More recently, traditionally-trained experts in classical law have entered into the judicial system as jurisconsults and are regularly brought onto cases that are relevant to their educational and professional experience.[34]

Additionally, the position of the judges, as agents of the modern state, produce their rulings from a completely different position of authority and power from the jurists of the past. In the pre-modern period, as discussed by Hallaq, the jurist was simply a member of a larger social network within which the *Sharīʿa* operated. Their rulings operated in an environment of legal plurality, and acted more as a guide than a proclaimer of the *Sharīʿa*.[35] On the other hand, contemporary Pakistani judges work as appointed agents of a modern state, imposing rulings and judgements upon the general population typically without their consultation or agreement.

The position of the Pakistani judiciary within the modern state can be most clearly exemplified through the conflict that has emerged with the country's traditional Islamic scholars, the *'ulamā'*.

The *'Ulamā'* in Modern Pakistan

The relationship between the *'ulamā'* and political authority in the South Asian context is one that has ebbed and flowed across the centuries. During the time of Akbar, for example, more traditional scholars were sidelined in the Sultan's effort to develop a more pluralistic understanding of the religion.[36] He forced many of them to sign a declaration giving him the absolute authority to dictate matters of the faith, and redirected funding from their schools towards his own projects. With the rule of Aurangzeb, on the other hand, the role of the *'ulamā'* changed drastically. For example, one of the most authoritative collections of *fatwā*s in the Ḥanafī School, the al-Fatāwā al-'Ālamgīriyya (al-Fatāwā al-Hindiyya), was constructed and

[34] See, for example, Saleem Ahmad v. The Government of Pakistan PLD 2014 Federal Shariat Court 43, the Judge wrote that "Dr. Aslam Khaki, Dr. Hafiz Tufail, Dr. Tahir Mansuri and Dr. Yousuf Farooqi who were appointed as Jurisconsults by the Court also entered appearance, made submissions and submitted their written comments." He further explained that "Various Fatawas were submitted in support of the contentions made by the petitioners."

[35] Wael B. Hallaq, *An Introduction to Islamic Law* (New York: Cambridge University Press, 2009), 60–64.

[36] Manzooruddin Ahmad, "The Political Role of the 'Ulamā' in the Indo-Pakistan Sub-Continent," *Islamic Studies* 6, no. 4 (1967): 330–31.

compiled under his auspices and patronage.[37] Traditional schools of learning flourished during this period, and the influence of the *'ulamā'* in the royal court was at its peak.[38]

Through the second half of the 19th century, however, the *'ulamā'* found themselves faced with the complexities of a rapidly changing society and the ravages of British colonialism. Following the events of the 1857 Uprising, the British adopted the recommendations of Macaulay's Education Note of 1835 that suggested the promotion of English as the primary medium of education.[39] Other languages, including the Muslim staples of Arabic and Persian, had their influence reduced. For example, Persian, which was once the official court language of the Mughals and had been used by the British during the early decades of their administration, was completely removed and replaced with English.[40]

At the same time that traditional educational institutions were being defunded and the once standard languages of Arabic and Persian taken out of the curriculum, the introduction of European influence also meant the development of new ideas and the creation of a cultural elite that called for change to the traditional approach. Although this environment began to form in the Delhi College (closed after 1857)[41] it was the school at Aligarh, founded by Sir Sayed Ahmad Khan, that would take this message much further.[42] Other reformists and modernists such as Muhammad Iqbal would call for a complete re-organization of Islamic thought and legal interpretation to fit modern understandings.[43] It was partially upon Iqbal's model of an Islamic state that would form the foundations of Pakistan in the first half of the 20th century.

The result of this tumultuous period was the diversification of the *'ulamā'* into multiple streams, each with a different project in mind for the development of South Asian Muslims and methodological approach to the development of Islamic law. One of these groups was the Deobandis. Based in the madrasa founded in 1867 by Rashīd Aḥmad Gangohī and Muḥammad

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[37] Alan M. Guenther, "Hanafi Fiqh in Mughal India: The Fatāwá-i 'Ālamgīrī," in *India's Islamic Traditions, 711-1750*, ed. Richard M. Eaton (New Delhi: Oxford University Press, 2003).
[38] Ahmad, "The Political Role of the 'Ulamā' in the Indo-Pakistan Sub-Continent," 331.
[39] Christopher Rolland King, *One Language, Two Scripts: The Hindi Movement in the Nineteenth Century North India* (Bombay: Oxford University Press, 1994).
[40] Ibid.
[41] See *The Delhi College: traditional elites, the colonial state, and education before 1857. ed. Margrit Pernau* (New Delhi: Oxford University Press, 2006), 1-5.
[42] David Lelyveld. *Aligarh's first generation: Muslim solidarity in British India* (Princeton: Princeton University Press, 1978).
[43] Iqbal, *The Reconstruction of Religious Thought in Islam*, 116–42.

Qāsim Nānotvī, the Deobandis believed in the legal adherence to the Ḥanafī School, accepting only interpretations that followed the Ḥanafīs.[44] Alongside the Deobandis were the Barelvīs, founded by Aḥmad Rezā Khān in what is now Northern India. Although the Barelvīs differed significantly with the Deobandis regarding the importance and practice of Sufism, they accepted the mainstream interpretations of the Ḥanafī School and supported adherence to the Ḥanafī methodology (*taqlīd*).[45] On the other side of the interpretive spectrum were the *Ahl-i Ḥadīth*, founded in Bhopal with the writings of Ṣiddīq Ḥasan Khān, who rejected the concept of *taqlīd* (adherence to a particular legal tradition) altogether. Rather, their methodology encouraged a return to the direct interpretation of the Qur'ān and Sunna, without the need for the traditional schools of law.

These three streams, along with the influence of new voices and reformers, would set the stage for the development of law and society in the new state of Pakistan following Partition. During this time, the *'ulamā'* redefined their role and found new opportunities to play an active role in state politics. The first was that led by Mawlānā Abū 'l-A'lā Mawdūdī who put forth demands for an Islamic constitution under the umbrella of the country's religious party Jamā'at-i Islāmī.[46] The Jamā'at was one of the many Muslim groups that pushed for the partition of the Indian Subcontinent. While redefining Islamic political theory, Mawdūdī coined the term "theo-democracy"[47] to synthesize the Islamic with the modern concept of the nation-state. In this theory the Islamic state was defined as one whose sovereign authority is with Allah Almighty and the Caliph or the head of state as His vicegerent. Since the Qur'ān and Sunnah were the governing principles under this theory, absolute legislative authority rests with Allah. The authority of legislation that the Umma may have is limited and the *'ulamā'* are those who could ensure that the primacy of the Qur'ān and Sunnah remains intact. This methodology was launched to have the Constitution drafted with an Islamic attachment. The then Prime Minister Liaqat Ali Khan presented what was titled the "Objectives Resolution" containing the broad

[44] Barbara Daly Metcalf, *Islamic Revival in British India: Deoband, 1860-1900* (Princeton, N.J.: Princeton University Press, 1982), 88, 141.
[45] Ibid., 265–67; Wilfred Cantwell Smith, *Modern Islām in India: A Social Analysis* (New Delhi: Usha Publications, 1979).
[46] Seyyed Vali Reza Nasr, *Mawdudi and the Making of Islamic Revivalism* (New York: Oxford University Press, 1996), 42.
[47] Ahmad, "The Political Role of the 'Ulamā' in the Indo-Pakistan Sub-Continent," 334.

outlines of an Islamic state.[48] The state ultimately accepted the popular demand and constituted the Board of Ta'līmāt-i Islāmiyya whose members were drawn from the *'ulamā'* of both West and East Pakistan. The Board unanimously asked for ultimate authority as constitutional guardian of the Qur'ān and Sunnah, a proposal that conflicted with the work of the constituent assembly who wanted to implement a parliamentary democracy.[49] Ultimately, the approach of the Board was seen as an encroachment upon the democratic theory of legislative sovereignty.[50] This struggle led to a constitution that was democratic yet acknowledging the sovereignty of Allah Almighty, endorsed by declaring the Qur'ān and Sunnah as the guiding principles of any legislation. Likewise, it was also suggested later to ensure that all existing laws shall also be reviewed to bring them in conformity with the injunctions of Islam and for that purpose a body called Council of Islamic Ideology was proposed in the Constitution.[51] Although this body was formed some years later, it was given only an advisory role.

As Pakistan's first constitution was ratified, the *'ulamā'* had appeared as a solidified "pressure group" in the formation of the state.[52] An interesting observation in this process was that despite the theological and sectarian differences between them, the *'ulamā'* were able to have consensus of opinion (*ijmā'*) on all matters concerning Islamic constitutionalism. The influence of the *'ulamā'* had developed in the constitutional process to the point that they were able to ensure the inclusion of an entire chapter in the 1973 Constitution dedicated to specifically outlining the Islamic provisions and contours of the state.

While the *'ulamā'* took part in constitutional politics, they also worked to establish new institutions of learning in Pakistan. In the era of General Ayub Khan (1958-1969) the Government had promulgated the West Pakistan Waqf Property Ordinance 1959 to regulate waqf properties as well as to curb the authority of *'ulamā'* who were freely enjoying the benefits of charitable properties. The *'ulamā'*, feeling the threat from this move, began establishing their own "religious schools (*dīnī madāris*)," organizations formed according to the different schools of thought that had emerged prior to Partition. The Deobandis founded their "wafāq al-Madāris al-'Arabiyya" in 1959 in Multan, while the Barelvīs founded "Tanẓīm al-Madāris al-'Arabiyya" in

[48] Ibid.
[49] Ibid., 335.
[50] Ibid.
[51] Ibid., 339.
[52] Ibid., 335.

Dera Ghazi Khan in 1959 and the *Ahl-i Ḥadīth* founded the "Markazī Jam'iyyat Ahl-i-Ḥadīth" in Lyallpur (now Faisalabad) in 1955. Likewise, Shia founded "Majlis-i Naẓarāt-i Shī'ah Madāris-i 'Arabiyya" in Lahore in 1958.[53] Despite having their main function to organize the curriculum of religious schools and centralize their examination system, these organizations also took part in the political system.[54] For example, each of these organizations were backed by their respective religious and political parties, who recruited their members from these organizations on the basis of their respective school of thought.[55] However, there was always a considerable minority of *'ulamā'* who distanced themselves from the workings of the state.

Attempts were made by the government to control and modernize these schools and organizations through the Awqaf Ordinance of 1961. Additionally, the Constitution of Pakistan provided for the establishment of an "Advisory Council of Islamic Ideology" in 1960 and Islamic Research Institute in 1962 to "make Islam compatible with the challenges of time."[56] Their stated purpose was to develop harmony between traditional Islamic and modern understandings, however their main job was to curb the influence of the *'ulamā'* and bring them into the purview of the state. The later government of Zulfiqar Ali Bhutto, however, reversed these policies and tried to use a calmer strategy with *'ulamā'*, giving them greater authority and permitting them to play a more active role in parliament.

The government of General Zia-ul-Haq then capitalized on the power and authority of *'ulamā'* by instituting his program of "Islamization," first demanded by the Pakistan National Alliance (PNA).[57] Under this project, the Zia-ul-Haq government made several changes such as providing for greater representation of *'ulamā'* in the Council of Islamic Ideology, organizing of several 'Ulamā'-o-Mashā'ikh conferences, the enactment of the National Education Policy of 1979 in which a whole chapter was dedicated to the religious school system, and even allocating a budget for religious schools.[58] Legally, the Zia-ul-Haq government is most famous for the

[53] S Jamal Malik, "Islamization in Pakistan 1977 -1985: The Ulama and Their Places of Learning," *Islamic Studies* 28, no. 1 (1989): 6–7.
[54] Ibid., 22–23.
[55] Ibid., 7.
[56] Ibid.
[57] Ibid., 9.
[58] Ibid., 9–15.

return to traditional interpretations of the law, in the name of applying the *Sharīʿa*, and the implementation of the Hudood Ordinances.

This oscillation in the relationship of the *'ulamā'* with the state set the stage for the legal conflict that would occur over the provisions of family law and the granting of divorce and *khul'*. Although the *'ulamā'* had been crucial in the development of the early Pakistani state, the attempts of the government in the 1960s to control their influence reflected a dominant opinion within the government that the *'ulamā'* were backwards and incapable of leading a modern society. This tension, as will be seen in later chapters of this dissertation, will give the judiciary precisely the courage that they needed to pick up the reigns of legal interpretation.

The authority of the *'ulamā'* in contemporary Pakistan has its limits, and members of each traditional school must carefully navigate the exercise and implementation of their power. One example of this is the treatment of the "blasphemy laws" represented by Article 295c of the PPC. In the famous case of Asia Bibi,[59] a Christian woman had gotten into a fight with workers in a field and uttered statements which the others felt were blasphemous. They took her in front of the village Imam who confirmed that her statements were illegal, and she was arrested and brought in front of the court. The court, following the rules of the Pakistan Penal Code, issued the death penalty. Asia Bibi, her family, and attorneys appealed to local NGOs and the international community, turning the case into a global issue. At one point, Asia Bibi met with the Governor of Punjab, Salman Taseer, who reportedly told her that the sentence against her is "inhumane" and at another occasion in an interview he said that the law she was being prosecuted under was a *kālā qānūn* "black law."[60] This statement was interpreted by the *'ulamā'* as an equally damning instance of blasphemy and, some called for his execution. In the midst of the controversy one of the governor's bodyguards shot and killed the governor and when questioned stated that he was taking "revenge for the Prophet" due to the governor's blasphemy.[61] The governor's bodyguard was eventually hanged for murder[62] and Asia Bibi, when her case reached the supreme court, was released due to a lack of evidence.[63]

[59] Mst. Asia Bibi v. The State, PLD 2019 SC 64.
[60] Hassan Choudary, "Taseer's Remarks About Blasphemy Law," *The Express Tribune*, January 5, 2011, last accessed September 10, 2019.
[61] Malik Muhammad Mumtaz Qadri v. The State, PLD 2016 SC 17.
[62] Ibid.
[63] Mst. Asia Bibi v. The State, PLD 2019 SC 64.

This case shows power that the *'ulamā'* can exert within Pakistani society. Their support for the execution of the Governor of Punjab and repeated calls for retribution in the name of Islam led directly to his death at the hands of his bodyguard. The case also at the same time, interestingly, shows the limitations of the reach of the *'ulamā'*. Despite their repeated insistence Asia Bibi was released and declared innocent by the country's Supreme Court. Their determination to see the implementation of the blasphemy laws was curtailed by the power of the state, leaving them in this situation with only the still potent power of public persuasion.

Finally, this case shows the lengths the *'ulamā'* are willing to go to in order to preserve their authority and legitimacy, all in the name of working against the state. In an article by Muhammad Mushtaq Ahmad entitled "Pakistani Blasphemy Law: Between *Ḥadd* and *Siyāsah*: A Plea for Reappraisal of the *Ismail Qureshi Case*," the author argues that according to the Ḥanafī tradition the current state of the blasphemy laws in Pakistan are inaccurate and require review.[64] Particularly, he argued that this law unfairly equalizes between Muslims and non-Muslims. For the former blasphemy is a fixed punishment (*ḥadd*), whereas for non-Muslims it is a discretionary punishment enforced by the political authority (*siyāsa*).[65] However, the *'ulamā'* are unwilling to waver even on the slightest point and consider the need for change. Rather, some of them considered the Punjab governor himself committing blasphemy when he merely – albeit incorrectly – criticized the existing law and suggested that it should be reviewed. The *'ulamā'*, therefore, were willing to go against their own principles, adherence to the Ḥanafī methodology, in the name of preserving their power against the authority of the courts.

This rift between the state and the *'ulamā'* also manifests itself regularly in issues of family law, the subject of this dissertation. Before Partition the *'ulamā'* were intimately involved in the creation and development of the law – such as in the DMMA of 1939. Since the creation of Pakistan, however, the *'ulamā'* have consistently rejected and opposed almost all attempts to reform family law in the country. For example, the Reform Commission Report of 1956 was rejected even by the member of the board drawn from the *'ulamā'*, Maulana Ehtishamul Haq.[66]

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[64] Muhammad Mushtaq Ahmad, "Pakistani Blasphemy Law Between *Ḥadd* and *Siyāsah*: A Plea for Reappraisal of the *Ismail Qureshi Case*," *Islamic Studies* 57, no. 1–2 (2018): 43.
[65] Ibid., 37–40.
[66] Freeland Abbott, "Pakistan's New Marriage Law: A Reflection of Qur'anic Interpretation," *Asian Survey* 1, no. 11 (1962): 29, doi:10.2307/3023637; Mian Abdur Rashid, "Report of the Commission on Marriage and Family Laws," in *Studies in the Family Law of Islam*, ed. Khurshid Ahmad, 2nd ed. (Karachi: Chiragh-e-Rah

The *'ulamā'* also opposed[67] the more recent amendment to the Hudood Ordinances proposed by then President Musharraf in 2006, which separated adultery by force (*zinā bi'l-jabr*) and adultery by consent (*zinā bi'l-riḍā*).[68] This was the case even though the *'ulamā'* had directly supported the initial drafting and implementation of the Hudood Ordinances during the regime of General Muhammad Zia ul-Haq.

When articulating their opposition to these new laws, the *'ulamā'* drew on the same soft power and threats to religious legitimacy that they exercised in the field of blasphemy, claiming that they are the sole individuals who have the right to interpret matters in Islamic law, and that only they can issue new rulings that carry the legitimacy of the religion. Any reforms presented by the state can only be accepted if they are in direct compliance with traditional understandings of the law. This rift remains in place today and will be seen in more detail in the rest of the dissertation. In each situation, there are members of the *'ulamā'* who support the reforms and efforts of the state, however those opinions usually remain in the minority.

Following the presentation of the central themes of this dissertation, this introduction will now turn to a review of the current academic literature on the subject of *khul'*, and how the legislative and judicial reforms undertaken in this area have been viewed.

Literature Review

In the development of *Khul'* as a legal device in the modern period, the majority focus in academic literature is on two contexts: Pakistan and Egypt. Significant work has been done on the Egyptian *Khul'* Law of 2000 that allowed a married couple to agree to

> separation (*khul'*): however, if they do not agree and the wife sues demanding (the separation) and separates herself from her husband by forfeiting all her financial legal

Publications, 1961), 51; Khurshid Ahmad, ed., *Marriage Commission Report X-Rayed: A Study of the Family Law of Islam and a Critical Appraisal of the Modernist Attempts to "reform" It.* (Karachi: Chiragh-e-Rah Publications, 1959), 253.

[67] Muhammad Taqi Usmani, "'Taḥaffuz-i Ḥuqūq Niswan Bill' Kā Aik Jā'iza," *Al-Sharī'a* 17, no. 12 (2006): 2–11.

[68] For details see Muhammad Ahmad Munir, ed., "The Protection of Women (Criminal Laws Amendment) Act, 2006," *Islamic Studies* 46, no. 1 (2007): 87–114.

rights and restores to him the dower he gave to her, then the court is to divorce her from him.[69]

According to Oussama Arabi, the law presented by the legislature was indicative of a new interpretation of the *Sharīʿa* as a whole. "In light of this policy," he argues, "*Sharīʿa* is being restructured by the judiciary apparatus of the Egyptian state, with a seemingly conservative reference to those part of Islamic law which express the content of the explicit Qur'ānic legal injunction or a Prophetic ascertained precedent (*sunna*)."[70] Arabi argues that within this new definition the Egyptian state exercised *ijtihād*, working outside of the boundaries of the traditional schools of law (*madhāhib*), and quotes a High Court ruling in which the rulings of the major schools are "subject to revision, evaluation, or replacement by other rules."[71]

Although Egypt's *khulʿ* law represented an important step towards giving women control over their marital affairs, other authors have highlighted that in practice this has not been as successful. For Dawoud el-Alami, for example, *khulʿ* in Egypt is at its best a "quick-fix,"[72] allowing women in desperate situations a way out in exchange for a full relinquishment of their financial rights. For the majority of women who have legitimate financial claims, *khulʿ* ends up being an alternative to the lengthy and costly process of working through the Egyptian legal system. In his view, "*khulʿ* represents progress inasmuch as it is a recognition of a woman's right of choice, but it does little to rectify the injustice of a system that denies women access to real remedies and just settlements."[73]

Another important element discussed in the literature is that of class. Elaborated significantly in the work of Nadia Sonneveld, she argues that *khulʿ* is a successful device for educated, upper-class women who do not have the same social pressures and stigma of divorce, particularly that initiated by the wife. In her analysis of the social impact and reactions to the *Khulʿ* Law of 2000, Sonneveld echoed the understandings that although upper-class women did have more access to *khulʿ*, those from lower and middle classes approached the courts even when

[69] The Arab Republic of Egypt, "Law No. 1 of the Year 2000: Regarding the Promulgation of a Law Regulating Certain Situations and Procedures of Litigation in Matters of Personal Status," *Al-Jarīda al-Rasmiyya (The Official Gazette)*, January 29, 2000, 14.
[70] Arabi, "The Dawning of the Third Millennium on Shariʿa: Egypt's Law No. 1 of 2000," 20.
[71] Ibid., 21.
[72] Dawoud S. El Alami, "Law No. 100 of 1985 Amending Certain Provisions of Egypt's Personal Status Laws," *Islamic Law and Society* 1, no. 1 (January 1994): 139.
[73] Ibid.

they had legitimate claims for divorce, such as the husband not providing for the family financially or marrying a second wife – an acceptable cause for harm (*ḍarar*) needed in Egyptian family law for a woman to request a divorce.[74]

In the Pakistani context, more attention has been paid to the divergent roles of the legislature and the judiciary in the development of the law. According to Elisa Giunchi, for example, the development of *khulʿ* was carried out by the Pakistani judiciary because the processes of colonialism had removed the diversity inherent in the pre-modern period. "Codifying the *šharīʿah*," in her view, "implied relinquishing the subtleties, nuances, and plurality characterising the religious legal literature…"[75] As a result, the work of the legislature became rigid and immoveable. It was therefore the judiciary that re-established this connection to the pre-modern period, "drew from their rich religious tradition," and allowed the law a new degree of flexibility and complexity.[76]

This opinion is echoed by Muhammad Zubair Abbasi, who argues that through allowing women to obtain a no-fault divorce, they have moved ahead of social norms to enhance the position of women in Pakistan. In one of his works, Abbasi describes that this drive by the judiciary to reform was because of a perceived obligation to reform Islamic law in the absence of political consensus, and where different elements within the government could not agree to the best path forward for women's rights following Partition and the creation of Pakistan. As opposed to their Indian counterparts who were interested in limiting the ability of Muslim husbands to control their wives and harmonize Muslim personal laws with those of other religious groups, the Pakistani judiciary expanded the rights of Muslim wives and "recognized a wife's unilateral right to no-fault based divorce."[77]

The primary legal methodology through which the Pakistani judiciary implemented these changes is labeled by Abbasi as "judicial *ijtihād*." This concept falls in the realm of neo-*ijtihād*, or new methods of Islamic interpretation developed during the modern period. "The [Pakistani] judges did not argue that the interpretation of classical jurists was erroneous," argues Abbasi,

[74] Sonneveld, *Khulʿ Divorce in Egypt*.
[75] Giunchi, "Islamization and Judicial Activism in Pakistan," 204.
[76] Ibid.
[77] Abbasi, "Women's Right to Unilateral No-Fault Based Divorce in Pakistan and India," 82.

> nor did they support their view based on the argument of changed circumstances, public welfare (*maṣlaḥa*), or necessity (*ḍarūra*). Rather, they presented their view as the correct interpretation of the relevant verses of the Qur'ān, supported by the traditions of the Prophet and the views of a few classical and modern jurists.[78]

According to Nadya Haider, the concept of *ijtihād* is framed by the desires of two camps within the Pakistani government, the "Traditionalists" and the "Modernists." Traditionalists, in her view, seek to limit the application of *ijtihād* to stay within the pre-modern juristic realms of interpretation. Their goals are to seek change through "social custom and convention," changing the laws only as society and religious understandings keep up, and far from the influence of the West. Modernists, on the other hand, seek an agenda "for social justice through a broad and liberal understanding and application of *Ijtihad*."[79] They are prepared to enact reform regardless whether the society accepts it or not. By doing so, they are adding common law understandings to what is normally a highly-codified legal system.

For others such as Lucy Carrol, the work of Pakistani judges is only a single step in a much larger process and such "*ijtihād*" comes with its pitfalls. For example, when introducing the concept of *khul'*, the judges chose to base their interpretation on Qur'ān 4:35, which calls for the appointment of arbiters (interpreted as the judiciary) to reconcile between a disputing couple. This is problematic, in her view, not only because the word arbiters is traditionally understood to mean representatives from the *families* and not the judiciary, but that they also do not have the ultimate authority to dissolve the marriage. This creates an inevitable problem with religious legitimacy. According to Carrol, this problem could be resolved by relying more upon Qur'ān 2:229, which in her view clearly allows the state to intervene if they fear that the couple will not be able to "maintain the limits of Allah" in their marriage.[80]

The importance of understanding the divergence of the Pakistani judiciary from the classical doctrine has been clearly outlined in an article by Muhammad Munir. Describing the various positions of each of the classical Sunni schools of law, Munir's article concludes that only the Mālikī tradition would potentially allow the judiciary room to enact a dissolution of the

[78] Abbasi, "Judicial *Ijtihād* as a Tool for Legal Reform," 387.
[79] Nadya Haider, "Islamic Legal Reform: The Case of Pakistan and Family Law," *Yale Journal of Law and Feminism* 12, no. 2 (2000): 340.
[80] Carroll, "Qur'an 2:229: 'A Charter Granted to the Wife'? Judicial *Khul'* in Pakistan," 106.

marriage without the consent of one of the parties.[81] Additionally, Munir argues that none of the country's higher courts have attempted to go further, accepting the minority interpretation of Qur'ān 4:35 within the Mālikī School that the husband has no control over the *khul'* process and place the matter entirely in their hands.[82]

The question of religious legitimacy, and how the *'ulamā'* of Pakistan have both interpreted and reacted to the work of the judiciary, is one of the main points of discussion in this dissertation. This element has been largely sidelined in the secondary literature, with the noted exception of the article by Mubasher Hussain. Focusing on the opinions of the *Ahl-i Ḥadīth* Movement, Hussain argues that throughout their history, the *Ahl-i Ḥadīth* have accepted the state's ability to intervene in matters of family law as the representatives of the Muslim state. In the particular understanding of *khul'*, the judge has the religious legitimate ability to dissolve the marriage as long as they see that the couple will not be able to live together and maintain the limits of Allah.[83]

The current academic literature on *khul'* has therefore highlighted the processes of the judiciary in their departure from previous juristic discourse, the importance of class, and the response of more traditional voices within society. What the literature has not yet covered to date, and what this dissertation aims to do, is to bring together a more comprehensive picture of the development of *khul',* tracing its understanding historically from its outset in the Qur'an and juristic discourse through the modern period and the dilemma of religious legitimacy that those seeking *khul'* continue to face.

Chapter Outline

The first chapter of this dissertation explores the issue of *khul'* through traditional Islamic legal discourse (*fiqh*), tracing its development throughout the four Sunni legal schools (*madhāhib*). In particular, the chapter discusses whether the option of *khul'* requires the consent of the husband or not, based on the interpretation of an important *Ḥadīth* of the Prophet Muḥammad. The question of whether *khul'* should be understood as a dissolution of the marriage (*faskh*) or a single instance of divorce (*ṭalāq*) is also addressed. Finally, the chapter turns to the Mālikī *fiqh*

[81] Munir, "The Law of *Khul'* in Islamic Law and the Legal System of Pakistan," 45.
[82] Ibid., 53–60.
[83] Mubasher Hussain, "*Khul'* Without Consent of Husband: Study of Ahl-e Ḥadīth Perspective," *Fikr-o-Nazar* 53, no. 2 (2015): 79–101.

discussion of arbitrators (*ḥakamayn*) and whether in traditional discourse this could be interpreted as judges. The chapter argues that each of these points as argued by the jurists resulted in the development of a range of different approaches to *khul'*, although every school agreed that the consent of the husband at some level was an absolute requirement. Pakistani judges would use these disagreements between classical jurists to justify their ability to return to the Qur'ān and Sunna on their own, bypassing the agreement of classical jurists as to the requirement of the husband's consent.

Chapter Two then turns to the South Asian context during the second half of the nineteenth century and looks at how the issue of divorce was approached by the colonial legal system. In an attempt to give greater authority to local custom in family matters, British judges were unwilling to grant divorces to Muslim women under any circumstances not officially recognized by the *'ulamā'*. This placed Muslim women in a critical dilemma, and many began to announce their apostacy from Islam in order to take advantage of a legal device (*ḥīla*) in order to escape their unwanted marriages. This chapter argues that the legal environment of the British Period drove the *'ulamā'* to play a larger role in the development of the law to solve the problems of Muslim women and, in turn, preserve the integrity of Islamic identity. Reformers such as Muhammad Iqbal wrote works calling for changes to be made to the law, resulting in the Dissolution of Muslim Marriages Act of 1939. This was a victory for the authority of the *'ulamā'*, and marked the first major milestone in the reform of Muslim family law in the Indian Subcontinent and, as yet unknown to the *'ulamā'*, would eventually give the Pakistani judiciary the tools they needed to take on further reform in the realm of *khul'* in the following decades.

Chapter Three of this dissertation then looks at the development of family law in Pakistan following partition. From a collection of diverse jurisdictions, the Pakistani system eventually developed specialized Family Law courts to adjudicate matters such as divorce and eased the rules of evidence so that women could more easily defend their position and obtain their rights within the court system, despite limited legal and financial resources. This chapter illustrates an important point: that, although it would eventually be the judiciary that would lead the charge in the realm of *khul'*, it was the entire Pakistani legal system, including the legislative and executive branches, that worked towards the reform of family law and promoted women's rights. This is most evident in the new *Khul'* Law of 2002, which legislated the application of *khul'*. The closing sections of Chapter Three turn to the Law of 2002 that made

khul‘ the primary method through which women could obtain a dissolution of their marriage and effectively rendered the DMMA irrelevant. This created yet another dilemma for Muslim women, as those with legitimate grounds for dissolution – grounds that would allow them under normal circumstances to maintain their dower – would automatically be granted a *khul‘* and forced to return their dower to their husband. This would only be partially fixed through new amendments in 2014, but the problems faced by Muslim women would continue.

The role of the judiciary in *khul‘* is the focus of Chapters Four and Five. Chapter Four traces the historical development of *khul‘* through the rulings of the High Courts and the Supreme Court of Pakistan. It focuses on four landmark cases where the judiciary decided on the question of *khul‘*, culminating in the case of *Mst. Khurshid Bibi v. Babu Muhammad Amin* (1967). In this case, the Supreme Court of Pakistan fully departed from traditional Ḥanafī discourse and established the precedent that granted women the absolute right to *khul‘* without the need for the consent of her husband.

These reforms were not without their problems, and Chapter Five turns to the question of *ijtihād* and the problem of religious authority between the judiciary and Pakistani *‘ulamā’*. Focusing on the writings of the Deobandi scholar Mufti Taqi Usmani, one of the most respected Muslim scholars in the country and an adamant opponent of the judicial interpretation of *khul‘*, the chapter charts the point-by-point challenges raised by Mufti Usmani against the ruling of the judiciary in 1967. His official position, which is still maintained by his organization today, is that any *khul‘* issued by the Pakistani judiciary is illegitimate according to the *Sharī‘a*. Women who get remarried after obtaining a *khul‘* from the courts are living a life of adultery (*zinā*), making them sinners and potentially subject to the punishment of stoning (*rajm*), where the rules of Islamic punishments (*ḥudūd*) fully applied. Religiously, this created yet another dilemma for Muslim women, as they now find themselves trapped between accepting the legal authority of the Pakistani state and judiciary, which is constitutionally founded as an Islamic state based on the principles of the Qur’ān and Sunna, or the self-proclaimed *Sharī‘a* authority of *‘ulamā’* like Mufti Taqi Usmani.

In its concluding sections, Chapter Five of this dissertation explores the approach of the Ahl-i Hadith movement, who grant religious authority to the actions of the judiciary and have proclaimed that *khul‘* decrees issued by the courts are legitimate according to the *Sharī‘a*. This group of scholars, although lacking the same degree of popular support as Mufti Taqi Usmani

and the Deobandis, represent an important alternative voice in the debate between the judiciary and the *'ulamā'* and could provide a way out for innocent Muslim women who are trapped in these debates with nowhere to turn.

The conclusion then summarizes these chapters and brings together the larger argument: that the development of *khul*' in Pakistan represents an important development of neo-*ijtihād* in the twentieth century. Undertaken implicitly by the judiciary but overtly supported and furthered by actions of the legislature and the executive, these reforms have been some of the most successful – and controversial – in the realm of Pakistani family law.

Chapter 1

Khulʿ in Sunni Classical Islamic Law

Introduction

Historically, *ṭalāq* (unilateral divorce by the husband), within Muslim marital life, as regulated by Islamic law and practice, has been initiated by the husband, the primary provider of the marital household. However, situations did inevitably arise in which a wife may detest her husband either upon seeing him, due to his harmful treatment, or for some other natural reason, resulting in an escalation of conflict and marital discord. Traditionally, such situations were handled through family reconciliation efforts between the spouses. In cases where the wife feels no longer able to fulfill her marital duties and remain with the husband, however, the *sharīʿa* does provide an option of separation to the wife where she may initiate the process of a no-fault divorce from the husband by paying some form of ransom or by foregoing her dower money (*mahr)* in exchange for his agreement to divorce her. In such a case, the husband is directed to accept her compensation and divorce his wife. Such a female-initiated divorce settlement is technically termed as a *khulʿ* in Islamic law.

A *khulʿ* is the primary mechanism in Islamic law by which a woman is granted the right to dissolve her marriage in cases where she dislikes her husband due to his religion, appearance, morality, age, illness or some other natural reason. As Ibn Rushd explains, "the right to seek a *khulʿ* (*al-fidā'*) has been created for the woman in contrast to the husband's unilateral right to divorce (*al-ṭalāq*). Therefore, just as the prerogative of a divorce has been granted to the man (*juʿila al-ṭalāq bi yad al-rajul*) when he is harmed by his wife, the woman has also been granted the option of a *khulʿ* (*juʿila al-khulʿ bi yad al-mar'a*) when she faces a similar situation of harm from the side of her husband."[84]

Among the major points of contention among the classical jurists was whether a woman is independent in seeking a *khulʿ* or whether its validity is conditional upon obtaining her husband's consent. The majority of the classical jurists held that a *khulʿ* does not effectively take place without the consent of the husband.[85] As Karin Karmet Yefet observes, unless the husband

[84] Abū al-Walīd Muḥammad b. Aḥmad Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, vol. 3 (Cairo: Dār al-Ḥadīth, 2004), 90.

[85] For al-Shāfiʿī, divorce is considered a sale-like contract (*bayʿ min al-buyūʿ*), and as in any sale, both parties must agree for the contract to take effect; likewise, for a *khulʿ*, the husband must agree to it for it to take effect. Muḥammad b. Idrīs al-Shāfiʿī, *al-Umm*, vol. 5 (Beirut: Dār al-Maʿrifa, 1990), 212. The Ḥanbalī

delegates the power of divorce to his wife, "all schools of Islam agree that a wife does not enjoy any privilege whatsoever to initiate a private divorce."[86] Since in the case of a *khulʿ*, the woman must forfeit all her financial rights to obtain her husband's cooperation, a "*khulʿ* signifies little more than a wife's buying her way to freedom, and has accordingly been compared to 'ransom.'"[87] Ron Shaham similarly notes that the "traditional pattern of the Islamic family is both patrilineal and patriarchal"[88], and this is evidenced by the fact that it is only men who have the right to unilaterally divorce their wives as they see fit, whereas women must obtain their her husbands' consent for their divorce to take effect.

Such patriarchal notions of the family that unduly privilege male spouses over women are further buttressed with historical examples of Sharīʿa court practice. For instance, as Ahmed Fekry Ibrahim has shown in his study on pragmatic eclecticism in the sixteenth- and seventeenth-century courts of Ottoman Egypt that, while each court was bound to rule according to its school's dominant opinion, litigants frequently had the flexibility to choose the forum of adjudication (i.e. the legal school) that was most amenable to achieving their desired results. While this was the case, however, in four out of the twenty-nine *khulʿ* cases sampled in his study, the courts were utilized to place the wife at a clear disadvantage by circumventing her financial rights that are established by one legal school via recourse to the process of combining two juristic opinions in the same legal transaction (*talfīq*).[89]

A detailed discussion of this topic is picked up at the end of the chapter, and it will suffice us to mention here that among the four classical Sunni schools, the Mālikī school has historically been the most lenient in the question of wife-initiated divorce, allowing for the possibility of a

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jurist Ibn Qudāma is clearer in declaring it a contract that takes place with mutual consent (*qaṭʿ ʿaqd bi'l-tarāḍī*), where the contract is similar to the termination of a sale contract (*iqāla*). Muwaffaq al-Dīn ʿAbd Allāh b. Aḥmad b. Muḥammad Ibn Qudāma, *al-Mughnī*, vol. 7 (Cairo: Maktaba al-Qāhira, 1968), 324. The Ḥanafīs call it an irrevocable divorce (*taṭlīqa bā'ina*), and allow for a revocation of the offer made by the wife prior to its acceptance by the husband (*yaṣiḥu rujūʿuhā qabla qubūlih*), indicating that the consent of the husband is necessary. See ʿAlī b. Abī Bakr al-Farghānī al-Marghīnānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, ed. Ṭalāl Yūsuf, vol. 2 (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī, n.d.), 261; Ibrāhīm b. Muḥammad b. Ibrāhīm al-Ḥalabī, *Multaqā Al-Abḥur*, vol. 2 (Beirut: Dār al-Kutub al-ʿIlmiyya, 1998), 107.

[86] Karin Carmit Yefet, "The Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb," *Harvard Journal of Law and Gender* 34, no. 2 (2011): 560.

[87] Ibid., 561.

[88] Ron Shaham, "Judicial Divorce at the Wife's Initiative: The Sharia Courts of Egypt, 1920-1955," *Islamic Law and Society* 1, no. 2 (1994): 217.

[89] Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History*, 156–57.

khul‘ without the consent of the husband.[90] The school allows for this through the harm (*ḍarar*) doctrine, which allows a woman to seek a divorce without the need of the husband's consent if she can prove that any harm was inflicted upon her.[91] Be that as it may, a *khul‘* or divorce is normally considered as a final remedy under the *sharī‘a*, falling under the category of "permitted but disliked" (*abghaḍ al-ḥalāl*) acts. Given that the protection of progeny is considered among the five major objectives of the Sharī‘a (*maqāsid*), the preservation of the family unit is greatly valued in Islam, and hence seeking a divorce or *khul‘* for trivial reasons is frowned upon. As such, divorce is held to be among "the most disliked permitted act" (*abghaḍ al-ḥalāl*)[92], with strict warnings narrated in the Prophetic Sunna directed to women who seek divorce without a valid reason.[93]

This chapter will look into the historical development of *khul‘* in the four Sunni classical schools. The discussion will show why the majority of Sunni jurists hold the position that the husband's consent is necessary for *khul‘* separation. The chapter will proceed by first dealing with the literal meaning of the term *khul‘* and then moving into its usage in the Qur'ān to see how this legal phenomenon is developed despite the fact that the Qur'ān has not directly called such divorce as *khul‘*. The chapter engages with the interpretation of verses 2:229-30 of the Qur'ān in order to trace the exegetical views about the addressees of the phrase "if you fear" (*fa in khiftum*). Does it address the spouses or judges? The chapter tries to delineate the Sunni juristic position around this question. If it is established that the addressees of this phrase are judges or

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[90] Ibn Rushd, *Bidāyat al-Mujtahid*, 3:91.

[91] Ibid., 3:90; Shams al-Dīn Muḥammad b. ‘Arafa al-Dasūqī, *Ḥāshiyat Al-Dasūqī ‘alā al-Sharḥ al-Kabīr*, vol. 2 (Cairo: Dār Iḥyā' al-Kutub al-‘Arabiyya, 1984), 356; Abū 'l-‘Abbās Aḥmad b. Muḥammad al-Ṣāwī, *Bulghat al-Sālik li Aqrab al-Masālik [Ḥāshiyat al-Ṣāwī ‘alā 'l-Sharḥ al-Ṣaghīr]*, vol. 2 (Dār al-Ma‘ārif, n.d.), 530.

[92] Abū Dāwūd Sulaymān b. al-Ash‘ath al-Sijistānī, *Sunan Abī Dāwūd*, ed. Muḥammad Muḥy al-Dīn ‘Abd al-Ḥamīd, 4 vols. (Beirut: al-Maktaba al-‘Aṣriyya, n.d.), *kitāb al-ṭalāq, bāb fī karāhiyyat al-ṭalāq*, # 2178; Abū ‘Abd Allāh Muḥammad b. Yazīd Ibn Māja al-Qazwīnī, *Sunan Ibn Māja*, ed. Muḥammad Fu'ād ‘Abd al-Bāqī, 2 vols. (Cairo: Dār Iḥyā' al-Kutub al-‘Arabiyya, 1952), *kitāb al-ṭalāq*, *bāb ḥaddathanā Suwayd b. Sa‘īd*, # 2018. These two major *ḥadīth* works are heretofore cited as *Sunan Abī Dāwūd* and *Sunan Ibn Māja*, followed by the chapter and section headings and *ḥadīth* number.

[93] For example, it is reported on the authority of Thawbān that the Prophet said, "If any woman asks her husband for a divorce without a valid strong reason, the odour of Paradise will be forbidden to her (*ayyumā imra'atin sa'alat zawjahā ṭalāqan fī ghayr mā ba'sin fa-ḥarāmun ‘alayhā rā'iḥat al-janna*). *Sunan Abī Dāwūd*: *kitāb al-ṭalāq, bāb fī al-khul‘*, # 2226; Muḥammad b. ‘Īsā al-Tirmidhī, *al-Jāmi‘ al-Ṣaḥīḥ wa-huwa Sunan al-Tirmidhī*, ed. Aḥmad Muḥammad Shākir, Muḥammad Fu'ād ‘Abd al-Bāqī, and Ibrāhīm ‘Aṭṭūwwa ‘Iwaḍ, 2nd ed., 5 vols. (Cairo: Maṭba‘a Muṣṭafā al-Bābī al-Ḥalabī, 1975), *kitāb al-ṭalāq wa al-li‘ān ‘an Rasūl Allāh ṣallā Allāh ‘alayh wa sallam, bāb mā jā' fī al-mukhtali‘āt*, # 1187. The latter *ḥadīth* reference is heretofore abbreviated as *Sunan al-Tirmidhī.*

rulers instead of the spouses then our argument in favour of *khul‘* without the consent of the husband becomes stronger. Furthermore, the chapter discusses the separation of Ḥabība bint Sahl from her husband Thābit b. Qays by an order of the Prophet to return the garden that was given as dower, and how this is considered the first case of *khul‘* in Islam. I will engage with several narrations of the story of Thābit to see how *khul‘* was dealt with at the time of the Prophet. The chapter then further highlights the arguments of the Ḥanafī, Mālikī, and Shāfi‘ī schools where they consider *khul‘* as divorce (*ṭalāq*) as opposed to Ḥanbalī view that considers it as annulment (*faskh*) of marriage. This discussion is important because it will be used by later judges and scholars to say that annulment could be done by way of judicial process hence, the husband's consent is not necessary. In a broader context, this chapter shows that all four Sunni schools held a position that a wife cannot end marriage contact merely by her own will. She needs the agreement of her husband as well. Finally, the chapter deals with later Mālikī jurists who provided an opinion by which an unhappy and unwanted marriage union could be dissolved by arbiters or judges. This is the point which shall be later used in the modern period to lay foundations for contemporary *khul‘* legislation justifying unilateral right of women to seek *khul‘* in case she does not intend to continue in the union.

The Meaning and Usage of *Khul‘* as a Technical Juristic Term

Literally, the word *khul‘* is derived from the three letter root *khā’-lām-ʿayn*, which means to ‘to take off’ or ‘to extract.’[94] Ibn Manẓūr’s (d. 711/1311-12) famous *Lisān* offers the example of one who “takes off his shoes, clothes or a blanket” (*khala‘a al-na‘l wa ’l-thawb wa ’l-ridā’*).[95] The Qur’ān also employs the word in its literal sense, as in God’s address to Moses (*Mūsā*): “Indeed, I am your Lord, so remove your sandals (*ikhlaʿ naʿlayk*). You are in the sacred valley of Ṭuwā.”[96] As a technical term, the word *khul‘* is also used to indicate a wife-initiated separation between the spouses (*khāla‘at al-mar’a zawjahā mukhāla‘atan*), where a wife chooses to sever the marital bond

[94] Hans Wehr and J. Milton Cowan, *A Dictionary of Modern Written Arabic (Arabic-English)*, 4th ed. (Urbana, IL: Spoken Language Services, 1994), 256.

[95] Muḥammad b. Mukarram b. ‘Alī Ibn Manẓūr, *Lisān al-‘Arab*, vol. 8 (Beirut: Dār Ṣādir, 1955), 76; Muḥammad b. Muḥammad b. ‘Abd al-Razzāq Murtaḍā al-Zabīdī, *Tāj Al-ʿArūs Min Jawāhir Al-Qāmūs*, vol. 20 (Alexandria: Dār al-Hidāya, 1965), 518; See also ‘Alī b. Muḥammad al-Sharīf al-Jurjānī, *Kitāb al-T‘arīfāt* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1983), 101.

[96] “*They are your garments and ye are their garments*.” Qur’ān 20:12.

by paying a ransom to the husband in exchange for his divorce .[97] Interestingly, the term in this context is intended as a response to the Qur'ānic metaphor that the husband and wife are 'garments' for one another, indicating thereby the metaphorical 'removal' of the marital garment.[98]

Several jurists have defined the term to highlight its conclusive severing of the marital bond. The twelfth-century Ḥanafī jurist 'Alā' al-Dīn Mas'ūd al-Kāsānī (d. 587/1191) defines *khul'* as a '*naz*", meaning to rip, pull out or extract, indicating that the husband has 'extracted' the wife from the marital relationship.[99] Ibn al-Humām (d. 861/1457) defines it as "a termination of (the husband's) ownership of the marital bond in exchange for compensation via the enunciation of a '*khul*" (*izālat milk al-nikāḥ bi badalin bi lafẓ al-khul'*)."[100] Others like al-Nasafī (d. 710/1310), define it as a 'separation' or 'breaking' of the marital bond (*al-faṣl min al-nikāḥ*).[101] As for the definitions of the Shāfi'īs and Mālikīs, there appear to be no substantial differences in implication. In the words of the Shāfi'ī jurist Ibn Ḥajar al-'Asqalānī (d. 852/1448), it is "a separation (*firāq*) from the wife in exchange for money.[102]"[103] Likewise, for Ibn Rushd (d.

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[97] Aḥmad b. Muḥammad Fayyūmī, *al-Miṣbāḥ al-Munīr fī Gharīb al-Sharḥ al-Kabīr*, vol. 1 (Beirut: al-Maktaba al-'Ilmiyya, n.d.), 178.

[98] Abū 'l-Fatḥ Nāṣir b. 'Abd al-Sayyid b. 'Alī al-Muṭarrizī, *al-Mughrib fī Tartīb al-Mu'rib*, vol. 1 (Aleppo: Dār ak-Kitāb al-'Arabī, n.d.), 151. Concerning the question of why, as a verbal noun (*maṣdar*), the word *khul'* uses a *damma* (*khul'*) instead of the usual *fatḥa* (*khal'*), most of the grammarians are of the opinion that the word *khul'* is not in fact a verbal noun but is rather a simple noun (*ism*). Another opinion holds that this word is also a verbal noun, like *khal'*, but the *ḍamma* on its first letter is used to differentiate between its literal meaning and its indicative meaning, where *khal'* expresses the meaning of 'taking off' and *khul'* refers to the legal concept of a woman-initiated for compensation divorce. A similar example can be found in the distinction between *ṭalāq* and *iṭlāq*; while both may be used in the sense of to 'liberate from confinement,' *ṭalāq* is used in the more restrictive sense of liberating from marriage (i.e. divorce), and *iṭlāq* is more generally used for liberation from other kinds of confinement. See al-Muṭarrizī, *al-Mughrib*, 1:151; Ibn Manẓūr, *Lisān al-'Arab*, 8:76; Aḥmad b. 'Alī Ibn Ḥajar al-' Asqalānī, *Fatḥ al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, vol. 9 (Beirut: Dār al-Ma'rifa, 1379), 395; Ibn 'Ābidīn, *Radd al-Muḥtār*, 3:439.

[99] The dominant role of the husband in the divorce transaction is clear from al-Kāsānī's definition. al-Kāsānī, *Badā'i' Al-Ṣanā'i'*, 3:144. See also Badr al-Dīn al-'Aynī (d. 855/145), Maḥmūd b. Aḥmad Badr al-Dīn al-'Aynī, *al-Bināya Sharḥ al-Hidāya*, vol. 5 (Beirut: Dār al-Kutub al-'Ilmiyya, 2000), 506.

[100] Kamāl al-Dīn Muḥammad b. 'Abd al-Wāḥid Ibn al-Humām, *Fatḥ al-Qadīr*, vol. 4 (Beirut: Dār al-Fikr, n.d.), 210. See also, Muḥammad b. 'Alī 'Alā al-Dīn al-Ḥaṣkafī, *al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār wa Jāmi' al-Biḥār*, ed. 'Abd al-Mun'im Khalīl Ibrāhīm (Beirut: Dār al-Kutub al-'Ilmiyya, 2002), 234.

[101] Abū al-Barakāt 'Abd Allāh b. Aḥmad b. Maḥmūd al-Nasafī, *Kanz al-Daqā'iq* (Beirut: Dār al-Bashā'ir al-Islāmiyya, 2011), 294.

[102] Aḥmad b. 'Alī Ibn Ḥajar al-'Asqalānī, *Fatḥ al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, ed. 'Abdul 'Azīz b. Bāz and Muḥibuddīn al-Khaṭīb, vol. 9 (Beirut: Dār al-Ma'rifa, 1379), 395.

[103] Aḥmad b. 'Alī b. Ḥajr al-'Asqalānī, *Fatḥ al-Bārī*, ed. 'Abdul 'Azīz b. Bāz & Muḥibuddīn al-Khaṭīb (Beirut: Dār al-Fikr, n.d.), 9: 395.

595/1198) it is "a woman's compensation (of the husband) to obtain her divorce" (*badhl al-mar'a al-ʿiwaḍ ʿalā ṭalāqihā*).[104]

Many jurists have also accepted the use of other terms such as '*mubāra'a*' and '*bayʿ wa shirā*" to effect a *khulʿ*-like agreement. For the Ḥanafīs, a *mubāra'a* (*lit.* the 'mutual release' from the marital contract) is similar to a *khulʿ* in its legal consequences in that all marital rights cease automatically once the contract is effected.[105] The Mālikī Ibn Rushd provides helpful distinctions in defining more precisely some of the terms used for these *khulʿ*-like agreements. As he explains, while all these terms have the shared meaning of a divorce for compensation, "as the jurists have clarified, the *khulʿ*, however, is distinguished in her paying all that he has given her [of the dowry], while the *ṣulḥ* refers to paying a part of it, the *fidya* to paying more than it, and the *mubāra'a* to her dropping of any claim that she had against him."[106]

An Overview of Divorce in Islamic Law

At this juncture, it may be helpful to overview the distinctive features of divorce in Islamic law, with a particular focus on *khulʿ*. As is common knowledge, under *sharīʿa*, once a husband pronounces his intention to divorce, the wife is required to enter into a waiting period (*ʿidda*) before the divorce takes full legal effect and she is able to remarry. [107] A husband may thus choose to revoke his intention to divorce at any point up to the termination of this wife's *ʿidda* period without legal consequence. While this is so, the *sharīʿa* has also instituted safeguards against a husband's potential for abuse by limiting his right to two consecutive divorces with the same woman, which includes the mere enunciation of his intention to divorce her (*ṭalāq ṣarīḥ*), after which a third divorce becomes permanent (*bā'in*) and the couple can no longer remarry unless the ex-wife happens to marry and divorce another man first. [108]

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[104] Ibn Rushd, *Bidāyat al-Mujtahid*, 3:89.
[105] Ibn ʿĀbidīn, *Radd Al-Muḥtār*, 3:441; Ibn Nujaym, *al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq*, 4:77.
[106] Ibn Rushd, *Bidāyat al-Mujtahid*, 3:89.
[107] The *ʿidda* waiting period was instituted to ensure that the father of any offspring produced by the couple would be clearly identified before the woman is able to remarry, among other reasons (Qurʾān 2:228). While its duration is normally three menstrual cycles, it can last longer based on differing circumstances; if they have not yet entered into a conjugal relationship, no waiting period is required (Qurʾān 33:49), while in the case of pregnancy, it lasts until she gives birth, and if she is widowed, its duration is four lunar months and ten days (Qurʾān 2:234-235).
[108] See Qurʾān 2:230.

A distinctive feature of the *khulʿ* divorce in Islamic law is that it may not be revoked (*ṭalāq bāʾin*). As Ibn Nujaym (d. 970/1563) observes concerning the *khulʿ* agreement, "the separation is absolute, whether compensation was paid or not, though it is necessary to enunciate the word '*khul'*' [to effect the transaction]," noting also that the wife's agreement to the stipulations of the *khulʿ* agreement is an equally necessary precondition by virtue of her obligation to pay the compensation amount.[109] This indicates that if the couple wishes to remain married after a *khulʿ* agreement has been enacted, the only way to do so is through establishing a new marital contract after the marital bond has been severed.

Accordingly, if a husband has already effected an irrevocable divorce with his wife and later chooses to enter into a *khulʿ* agreement, such an agreement is not legally binding or valid under the Sharīʿa since he has already terminated his ownership of the marital contract.[110] Likewise, concluding a second *khulʿ* agreement with the wife during her waiting period (*ʿidda*) after a *khulʿ* agreement has already been concluded has no legal validity. In contrast to the irrevocable nature of the *khulʿ* agreement, a revocable divorce (*ṭalāq ṣarīḥ*; *ghayr bāʾin*) does not automatically sever the marital tie until after the completion of the waiting period (*ʿidda*). Hence, if the husband enters into a *khulʿ* agreement with the wife after a revocable divorce has already been initiated, the *khulʿ* carries full legal effect, and the wife will have to pay back the agreed upon dowry to regain control of her status.[111]

Apostasy is considered another legal ground for an irrevocable divorce, where the control of the husband over the person of his wife (*milk al-nikāḥ*) automatically ceases. Thus, if a husband enters into a *khulʿ* contract after the wife has committed apostasy, such a contract is considered null and void, as an irrevocable divorce has already taken place. For example, if the husband declares a *khulʿ* against his deferred dowry payment, it will be of no legal consequence, and the wife may legally force him to pay it.[112] Similarly, if the marriage was considered void (*fāsid*) due to the absence of some martial condition, any *khulʿ* agreement would also be void, as

[109] Zayn al-Dīn b. Ibrāhīm Ibn Nujaym, *al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq Wa Maʿah Ḥāshiyat Minḥat al-Khāliq wa fī Ākhirih Takmilat al-Baḥr al-Rā'iq*, vol. 4 (Cairo: Dār al-Kitāb al-Islāmī, n.d.), 4:77. See also al-Ḥaṣkafī, *al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār*, 234.
[110] Ibn Nujaym, *al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq*, 4:77.
[111] Muḥammad b. Aḥmad b. Abī Sahl al-Sarakhsī, *al-Mabsūṭ*, vol. 6 (Beirut: Dār al-Maʿrifa, 1993), 175; Ibn Nujaym, *al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq*, 4:77.
[112] Ibn Nujaym, *al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq*, 4:77.

the husband's control over the person of the woman (*milk al-nikāh*) was not legally established in the first place.[113]

On the legal differences between a *khulʿ* and *ṭalāq ʿalā al-mal* (divorce with payment)

One important feature of the *khulʿ* divorce in Islamic law is that it is automatically deemed to irrevocably apply upon the pronouncement of a '*khulʿ*" or some synonym thereof. This condition is considered a key feature by the Ḥanafī jurists in particular that distinguishes a *khulʿ* from a similar form of divorce, known as *al-ṭalāq ʿalā al-māl* (pronouncement of divorce with payment).[114] According to the Ḥanafī position, a *ṭalāq bil māl* resembles a *khulʿ* in that the wife must pay a sum of money for the divorce to take effect. However, the jurists have outlined some important distinctions between the two, a major one being that while a *khulʿ* is considered irrevocable (*bāʾin*), the *ṭalāq bil māl* is considered revocable (*ṣarīḥ; ghayr bāʾin*). Thus, as Ibn ʿĀbidīn explained, since the former is considered irrevocable, it may not be followed by a second *khulʿ* during the waiting period, while it may still be followed by a *ṭalāq bil māl*; in this case, *the ṭalāq bil māl* will count as a second enunciation of divorce, though the wife is not forced to pay any further sum of money, as she has already paid a defined sum to free herself from the marriage.[115]

Additionally, another major difference is that while there is no disagreement on the *ṭalāq ʿalā al-māl* constituting a divorce, there is some disagreement among the jurists as to whether a *khulʿ* is considered a 'divorce' (*ṭalāq*) proper or simply an 'annulment' of the marital contract (*faskh*).[116] Thus, declaring a *ṭalāq ʿalā al-māl* a *khulʿ* would be a clear source of disagreement.[117] A final major difference is that in a *ṭalāq ʿalā al-māl*, the wife's eligibility for her other marital rights such as the dowry and maintenance do not end automatically and all that is required of her is to pay the compensation amount that has been agreed upon, while in a *khulʿ*, on the other hand, all such financial rights automatically cease once a *khulʿ* agreement has been effected.

In contrast to the Ḥanafīs, the Mālikīs and Shāfiʿīs do not legally differentiate between a *khulʿ* and *ṭalāq ʿalā al-māl*, which for them are considered the same. Nor do they not require that

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[113] Ibn 'Ābidīn, *Radd al-Muḥtār*, 3:439.
[114] For further details of this form of divorce, see al-Marghīnānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, 2:264; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾiʿ*, 3:152; Ibn 'Ābidīn, *Radd al-Muḥtār*, 3:307–10.
[115] Ibn Nujaym, *al-Baḥr al-Rāʾiq Sharḥ Kanz al-Daqāʾiq*, 4:77.
[116] For more on this important juristic debate and its legal consequences, see my section below: Is the *khulʿ* a divorce (*ṭalāq*) or an annulment (*faskh*)?
[117] Ibn al-Humām, *Fatḥ al-Qadīr*, 4:211.

the word *khul‘* or its synonym be used for such separation to take effect. As the nineteenth-century Mālikī al-Ṣāwī (d. 1241/1825) clarifies in his gloss on al-Dardīr's commentary on *Aqrab al-Masālik*, a *khul‘* may signify one of two things: i) a divorce for compensation (*al-ṭalāqu bi ʿiwaḍ*), which is the more common usage, or ii) a divorce that is effected through the enunciation of the word itself (*bi lafdhih*), as in when the husband declares '*khālaʿtuki*', even if it is without a compensation or ransom amount. In either of these two senses, the divorce is considered irrevocable for the Mālikīs.[118]

As Imām al-Nawawī (d. 676/1277) defines in *al-Minhāj*, a *khul‘* is a "separation [between the spouses] with compensation [to the husband] and the enunciation of [the words] '*ṭalāq*' or '*khul‘*'."[119] Since Shafi'īs do not differentiate between a *ṭalāq ʿalā al-māl* and a *khul‘*, for them a *khul‘* may also take effect with a direct enunciation of divorce (*ṣarīḥ*), such as using the word '*ṭalāq*', or an indirect or metaphorical enunciation of intent (*kināya*), such as with the word '*khul‘*'. His commentator al-Khaṭīb al-Shirbīnī emphasizes the compensation (*bi ʿiwaḍ*) to ensure that the divorce is irrevocable (*ṭalāq bā'in*), as enunciating the divorce without compensation makes it revocable (*raj'ī*), where the husband could return to his wife within the waiting period, which is not the intent in the case of a *khul‘*.[120] In addition to a financial compensation, the Shāfiʿis have added two further conditions: i) that the compensation should be meaningful, barring anything that does not bear financial value, and ii) the compensation must be handed over to the husband. Thus, if the husband divorces his wife on a condition that she will forego a loan payment owed to her by person x, in such a scenario the separation is not considered a *khul‘* but may count as a revocable divorce.[121]

As for the Ḥanbalī definition of *khul‘*, we notice some significant differences. Here, it is defined as a "separation of a husband from his wife, through a specifically designated enunciation, in exchange for the husband's financial compensation by her or by someone else"

[118] al-Ṣāwī, *Bulghat al-Sālik*, 2:518. See also, al-Dasūqī, *Ḥāshiyat al-Dasūqī ʿalā al-Sharḥ al-Kabīr*, 2:347.
[119] See Shams al-Dīn Muḥammad b. Aḥmad al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj ilā Ma'rifat Ma'āni Alfāẓ al-Minhāj*, vol. 4 (Cairo: Dār al-Kutub al-'Ilmiyya, 1994), 430.
[120] al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:430.
[121] Shams al-Dīn Muḥammad b. Aḥmad al-Ramlī, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj*, vol. 6 (Beirut: Dār al-Fikr, 1984), 393–94; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:430.

(*firāqu zawjin zawjatah bi-ʿiwaḍ ya'khudhuh al-zawj minhā aw min ghayrihā bi-alfāẓ makhṣūṣah*).[122] It must be noted here that for the Ḥanbalīs, a *khulʿ* is clearly classified as an annulment (*faskh*) of the marital contract and not a divorce, however, this compensation could be paid by someone else on behalf of the wife. [123] The famous Ibn Qudāma al-Maqdisī (d. 620/1223) attributes different words to direct and indirect enunciations. For the former *khulʿ*, *mufādāt* and *faskh* are used, whereas for the latter category *mubāra'a*, *mubāyana* and *mufāraqa* are used to enunciate *khulʿ*.[124]

Is the *Khulʿ* a Divorce (*ṭalāq*) or an Annulment (*faskh*)?

The question of whether the jurists have categorized the *khulʿ* as a divorce (*ṭalāq*) or annulment (*faskh*) is not merely a pedantic concern, but of prime importance. If it is viewed as a type of divorce, then it would count among the husband's three permissible divorces, while this is not the case for a mere annulment (*faskh*) of the marital contract.[125] Moreover, there is no disagreement among the jurists that divorce is the husband's exclusive right, which may not be exercised without his permission and authorization. Hence, if the *khulʿ* is classified as a type of divorce, then it would automatically require that the husband's consent be sought in order for this divorce to take effect. On the other hand, if the *khulʿ* were declared an annulment (*faskh*), the husband's consent would become irrelevant because the annulment of a contract does not normally necessitate soliciting the consent of the parties concerned, the reason being that the agreement either lacks some fundamental element of the contract or the stipulated conditions of the agreement have not been fulfilled.

Whether a termination of the marital contract is classified as a *ṭalāq* or a *faskh* has significant legal implications in Islamic law. Literally *faskh* refers to "the removal of something from its place," and its generally used in the sense of a cancellation, abolishment, or annulment.[126] Unlike the normal divorce, an annulment of the marital contract (*faskh*) is based on necessity or such special or emergency circumstances that are against the objectives of

[122] Manṣūr b. Yūnus al-Bahūtī, *Sharḥ Muntahā al-Irādāt*, vol. 3 (Beirut: ʿĀlam al-Kutub, 1993), 57; Mūsā b. Aḥmad al-Maqdisī, *Al-Iqnāʿ fī 'l-Fiqh al-Imām Aḥmad b. Ḥanbal*, vol. 3 (Beirut: Dār al-Maʿrifa, n.d.), 252; Manṣūr b. Yūnus al-Bahūtī, *Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ*, vol. 5 (Beirut: ʿĀlam al-Kutub, 1983), 212.
[123] al-Bahūtī, *Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ*, 5:212.
[124] Ibn Qudāma, *al-Mughnī*, 7:329.
[125] Wahbah al-Zuḥaylī, *al-Fiqh al-Islāmī wa Adillatuh*, vol. 9 (Damascus: Dār al-Fikr, 1989), 328.
[126] Ibn Manẓūr, *Lisān al-ʿArab*, 3:44-45; Wehr and Cowan, *A Dictionary of Modern Written Arabic*, 712.

marriage, such as the apostasy (*irtidād*) of one of the spouses. Likewise, a *faskh* takes place if at the time of the marriage there are reasons that would prohibit the marital contract from taking effect, an example being the right of option attained at the age of maturity (*khiyār al-bulūgh*) or incompatibility between the spouses (*ʻadam al-kafāʼa bayn al-zawjayn*).[127]

Given these fundamental differences, the jurists have debated whether the *khulʻ* constitutes as a divorce or an annulment. Generally speaking, they have agreed that if the husband enunciates the word for divorce (*ṭalāq*) or clearly intends it, this will constitute as a divorce by way of *khulʻ* (*idhā waqaʻa bi-lafẓ al-ṭalāq aw nawā bihī al-ṭalāq fa huwa ṭalāq*).[128] However, if the husband does not enunciate the word for divorce at the time of the *khulʻ* and doesn't display a clear intention of divorce, in this case the jurists have differed as to whether such a *khulʻ* constitutes as a divorce (*ṭalāq*) proper or an annulment (*faskh*). According to one narration of Imām Aḥmad b. Ḥanbal (d. 241/855), and the earlier opinion of Imām al-Shāfiʻī (d. 204/820), it's considered an annulment. Among the Companions of the Prophet (peace be on him), the first Caliph Abū Bakr (d. 13/634) also upheld this opinion, as well as ʻAbd Allāh Ibn ʻAbbās (d. 68/687), Ṭāʼūs, ʻIkrama, Isḥāq b. Rahwayh and Abī Thawr. Imām Aḥmad also mentions a weak (*ḍaʻif*) *ḥadīth* on the authority of ʻUthmān (d. 35/656), ʻAlī (d. 40/661), and Ibn Masʻūd (d. 32/653) where such a separation is considered a *faskh*.[129] ʻAbd Allāh b. ʻAbbās narrates that the *khulʻ* is a separation and not a divorce (*al-khulʻ furqatun wa laysa bi-ṭalāq*).[130] However, al-Sarakhsī notes that it is also narrated from ʻAbd Allāh b. ʻAbbās that he had withdrawn this opinion.[131]

On the other hand, a majority of the jurists (*jumhūr*), including the early rationalists (*ahl alr-Raʾy*) and later Ḥanafīs, the Mālikīs, and many of the early *Salaf*, including Saʻīd b. al-Musayyib (d. 94/715), al-Ḥasan al-Baṣrī (d. 110/728), ʻAṭāʼ (d. 114/732), Qabīṣa, Shurayḥ, Mujāhid, Abī Salma b. ʻAbd al-Raḥmān, Ibrāhīm al-Nakhaʻī (d. 96/714), al-Shaʻbī, al-Zuhrī, Makḥūl, Ibn Abī Najīḥ,

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[127] al-Kāsānī, *Badāʼiʻ al-Ṣanāʼiʻ*, 3:144.

[128] Wizārat al-Awqāf waʼl-Shuʾūn al-Islāmiyya, *al-Mawsūʻa al-Fiqhiyya al-Kuwaytiyya*, 2nd ed., vol. 9 (Kuwait: Dhāt al-Salāsil, 1983), 237; al-Shīrāzī, *al-Muhadhdhab*, 2:490; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:439; ʻAlāʼ al-Dīn Abū ʼl-Ḥasan ʻAlī b. Sulaymān al-Mardāwī, *al-Inṣāf fī Maʻrifat al-Rājiḥ min al-Khilāf*, vol. 8 (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, n.d.), 393.

[129] Ibn Qudāma, *al-Mughnī*, 7:328; Abū ʻAbd Allāh Muḥammad b. Aḥmad al-Qurṭubī, *al-Jāmiʻ li Aḥkām al-Qurʼān*, vol. 3 (Cairo: Dār al-Kutub al-Miṣriyya, 1964), 143; al-Shīrāzī, *al-Muhadhdhab*, 2:491

[130] Abū al-Ḥasan ʻAlī b. ʻUmar al-Dāraquṭnī, *Sunan al-Dāraquṭnī*, ed. Shuʻayb al-Arnūṭ et al. (Beirut: Muʾassassat al-Risāla, 2004), *kitāb al-nikāḥ*, *bāb al-mahr*, # 3869.

[131] al-Sarakhsī, *al-Mabsūṭ*, 6:171.

Mālik b. Anas (d. 179/795), Sufyān al-Thawrī (d. 161/778), and al-Awzāʿī (d. 157/774) all upheld the view that *khulʿ* is a divorce. This view is also attributed to another narration by Imām Aḥmad and is also considered to be the later and more preponderant (*rājiḥ*) ruling of al-Shāʿfiʿī.[132] According to this latter majority view, therefore, given that the rules of *ṭalāq* remain applicable for the *khulʿ*, one of its major requirements is that such a divorce may not take place without the agreement of the husband.

The Khulʿ as Annulment (*Faskh*): Legal Interpretations of the Qur'ān and *Ḥadīth*

Jurists and legists who hold the *khulʿ* as annulment draw their legal reasoning primarily from the context of verses 2:229-230 of *Sūrat al-Baqara* where the rulings on divorce and *khulʿ* are mentioned:

> A divorce is only permissible twice (*al-ṭalāq marratān*): after that, the parties should either hold together on equitable terms, or separate with kindness. It is not lawful for you, (Men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by God. If ye (judges) do indeed fear that they would be unable to keep the limits ordained by God, there is no blame on either of them if she give something for her freedom. These are the limits ordained by God; so do not transgress them if any do transgress the limits ordained by God, such persons wrong (Themselves as well as others). So if a husband divorces his wife (irrevocably), He cannot, after that, re- marry her until after she has married another husband and He has divorced her . . . [133]

There has been consensus among the exegetes and jurists of the classical period that the first part of the verse "*al-ṭalāq marratān*" refers to unilateral divorce by the husband. Whereas, the second part of the verse beginning with "*fa in khiftum an lā yuqīmā ḥudūd Allāh fa lā junāḥ ʿalayhimā fī mā iftadat bihi*" refers to *khulʿ*.

Some classical scholars and exegetes, including Ibn Qudāma, al-Qurṭubī, and al-Kāsānī have read these verses as evidence that a *khulʿ* is definitively a *faskh* and not a *ṭalaq*. As we have

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[132] *al-Qurṭubī, al-Jāmiʿ*, 3:143; al-Sarakhsī, *al-Mabsūṭ*, 6:171; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:439; Ibn Rushd, *Bidāyat al-Mujtahid*, 3:90; Ibn Qudāma, *al-Mughnī*, 7:328; Shams al-Dīn Abū ʿAbd Allāh Muḥammad b. Muḥammad al-Ḥaṭṭāb al-Ruʿaynī, *Mawāhib al-Jalīl fī Sharḥ Mukhtaṣar Khalīl*, vol. 4 (n.p.: Dār al-Fikr, 1992), 19.

[133] ʿAbdullah Yūsuf ʿAlī, trans., *The Holy Qur'ān: Text, Translation and Commentary*, new revised edition (Maryland: Amana Corporation, 1983), 2:229.

already seen, these verses establish the basis for the three-divorce rule in Islamic law.[134] As they argue, these verses mention a total of three divorces (*ṭalāq*), twice prior to mentioning the *khulʿ* and once afterwards. In this case, considering the *khulʿ* here as a *ṭalāq*, as per their reasoning, would entail a total of four consecutive divorces, which is not permissible under any circumstance.[135] Thus, from the context of these verses, it is obvious that a *khulʿ* is not a divorce but an annulment (*faskh*).

A second argument for this position is based on the *khulʿ* narration of Thābit b. Qays. In this narration from *Sunan al-Nasāʾī*, the Prophet (peace be on him) tells Thābit b. Qays, "Take what she owes you and let her go" (*khudh alladhī lahā ʿalayk wa khalli sabīlahā*), to which Thābit agrees. The Prophet then orders Thābit's wife to wait for one menstrual cycle and then go to her family.[136] Some jurists have deduced from the Prophet's order '*khalli sabīlahā*' (let her go) and his command to Thābit's wife to go back to her family (*talḥaq bi-ahlihā*) in this narration that the *khulʿ* is clearly an annulment, as the husband's consent is not sought. Additionally, another argument from this narration is that Thābit's wife is ordered to wait for only one menstrual cycle before the separation, and this proves that a *khulʿ* cannot be a divorce because the waiting period for a *ṭalāq* is explicitly mentioned in the Qur'ān as three menstrual cycles (*thalāthat qurūʾ*).[137]

The third argument for this opinion is based on analogy (*qiyās*). Some jurists make an analogy between a *khulʿ* and an *iqāla fī al-bayʿ* (termination of a sale agreement) and hold that just as a sale transaction is annulled through an *iqāla*, likewise, the marital contract is annulled through a *khulʿ*. Thus, a *khulʿ* is considered another example of a *faskh*, as separations that result in the cases of apostasy (*irtidād*) of one of the spouses, refusal of continuing in a marriage contract by a spouse who was married prior to the age of maturity on the basis of the right of

[134] See the section above: An Overview of Divorce in Islamic Law.
[135] Ibn Qudāma, *al-Mughnī*, 7:328–29; al-Qurṭubī, *al-Jāmiʿ*, 3:143; al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 3:144.
[136] Abū ʿAbd al-Raḥmān Aḥmad b. Shuʿayb al-Nasāʾī, *al-Mujtabā min al-Sunan*, ed. ʿAbd al-Fattāḥ Abū Ghudda, vol. 6 (Aleppo: Maktab al-Maṭbūʿāt al-Islāmiyya, 1986), 186, *kitāb al-ṭalāq*, *bāb ʿiddat al-mukhtaliʿa*, # 3497. This work is heretofore cited by its more popular title of *Sunan al-Nisāʾī*. For more on this narration, see also *Sunan al-Dāraquṭnī*: *kitāb al-nikāḥ*, *bāb al-mahr*, # 3629.
[137] Qur'ān 2:228; Muḥammad b. Abī Bakr Ibn Qayyim al-Jawziyya, *Zād al-Maʿād fī Hady Khayr al-ʿIbād*, vol. 5 (Beirut: Muʾassasat al-Risāla, 1994), 179.

option attained at the age of maturity (*khiyār al-bulūgh*), and marriage annulled due to an incompatibility between the spouses (*'adam kafā'a bayn al-zawjayn*).[138]

The *Khul'* as Divorce: The Majority (*Jumhūr*) Juristic Opinion

The majority of the jurists (*jumhūr*) who consider *khul'* as divorce assert that there is no clear evidence from verses 2:229-230 to suggest that a *khul'* is a *faskh*, arguing instead that two different categories of divorce are mentioned here - divorce without compensation and divorce with compensation (i.e. *khul'*). The mention of '*al-ṭalāq marratān*' (a divorce is only permissible twice) at the beginning of 2:229 is a reference to the typical divorce without compensation; after divorcing his wife twice, the husband has one final opportunity to remain with his wife. Before discussing the third and irrevocable divorce in 2:230, a sub-clause is introduced (*fa lā junāḥ 'alayhimā fī mā iftadat bihi*)[139] that introduces the option of a divorce with compensation, in case it is feared that the couple would be unable to keep the limits ordained by God (*fa in khiftum an lā yuqīmā ḥudūd Allāh*). Here the *khul'* is mentioned not as a third divorce but introduced as another option for the couple. Verse 2:230 then moves on to a discussing the third irrevocable divorce, after which the husband and wife cannot remarry.[140] In yet another view, the Ḥanafī Ibn al-Humām (d. 861/1457) holds that a better interpretation of verse 2:229 is to hold that it does not indicate whether the separation is a *ṭalāq* or *faskh* and that it merely permits for the wife's payment of a compensation and its acceptance by the husband. In this case, other evidence is used to prove that such separation is indeed a *ṭalāq*.[141]

As far as the *khul'* example of Thābit b. Qays's wife is concerned, different narrations of this incident in the *ḥadīth* literature are used to bolster the claim that her separation from Thābit was considered divorce as opposed to an annulment. One clear narration of Ibn Abī Shayba (d. 235/849) on the authority of Sa'īd b. al-Musayyib states, "that the Prophet, peace be on him, declared *khul'* a single divorce, (*anna al-Nabiyy ṣallallāh 'alayh wa sallam ja'al al-khul' taṭlīqa*).[142] In

[138] al-Mardāwī, *al-Inṣāf*, 8:395; Ibn Rushd, *Bidāyat al-Mujtahid*, 3:91; al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 3:144.
[139] "There is no blame on either of them if she gives something for her freedom." Qur'ān 2:229.
[140] al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 3:144–45.
[141] Ibn al-Humām, *Fatḥ al-Qadīr*, 4:213.
[142] 'Abd Allāh b. Muḥammad Ibn Abī Shayba, *al-Kitāb al-Muṣannaf fī 'l-Aḥādīth wa 'l-Āthār*, vol. 4 (Riyadh: Maktabat al-Rushd, 1409AH), *kitāb al-ṭalāq*, *mā qālū fī 'l-rajul idhā khala'a imra'atah*, # 18433; *Sunan al-Dāraquṭnī: kitāb al-khul' wa 'l-ṭalāq wa 'l-Īlā' wa ghayruh*, # 4025.

addition to these textual indicants, a majority of jurists (*jumhūr*) provide the following rational arguments in support of their opinion.

a. A separation between spouses whose charge is in the hands of husband is considered *ṭalāq* as per the consensus of jurists, and in case of *khul*ʿ the separation is also concluded from the husband's side, therefore, it is also a divorce. However, in this divorce woman pays compensation to her husband.[143]
b. If *khul*ʿ were *faskh* then it would have not been allowed for the husband to take anything more than the *mahr* that he had paid to her, just like an annulled sale contract where it is not permitted to receive more than what has originally been paid. Whereas, *khul*ʿ is permitted with compensation which may be equal to or in access of what has been paid in *mahr*. In addition, in *khul*ʿ contract it is not necessary to mention the repayment of *mahr*, as that must be returned regardless just like a sales contract where the sale price must be returned to the purchaser in case of annulment.[144]
c. The word *khul*ʿ is used for *ṭalāq* as an indirect declaration of intent (*kināya*) therefore, whenever *kināya* is used it will mean *ṭalāq*.[145]
d. Another indicant in favour of the opinion that *khul*ʿ is divorce is that the word *khul*ʿ literally means *naz*ʿ (to extract),. Therefore, the term *khalaʿahā* means that the husband separated his wife from the marriage bond, and that is the meaning of irrevocable divorce. Whereas, *faskh* means to pull out from the root an alternative interpretation that does not carry the meaning of separating one thing from the other. Therefore, the ruling derived from a word that also corroborates with literal meaning of the word is more appropriate than opting for its metaphorical meaning.[146]

It is clear from the above discussion and reasoning of the two schools that *khul*ʿ is generally considered an irrevocable divorce. One of the main consequences of considering *khul*ʿ as divorce, as mentioned earlier, is that it then falls under the authority of the husband. Since

[143] Ibn Qudāma, *al-Mughnī*, 7:328–29; al-Qurṭubī, *al-Jāmi*ʿ, 3:143; Ibn Rushd, *Bidāyat al-Mujtahid*, 3:91.
[144] Aḥmad b. ʻAlī Abū Bakr al-Rāzī al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, ed. Muḥammad Ṣādiq al-Qamḥāwī, vol. 2 (Beirut: Dār Iḥyā' al-Turāth al-ʻArabī, 1405AH), 94; al-Shirbīnī, *Mughnī al-Muḥtāj*, 4:439.
[145] Ibn al-Humām, *Fatḥ al-Qadīr*, 4:214.
[146] al-Kāsānī, *Badā'i*ʿ *al-Ṣanā'i*ʿ, 3:144.

ṭalāq is husband's prerogative and he has unilateral authority over it, thus if *khul'* is also considered a form of *ṭalāq*, it makes the husband the final authority in concluding this agreement and he can choose to reject it. Contrary to this, *faskh*[147] does not necessarily require agreement of the parties involved. It generally depends upon the circumstances and conditions that are part of the contract. If the situation arises in which *faskh* is necessary, then a third party – in case of *khul'*, a court or *ḥākim* – can declare the implementation of *faskh* even without the explicit authority or consent of the husband. This, then brings us to the discussion of husband's consent in *khul'*. The questions that we need to answer are that whether husband's consent is necessary for the *khul'* to take effect? Can a *khul'* take place without his consent? Does the political authority, in the modern context a judge, have the authority to decide on *khul'* between spouses without the consent of the husband? This discussion is primarily related to the main thesis of this dissertation. The argument here is that in classical Islamic law, the consent of the husband was made a necessary condition for the *khul'* to take effect. However, a review of Qur'ān 2:229 and *aḥādīth* of the Prophet reveal that *khul'* may take place without the consent of the husband. Judges in Pakistani courts between 1959 and 2002, invoking the theory of judicial *ijtihād*, (which we shall also discuss in in due time) have established that *khul'* without the consent of the husband is within the ambit of *sharī'a* and this right should be extended to Muslim women living in Pakistan. Finally, in 2002, through a Presidential Order, the right of *khul'* without the consent of the husband was granted to Pakistani woman invoking *aḥādīth* of Thābit b. Qays in which his wife was granted *khul'* by the Prophet, acting in his capacity as judge. This chapter will now move to the discussion on the consent of the husband in *khul'* divorce as illustrated in classical Islamic jurisprudence of the four Sunni schools – Ḥanafī, Shāfi'ī, Ḥanbalī and Mālikī.

Consent of the Husband in *Khul'* in Pre-Modern Islamic Law

As briefly mentioned above, the majority of Sunni jurists (*jumhūr*) consider the consent of the husband a must for *khul'* except for the Mālikī school which provides an opportunity for the woman to seek divorce on grounds of harm (*ḍarar*) without the consent of the husband, using a

[147] For more on *faskh*, see Wizārat al-Awqāf wa'l-Shuʾūn al-Islāmiyya, *al-Mawsū'a al-fiqhiyya al-Kuwaytiyya*, 1st ed., vol. 32 (Cairo: Maṭābi' Dār al-Ṣafwa, 1983), 131; al-Kāsānī, *Badā'i' al-Ṣanā'i' Fī Tartīb Al-Sharā'i'*, 3:182; 'Abd al-Raḥmān b. Abī Bakr Jalāl al-Dīn al-Suyūṭī, *Al-Ashbāh Wa 'l-Naẓā'ir* (Beirut: Dār al-Kutub al-'Ilmiyya, 1990), 287; Zayn al-Dīn b. Ibrahīm b. Muḥammad Ibn Nujaym, *Al-Ashbāh Wa 'l-Naẓā'ir 'alā Madhhab Abī Ḥanīfa Al-Nu'mān* (Beirut: Dār al-Kutub al-'Ilmiyya, 1999), 292.

much wider definition of harm than that accepted by the other schools.[148] The following pages will show how the issue of husband's consent is treated across the aforementioned Sunni *fiqhī* schools. Since *fiqh* literature relies on primary sources i.e. Qur'ān and *ḥadīth*; let us first see what the Qur'ān and *ḥadīth* say about *khulʿ* and then how exegetes and jurists interpreted those verses.

Muslim exegetes differ as to who the subjects of the phrase "if ye (judges) do indeed fear"[149] (*fa in khiftum*) in verse 2:229 are. The basic question is whether the subjects of these words are rulers, who are represented by judges, or is it the husband and wife themselves. In other words, who should decide whether spouses are able to live within the boundaries prescribed by Allah Almighty or not? Is it the responsibility of the court, that acts on behalf of the state, or do the spouses have to decide themselves? Furthermore, what is meant by the fear that is made as the basis for *khulʿ*? According to al-Shāfiʿī, if one of the two spouses is unable to stay within the limits prescribed by Allah, this will entail that both of them are not able to remain within the limits prescribed by Allah (*wa idhā lam yuqim aḥaduhumā ḥudūd Allāh fa laysa maʿan muqīmayn ḥudūd Allāh*).[150] Abū Bakr al-Jaṣṣāṣ (d. 370/٩٨٠) opines that *illā an yakhāfā* refers to the two spouses.[151] The fear of not respecting the limits prescribed by Allah appears when one of the spouses does not fulfill their marital responsibilities[152] and violates the other's rights. Qur'ān states that "women shall have rights similar to the rights against them according to what is equitable" (*wa lahunna mithl alladhī ʿalayhinna bi 'l-maʿrūf*).[153]

Al-Qurṭubī (d. 671/1273), with reference to the majority of jurists, mentions that in verse 35 of Sūrat al-Nisā', the words *wa in khiftum* (and if you fear) are addressing the rulers, and in the same verse, the words *in yurīdā iṣlāḥan* (if they both intend reconciliation), according to ʿAbd

[148] Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid*, 3:90; al-Dasūqī, *Ḥāshiyat al-Dasūqī ʿalā al-Sharḥ al-Kabīr*, 2:356; al-Ṣāwī, *Ḥāshiyat al-Ṣāwī ʿalā 'l-Sharḥ al-Ṣaghīr*, 2:530.
[149] The word "judges" is added by ʿAbdullah Yūsuf ʿAlī as is apparent from the parenthesis. The Arabic phrase literally means "if you (in plural) fear."
[150] al-Shāfiʿ ī, *al-Umm*, 5:211.
[151] al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 2:89–90.
[152] Not fulfilling one's marital responsibilities also falls under the category of transgression, referred to in the Qur'ān as *nushūz*, which can take place from either spouse. For more on the *nushūz* of the husband, see the following juristic works, al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 2:91–94; al-Bahūtī, *Kashshāf al-Qināʿ ʿan Matn al-Iqnāʿ*, 5:209, 211, 213; al-Aṣbaḥī, *al-Mudawwana al-Kubrā*, vol. 2:241–42; Ibn ʿĀbidīn, *Radd al-Muḥtār*, 3:445.
[153] Qur'ān 2:228

Allāh b. ‘Abbās, Mujāhid and other exegetes, mean if arbitrators from both sides intend to bring about a compromise, God will bring the spouses close to each other.[154]

Muḥammad Ṭāḥir b. ‘Āshūr (d. 1973), a Tunisian jurist and exegete, agrees with al-Qurṭubī and further elaborates on this and states that if the verbal ending *tum* (you, in the plural) in the word *khiftum* (you fear) were to address the spouses, then the wording of the verse would have been like this: *fa in khiftumā an lā tuqīmū* or *an lā tuqīmā*.[155] Abū Zahra (d. 1974) claims that these words are either addressing a group of believers because in case of a conflict between the spouses Muslim believers tend to help them in resolving their conflict, or the addressees of these words are group of men who have conflicts with their wives, however, Abū Zahra prefers the former interpretation.[156]

Exegetes of the Mālikī school discuss *khul‘* under the verse of sūrat al-Nisā’, “If ye fear a breach between them twain appoint (two) arbiters one from his family and the other from hers; if they wish for peace Allah will cause their reconciliation: for Allah hath full knowledge and is acquainted with all things.”[157]

Al-Qurṭubī, in his exegesis, explains this verse and states that the ruler should send an arbitrator each from his family and her family who together are to determine which of the spouses is inflicting harm, and when established, they should separate them through *khul‘*.[158] He further states that the arbitrators must be from the families of the spouses because they have a better understanding of the situation. Furthermore, the arbitrators chosen should be just, wise and knowledgeable in *fiqh.* In case no such person is available from the family of the woman, two persons from outside the family who are just and knowledgeable are to be appointed as arbitrators.[159] Al-Qurṭubī concludes that the arbitrators should do their best in bringing the couple close to each other in the name of God. If the spouses reconcile and agree to live together then the conciliators should withdraw, however if they do not reconcile and the conciliators consider it appropriate to separate them, they may do so, and their decision of separating the

[154] al-Qurṭubī, *al-Jāmi‘ li Aḥkām al-Qur’ān*, vol. 5:175.
[155] Muḥammad al-Ṭāhir Ibn ‘Āshūr, *Tafsīr Al-Taḥrīr Wa ’l-Tanwīr* (Tunis: al-Dār al-Tūnisiyya li ’l-Nashr, 1984), 408.
[156] Muḥammad Abū Zahra, *Zahrat al-Tafāsīr*, vol. 2 (Cairo: Dār al-Fikr al-‘Arabī, 1987), 779.
[157] ‘Alī, *The Holy Qur’ān*, 4:35.
[158] al-Qurṭubī, *al-Jāmi‘ li Aḥkām al-Qur’ān*, 1964, 5:175.
[159] Ibid.

spouses shall have full force of the law.[160] Ibn ʻĀshūr infers from verse 35 of sūrat al-Nisā' and states that in case of continuous dispute between the spouses where they are not ready to listen to each other, that is referred to as *shiqāq*, it is necessary to appoint arbitrators. The right to appoint a mediator belongs to the ruler and not to the spouses. This is because the spouses are not the addressees of the verb *ibʻathū. Baʻth* here means influence and the influence is not possible without authority, hence, the arbitrators shall have the right to reconcile between them or to separate them as they deem appropriate.[161] Ibn ʻĀshūr holds that the arbitrators have the right to decide as they deem appropriate; be it separation between the spouses or reconciliation.[162] The preponderant opinion, according to Ibn ʻĀshūr is that of ʻAlī, who said to the arbitrators sent for resolving the conflict between ʻAqīl b. Abī Ṭālib and his wife, that if you see that the separation between them is appropriate then separate them, and if you can reconcile between them then choose reconciliation . Appointment of arbitrators is to be by the orders of a judge and only in case of dissonance (*shiqāq*) that is unresolvable by the spouses themselves.[163] Consequently, whatever decision is made by the arbitrators, be it of separation, of reconciliation, or of *khulʻ*, it is binding on both parties.[164]

The Qur'ān provides several principles for *khulʻ* that are neatly summarized by Muhammad Munir in the following points.[165] First, the offer (*ījāb*) of *khulʻ* could be from either of the spouses when they think that it is impossible to fulfill their mutual rights and obligations. Second, exegetes interpret Qur'ānic verses as permitting spouses to effectuate *khulʻ* through mutual agreement, if they fear that they cannot respect the limits prescribed by God, against some compensation to be paid by the wife to her husband. However, the question as to whether the court has the authority to decide on this matter with the agreement of the husband is unanswered. Verse 229 of Sūrat al-Baqara does not deal with question. Third, it is permissible for the husband to accept the consideration based on the Qur'ānic phrase *fī mā iftadat bihi*[166] that the woman shall pay consideration for gaining full control of her person. Fourth, with reference

[160] Ibid., 5:176.
[161] Ibn ʻĀshūr, *Tafsīr Al-Taḥrīr Wa 'l-Tanwīr*, 1671.
[162] Ibid., 1672.
[163] Ibid.
[164] Ibid., 1671.
[165] Muhammad Munir, *Islāmī Sharīʻat Aur Pākistānī Qānūn Mēṇ Khulʻ Kī Ḥaithiyyat: Rasūl-i Akram Kī Sunnat Yā ʻAdālatī Ijtihād* (Islamabad: Sharīʻah Academy, 2017), 18–19.
[166] Arabi, "The Dawning of the Third Millennium on Shari'a: Egypt's Law No. 1 of 2000," 8, 11.

to verse 35 of Sūrat al-Nisā', arbitrators may be appointed from both sides who shall have the authority to decide as per the situation. Again, in this verse, this question of whether the arbitrators have full authority to declare *khul*ʿ without the consent of the husband is not explicitly answered. We shall have to look into other sources to justify this interpretation. This is because as per the verse, the primary responsibility of the arbitrators is to attempt reconciliation so that the spouses could continue living together without further discord or conflict. If the arbitrators conclude that the reconciliation is not possible between the spouses, they have the authority to separate the spouses and their decision is binding. The nature of arbitrators' final decision, whether it is binding or not, is open to interpretation, therefore, we shall treat it later in the chapter when discussing the matter of the husband's consent. Fifth, the question of who is the subject of the phrase *fa in khiftum* (if you fear) has varying interpretations. Majority of the jurists have interpreted it as referring to the spouses, whereas several exegetes have opined that the ruler or his delegated court are the subjects of this phrase, hence they have the authority to grant *khul*ʿ without the consent of the husband.

It is clear from the above discussion that the matter of consent of the husband in *khul*ʿ divorce falls in the ambit of *ijtihād*. This is because the Qur'ānic verse is ambiguous and open to interpretation and some exegetes and jurists have inferred that the court has no authority in this matter while others contend that it does. In case of the latter interpretation of the verse, the court may separate the spouses by ending their marriage contract against some compensation equal to *mahr* or any other mutually agreed upon consideration for *khul*ʿ. It is a general principle for Qur'ānic interpretation that if a matter is not resolved completely by the Qur'ān, it is open for *ijtihād* and allows interpretations based upon other sources such as *ḥadīth* (statements, actions or tacit approvals of the Prophet that are transmitted through a chain of

narrators), *ijmā'* (consensus),[167] *qiyās* (analogical reasoning),[168] *istiḥsān* (juristic preference)[169] and *al-maṣlaḥa al-mursala* (public good)[170]. In such cases exegetes and jurists use *aḥādīth* to find their answers as a first step. The chapter shall therefore turn to *ḥadīth* literature to study the concept of *khul'* and to assess how it was dealt by the Prophet himself. Did the Prophet seek consent of the husband or did he grant *khul'* to women in his own capacity as a ruler and a judge? Exegetes of the Mālikī school have discussed *khul'* under verse 35 of Sūrat al-Nisā' as well and have concluded that the arbitrators can decide upon *khul'* matters without the agreement of the husband and such decision shall be binding upon the spouses. Again, verse 35 of Sūrat al-Nisā' cannot be considered a categorical proof without reading it in the light of *ḥadīth* literature. This is particularly so because the verse does not treat the subject of the consent of the husband at all.

Prophetic Treatment of *Khul'*: The Case of Thābit b. Qays

When speaking of *khul'* in the *ḥadīth* collections, four of the six canonical Sunni works (al-Bukhārī, Ibn Māja, Abū Dāwūd, and al-Nasā'ī) mention the case of Ḥabība bint Sahal, the wife of Thābit b. Qays in their chapter of *khul'*. Muḥammad b. Ismā'īl al-Bukhārī (d. 256/870) mentions this story as the following:

> The wife of Thābit b. Qays came to the Prophet, peace be on him, and said, "O Allah's Messenger! (peace be on him), I do not blame Thābit for defects in his character or his religion, but I, being a Muslim, dislike to behave in un-Islamic manner (if I remain with

[167] For authoritativeness (*ḥujjiyya*) of consensus (*ijmā'*) in Sunni tradition see Muḥammad b. Idrīs al-Shāfiʿī, *Al-Risāla*, ed. Aḥmad Muḥammad Shākir (Beirut: Dār al-Kutub al-ʿIlmiyya, 1939), 471–76; Abū al-Maʿālī ʿAbd al-Malik b. ʿAbd Allāh b. Yūsuf b. Muḥammad al-Juwaynī, *Al-Burhān Fī Uṣūl al-Fiqh*, ed. Ṣalāḥ b. Muḥammad b. 'Uwayḍa, 1st ed., vol. 1 (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 259–80; al-Ghazālī, *al-Mustaṣfā fī 'Ilm al-Uṣūl*, 137–58; Fakhr al-Dīn Muḥammad b. ʿUmar al-Rāzī and Ṭāhā Jābir Fayyāḍ al-ʿAlwānī, *Al-Maḥṣūl fī 'Ilm Uṣūl al-Fiqh*, vol. 4 (Beirut: Muʾassasat al-Risāla, 1992), 35–101; ʿAbd al-ʿAzīz b. Aḥmad b. Muḥammad al-Bukhārī, *Kashf al-Asrār ʿan Uṣūl Fakhr al-Islām al-Bazdawī*, vol. 3 (Beirut: Dār al-Kitāb al-ʿArabī, 1974), 236–43.

[168] For details of analogical reasoning (*qiyās*), its authoritativeness (*ḥujjiyya*) and kinds see al-Bukhārī, *Kashf al-Asrār ʿan Uṣūl Fakhr al-Islām al-Bazdawī*, 3:270–93; al-Shāfiʿī, *Al-Risāla*, 476–86; Abū al-Maʿālī ʿAbd al-Malik b. ʿAbd Allāh b. Yūsuf b. Muḥammad al-Juwaynī, *Al-Burhān Fī Uṣūl al-Fiqh*, ed. Ṣalāḥ b. Muḥammad b. 'Uwayḍa, 1st ed., vol. 2 (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 3–13; al-Shawkānī, *Irshād Al-Fuḥūl Ilā Taḥqīq al-Ḥaqq Min ʿIlm al-Uṣūl*, 2:89–104.

[169] For a definition and authoritativeness of juristic preference see al-Shawkānī, *Irshād Al-Fuḥūl Ilā Taḥqīq al-Ḥaqq Min ʿIlm al-Uṣūl*, 2:181–84.

[170] On definition and use of *al-maṣlaḥa al-mursala* (public good) in deducing the rules see ibid., 2:184–86.

him)." On that Allah's Messenger, peace be on him said (to her), "Will you give back the garden which your husband has given you (as *mahr*)?" She said, "Yes. "Then the Prophet, peace be on him said to Thābit, "O Thābit! Accept your garden, and divorce her once.[171]

In four other narrations of the same story in al-Bukhārī, with slight variation of words, the Messenger of Allah asked Thābit to divorce Ḥabība[172] in consideration of the return of the garden.[173] In the first narration of Bukhārī, words *iqbal* (accept) and *ṭalliqhā* (divorce her) are used in their imperative form,[174] whereas in the second narration, it is explicitly mentioned through the indirect speech that the Prophet ordered him (*amarahu*) to divorce his wife.[175] It becomes clear from this narration that the consent of Thābit was not sought. Instead, the Messenger of Allah ordered him to grant a divorce.[176]

In the collection of Aḥmad b. Shuʿayb al-Nasā'ī (d. 303/915), the same narration of above is mentioned. However, he also presents the following alternative account:

> Al-Rubayyiʿ bint Muʿawwidh b. 'Afrā' narrated that Thābit b. Qays b. Shammās hit his wife and broke her arm - she was Jamīla bint 'Abd Allāh b. Ubayy. Her brother came to the Messenger of Allah to complain about him, and the Messenger of Allah called upon Thābit and said: "Take what she owes you and let her go." He said: "Yes." And the Messenger of Allah ordered her to wait for one menstrual cycle and then go to her family.[177]

This narration of the story mentions the reason for complaint, which is Thābit's beating of his wife and breaking her arm. Here it appears that the husband is at fault and the Prophet effectuated *khulʿ* without seeking his consent and ordered the wife to return what he had given her as *mahr*. In another narration reported by Abū Dāwūd Sulaymān b. al-Ashʿath (d. 275/889) he states, on the authority of 'Ā'isha:

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[171] *Ṣaḥīḥ al-Bukhārī: kitāb al-ṭalāq, bāb al-khulʿ wa kayf al-ṭalāq fih*, # 5273.
[172] Ibn 'Abbās has narrated all these aḥādīth from 'Ikrama. In three out of the five narrations the woman who approached the Prophet is referred to as "the wife of Thābit b. Qays", in one narration as "the wife of Thābit b. Qays b. Shammās," and in one narration 'Ikrama mentioned her with the name Jamila. See ibid., Kitāb al-ṭalāq, Bāb al-khulʿ wa kayf al-ṭalāq fih, ḥadīth nos. 5273, 5274, 5275, 5276 and 5277.
[173] Ibid., Kitāb al-ṭalāq, Bāb al-khulʿ wa kayf al-ṭalāq fih, ḥadīth nos. 5274, 5275, 5276 and 5277.
[174] Ibid., Kitāb al-ṭalāq, Bāb al-khulʿ wa kayf al-ṭalāq fih, ḥadīth no. 5273.
[175] Ibid., Kitāb al-ṭalāq, Bāb al-khulʿ wa kayf al-ṭalāq fih, ḥadīth no. 5274.
[176] Arabi, "The Dawning of the Third Millennium on Shariʿa: Egypt's Law No. 1 of 2000," 17.
[177] al-Nasā'ī, *Al-Mujtabā Min al-Sunan*, 6:186, Kitāb al-ṭalāq, Bāb 'iddat al-mukhtaliʿa, ḥadīth no. 3497.

> Ḥabība, daughter of Sahl, was the wife of Thābit b. Qays b. Shammās. He beat her and broke some of her parts. So she came to the Messenger of Allah (peace be on him) the next morning, and complained to him against her husband. The Prophet (peace be on him) called on Thābit and said (to him): Take a part of her property and separate her. He asked: Is that right, Messenger of Allah? He said: Yes. He said: I have given her two gardens as a dower, and they are already in her possession. The Prophet (peace be on him) said: Take them and separate her (from yourself). Therefore, he did so.[178]

Muḥammad Ibn Māja (d. 273/886) also narrated this *ḥadīth* from Ibn ʻAbbās in the same way as al-Bukhārī. However, the difference between the two narrations is that in Ibn Māja's narration the woman's name is Jamīla bint Salūl (not Sahl). The other difference is that the Messenger of Allah commanded Thābit to take back his garden only and not more. To quote Ibn Māja's narration, "Jamīla bint Salūl approached the Prophet (peace be on him) and said:

> By Allah, I do not find any fault in Thābit concerning his religion and behaviour, but I hate disbelief after becoming Muslim and I cannot stand him. The Prophet (peace be on him) said to her: "Will you give him back his garden?" She said: "Yes." So the Messenger of Allah (peace be on him) ordered him to take back his garden from her and no more than that.[179]

On the one hand this narration seems to suggest that the husband should not ask more than what he had given in *mahr* as compensation for *khulʻ*, on the other hand the *ḥadīth* is not clear on whether the Prophet himself separated them or asked Thābit to divorce her.[180] *Ḥadīth* scholars combine this narration with the following *ḥadīth* of Ibn Māja in which it is clear that the Prophet did not seek consent or agreement from Thābit and that he separated them himself (*fa farraqa baynahumā Rasūl Allah ṣallā Allāh ʻalayh wa sallam*).[181]

The story of Ḥabība and Thābit mentioned in the Musnad of Aḥmad Ibn Ḥanbal further describes the intensity of dislike between Ḥabība and her husband Thābit. The wording of Ibn Ḥanbal's narration is as follows:

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[178] al-Sijistānī, *Sunan Abī Dāwūd*, Kitāb al-ṭalāq, Bāb fī al-khulʻ, ḥadīth no. 2228.
[179] Ibn Māja, *Sunan Ibn Māja*, Kitāb al-ṭalāq, Bāb al-mukhtaliʻa ya'khudh mā aʻṭāhā, ḥadīth no. 2056.
[180] Al-Jaṣṣāṣ quotes a similar tradition from Ibn Ḥanbal and states that according to Ḥanafīs it is not allowed for the husband to take anything more that he has given her in mahr, see al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 2:93.
[181] Ibn Māja, *Sunan Ibn Māja*, Kitāb al-ṭalāq, Bāb al-mukhtaliʻa ya'khudh mā aʻṭāhā, ḥadīth no. 2057.

> Sahl b. Abī Ḥathma narrates that Ḥabība bint Sahl was married to Thābit b. Qays al-Anṣārī. whom she detested. He was an ugly man. She came to the Prophet (peace be on him) and said: "O Messenger of Allah, when I look at him, were it not for fear of Allah, I would spit on his face."[182] The Messenger of Allah asked her: "Will you give him back his garden that he gave you in *mahr*?" She said: "Yes." The Messenger of Allah called upon him and she returned his garden back to him, at this he (the Messenger of Allah) declared separation between them.[183]

Aḥmad Ibn Ḥanbal said this was the first case of *khul'* in Islam. In this case, again referring to Ḥabība daughter of Sahl,[184] several principles regarding no-fault wife-initiated divorce are established. Firstly, that a woman may initiate a no-fault divorce. Secondly, the reason for dislike could be anything as Ḥabība did not like her husband just because he was not a good-looking man. The Prophet considered this a valid justification to separate the couple. Moreover, the Prophet issued his orders in combination with Qur'ānic injunctions on *khul'* where it is said that a woman may pay consideration for her separation if it is believed that one or both spouses will not be able to maintain the limits ordained by Allah. In this case Ḥabība was explicit in stating that she was not able to maintain the limits ordained by Allah as she felt like spiting on the face of Thābit when he approached her. The *ḥadīth* further provides that the Prophet, on assessing the intensity of her dislike for her husband, did not initiate an attempt at reconciliation, rather he proceeded with effecting separation. This is because in the way Ḥabība presented her case to the Prophet it was obvious that she had made every effort to stay with her husband but was unable to do so and thus wanted a divorce. Finally, the Prophet, after ensuring the return of the *mahr* to the husband, announced the separation between them himself. His act of declaring

[182] The original wording of the *ḥadīth* where the intensity of her dislike for her husband due to no-fault of him is mentioned is "*fa law lā makhāfat Allāh la-bazaqt 'alā wajhih*."

[183] Aḥmad b. Muḥammad Ibn Ḥanbal, *Musnad al-Imām Aḥmad Ibn Ḥanbal*, ed. Shu'ayb al-Arna'ūṭ and 'Ādil Murshid, 2nd ed. (Beirut: Mu'assasat al-Risālah, 2001), Musnad al-Madaniyyīn, baqiyyat ḥadīth Sahl b. Hathma, ḥadīth no. 16095.

[184] In several narrations of this story, the name of the wife of Thābit on some occasions appear as Jamīla and at other as Ḥabība. As we mentioned earlier, that Bukhārī has mentioned her twice as the wife or Thābit, but in one narration he mentioned her as Jamīla. Ibn Ḥanbal, Abū Dāwūd and Mālik in his al-Muwaṭṭa' has described her as Ḥabība, whereas, Ibn Māja and Nasā'ī mentioned her as Jamīla. The higher judiciary of Pakistan in all their discussions on *khul'*, have written her name as "Jamila." However, at some places the court opines that Thābit b. Qays had two wives. For simplification purposes, we have referred to her as Ḥabība unless dictum is quoted.

separation between Ḥabība and Thābit shows that the consent of the husband was not solicited and the Prophet, after analyzing the case on its merits, announced the decision of separation himself. The Prophet acting in the capacity of a judge or arbitrator is supported by verse 35 of Sūrat al-Nisā', for which further explanation will follow in this chapter, and is a key principle in deciding matters between the spouses where they are not able to resolve their issues among themselves. Despite the fact that the literature is silent on whether Ḥabība bint Sahl first made an effort to separate from Thābit b. Qays or not, it is assumed that she must have first exhausted other available options to her to get herself relieved from the marriage before she approached the Prophet which Ḥabība knew had the authority to arbitrate her case in his capacity as Prophet, arbitrator and judge. One may question here that the Qur'ān suggests the provision of two arbitrators (*ḥakamyn*), one from the husband's side and one from the wife's side, but in this case there was only the Prophet who acted alone. To this one may respond that the Prophet in his capacity as the Messenger of Allah was a *ḥakam* for Ḥabība as well as Thābit, hence could act from both sides. This is the reason that once Ḥabība approached the Prophet, Thābit did not object to it, nor he asked someone else to represent himself in front of the Prophet.

From the narration of Ibn Māja and Abū Dāwūd it appears that the husband played no decisive role in the *khul*ʿ (as opposed to the jurists who assign the husband the decisive role) as the Prophet did not seek any consent or agreement from Thābit. From the above analysis of different *aḥādīth* that narrate the same story of Ḥabība (or Jamīla) and Thābit's *khul*ʿ, it could be concluded that the consent of the husband is not necessary for such divorce. However, as shall be discussed in the following section, a majority of jurists (*jumhūr*) of Ḥanafī, Shāfiʿī, Ḥanbalī and Shīʿa schools of jurisprudence make it necessary to seek husband's consent and do not allow the court to grant *khul*ʿ without the consent of the husband. This is even though four of the six authentic collections of *aḥādīth* do not provide any direct or indirect hint that justifies seeking husband's consent in matters of *khul*ʿ divorce. On the contrary, what is common in all these narrations is the commanding nature of the Prophetic order to Thābit that he should take back his garden and separate himself from Ḥabība.[185]

[185] Arabi, "The Dawning of the Third Millennium on Shariʿa: Egypt's Law No. 1 of 2000," 17.

Did the Prophet Himself Pronounce *Khul‘* to Ḥabība on Behalf of Thābit?

Most of the *ḥadīth* literature that we have discussed above describe the story of Ḥabība and Thābit in a way where the Prophet ordered Thābit to accept his garden and divorce his wife a single divorce. However, one narration of this *ḥadīth* mentioned by al-Dāraquṭnī in his *Sunan* in the book of marriage (*Kitāb al-Nikāḥ*) under the chapter of dower (*Bāb al-Mahr*), goes one step further and justifies the court's right to announce *khul‘* without consulting the husband. In this *ḥadīth* the wife of Thābit is named Zaynab bint ʻAbd Allāh b. Ubayy b. Salūl. Al-Dāraquṭnī narrates on the authority of Abū al-Zubayr that when Zaynab approached the Prophet and disclosed her dislike towards Thābit the Prophet said, "Will you return his garden that he has given you?" She responded, "Yes and even more." The Prophet said, "No more, but only his garden." She said, "Yes." The Prophet took the garden for him (Thābit) and divorced her (*fa akhadhahā lahu wa khallā sabīlahā*). When this news reached Thābit b. Qays, he said, "I accept the decision of the Messenger of Allah, peace be on him."[186] Ibn al-Qayyim mentions that al-Dāraquṭnī has declared the chain or narrators of this *ḥadīth* as authentic (*ṣaḥīḥ*).[187]

In this *ḥadīth* the following principles are established. First, the judge may hear the case in the absence of the husband. Second, if the judge is convinced of the merits of the case,[188] he may pronounce *khul‘* without consulting the husband. Finally, he may himself receive the *mahr* on behalf of the husband. Hence, it could safely be said that *ḥadīth* literature interprets the Qur'ānic provision of *khul‘* in a way where the wife may approach the court for separation and after forfeiting her financial rights may obtain *khul‘* directly from the court without necessarily obtaining the agreement of her husband.

Even though the Prophet had not assigned any decisive role to the husband in the matter of Ḥabība's *khul‘*, classical jurists have had a consensus that the consent of the husband is a condition for the *khul‘* to take effect. According to a Ḥanafī jurist and exegete al-Jaṣṣāṣ, the process of the Prophet asking Ḥabība and her husband about returning the *mahr* and his

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[186] al-Dāraquṭnī, *Sunan Al-Dāraquṭnī*, Kitāb al-nikāḥ, bāb al-mahr, ḥadīth no. 3629. Ibn Qayyim, *Zād al-Maʻād*, 5:175.

[187] Ibn Qayyim, *Zād Al-Maʻād*, 5:175.

[188] Sayyid Raʾīs Aḥmad Jaʻfarī, the Urdu translator of *Zād al-Maʻād*, has expressed this opinion and states that this *ḥadīth* proves that the ruler can also grant a divorce on behalf of the husband if he finds the case of the wife strong enough. See Ibn Qayyim al-Jawziyya, *Zād al-Maʻād*, trans. Sayyid Raʾīs Aḥmad Jaʻfarī, vol. 4 (Karachi: Nafīs Academy, 1990), 760–61.

acceptance of *mahr* in response itself is an enough evidence to prove that the husband has a central role in *khul*ʿ divorce. Otherwise, the Messenger of Allah could have announced *khul*ʿ without any consultation about *mahr* and disregarded Thābit altogether, but he did not do so.[189]

Therefore, the majority of jurists hold an interpretive opinion other than what the Qur'ān and *ḥadīth* literature's apparent meanings suggest in regard to the consent of the husband in *khul*ʿ divorce. There is no doubt that the Qur'ānic verses are further clarified through the story of Ḥabība and the decision of the Prophet is a precedent and a primary source for *khul*ʿ as well. Arabi deals with this issue and opines that the Qur'ānic notion of *iftadat bihi* does provide for a consensual agreement between the husband and wife, whereas the Prophet's Sunna is clear on pronouncing *khul*ʿ without seeking the husband's consent in return for the wife forfeiting her financial rights of dower and alimony.[190] This apparent contradiction was resolved, according to Arabi, by the majority of jurists " allowing [the] Qur'ānic implication of a consensual transaction overrule the Prophet ruling in Ḥabība's *khul*ʿ separation case."[191] This requires us to turn towards juristic literature of the four Sunni school and see how they managed to overrule Prophetic precedent that in fact was a compliment to the Qur'ānic injunctions. A possible outcome of the application of the primary sources of Islamic law i.e. Qur'ān and Sunna could have been that, based on the Qur'ānic verse, the husband and wife were allowed to negotiate a *khul*ʿ settlement in which the consent of the husband was equally necessary, and in the case where they are unable to reach an agreement and approach a court of law – as Ḥabība did by approaching the Prophet – in the light of the Prophetic precedent, the judge would have the right to decide without seeking the consent of the husband. This would have been a perfect mix and implementation of Qur'ānic as well as Sunna provisions for *khul*ʿ divorce. Egyptian legislators in their Law 1 of 2000 adopted this approach and offered both options to the spouses.[192] Pakistani lawmakers, as will be seen later, did not find it necessary to include the first option in their law of *khul*ʿ as it is always an option for spouses to negotiate any agreement

[189] al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 2:95.
[190] Arabi, "The Dawning of the Third Millennium on Shariʿa: Egypt's Law No. 1 of 2000," 18.
[191] Ibid.
[192] Article 20 of Law 1 of 2000 reads, "A married couple may mutually agree to separation (khulʿ); however, if they do not agree and the wife sues demanding it, and separates herself from her husband by forfeiting all her financial legal rights, and restitutes to him the dower he gave to her, then the court is to divorce her to him." See ibid., 18–19.

that is acceptable to parties and divorce without involving the court. Pakistani law rather spells out the second option regarding when a woman approaches the court. In this case, the court is to grant her *khul*ʿ provided reconciliation fails and she forfeits all of her financial and legal rights and returns the dower money to her husband.

Although classical jurists retained the first option, i.e. Qur'ānic injunction, intact by allowing a mutually negotiated *khul*ʿ settlement called *mubāra'a*,[193] they failed to accord with the right given to the court by the Sunna where the wife could attain a *khul*ʿ degree by forfeiting her financial rights and dower money in favour of her husband. Let us now examine the arguments provided by the jurists that led them to declare that *khul*ʿ cannot take place without the consent of the husband, even if the court would decide so.

*Khul*ʿ in the Four Sunni Schools of Law

The Ḥanafī school has dealt with the matter of *khul*ʿ and its rulings more extensively in comparison to the other Sunni schools, and most Ḥanafī jurists dedicated a special section in their *fiqh* manuals to *khul*ʿ divorce. Ḥanafī sections on *khul*ʿ are comprehensive and detailed to the extent that they discuss non-Ḥanafī positions and then provide their counter arguments as well. The summary of the Ḥanafī position is that *khul*ʿ is one of the three rights of divorce of the husband, it is irrevocable, and to enact it the wife forfeits her financial rights and *mahr* as consideration for separation, and husband must agree to this divorce and its stipulations just like a sales contract where both parties must agree. The court cannot unilaterally rule on *khul*ʿ divorce without the consent of the husband.

The Ḥanafīs fully endorse and accept the *ḥadīth* about the story of Thābit and Ḥabība; however, there is consensus among Ḥanafī jurists that the husband has the decisive role in *khul*ʿ. As mentioned earlier, al-Jaṣṣāṣ draws from this *ḥadīth* that the Prophet's conversation with Thābit about the *mahr*, and later his confirmation from Ḥabība about her willingness to return the garden, is sufficient proof that the Prophet did not take *khul*ʿ into his own hands. If he had done so, the Prophet would have disregarded Thābit altogether and decided automatically in favour of Ḥabība. However, he did not do so and instead asked Thābit to divorce her.[194] The Ḥanafīs therefore insist that the husband's consent is essential for *khul*ʿ separation. Al-Sarakhsī

[193] See the following sections of all four schools where *mubāra'a* is permitted.
[194] al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 2:95.

(d. 483/1090) opines that *khul*ʿ can take place in the court or outside the court, as this is a contract that requires the consent of the parties like all other contracts.[195] In the Ḥanafī school *khul*ʿ can take place with any of the five words: *al-khul*ʿ , *al-mubāra'a*, *al-ṭalāq*, *al-mufāraqa*, and *al-bay*ʿ *wa'l-shirā'*.[196] According to al-Kāsānī, the basic elements of *khul*ʿ are offer (*ījāb*) and acceptance (*qubūl*) because this is a divorce contract against consideration, therefore, without the acceptance of the husband, separation cannot take place.[197] In other words, since the court cannot force someone to enter into a contract against his will, similarly without his agreement a court cannot issue divorce. It is also an agreed upon matter for Ḥanafīs that *khul*ʿ is an irrevocable divorce (*ḥukmuh ḥukm al-ṭalāq al-bā'in*).[198] Al-Kāsānī provides two reasons for this divorce to be irrevocable; firstly because *khul*ʿ is pronounced through a word that is an indirect declaration of intent (*kināya*) and that for Ḥanafīs, indirect divorce declarations of intent result in irrevocable divorce. Secondly, this divorce is against a financial consideration and when the husband has accepted the consideration it is imperative that the woman also regain full control of her status in exchange for the consideration; and this is possible only through an irrevocable divorce.[199] Ḥanafīs hold that their opinion is based on a *ḥadīth* where the Prophet declared *khul*ʿ an irrevocable divorce "*ja*ʿ*ala al-khul*ʿ *taṭlīqa bā'ina.*"[200]

For an irrevocable divorce there is no need of a judicial order and this settlement can take place outside of the court as well. According to the school's eponymous founder Abū Ḥanīfa (d. 150/767), if the offer of *khul*ʿ is from the wife the rules of a sales contract (*al-bay*ʿ) shall be applicable to it. Thus, she can withdraw her offer any time before the acceptance from her

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[195] al-Sarakhsī, *al-Mabsūṭ*, 6:173.
[196] Ibn ʿĀbidīn, *Radd al-Muḥtār*, 3:443.
[197] al-Kāsānī, *Badā'i*ʿ *al-Ṣanā'i*ʿ, 3:145.
[198] al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 2:95; al-Sarakhsī, *al-Mabsūṭ*, 6:171; Ibn al-Humām, *Fatḥ al-Qadīr*, 4:211; ʿUthmān b. ʿAlī al-Zayla*ʿ* ī, *Tabyīn Al-Ḥaqā'iq Sharḥ Kanz Al-Daqā'iq Wa Ḥāshiyyat Al-Shilbī*, vol. 2 (Būlāq: al-Maṭbaʿah al-Kubrā al-Amīriyya, 1313), 267; al-ʿAynī, *al-Bināya Sharḥ al-Hidāya*, 5:506; Aḥmad b. Muḥammad b. Aḥmad b. Ja*ʿ*far b. Ḥamdān al-Qudūrī, *Mukhtaṣar al-Qudūrī fī al-Fiqh al-Ḥanafī*, 1st ed. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 163; Maḥmūd b. Aḥmad b. ʿAbd al-ʿAzīz b. ʿUmar Ibn Māzah, *al-Muḥīṭ al-Burhānī fī al-Fiqh al-Nuʿmānī*, ed. ʿAbd al-Karīm Sāmī al-Jundī, 1st ed., vol. 3 (Beirut: Dār al-Kutub al-ʿIlmiyya, 2004), 335; Ibn ʿĀbidīn, *Radd al-Muḥtār*, 3:440; Ibn Nujaym, *al-Baḥr al-Rā'iq Sharḥ Kanz al-Daqā'iq*, 4:77; al-Kāsānī, *Badā'i*ʿ *al-Ṣanā'i*ʿ, 3:145.
[199] al-Kāsānī, *Badā'i*ʿ *al-Ṣanā'i*ʿ, 3:145.
[200] al-Dāraquṭnī, *Sunan Al-Dāraquṭnī*, Kitāb al-khul*ʿ* wa 'l-ṭalāq wa 'l-Īlā' wa ghayruh, ḥadīth no. 4025; Abū Bakr Aḥmad b. al-Ḥusayn b. ʿAlī al-Bayhaqī, *Al-Sunan al-Kubrā*, ed. Muḥammad ʿAbd al-Qādir ʿAtā, 3rd ed., 11 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 2003), Kitāb al-khul*ʿ* wa al-ṭalāq, Bāb al-khul*ʿ* hal huwa faskh aw al-ṭalāq, ḥadīth no. 14865.

husband. However, if the offer of *khul*ʿ is from the husband then the rules of oath (*yamīn*) shall be applicable to it, hence, retraction of the contract is not permissible for him, and he will have to wait for the acceptance or refusal by his wife.[201] Abū Ḥanīfa deduces from this principle that *khul*ʿ is a sale contract from the wife's side because through this contract she regains control of her own status.[202] Another principle held by the Ḥanafīs is that if the reason of discord is the husband's behavior and his treatment towards his wife, then it is not permissible for him to receive any compensation or consideration in exchange of granting *khul*ʿ to his wife.[203] From the apparent meaning of the Qur'ānic phrase "*fī mā iftadat bihi*" (she ransoms herself) it is assumed that since the wife pays compensation to obtain her freedom and regain complete control of her own status, hence, it must have been the wife who is at fault and the reason of discord between the spouses. Whereas Qur'ānic verses reveal that transgression (*nushūz*) can occur from either side.[204] Al-Marghīnānī (d. 593/1197) expresses the Ḥanafī school's position in terms very similar to those of the other three Sunni schools. He states that if the couple are in grave conflict it is permissible for the wife to ransom herself from him (*taftadī nafsahā minhu*) for a certain sum so that he would repudiate her; were they to do so, the separation (*khul*ʿ) effected is an irrevocable divorce (*taṭlīqa bā'ina*). Were the transgression to originate from the husband's side, however, it is reprehensible that he receive any compensation. This is because she is already deserted by him; hence and her alienation may not be compounded by taking compensation (*fa-lā yazīd fī waḥshatihā bi-akhdh al-māl*).[205] However, were the transgression to originate with the wife, al-Marghīnānī considers it reprehensible that the husband take from her more than he gave her (*karihnā lahu an ya'khudh minhā akthar mimmā a'ṭāhā*); if he takes more, it is judicially effective (*jāza fi'l qaḍā'*).[206] The central and decisive role of the husband in the enactment of *khul*ʿ is clear from this discussion as well. Therefore, according to Ḥanafī jurists the *khul*ʿ will not take place if husband does not agree to it, and even the court cannot force the husband to accept the offer of compensation made by the wife.

[201] al-Marghīnānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, n.d., 2:263.
[202] al-Zaylaʿī, *Tabyīn al-Ḥaqā'iq*, 2:268.
[203] al-Kāsānī, *Badā'iʿ al-Ṣanā'iʿ*, 3:150.
[204] See Qur'ān 4:34 for a situation where transgression from the women side is mentioned and Qur'ān 4:128 where it is said that a woman may also suffer from transgression from her husband.
[205] al-Marghīnānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, n.d., 2:261.
[206] Ibid.

ʻAlā al-Dīn al-Kāsānī states that if *khulʻ* is adjudicated by a person not related to the couple's families, it is permissible for him to ask the woman to pay consideration to her husband equal to *mahr*. If he orders her to pay more than the dower, *khulʻ* will not take place without the agreement of the wife, because this undermines her rights (*ibṭāl ḥaqq al-marʼa*).[207] Likewise, if he orders her to pay less than the *mahr* amount then the divorce shall not take place until the husband agrees to this settlement, as it undermines his right (*ibṭāl ḥaqq al-zawj*).[208] In other words, according to al-Kāsānī, who is known as Mālik al-ʻUlamāʼ among Ḥanafī scholars, the consent of the husband is equally necessary when the compensation ordered is less than the *mahr* amount. In short, *khulʻ* is like divorce where the husband has the unilateral right to pronounce it. Arabi concludes on the basis of the above views of Ḥanafī scholars that the school's common understanding of *khulʻ* in terms of the Qur'ānic notion of ransoming and mutual exchange is that it has requirement of a husband's consent as the *sine qua non* condition for the separation to have legal effect.[209]

Khulʻ in Shāfiʻī Jurisprudence

Abū Isḥāq al-Shīrāzī (d. 476/1083), an authority in Shāfiʻī *fiqh,* has elaborated the position of the school in simple words. He states that if a woman dislikes her husband due to his ugly appearance or poor living conditions and she fears that in this situation she will not be able to fulfil her obligations towards him, it is permitted for her to seek *khulʻ* against financial consideration.[210] He explains that this position is directly based on the Qur'ānic verse, "If you do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she give something for her freedom," and the *ḥadīth* mentioned above[211] He further points out that if both spouses agree to it then *khulʻ* is also permissible even if she does not dislike him. In other words, *khulʻ* is allowed without any reason. However, if harm has been inflicted upon her, or her husband harms her so that she will pay him money, it is not permissible for him to receive any compensation for *khulʻ* at all.[212]

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[207] al-Kāsānī, *Badāʼiʻ al-Ṣanāʼiʻ fī Tartīb al-Sharāʼiʻ*, 3:149.
[208] Ibid.
[209] Arabi, "The Dawning of the Third Millennium on Shariʻa: Egypt's Law No. 1 of 2000," 15–16.
[210] al-Shīrāzī, *al-Muhadhdhab*, 2:489.
[211] Ibid.
[212] Ibid.; al-Shāfiʻī, *al-Umm*, 5:124.

Whether *khul‘* is *faskh* or *ṭalāq* is another issue that is discussed by the Shāfi‘īs.[213] This depends upon the words that are used while entering into the process of *khul‘*. *Khul‘* may take place with both the words *khul‘* and *ṭalāq*. If *khul‘* is concluded with the word *ṭalāq* or if it is pronounced with an indirect declaration of intent (*kināya*) with the intention of *ṭalāq*, in both these cases *khul‘* shall be a divorce (*ṭalāq*) because in these two situations there is no other possibility except for a divorce.[214] However, if *khul‘* is concluded with the use of the word *khul‘*, this requires further consideration, as the husband's intention is not to pronounce a divorce.[215] Al-Shīrāzī states that there are three opinions in this situation. First, no separation shall take place, and this is al-Shāfi‘ī's statement in his book *al-Umm*. According to al-Shāfi‘ī in the matter of divorce, an indirect declaration without clear intention (*kināya fī 'l-ṭalāq min ghayr niyya*) does not constitute separation. The second opinion is that such *khul‘* will be an annulment (*annahu faskh*), and this is al-Shāfi‘ī's old position. The reason being that *khul‘* is permitted for separation other than divorce, hence it cannot be a *ṭalāq*. In addition to that, *ṭalāq* does not take place except with a direct statement (*bi-ṣarīḥ*), or with an indirect declaration where the intention is to divorce (*kināya maʿa al-niyya*), and the *khul‘* is neither. Hence, it is necessary that it be considered an annulment (*fa wajaba an yakūnu faskhan*).[216] The third opinion is that it is a *ṭalāq* (divorce) and this is al-Shāfi‘ī's position in his book *al-Imlā'*.[217] Al-Muzanī has also adopted this position, stating that *khul‘* is a divorce and takes place in the same way as a divorce (*lā yaqaʿ illā bimā yaqaʿ bihi al-ṭalāq*) i.e. with the intention of divorce. If a person mentions or intends a certain number, that many divorces shall be effective from *khul‘*.[218]

As for the nature of *khul‘*, according to al-Shāfi‘ī, *khul‘* is similar to divorce and only the husband can pronounce it. This is because the husband has the control over the person of the wife (*amlaka bihā*) and *khul‘* is a sales contract like other sales contracts (*annahā bayʿun min al-buyū‘*). Shāfi‘ī is also explicit in stating that *khul‘* does not take place except when concluded by

[213] Abū Zakariyya Muḥyī al-Dīn Yaḥyā b. Sharaf al-Nawawī, *Minhāj al-Ṭālibīn wa-ʿUmdat al-Muftiyīn fī al-Fiqh*, ed. ʻIwaḍ Qāsim Aḥmad ʻIwaḍ (Beirut: Dār al-Fikr, 2005), 227.
[214] al-Shīrāzī, *al-Muhadhdhab*, 2:490.
[215] Ibid., 2:490–91.
[216] Ibid., 2:491.
[217] Ibid.
[218] Ismāʿīl b. Yaḥyā b. Ismāʿīl al-Miṣrī al-Muzanī, *Mukhtaṣar al-Muzanī fī Furūʿ al-Shāfiʿiyya*, ed. Muḥammad ʿAbd al-Qādir Shāhīn (Beirut: Dār al-Kutub al-ʿIlmiyya, 1998), 250.

the husband (*lam yaqa' illā bi-īqā' al-zawj*).[219] This he suggests based on an analogy (*qiyās*) of *khul'* with *ṭalāq*. Al-Shāfi'ī states that since *ṭalāq* cannot take place without its being concluded by the husband, likewise, *khul'* also cannot take place without the husband's consent. In Shāfi'ī's words,

> When a person executes *khul'* with his wife and intends the divorce, but does not intend the number of divorces from this *khul'*, it shall count as one divorce where he does not have the right to return his wife back (*lā yamlik fīhā al-ruj'a*) because it is a sale like other sales, hence it is not permissible for him to own control over her simultaneously when he owns her property.[220]

There are several conclusions that can be drawn from the above statement of Shāfi'ī. Firstly, it highlights that *khul'* is divorce and irrevocable. Prior to announcing *khul'* the husband had control over the status of his wife just like a person who buys something and owns it. This is because he has paid financial consideration to purchase the object. In the case of a marriage contract the husband has purchased the right to benefit from his wife against the payment of *mahr*. Once he relinquishes his right to benefit from her by receiving back the amount he originally paid as *mahr khul'* is therefore an irrevocable divorce. One characteristic of sale contracts is that they require the consent of the parties entering into the contract. The case of *khul'*, according to al-Shāfi'ī, is no different. For al-Shāfi'ī, for the *khul'* to be effective, the husband must agree to this contract. He explains with reference to 'Alī b. Abī Ṭālib that the ruler does not have the right to send arbitrators without the permission of the spouses. Further, the arbitrators will be agents (*wakīlān*) for the spouses.[221] This means that if one of them disagrees, the *khul'* cannot be executed and the husband's agreement is thereby a de-facto condition for *khul'*.

The Ḥanbalī School and *Khul'*

The Ḥanbalī position is similar to the Shāfi'ī and Ḥanafī positions as they also consider *khul'* an irrevocable divorce that takes place against compensation which the wife pays to her husband to ransom herself. Ibn Qudāma quotes Aḥmad Ibn Ḥanbal's statement that *khul'* cases will not be taken to the political authority.[222] He holds this position based on a *ḥadīth* of al-Bukhārī that he

[219] al-Shāfi' ī, *al-Umm*, 5:212.
[220] Ibid., 5:512.
[221] Ibid., 5:125.
[222] Ibn Qudāma, *al-Mughnī*, 7:324.

narrates on the authority of ʻUmar and ʻUthmān, that *khulʻ* is an exchange contract like marriage (*nikāḥ*) and sale (*bayʻ*) contracts, hence there is no need for a ruler or judge to issue a decree for it to be effective. Moreover, this is cancellation of a contract with mutual consent (*qatʻ ʻaqd bi 'l-tarāḍī*), just like the contract of *iqāla* (annulment of a sale contract).[223] It transpires from this discussion that if one spouse does not agree to *khulʻ* contract it will have no legal value, making the husband's consent equally necessary as the consent of parties in a sale contract.

Ibn Qayyim al-Jawziyya (d. 751/1350), a Ḥanbalī jurisconsult and theologian, refers to Ḥabība's incident through the narrations of al-Bukhārī, al-Nasā'ī, Abū Dāwūd and al-Dāraquṭnī and derives a few principles from it: a.) *khulʻ* is permissible as per the Qur'ānic injunction in verse 229 of Sūrat al-Baqara; b.) *khulʻ* may take place with or without the decree of the sultan or a judge; c.) it results in an irrevocable divorce because it is called "*fidya*" (compensation) in the Qur'ān and if we make it a revocable divorce, it will defeat the purpose of her getting separation from her husband by paying compensation; and d.) it is permissible for the husband to take less or more than what he gave her in *mahr*.[224] Ibn al-Qayyim discusses *āthār* (narrations from the people other than the Prophet) of the Companions where *khulʻ* was allowed with more and less than what the husband paid in *mahr* as compensation for *khulʻ*. In the case of al-Rabīʻ daughter of Muʻawwadh b. ʻAfrā' where ʻUthmān allowed her husband to take everything that she had as compensation; and in the case of a female servant of Ibn ʻUmar's wife who took *khulʻ* from her husband against everything that she had, Ibn ʻUmar allowed it. The second Caliph ʻUmar b. al-Khaṭṭāb ordered to a woman who was a transgressor towards her husband (*nashazat ʻan zawjihā*) to pay even just an earring as compensation for *khulʻ*. However, ʻAlī b. Abī Ṭālib forbade taking more than what the husband had given his wife in *mahr*. Ṭā'ūs, al-Zuhrī, Maymūn b. Mihrān, al-Awzāʻī all opine that it is not right for the husband to take more than what he has given in *mahr*. After discussing both opinions, Ibn al-Qayyim enlists Aḥmad b. Ḥanbal's opinion that he considers it reprehensible (*naṣṣa ʻalā al-karāha*) to take more than what he has given in *mahr*.[225]

[223] Ibid.
[224] Ibn Qayyim, *Zād al-Maʻād*, 5:174–76.
[225] Ibid., 5:176–78.

Resumption of the Conjugal Relationship during the Waiting Period from *Khul‘*

It has become clear from our previous discussions that in all Sunni schools *khul‘* results in an irrevocable divorce (*ṭalāq bā’in*), which means the husband cannot resume the conjugal relationship with his wife during the waiting period without entering into a marriage contract afresh after the end of her waiting period. However, the Ḥanbalīs discuss an interesting point that has not been discussed by jurists of other schools: the possibility of resuming the conjugal relationship during the waiting period after *khul‘*. Under this heading Ibn al-Qayyim makes the spouses’ consent necessary for the *khul* to be effective. For him, “*khul‘* is “*fidya*” which is a proof of it having the meaning of exchange contract, hence, the consent of the spouses has to be taken into consideration.”[226] Ibn al-Qayyim asks the question, if the husband revokes *khul‘* and returns to her what he has received, and resumes the conjugal relationship with her during the waiting period, is it legal for both of them? He states that all four schools eponyms and others have prohibited it because the *khul‘* has already made the divorce irrevocable. However, it is narrated from Sa‘īb b. al-Musayyib he said, a man may revoke a *khul‘*.[227] He will have to return all what he has received from the wife within the waiting period. The only condition for withdrawal from *khul‘* is to have witnesses for this revocation. He further mentions on the authority of Ma‘mar that al-Zuhrī held the same position. Whereas, according to Qatāda, al-Ḥassan said he may not revoke the *khul‘* separation except through another marriage sermon (*lā yurājiʿuhā illā bi-khuṭbatin*).[228]

According to Ibn al-Qayyim the position of Sa‘īd b. al-Musayyib and al-Zuhrī contains a delicate juristic debate and as per the principles of Islamic legal theory, however, the practice is against this position (*anna al-ʿamal ʿalā khilāfih*). The reason of this position is that as per the principles of legal theory the woman is still in her waiting period and is still within his control of the marriage. If the husband withdraws the *khul‘* with mutual agreement of the spouses, and returns to her what he has received, no legal rule prohibits him from remarrying her within the

[226] Ibid., 5:178.

[227] It is interesting to note that scholars are not ready to accept any opinion in this regard that deviates from the consensus opinion of the four schools, even if it is an opinion of jurists from early period of Islam. One such example is Ra’īs Aḥmad Ja‘farī’s note in his translation of Zād al-Ma‘ād. When he translates this sentence, he immediately rejects it by saying, “the legal rule is that the man cannot revoke this divorce, as khul‘ is an irrevocable divorce where the husband does not have the right to resume his conjugal relationship once khul‘ is pronounced. For details see Ibn Qayyim, *Zād al-Ma‘ād*, 4:764.

[228] Ibn Qayyim, *Zād al-Ma‘ād*, 5:178.

waiting period himself (*anna lahu an yatazawwajhā fī 'iddatihā minhu*) as opposed to any other man.[229] This position is against the majority and preponderant opinion, as it negates the woman's right that she obtained after paying the compensation for regaining full control of her status back from her husband.

Existence of juristic disagreements and multiple opinions on the same issue demonstrates that the discussion on *khul'* in Sunni schools has evolved into a plurality of opinions, which lends flexibility to Islamic jurisprudence and allows the implementation of Islamic injunctions in the best interest of the person in question keeping account of contemporary circumstances.

Khul' in the Mālikī School

In Mālikī jurisprudence *khul'* is a separation between the two spouses where the woman pays back either all her dower money, or more or less than it (*bi ṣadāqihā kullih wa bi aqall wa bi akthar*), depending upon her agreement. This is because she is the owner of her own affairs (*mālikat amrihā*) and so should not be harmed in the process of separation (*lam yuḍārhā li-taftadī minh*).[230] It is considered an irrevocable divorce (*taṭlīqa bā'ina*). *Khul'* is permissible with and without the ruling of the sultan.[231] Despite this clarity in the rulings of *khul'* the issue of husband's consent is not clear in Mālikī *fiqh*. To understand whether the consent of the husband is necessary or not, "one needs to do a deep analysis of their opinions."[232] To explain the concept of *khul'* and the status of the husband's consent in it Mālik, the eponymous founder of that school, considers verse 35 of Sūrat al Nisā', the *ḥadīth* of Ḥabība, and two other incidents where the husband had mistreated his wife. The way he has explained the legal status of these narrations and the verse indicates that he assigns a central role to the two arbitrators in deciding for *khul'* or divorce.[233] Mālik also accepts a settlement that is mutually negotiated between the spouses.

When it becomes difficult for a woman to live with her husband and she approaches the court, the court as a first step is to determine which spouse is the reason for the discord. Once

[229] Ibid., 5:178.
[230] Yūsuf b. 'Abd Allāh Ibn 'Abd al-Barr, *al-Kāfī fī Fiqh Ahl al-Madīnah al-Mālikī*, ed. Muḥammad Muḥammad Aḥyad Mādīk, 1st ed., vol. 2 (Riyadh: Maktabat al-Riyāḍ al-Ḥadītha, 1980), 593.
[231] Ibid.
[232] Munir, *Islāmī Sharī'at Aur Pākistānī Qānūn Mēṇ Khul' Kī Ḥaithiyyat*, 27.
[233] al-Aṣbaḥī, *al-Mudawwana al-Kubrā*, 2:241–42.

that is established, it should try reconciliation between them. If it is impossible for them to reconcile, the court is to then proceed to end the marriage contract and separate them.[234] If it is proven in the court that the transgression is from the husband, the court will declare *khul*ʿ and it will order the wife to return the *mahr*. If it is proven that the transgression is from the wife's side, in this case the court will end the marriage through a decree of divorce, and if the dower money has not already been paid to the wife, the court shall order the husband to pay it. Ibn Juzayy al-Gharnāṭī (d. 741/1340) opines that this is because in Mālikī jurisprudence the court has the jurisdiction to end the marriage through divorce and *khul*ʿ without the consent of the spouses.[235]

If the court is not able to establish which of the spouses is the reason for discord, it will appoint two arbitrators, one from the side of the husband and one from the side of the wife. The Mālikīs outline the role of arbitrators in detail. It is generally agreed upon that depending upon the nature of the conflict, the arbiter can end the marriage by way of divorce or *khul*ʿ. What transpires from this is that the *khul*ʿ declared by the arbiter or the court does not require the consent of either of the spouses. Some Mālikī jurists are very clear in stating that the consent of the spouses is not necessary when the court or the arbiter annuls the marriage by way of divorce or *khul*ʿ. This becomes clear by reading classical Mālikī texts and their glosses. Ibn Juzayy further states that in verse 35 of Sūrat al Nisā', "God provides the ruling for a woman who commits transgression and the woman who is obedient. After that, He has described another situation which is when the spouses are in serious conflict and they are unable to resolve it among themselves, and it is also not known that who is unjust. In this case, two Muslim arbitrators will be appointed who shall investigate the matter and decide on divorce or *khul*ʿ, whatever they see appropriate, without the consent of the husband."[236]

Another prominent Mālikī jurist, Ibn ʿAbd al-Barr (d. 463/1071), is of a similar opinion. He infers from the verse that the spouses have the right to appoint the two arbitrators without the interference of the Sultan, and if the injustice is from the husband, they are to separate them without anything and it will not be permissible for them to take anything from the wife as

[234] Ibn ʿAbd al-Barr, *al-Kāfī*, 2:596.
[235] Muḥammad b. Aḥmad Ibn Juzayy, *al-Tashīl li-ʿUlūm al-Tanzīl*, ed. ʿAbd Allāh Khālidī, vol. 1 (Beirut: Sharikat Dār al-Arqam b. al-Arqam, 1996), 191.
[236] Ibid., 1:190–91.

consideration to her divorce. One opinion is that it is permissible. On the other hand, if the injustice is from her side, they will take from her what they deem appropriate and will separate them by way of *khul'*.[237]

Mālikī jurists have also explained a situation where both the husband and wife are responsible for the discord. According to Muḥammad b. Yūsuf al-'Abdarī (d. 897/1492) – in his *al-Tāj wa 'l-Iklīl,* which is a commentary of *Mukhtaṣar Khalīl* of Khalīl b. Isḥāq al-Mālikī "some of our scholars opine that if the husband and the wife are both the reason of conflict then the husband shall not receive anything for the divorce."[238]

Mālik discussed three traditions about the incident of Ḥabība. A contemporary Pakistani scholar Muḥammad Munir holds that a review of these three *aḥādīth* reveals that in the third *ḥadīth* the Prophet requires the consent of the husband.[239] His inference is based on the conversation that took place between the Prophet and Thābit in the third narration of Ḥabība's story – where it is discussed whether *khul'* results in a single, double or triple *ṭalāq*.[240] Ibn Musayyib said the Messenger of Allah (peace be on him) called on Thābit b. Qays and told him the situation of Ḥabība and his question to Ḥabība, "Will you return him his garden?" She said, "Yes." On hearing this Thābit asked the Prophet, "Is it permissible for me to take it back?" He said, "Yes," Thābit said, "So I did it." On this the Messenger of Allah said to her, "Observe your waiting period." Then he turned towards him (Thābit) and said, "This is one (divorce)."[241] This narration is described in a way where one may infer that the Prophet sought the consent of Thābit because after receiving information from the Prophet about the validity of accepting the dower back as compensation to *khul',* Thābit divorced her by himself when he said "*qad fa'altu*" (So I did it).

Mālik did not explicitly mention anywhere that for *khul'* the consent of the husband is necessary. However, his opinion is clear about the central role of arbitrators in reconciliation or separation of the spouses. Mālik states if it is possible for the arbitrators to reconcile they should do so. However, if the reconciliation (*ṣulḥ*) is not possible between the spouses due to the

[237] Ibn 'Abd al-Barr, *al-Kāfī*, 2:596.
[238] Muḥammad b. Yūsuf b. Abī al-Qāsim al-'Abdarī, *al-Tāj wa 'l-Iklīl li Mukhtaṣar Khalīl*, vol. 5 (Beirut: Dār al-Kutub al-'Ilmiyya, 1994), 266.
[239] Munir, *Islāmī Sharī'at Aur Pākistānī Qānūn Mēṇ Khul' Kī Ḥaithiyyat*, 30.
[240] al-Aṣbaḥī, *Al-Mudawwana al-Kubrā*, 2:247.
[241] Ibid.

intensity of the conflict, then the arbitrators may decide in separating them without the permission of the ruler. If the arbitrators decide to make the wife pay some compensation to her husband in exchange of this separation, so that it becomes *khul'*, they can do so.[242]

Munir again concludes from this discussion that despite the non-clarity in Mālik's opinion about the consent of the husband, we must read his views in conjunction with the opinions of other Mālikī jurists. Combining other Mālikī opinions and Mālik's own opinion about the central role of the arbitrators where they can decide without the consent of the sultan, we are able to have a clearer Mālikī position that does not require the agreement of the husband for *khul'* to take effect.[243]

'Abd al Wahhāb Baghdādī states that when the relationship between the spouses deteriorates and a conflict arises, it should be determined who is causing the harm. Once established, the matter is to be resolved accordingly. If the matter becomes complicated and they are unable to resolve it, the ruler should send two arbitrators; one from the man's side and one from the woman's side. These arbitrators must be wise and just. They both shall investigate the matter and do their best according to what they see appropriate in reconciling the parties. If reconciliation is not possible, they may proceed with separating them by disregarding the agreement or disagreement of any one spouse or the ruler.[244]

Ibn Rushd appears to have held a "contemporary" opinion about *khul'*; he states that our understanding about the *khul'* is that *khul'* (*fidā'*) is given in woman's hand as an equivalent for divorce (*ṭalāq*) that is in man's hand. Therefore, when the man has friction with the woman, he has the right to divorce; likewise, when the woman develops friction towards the man, she has the right to *khul'*.[245] According to this statement of Ibn Rushd, he considers *khul'* a right of the woman that is similar to husband's right to divorce. As the divorce is not dependent upon the wife's consent, similarly *khul'* is not dependent upon the husband's consent. Even though the above statement of Ibn Rushd and other Mālikī jurists is not clear about the husband's agreement in *khul'* but the following opinion of Ibn Rushd about the arbitrators (*al-ḥakamayn*) points us to draw more conclusions. Ibn Rushd says, "Jurists differ on a separation between

[242] Ibid., 2:267.
[243] Munir, *Islāmī Sharī'at Aur Pākistānī Qānūn Mēṇ Khul' Kī Ḥaithiyyat*, 31.
[244] 'Abd al-Wahhāb b. 'Alī b. Naṣr al-Baghdādī, *al-Talqīn fī al-Fiqh al-Mālikī*, 1st ed., vol. 1 (Beirut: Dār al-Kutub al-'Ilmiyya, 2004), 131; Munir, *Islāmī Sharī'at Aur Pākistānī Qānūn Mēṇ Khul' Kī Ḥaithiyyat*, 31.
[245] Ibn Rushd, *Bidāyat al-Mujtahid*, 3:90.

spouses that is unanimously decided by the arbitrators, whether such separation requires husband's consent or not (*hal yuḥtāj ilā idhn min al-zawj aw lā yuḥtāj ilā dhālik*). Mālik and his companions said: the decision of arbitrators, be it in the form of reconciliation or separation between the spouses, is valid without the authorization from the spouses (*bi-ghayr tawkīl al-zawjayn*) as well as without the consent of one of them (*wa lā idhn min humā fī dhālik*)."[246]

A prominent Mālikī scholar of the twentieth century, Taqī al-Dīn Hilālī, states that the jurists differ among themselves about the status of two arbitrators whether they are appointees of the state and may decide without the consent of the spouses or they are the agents of the spouses? There are two pinions on this issue. The majority of jurists (*jumhūr*) argue that they are the representatives of the state. This opinion is based on the Qur'ānic verse "*wa ibʿathū ḥakaman min ahlih wa ḥakaman min ahlihā*" (send an arbiter from his family and an arbiter from her family). In this verse God has called "*ḥakamayn*" and the role of a "*ḥakam*" (an arbitrator) is that he decides without the consent of the parties in dispute.[247]

It is obvious from the above discussion that the Mālikī jurists assign important role to the two arbitrators who can end the marriage through *khulʿ* without the consent of the spouses. Moreover, Ibn al-ʿArabī (d. 543/1148), a Mālikī jurist and exegete, in his exegesis of the Qur'ān mentions the Mālikī view point about the status of *khulʿ* and says that *khulʿ* is a divorce (*anna al-khulʿ ṭalāq*).[248] Ibn Qudāma quotes a clear statement from Mālik b. Anas where he states that *khulʿ* is an irrevocable divorce (*al-khulʿ hāhunā taṭlīqa bā'ina*).[249] As far as the compensation for *khulʿ* is concerned, Ibn Rushd quotes Mālik, Shāfiʿī and a group of jurists permitting the wife to pay more than what she received in *mahr* as ransom for *khulʿ* to free herself from the marriage contract, if the transgression is from her side.[250]

In summary, Mālik considers *khulʿ* an irrevocable divorce that requires husband's consent to be effective. His opinion is not very different from the other three schools who also consider *khulʿ* an irrevocable divorce. However, later Mālikī jurists assign arbitrators a decisive

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[246] Ibid., 3:117.
[247] Taqī al-Dīn Hilālī, *Aḥkām al-Khulʿ fī al-Islām*, 2nd ed. (Beirut: Al-Maktab al-Islāmī, 1395), 12.
[248] Muḥammad b. ʿAbd Allāh Abū Bakr Ibn al-ʿArabī, *Aḥkām al-Qur'ān*, ed. Muḥammad ʿAbd al-Qādir ʿAṭā, vol. 1 (Beirut: Dār al-Kutub al-ʿIlmiyya, 2003), 264.
[249] al-Aṣbaḥī, *Al-Mudawwana al-Kubrā*, 2:241; In words of Ibn Rushd "majority of scholars consider it divorce, and this is Mālik's opinion." See Ibn Rushd, *Bidāyat al-Mujtahid*, 3:91. Al-Dasūqī indicates that a *khulʿ* in, its essence, is a divorce. al-Dasūqī, *Ḥāshiyat al-Dasūqī ʿalā al-Sharḥ al-Kabīr*, 2:347.
[250] Ibn Rushd, *Bidāyat al-Mujtahid*, 3:89.

role, once they are appointed by the ruler or the judge. The arbitrators' role is first to establish who is at fault and then try to reconcile between the spouses. However, after their efforts for reconciliation fail, they have the right to separate the spouses by way of *khul*ʿ and they can do so with or without compensation. The decision of the compensation will be dependent upon who is at fault. If the transgression is from the husband's side, he is not eligible for compensation for *khul*ʿ divorce. However, if for some reason it is decided that the wife will pay some compensation, it will be legally effective, and the husband may receive it. However, if the reason of discord is the wife, then the arbitrators may order the wife to pay back all what she has received in the *mahr*. They can also decide to order her to pay more than the *mahr* but that is in exceptional situation though if arbitrators do so, it will be legally effective.

Conclusion

This chapter demonstrated that the impermissibility of *khul*ʿ without the prior agreement of the husband remained the dominant opinion throughout the classical and premodern period. Despite the fact that there existed a multiplicity of opinions that could provide an alternative solution, however, those opinions never gained support from the majority of jurists hence, keeping *khul*ʿ at par with divorce (*ṭalāq*) except that in case of *khul*ʿ the wife had to return the dower where as if divorce is pronounced by the husband, there was no question of returning the dower. To maintain this position the Ḥanafī's equated *khul*ʿ with a sale contract where both parties must agree in order for it to be effective. The seller in the case of *khul*ʿ was the husband, the wife the purchaser, the payment of the dower and the "right to benefit from the women" is the consideration for this contract. This chapter has shown that the Ḥanafī position remained the same throughout Islamic history. It is maintained that *khul*ʿ shall be counted as one divorce (*ṭalāq*) leaving behind one more right of divorce without the requirement of the wife's marriage with another man before she could remarry her first husband. The Shāfiʿīs and the Ḥanbalīs do not differ much from the Ḥanafīs except that the Ḥanbalī's considered *khul*ʿ as an annulment (*faskh*) meaning that it does not count towards the two rights of divorce that the Qur'ān has granted to the husband. The Mālikī's, agree with the Ḥanafī's and others on the agreement of the husband in principle when the matter is in the hands of both the spouses, yet they take a different approach when the case is referred to arbitrators. For non-Māliki jurists, arbitrators cannot separate the spouses unless the parties have already given that authority to them to

either separate them or make a compromise. On the other hand, Mālik, Ibn Qudāma, Ibn Rushd, Ibn al-'Arabī, 'Abd al-Wahhāb Baghdādī and Taqī al-Dīn Hilālī held that the two appointed arbitrators (*ḥakamayn*) are authorized to decide as they see appropriate, including separating the spouses against their will if they don't see any other solution to the discord between the spouses. Hence, for the Mālikīs, the role of the arbitrators is central in deciding matters of *khul'* and divorce.

A section of the chapter dealt directly with Qur'ānic and Prophetic treatment of *khul'*. It is concluded from the discussion of the Qur'ānic verse and several *aḥādīth* on *khul'* case of Thābit b. Qays that the existence of multiple narrations of Ḥabība's story provides flexibility to jurists and legislators to issue *fatwā*s and enact laws that directly respond to contemporary challenges, while respecting opinions of past jurists who established their opinions to the best of their knowledge and abilities keeping in view the circumstances of their time and space. The Mālikī approach that provides greater authority to arbitrators and the ruler may provide an opening for contemporary scholars and jurists to respond to the hardships faced by women in the process of seeking separation from their husbands out of court or through the court of law.

The next chapter shall turn to the Indian Subcontinent and explore how Muslim women resolved the dilemma of being stuck in an unwanted and unhappy union created by the classical approach and what mechanism(s) Indian Muslim family laws provided them to come out of this situation.

Chapter 2

Background and History of *Khulʿ* Law in Anglo-Muhammadan Law including and up to the Dissolution of Muslim Marriages Act, 1939

Introduction

In Colonial India Muslims and non-Muslims shared laws and a legal system that was laid down by the British during their rule between 1757 and 1947. With some exceptions, laws were equally applicable to Muslims and non-Muslims. Family law was among the exceptions that allowed Muslims to have *sharīʿa* rules applied in marriage and divorce cases. Despite these concessions, courts used rules of prevalent *fiqh* school, which was Ḥanafī in India, to seek *fatwā*, if needed, and then decide cases according to those *fatwā*s. It is a known fact that Ḥanafī school has most stringent rules for women-initiated divorce, hence in British India it was virtually impossible for a woman to seek divorce without the consent of the husband. This situation continued well into the twentieth century when some women who were living under miserable conditions opted for apostasy to untie the marriage contract as according to the majority opinion in Ḥanafī school apostasy automatically invalidates the marriage contract of the person who commits apostasy.[251] These incidents led Muslim jurists to think about ways they could ease up divorce rules for women providing them an alternative to getting rid of marriage contract through apostasy. These efforts in the first half of the twentieth century forced Colonial rulers to enact Acts specifically dealing with Muslim family matters. In this chapter we will see how these legal changes came about and what did they achieve. How easy did it make for women to get divorce if the husband is not cooperative in divorce. Did these Acts and legal rules when implemented in courts improve divorce rules in favour of women or not, are the questions that we shall try to answer in the following pages.

Further to that, in this chapter I argue that Muslim family laws were implemented and reformed in colonial India at three different levels on different grounds. First, from the second half of the eighteenth century until the first half of the twentieth century Muslims were allowed by the colonial rulers to implement *sharīʿa* rules in their family matters. This was done through the appointment of *sharīʿa* judges (*qāḍī sharʿī*) for adjudication of Muslim family matters or in the areas where *sharīʿa* judges were not available, English judges adjudicating cases by seeking *fatwā*s

[251] Ibn ʿĀbidīn, *Radd Al-Muḥtār*, 1992, 3:193–94; Kamāl al-Dīn Muḥammad b. ʿAbd al-Wāḥid al-Sīwāsī Ibn al-Humām, *Fatḥ al-Qadīr*, vol. 3 (Beirut: Dār al-Fikr, n.d.), 428–29.

from *'ulamā'* pertaining to the case in hand. In this phase the cases were adjudicated strictly under Ḥanafī rules and women had no choice but to convince their husband if they need to relieve themselves of the marriage tie. The second phase in the implementation of Muslim family laws started when the Muslim Personal Law (*Sharīʿat)* Application Act, 1937 was enacted. The purpose and the reasons behind this enactment were different however, this Act also dealt with Muslim law of divorce. The 1937 Act was enacted due to the pressure of Muslim *'ulamā'* to allow Muslim women her due right in inheritance. The third and the last phase of reform in Muslim family law prior to the independence of India and Pakistan was the use of a legal principle known in the modern period as *takhayyur*[252] in selecting less stringent rules from other juristic schools. This was realized by the enactment of Dissolution of Muslim Marriages Act (DMMA), 1939. This Act particularly dealt with the right of women to seek divorce and provided several grounds to women to seek divorce against the will of their husband without forfeiting her dower (*mahr*) and other financial rights.

Despite the fact that DMMA eased the divorce process for women up to a certain extent, however, the burden of proof remained on the woman to prove that she is facing harm (*ḍarar*) while staying in the marriage contract. This third phase was a significant move towards pragmatic eclecticism.[253] For the purpose of removing hardship, Ḥanafī *'ulamā'* of the Indian subcontinent benefitted from Mālikī school and opted for rules of divorce that allow an easy divorce to women in case *ḍarar* is inflicted upon her by staying in the marriage contract. This process in the primary sources was known as *tatabbuʿ al-rukhaṣ* but was associated with negative connotation of following whims and wishes by picking and choosing from different schools. However, in the modern period in a desire to clear of negative connotation it was referred to as *takhayyur* (the process of selecting the least stringent juristic opinion). Ibrahim traces earliest usage of *takhayyur* in the modern period in the first half of the twentieth century when the rector of Al-Azhar University, Muṣṭafā al-Marāghī (d. 1435/1945) used it describing Rashīd Riḍā from among the people who "selected rules that were beneficial to people and suitable for their

[252] Literally, picking, selecting or choosing; a reforming method prohibited by traditional *Sharīʿa* – of selecting opinions from various schools in order to create a modernized body of law. It is mostly applied in regard to the law of personal status, see Hallaq, *An Introduction to Islamic Law*, 177.

[253] For a definition of pragmatic eclecticism and use of *takhayyur* in the modern legal reforms and codification efforts in the Muslim world see Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History*, 2–4.

age (*takhayyur al-aḥkām al-munāsiba lil-zamān wa'l-nāfiʿa lil-umam).*"[254] Indian scholars were also following and in contact with the scholars of Egypt and other Muslim countries, hence they benefited from this evolution and also applied this principle of *takhayyur* for reforms in Indian Muslim personal law, although for different reasons.[255]

I argue that the shift in the position of strict Ḥanafī *'ulamā'* by permitting crossing of school boundaries to look for rules that are less stringent for women, became the starting point for several legal reforms to come that will allow women their rights equal to men, including the right of women to seek *khulʿ* without the consent of their husband, which was enacted in Pakistan in 2002. However, the motives for adopting this principle were different from place to place. In Egypt, as Ibrahim contends, the reason for family law reforms was a need for novel approaches to legal reforms that was reinforced by the UN Declaration of Human Rights issued in 1948;[256] however, in India the reasons were different. Women were renouncing Islam and committing apostasy (*irtidād*) to dissolve their marriages,[257] as it was almost impossible for women to end their marriage contract against the will of their husbands due to the strict Ḥanafī rules. We shall see in the following pages how these events unfolded and what was the response of *'ulamā'* to this situation. We shall further see how these developments contributed towards a movement by *'ulamā'* to call for reform in law that allowed woman to initiate divorce process in a court of law. This dissolution of Muslim marriages law further empowered courts to pronounce divorce against the will of the husband, if he is proven guilty of the allegations brought forward by the wife. This initial codified law proved to be an agent of change in Muslim divorce laws in post-partition Pakistan as well.

Judicial Affirmation of Ḥanafī Principles in the Nineteenth Century – *Khulʿ* Case of 1861

During the colonial period in India in the eighteenth and nineteenth century, family matters were governed under customary laws that created significant hardship for Muslim women. Whenever *sharīʿa* rules were used to adjudicate a divorce case, these rules were either taken from the Ḥanafī legal texts or *fatwā*s were sought from the local *'ulamā'*. Both the sources were

[254] Ibid., 195.
[255] Tahir Mahmood, *Family Law Reform in the Muslim World.* (Bombay: N. M. Tripathi, 1972), 171.
[256] Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History*, 196.
[257] Thānavī, *Ḥīla-i Nājiza Yaʿnī ʿAuratōṇ Kā Ḥaqq-i Tansīkh-i Nikāḥ*, 11; Mahmood, *Family Law Reform in the Muslim World.*, 171.

generally Ḥanafī by default and did not help much to women if they initiate a no-fault based divorce. This was partly because of the Ḥanafī law that was widely practiced in India by Muslims and scholars who generally issued *fatwā*s as per the *fiqh* manuals of Ḥanafīs. As was shown in the previous chapter in all four Sunni schools, with some exceptions in the Mālikī school, the husband's consent is necessary for *khul'* to be effected. The Ḥanafī school, the strictest school in terms of wife-initiated no-fault based divorce, does not accept the court's right to dissolve a marriage on merely the wife's request. It requires consent of the husband a precondition for dissolution of marriage. Outside of the husband's unilateral right to divorce and his ability to delegate this right to his wife, the Ḥanafīs consider all other kinds of dissolution of marriage as analogous to sale contracts where both parties must agree in order for the contract to be valid. Due to such adherence to one school, the highest court of appeal in the British Empire, the Judicial Committee of the Privy Council in 1861 ratified this principle in *Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa* (Munshī Badhl al-Raḥīm v. Laṭīfat al-Nisā') case and declared that "[a] divorce by *Khoola* [*khul'*] is a divorce with the consent and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie."[258] This decision of the Privy Council became a judicial precedent for the other similar cases to follow. It was important because as a practice in Indian high courts and appeal courts, the cases related to Muslim family were adjudicated through the application and interpretation of classical Islamic law (*fiqh*) found in juristic texts.[259] Before discussing the case and the precedents set by it, a few words about how the judicial system worked in colonial India are necessary.

Implementation of *Sharī'a* by Way of English Lawyers

Another issue that made the situation more complex was the increasing appointment of non-Muslim judges in colonial India. It was essential for Muslim scholars to address this issue because as per the rules of Islamic *fiqh* a non-Muslim judge has no jurisdiction to annul a Muslim

[258] Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa, 8 Moo Ind App 379 (United Kingdom Privy Council, Calcutta 1861); Asaf Ali Asghar Fyzee, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh*, ed. Tahir Mahmood, 2nd ed. (New Delhi: Oxford University Press, 2005), 130.
[259] Abbasi, "Women's Right to Unilateral No-Fault Based Divorce in Pakistan and India," 83.

marriage.[260] The appointment of non-Muslim British judges was a natural outcome of the British rule in the region in the eighteenth and nineteenth centuries. Prior to the arrival of the British rulers *'ulamā'* played the role of custodians of the tradition, however, we have little information – unlike the Ottoman court records – about Islamic courts and *qāḍī*s in Mughal Empire and the way Muslims were using judicial system to adjudicate personal status matters. Muhammad Qasim Zaman considers the existence of *al-Fatāwā al-'Ālamgīriyya* (also known as *al-Fatāwā al-Hindiyya*) a sign of diversity in the legal system of pre-colonial India.[261] Masud, Peters and Powers hold that "The *qāḍī* system developed by the 'Abbasids continued to operate under the Mughals in India (1526-1858)."[262] Muslim judges were adjudicating cases of Muslim personal law however, when the East India Company took control of the finances of Bengal, Bihar and Orissa in 1765, it also started to influence the judicial system.[263] Since areas like Bengal were under Mughal control and based on the treaty signed between the East India Company and Mughal rulers of Bengal *sharī'a* was still considered "as the law of the land."[264] Whereas, the British had already started to set up their own legal and judicial system in the form of civil and criminal courts where British judges adjudicated cases with the help of "*mawlānās*" and "*pundits*" in their official capacity as jurisconsult in Muslim and Hindu cases respectively. Asaf A.A. Fyzee suggests that this was in fact continuation of the system that was established by Mughals.[265] Colonial judges were officially required to receive assistance of jurist consults through a legislation called "Mufassal Regulation of Warren Hastings, 1772." In an amendment made to this regulation in 1780 it was established

> "That in all suits regarding inheritance, marriage and caste, and other religious usages or institutions, the laws of the Koran with respect to the Mahomedans, and those of the Shaster with respect to the Gentoos, and where only one of the parties shall be a

[260] Muhammad Khalid Masud, *Ibqāl kā Taṣawwur-i Ijtihād (Iqbal's Conception of Ijtihād)* (Islamabad: Idāra-i Taḥqīqāt-i Islāmī [Islamic Research Institute], 2018), 243.
[261] Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change*, Princeton Studies in Muslim Politics (Princeton, N.J.: Princeton University Press, 2002), 20.
[262] Muhammad Khalid Masud, Rudolph Peters, and David Stephan Powers, *Dispensing Justice in Islam: Qadis and Their Judgements* (Leiden; Boston: Brill, 2006), 15.
[263] Zaman, *The Ulama in Contemporary Islam*, 21.
[264] Masud, Peters, and Powers, *Dispensing Justice in Islam*, 37.
[265] Asaf A. A. Fyzee, "Muhammadan Law in India," *Comparative Studies in Society and History* 5, no. 4 (1963): 412.

Mahomedan or Gentoo, the law and usages of the defendant shall be invariably adhered to."[266]

This rule bound the courts to discover the law that is applicable to "the particular person" and apply it; and in case parties have different religious rules, the law of the defendant shall prevail. In addition to that, Courts started to introduce their concepts of "justice and right" and "justice, equity and good conscience" for the adjudication of cases, particularly because at many instances Islamic as well as Hindu law was in conflict with the common law.[267] Moreover, as the number of trained English judges started to increase it continued to become more and more difficult for English lawyers to find out the exact law applicable to the appellant or the defendant.

In order to overcome this difficulty, some classical Islamic *fiqh* sources were frequently used in courts by the jurisconsults and some of these works were even translated into English by the judges. Several commentaries were also written to explain the principles of Muhammadan law and the scope of Islamic jurisprudence. These books included *al-Hidāya* of al-Marghīnānī translated into English by Charles Hamilton, *al-Fatāwā al-ʻĀlamgīriyya* written in the leadership of Mullā Niẓām, *al-Sirājiyya* of al-Sajāwandī and *Sharā'iʻ al-Islām* of al-Ḥillī. Works on the principles of Muhammadan law (*uṣūl al-fiqh*) further supported judicial staff and the judges to understand and implement Islamic principles in Muslim family matters. *Principles and precedents of Moohummudan law,* by William Hay Macnaghten was the first commentary in this tradition. Commentaries written by Shama Churun Sircar, Amīr 'Alī, Muḥammad Yūsuf, 'Abdur Raḥmān, RK Wilson, FB Tyabji, DF Mulla, Abdur Rahim, AA Fyzee and Vesey-Fitzgerald provided a critique of case law and were often relied upon by the courts in British India.[268] In general it was not an easy task for English lawyers and judges to discover the exact law of Muslim and Hindu religious traditions. One of the reasons being that Islamic law was uncodified and multiplicity of opinions was one of its salient features. Although this was not so problematic in India because for Muslim laws majority of Indian Muslims were adhering to Ḥanafī *fiqh* whith some percentage of Shāfiʻī practitioners at the coastal areas and Shīʿa in relatively smaller

[266] Ibid.
[267] Ibid., 412.
[268] Abbasi, "Women's Right to Unilateral No-Fault Based Divorce in Pakistan and India," 83; Shahbaz Ahmad Cheema and Samee Ozair Khan, "Genealogical Analysis of Islamic Law Books Relied on in the Courts of Pakistan," *Al-Aḍwā'* December 2013 (2013).

numbers. However, Ḥanafī *fiqh* was also not codified and does contain opinions of the eponym Abū Ḥanīfa (d. 150/767), his famous three pupils Abū Yūsuf (d. 182/798), who later became the chief justice, Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/805), Zufur b. al-Hudhayl (d. 158/775) and several other jurists of the school who wrote commentaries, glosses and super glosses to the primary texts. In these texts, several opinions are mentioned simultaneously, and one is declared as preponderant (*rājiḥ*) or most authentic and reliable opinion while the minor opinion is also not denied. This situation required that in order to find a decisive rule a scholar or jurist who is well versed in the tradition must be appointed to assist the court. This practice gave more authority to religious scholars as it was them who provide primary ruling (*fatwā*) in Muslim personal law cases. The role of the judge was to implement a given *fatwā* within the parameters of "justice, equity and good conscience." Hence, Ḥanafī *fiqh* held a central position in colonial Indian courts until the promulgation of family law acts in the first half of the twentieth century.

In other words, *sharīʿa* rules of Muslim personal law continued to be applicable particularly because the British did not impose a uniform legal system. However, this did not continue for long particularly because the presence of *qāḍī* courts also started to diminish due to the presence of more English judges. The multiplicity of opinions in Ḥanafī legal sources and its application by muftis and *maulavī*s was at a point seen as "uncertain, unsystematic, and arbitrary" by the British calling for a more systematic and reliable system.[269] It was for this reason that the British came to decide about specific authentic texts – as mentioned above – within the Ḥanafī tradition as being the most authoritative as a say to systematize application of *sharīʿa* for Muslims in family matters throughout India. This effort of systematization of *sharīʿa* rulings seriously called into question the authority of *'ulamā'*. The *'ulamā'*s role as the torch bearers and interpreters of *sharīʿa* rulings was threatened, their religious tradition labeled as lacking cohesion and methodologically or structurally unsound.

It was this background, along with call for reforms from within the Islamic tradition, particularly because of the women who were suffering the unjust circumstances and renouncing their religion, that the British rulers decided to introduce reforms in Muslim personal laws. They primarily intended to implement the principles of equity and justice which, according to Fyzee, "in most instances, removed angularities of the law of Islam according to the Hanafi school as

[269] Zaman, *The Ulama in Contemporary Islam*, 22.

interpreted and applied in India, and brought it in line with modern notions of social justice."[270] Fyzee here defends the term "Muhammadan Law" for Indian context as opposed to "Muslim" or "Islamic" Law, as suggested by purists, to emphasize that Muhammadan law is "that portion of the law of Islam, which is received in India, and which is affected both by the changing social conditions prevailing in the country and by the principles of English law and equity, so far as they conduce to justice."[271]

Principles of equity, as introduced by the British, did not always proved to be correct in the Indian Muslim context. In a leading family *waqf* (endowment) case of Abul Fata v. Russomoy a form of *waqf,* which had always been accepted as lawful by all Muslim traditions, was considered null and void based on the English principles of equity. This created unrest among Muslims up to the extent that the Government had to interfere to restore the *waqf* through a statute and undo the decision of the court.[272]

However, it can safely be concluded that the British adopted the policy of non-interference in the personal laws of each religious community from the Mughals. The Shariat Act, 1937, was one of its examples whereby all customs and usages contrary to the *sharīʿa* were abrogated and the primacy of Muhammadan law was restored. Despite the fact that the British had adopted not to interfere in the personal laws of Muslims and other religious communities, they were also confirming some rules of Ḥanafī law that were causing stringent restrictions on certain groups of the society. The case of Moonshee Buzl-ul-Raheem discussed above is an excellent example where the court did not interfere in the principles of Ḥanafī *fiqh*, instead sought a *fatwā* from a *maulavī*, applied it in its letter and spirit, and concluded that *khulʿ* cannot take place without the consent of the husband. Although the wife, Nissa, was successful in her appeal and was able to seek divorce without forfeiting her *mahr*, a precedent was set for the next two centuries confirming husband's veto power in *khulʿ* separation by strictly adhering to Ḥanafī principles.

Returning to the case of *Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa*, the case highlights how courts dealt with Muhammadan law in the nineteenth century in general and with the question of woman's right to divorce in particular. The original case was filed in the

[270] Fyzee, "Muhammadan Law in India," 413.
[271] Ibid.
[272] Ibid., 414.

Civil Court of the Twenty-four Pergunnahs by a women named Luteefut-oon-Nissa, against her former husband Moonshee Buzul-ul-Raheem to recover "*dyn-mohr*" (marriage gift) that he has taken back from her through a "*kabeenamah*" (deed of marriage settlement) as compensation in a *khul*ʿ agreement.[273] The claim of the husband was that he had legally executed a *khul*ʿ agreement and receiving the *mahr* was his right as the consideration for the *khul*ʿ whereas the wife stated that her husband had dissolved the marriage by pronouncing a *ṭalāq* (divorce) but "had obtained from her by force and duress two instruments, first, an *Ibranamah,* or release of her *dyn-mohr,* and secondly, a *Khoolanamah,* or deed securing her husband the stipulated consideration to be paid by a wife in a case of *Khoola* divorce."[274] The Zillah (District) Judge decided in favor of the wife and approved the divorce by *khul*ʿ but declared the agreement entitling the husband to take back the *mahr* fraudulent and void. Hence, the wife was entitled to recover her *mahr* and was declared divorced from her husband through *khul*ʿ.[275]

The appeal was brought to the High Court who first explained the concept of *ṭalāq* and *khul*ʿ as per Muhammadan law. It was here when the High Court admitted that *khul*ʿ is a divorce with the consent of the parties and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. The court further elaborated the option of stipulations in *khul*ʿ where husband and wife can mutually bargain on the amount of consideration. It was explained that "the wife may, as the consideration, release her *dyn-mohr* and other rights."[276] Court also pointed out that *khul*ʿ is a complete and irrevocable divorce but the woman must observe her ʿ*idda* (waiting period). Moonshee Buzul-ul-Raheem argued that since the divorce is considered valid through *khul*ʿ agreement to which he consented he cannot be denied the price which he was to receive for consenting to it. In order to be accurate in implementing *Sharīʿa* rules in a divorce case, the court decided to seek a *fatwā*. The *Maulavī* (religious leader) provided a *fatwā* citing the Ḥanafī texts of al-Āmidī, Ibn ʿĀbidīn and al-Tahtānī confirming that if a husband has executed a *khul*ʿ agreement by way of fraud, then an irrevocable divorce shall take place, but he will not be entitled to receive consideration

[273] Fyzee, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh*, 129.
[274] Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa, 8 Moo Ind App at 380.
[275] Fyzee, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh*, 129; Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa, 8 Moo Ind App at 387–88.
[276] Fyzee, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh*, 130.

mentioned in *khul‘* agreement.[277] The Right Hon. Lord Kingsdown of the Privy Council, in the final appeal of the case, confirmed the decisions of the previous two courts and reaffirmed that *khul‘* "is a divorce with consent." Lord Kingsdown agreed with the lower courts and with the *fatwā* issued by a *maulavī* where it was said that the divorce has taken place by virtue of *khul‘* deed to which husband accepts, however, he is not entitled to compensation or return of *mahr* because he obtained *khul‘* by way of duress and force. Finally the judge, after defining *khul‘* from the Ḥanafī *al-Hidāya* of al-Marghīnānī also invoked Qur'ān 2:229 and noted that this verse defines *khul‘* in a way where the "wife shall redeem herself."[278] Redeeming means that she has to enter into a sale-like contract with her husband that is purely dependent upon the consent of the parties.

This case is a typical example of the application of Ḥanafī rules in matters of *khul‘* where *khul‘* was misused by the husband particularly because he knew that according to the rules of Ḥanafī *fiqh* his wife is not able to secure divorce against his will. Likewise, if she offers a *khul‘* agreement, it will also not be effective without his consent. Hence, he used his 'veto' power in the *khul‘* agreement to force his wife to surrender all the *mahr* that she was due to receive because he had married another woman and wanted to pay second wife's *mahr* by taking it back from his first wife.

This case shows how men were abusing their "right" to consent a *khul‘* and using it as a device (*ḥīla*) to force their wives to forfeit their financial rights. The wife at the first place is not able to secure a regular divorce (*ṭalāq*) at her own initiation hence, she is left with only one option that is judicial divorce by way of forfeiting her *mahr*. She does this in good faith that as per the provisions of the Qur'ān that by paying compensation she will free herself from a marriage union which she does not wish to continue but the husband has an honest intention to continue the marriage. However, the compensation that she pays to her husband for *khul‘* is in fact a consideration of his no-fault. However, in the above-mentioned case, the purpose of *khul‘* was totally defeated because the husband had married, or was at the point of marrying, a second wife who stipulated as a condition of her consent to the marriage that her husband should divorce his first wife. The judges observed that the husband "had the power to do so by *Talâk* [*ṭalāq*]" but he didn't do so because he wanted to recover Rs. 26000 that he had paid to his

[277] Ibid., 127–28.
[278] Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa, 8 Moo Ind App at 391.

first wife and use them as *mahr* for his second wife.[279] This was against the principles of *sharīʿa* and the raison d'être of *khul*ʿ, therefore, when the court discovered the malintent of the husband in *Moonshee Buzl-ur-Ruheem* case, it decided to implement the divorce part of the *khul*ʿ contract however, nullified the compensation part of it. At the same time the court confirmed that the wife cannot be released from a marriage tie by a court without the consent of her husband.

Judicial-affirmation of the Ḥanafī principle of husband's consent as a fundamental element of any kind of divorce including *khul*ʿ,[280] along with traditional legal theory of local customs that were regarded superior to a written text of the law, regardless if it is contrary to the latter[281] added misery to women who were living under an undesirable marriage contract. These women could not seek the abrogation of their marriages hence they started to look for legal stratagems or legal devices (*al-ḥiyal*, singl. *ḥīla*). Interestingly, the scholars who initially thought of providing these women a way out of this unwanted situation also resorted to *ḥiyal*. For example, Ashraf ʿAlī Thānavī (d. 1943) wrote a treatise combining *fatwā*s of Ḥanafī and Mālikī scholars to address the existing moral and legal dilemma faced by women when their husband is unable to consummate marriage (impotent), insane, missing, miserly or absent.[282] He resorted to these across-the-school *fatwā*s because the nature of these hardships combined with Ḥanafī restrictions on annulment of marriage, women were renouncing Islam and adopting Christianity which was a bigger dilemma for Thānavī in his times. Hence, he suggested a solution by way of another legal stratagem entitled "transferring the right to divorce to the wife" at the time of their marriage. The title of the *fatwā* was *al-Ḥīla al-Nājiza li'l-Ḥalīla al-ʿĀjiza* (*The Successful Legal Stratagem for the Helpless Wife*). This treatise, a combination of Ḥanafī and Mālikī *fatwā*s on delegating the right to divorce to the wife and option of judicial annulment of marriage in cases of extreme hardship, was the first step in Colonial India towards Muslim family law reforms in general and women's right to divorce in particular.

Reforms in divorce laws shall be discussed in the following pages. However, it is in order to first see how the legal stratagem of apostasy played a role in the modern Muslim divorce laws

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[279] Ibid., 8:398.
[280] Fyzee, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh*, 130; Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa, 8 Moo Ind App at 395.
[281] John D. Mayne, *A Treatise on Hindu Law and Usage* (Madras: Higginbotham, 1878), 34, http://www.llmc.com.proxy3.library.mcgill.ca/docdisplay.aspx?textid=53442337&type=PDF.
[282] Thānavī, *Ḥīla-i Nājiza Yaʿnī ʿAuratōṇ Kā Ḥaqq-i Tansīkh-i Nikāḥ*, 42–78.

in India and Pakistan, particularly how the *'ulamā'* reacted to *ḥiyal* by way of another *ḥīla* (legal device) while maintaining the legal authority of the traditional class of *'ulamā'*. It will equally be useful for the discussion to see how apostasy became a device for Muslim women in India for the annulment of their marriages. When the use of this legal device increased between 1920s and 1930s the *'ulamā'* who previously had issued *fatwā*s testifying it, retracted or changed their *fatwā*s to discredit this legal device in the name of greater benefit of Islam and Muslims.

Situating Apostasy in Muslim Personal Law Reforms in the Twentieth-Century India

As has already been mentioned in previous sections, the requirements placed on women to obtain a divorce in the classical interpretation of the Ḥanafī School created a dilemma. Once the marriage contract had been completed, women were entirely at the mercy of their husbands and had no legal recourse to remove themselves from an unwanted marriage, unless the husband had already delegated divorce right to her.[283] At every step of the process they required their husband's consent. This was not simply the case within traditional Ḥanafī *fiqh* discourse but had become established practice within Indian courts before the arrival of the British and was confirmed by colonial judges as established precedent to be followed in all circumstances.[284]

What was a woman to do who found herself in a marriage that she was not happy in but had no recourse to dissolve? As early as the 1850s they had found a path from within the tradition: to leave Islam. According to classical Ḥanafī sources, a person who renounces the religion of Islam and openly converts to another (*irtidād*) would be legally separated from their spouse. According to al-Marghīnānī, "If either the husband or wife renounce Islam they are to be separated without the pronouncement of divorce, and this is according to Abū Ḥanīfa and Abū Yusuf." (*idhā irtadda aḥad al-zawjayn 'an al-Islām waqa'at al-furqa bi-ghayr ṭalāq*).[285]

Al-Fatāwā al-'Ālamgīriyya – also known as *al-Fatāwā al-Hindiyya* – made the same proclamation, adding the additional point that the separation of the couple was to take place immediately. However, the *al-Fatāwā al-'Ālamgīriyya* also included a second paragraph that would become the source of serious debate in the 20th century. It stated,

[283] Yefet, "The Constitution and Female-Initiated Divorce in Pakistan," 560–61.
[284] Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa, 8 Moo Ind App at 2.
[285] 'Alī b. Abī Bakr al-Farghānī al-Marghīnānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, ed. Ṭalāl Yūsuf, vol. 1 (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d.), 215.

> If a woman wants to spite her husband, to relieve herself of her marriage, or to get a new *mahr* from him and she makes a pronouncement of apostasy then she becomes forbidden for him [to have intercourse] (*tuḥarram ʻalā zawjihā*). Then, she will be forced to become a Muslim again (*fa tujbar ʻalā al-Islām*) and every judge has the right to renew the marriage on the lowest level of dower possible, regardless of whether the woman accepts it or not. The woman will also have no right to marry any other man than her [former] husband (*wa laysa lahā an tatazawwaj illā bi-zawjihā*).[286]

Within *fiqh* discourse, Ḥanafī *ʻulamāʼ* did not intend the idea of apostasy to be used as a legal device (*ḥīla*) to help people get out of marriage. Rather, the annulment of marriage was mentioned as a negative worldly consequence of apostasy (*irtidād*) in addition to the other consequences of criminal liability, the financial penalty of exclusion from inheritance from the apostate's Muslim relatives, and the theological consequence of eternity in Hellfire. This ruling was appropriated in the 19th century by those Indian Muslim women who were looking for a way out of marriage. Using apostasy from Islam to get out of a marriage created yet another, indeed worse, dilemma for the conscience of the woman who was using it. According to Muslim theology one of the greatest sins in the religion of Islam is to leave it and voluntarily accept disbelief (*kufr*) as preferable to following the Truth. Legally it created another problem, as those who were convicted of voluntarily leaving Islam were subject to extreme penalties which could extend to execution.[287] Finally, the use of apostasy as a *ḥīla* created an even larger problem for the *ʻulamāʼ* of the time.[288] Islamic law which they relied upon to defend the faith, specifically the rules established by the Ḥanafī School, was *encouraging* people to leave Islam.

During the second half of the nineteenth century cases began to appear within colonial courts where a woman claimed to have changed her religion (usually to Christianity) and therefore requested that her marriage to her husband be annulled. According to Masud, these

[286] Niẓām al-Dīn Balkhī et al., *Al-Fatāwā al-Hindiyya*, 2nd ed., vol. 1 (Beirut: Dār Ṣādir, 1893), 339.
[287] ʻAlī b. Abī Bakr al-Farghānī al-Marghīnānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, ed. Ṭalāl Yūsuf, vol. 2 (Beirut: Dār Iḥyāʼ al-Turāth al-ʻArabī, n.d.), 406; ʻAlā al-Dīn Masʻūd al-Kāsānī, *Badāʼiʻ Al-Ṣanāʼiʻ Fī Tartīb Al-Sharāʼiʻ*, vol. 7 (Beirut: Dār al-Kutub al-ʻIlmiyya, 1986), 134–35; Muḥammad Amīn b. ʻUmar Ibn ʻĀbidīn, *Radd Al-Muḥtār ʻalā Al-Durr Al-Mukhtār*, 2nd ed., vol. 4 (Beirut: Dār al-Fikr, 1992), 233.
[288] Thānavī, *Ḥīla-i Nājiza Yaʻnī ʻAuratōṇ Kā Ḥaqq-i Tansīkh-i Nikāḥ*, 11.

cases were rare occurrences for the majority of the century, however began to come in much greater numbers during the first decades of the twentieth century.[289]

The main reason behind this growth in the number of cases of apostasy can be traced to the rapid expansion of Christian missionary work during the period. According to Masud, many missionaries actively encouraged women to convert to Christianity to get out of their marriages and, particularly in the Punjab, helped women obtain baptism certificates. Masud cites the case of a one Reverend Paul in Lyallpur who baptized numerous new converts and issued certificates of conversion, many of which were to women who would then approach the courts and ask for annulment.[290]

The rise in the number of women seeking to annul their marriages by committing apostasy created a problem within the courts, who had to answer the hard questions of intent and the validity of annulments when clearly there was no desire to convert.[291] It also challenged the established court precedent, which dictated that a husband's consent was required for the annulment of a marriage.[292]

Initially, Indian *'ulamā'* issued *fatwā*s that supported this approach. In one important case from 1913, a man filed suit in British courts for the "restitution of conjugal rights." He claimed that his wife had left the marital home and refused to return. When he contacted her family, they claimed that she had left the religion of Islam and therefore is no longer married to him. They produced a baptism certificate, indicating her conversion to Christianity. With this evidence presented, the court requested that the husband seek a *fatwā* from a Muslim scholar to answer the question as to whether this marriage is still valid from an Islamic point of view.[293] The husband then approached Ashraf 'Alī Thānavī (d. 1943) and asked:

> With the regard to this woman who uttered the words of unbelief, whether as instructed by her guardians or on her own [initiative], with the intention to annul her marriage, is her marriage contract annulled according to God or not?

Thānavī responded with the following *fatwā* that was introduced to the court:

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[289] Masud, *Ibqāl kā Taṣawwur-i Ijtihād*, 229.
[290] Muhammad Khalid Masud, Brinkley Morris Messick, and David Stephan Powers, *Islamic Legal Interpretation: Muftis and Their Fatwas* (Cambridge, Mass.: Harvard University Press, 1996), 195.
[291] Mt. Rahmate v. Nikka and others, 1928 All India Reporter 954 (1) (Lahore High Court 1928).
[292] Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa, 8 Moo Ind App.
[293] Masud, Messick, and Powers, *Islamic Legal Interpretation*, 193.

> Annulled. Uttering words of unbelief, intentionally and knowingly, whether one actually believes in those words or not, whether it is one's own view or someone else's instructions, necessarily constitutes unbelief in all cases. Since unbelief causes annulment of the marriage contract, the marriage is dissolved. The marriage contracts of all those who consented to such instruction are also annulled. The only difference [between the status of the marriage contract of Zayd's wife and that of the wives of those who taught her words of unbelief] is that according to the *Sharī'a*, Zayd's wife should be forced to embrace Islam and to marry the same first husband. She is not allowed to marry any other person. The wives of those who taught words of unbelief and of those who supported them, however, are allowed to marry whomever they wish after completing their waiting period (*'idda*).[294]

This *fatwā* contained three important points and is in line with the ruling developed within the *fiqh* discourse. The first is that, regardless of intent, any person who commits apostasy is to be immediately separated from their spouse and their marriage annulled. The second point is that the marriages of those who assisted in the commission of apostasy are to meet the same fate as punishment for helping a Muslim leave the religion. The third point points out a difference between men and women. The apostate woman should be forced to convert back to Islam and remarry the same person that she wanted to get away from. The wife of an apostate husband – those who helped in the apostasy of the woman – are now free to marry any man that they want after their statutory waiting period, and do not have to wait for their apostate husbands to be either punished for their crime or forced to return to Islam. Thānavī's *fatwā* cited Ḥanafī texts such as the *al-Durr al-Mukhtār* by al-Ḥaṣkafī (d. 1088/1677) and the *Fatāwā* of Qāḍīkhān (d. 592/1196) to confirm that this is consistent with the majority understanding of the Ḥanafī School. At this point, he was not interested in exploring the issue further, nor developing opinions beyond that which was already present in the *fiqh* discourse.

Using this *fatwā* the British court granted the annulment, based primarily on the first principle of the *fatwā* that a person who commits apostasy is to be immediately separated from their spouse and their marriage annulled. The court ignored the other points of the *fatwā* because, as a non-Muslim governing body, they were not interested in the criminal implications

[294] Thānavī, *Imdād al-Fatāwā*, 2:392–93.

of the act of apostasy as established in the Ḥanafī school, as they had already codified criminal law through the Indian Penal Code of 1860. Punishing a person for conversion to another religion was against their understanding of "justice, equity, and good conscience," which was mentioned earlier in this chapter.

At this point in Indian history, the *'ulamā'* were not concerned with women committing apostasy or its wider implications on Muslims in society.[295] More cases started to come to the courts, and British judges continued to use the principles established in Ḥanafī *fiqh*. Many of these cases were brought by men, questioning the sincerity of the claim of apostasy made by their wife. In their view, women who were still Muslims at heart but only wanted to get out of their marriage through this legal device were violating the spirit of the *fatwā* and should be held to account for their true intentions.

The lower court judges tended to agree with this approach and evaluated the intent of the apostate wife. In a case from August of 1927, the judge dismissed a wife's claim for annulment by saying "the change in religion was not sincere, rather it was only a legal device."[296]

In evaluating the merit of these cases when the wife appealed the lower ruling, however, the higher court's primary interest was in the act of apostasy and not the intent of the person committing it, overruling the husband's concerns of sincerity and following the *fatwā*s of the Ḥanafī *'ulamā'*. For example, in an appeal filed in the Lahore High Court in 1924 by a woman named Bakho against the decision of a District Judge, the High Court dismissed the lower court's argument that "the baptism of Mt. Bakho was wholly inefficacious." Judge further held that "even if it was, the real question which had to be determined was whether Mt. Bakho had renounced the Muhammad religion."[297] To this effect the High Court ruled that there is no doubt that she has renounced Islam because she has given a clear statement of renouncing Islam in the "witness-box" and another Indian Christian Halim Ali who baptized her has provided the evidence of it. The judge accepts the appeal and states that "in accordance with the authorities already mentioned" – he mentioned six other similar cases in his judgement – "the marriage has been dissolved."[298] In such cases, the question is not whether the woman has been baptized or

[295] Masud, Messick, and Powers, *Islamic Legal Interpretation*, 195.
[296] Mt. Rahmate v. Nikka and others, 1928 All India Reporter at 954.
[297] Mt. Bakho v. Lal, All India Reporter 397 (Lahore High Court 1924).
[298] Ibid.

not, rather the question is whether the woman has renounced Islam. A woman did not even have to provide evidence of her conversion, and in one case from 1934 the court granted an annulment based on the woman's mere claim that she had left Islam.[299]

In the appeal to the High Court of the case mentioned above from 1927, the court ruled that "in the question of restitution of conjugal rights, there is no weight given to whether there was proper intent to change one's religion, or whether it was a legal device." The ruling then explained further that "because the appellant has renounced Islam through the performance of the ceremony of baptism, which is one way of becoming a Christian, according to the law her marriage is necessarily annulled."[300] Again, the emphasis here was placed on the presence of the act of apostasy as evidenced in front of the judge.

As time went by the question of intent began to play a larger role in the courts, even convincing some appellate judges to side with the man and restore their conjugal rights. In the case of *Mt. Saeedan v. Sharaf*, a woman approached the court and requested an annulment based on her apostasy from Islam. The husband's lawyer challenged this claim, stating that the woman was currently living with another Muslim man named Sadaruddin and that her claim of apostasy was fake and merely an attempt to leave her husband and marry another. The lower court judge ignored the husband's claim and granted the annulment, upon which he appealed. The first appellate judge decided to investigate the case further, and in response the wife presented a baptism certificate issued by Reverend Paul (mentioned above). The judge doubted the authenticity of this certificate and subsequently reversed the lower court's ruling. The wife then appealed to the High Court and here the judge chastised the appellate judge, questioning why he had bothered to investigate. "Leaving the religion necessarily annuls the marriage," he said, "no matter what the reason was."[301]

Sometimes the investigation by appellate judges went much further than a certificate and carefully examined the woman's intent to leave Islam. In the case of *Mst. Resham Bibi v. Khuda Bakhsh* in 1938 the wife had filed the initial case and the annulment was issued. The husband appealed, and the appellate judge then took up the investigation. Instead of asking for a certificate of baptism, however, the judge ordered "pork to be brought into Court and called

[299] Mt. Sardaran v. Allah Baksh, All India Reporter 976 (Lahore High Court 1934).
[300] Mt. Rahmate v. Nikka and others, 1928 All India Reporter at 954.
[301] Mt. Saeedan v. Sharaf, All India Reporter 277 (Lahore High Court 1937).

upon the plaintiff to take it to prove the sincerity of her declaration."[302] When she refused the judge ruled the annulment to be invalid and that, because of her clothing and lifestyle are that of the Muslims, she must not have truly renounced Islam. She then appealed to the High Court, which in its ruling referenced the previous cases cited here and confirmed the annulment, further emphasizing that no investigation was necessary to prove that she had left Islam.[303]

As has been seen in these cases the lower courts, and increasingly district judges upon initial appeal, investigated the intent of the wife in her act of apostasy. They believed that by judging whether the intent was present the veracity of the wife's conversion to another religion could be tested. Women who clearly had only converted just to get out of the marriage and use apostasy as a legal device (*ḥīla*) were insincere and not deserving of an annulment. Hence, in lower courts local circumstances took precedence.[304] The High Court consistently disagreed with this approach and believed that it was only the *act of apostasy* that was sufficient cause to issue the annulment, and further investigation by the judges was not necessary. By doing so they continued to conform to the Ḥanafī ruling that was established by the *fatwā*s of the *'Ulamā'* and refused to move beyond the dominant understanding of the *fiqh*. This also allowed them to support the rights of the wife to separate from her husband if she felt trapped in a marriage. This was confirmed by a decision given in 1936 by a Muslim judge named Agha Haidar in the case of *Sardar Mohammad v. Mt. Maryam Bibi*, in which he said, "I do not feel strong enough to record my dissent against this highly respectable and distinguished body of judicial opinion." The judge noted that there is little doubt that Maryam Bibi renounced Islam and embraced Christianity to dissolve her marriage, "whatever may be her motives, the fact remains that she has given up the Mahomedan faith" hence her marriage is annulled.[305]

These cases, and the use of apostasy as a legal device (*ḥīla*), started to create significant unrest within the Muslim community and particularly amongst the *'ulamā'*. They saw the religious problem that these cases were creating, and that a growing number of Muslim women were leaving Islam just to get out of their marriages.[306] Additionally, they perceived the growing threat of Christian missionary activities and their impact on the community. As a result, they

[302] Mt. Resham Bibi v. Khuda Bakhsh, All India Reporter 482 (Lahore High Court 1938).
[303] Ibid., 485.
[304] Masud, *Ibqāl kā Taṣawwur-i Ijtihād*, 233.
[305] Sardar Mohammad v. Mt. Maryam Bibi, All India Reporter 666 (Lahore High Court 1936).
[306] Thānavī, *Ḥīla-i Nājiza Yaʿnī ʿAuratōṇ Kā Ḥaqq-i Tansīkh-i Nikāḥ*, 11.

began to question the Ḥanafī approach used by the courts and suggested new ways of legal reform.

The most important of these voices for reform was Muḥammad Iqbal (d. 1938), the famous Indian Muslim thinker, trained as a lawyer in Germany. He was a well-respected member of the Muslim community in South Asia and was one of the first people to propose the idea of an independent nation for Muslims in the region, leading to the eventual establishment of Pakistan. Between 1928-1930 he delivered a series of lectures in the universities of Madras, Hyderabad and Aligarh. These articles were later published as *The Reconstruction of Religious Thought in Islam* in 1930. The sixth Lecture of this series titled "The Principle of Movement in the Structure of Islam" was calling for new legal interpretation (*ijtihād*) to answer the questions posed in the contemporary period, and proposed a new methodology based on the objectives of the *Sharīʿa* (*maqāṣid*).[307] Citing the traditional Andalusian Mālikī scholar al-Shāṭibī (d. 790/1388), Iqbal argued that there were five main purposes of the *Sharīʿa*, chief among them the preservation of religion (*ḥifẓ al-Dīn*). By following the Ḥanafī ruling which allowed for apostasy to annul marriages, Islamic Law was no longer serving its primary purpose, and had become merely a tool in the hands of Muslims seeking practical solutions to their daily problems. The traditional method of legal interpretation based on analogy (*qiyās*) was no longer sufficient, and the higher purposes of the *Sharīʿa* should be considered. By changing this methodology, Iqbal believed that the *Sharīʿa*, and by extension the religion of Islam, would no longer be a burden on the lives of Muslims and could play a more important role in their daily lives.[308]

Iqbal was also interested in seeing reform as conforming with the global movement of women's rights, which he believed was critical to a full establishment of Islamic Law. However, he believed that the incorporation of women's rights must be contextualized and could not be introduced uniformly. He called into question the ideas of the Turkish reformist writer and poet Ziya Gökalp (d. 1924), who suggested reform to Islamic family laws of marriage, divorce, and inheritance to give women equal rights to men, saying that such drastic changes would not work in Indian society as they do not conform to social norms.[309]

[307] Iqbal, *The Reconstruction of Religious Thought in Islam*, 133–34.
[308] Ibid., 134, 140–41.
[309] Ibid., 134–35.

Therefore, he proposed more specific and localized changes that would fit the Indian context. "In the Punjab, as everybody knows," he said, "there have been cases in which Muslim women wishing to get rid of undesirable husbands have been driven to apostasy. Nothing could be more distant from aims of a missionary religion." Considering the purposes of the religion, Iqbal writes, "I venture to ask, 'Does the working of the rule relating to apostasy, as laid down in the *Hidāya*, tend to protect the interests of the Faith in this country?'"[310]

In this same speech, Iqbal attacked the current approach of imitation of Ḥanafī rulings (*taqlīd*) saying, "Due to the strict following of the tradition, Indian judges have no choice but to follow these authentic texts. The result is, that although the world is moving ahead, the law remains stationary."[311]

It is unclear from this speech what Iqbal's specific motive was. He could either have been interested in granting women more rights, curtailing missionary activity, protecting women from leaving Islam, or preserving the relevance of Islam itself in Indian society. However, what is important is that Iqbal was interested in solving the problems on the ground. He was not concerned with lofty and unattainable goals of equal rights, but rather finding "new rulings by which a woman may achieve her rights and may not become so deprived that she had to leave her religion."[312] This was all happening in an environment where women were subject to the husband's consent in all cases of divorce. Even in the realm of *khul'*, where a woman could theoretically obtain a divorce by paying a ransom to her husband, she required his consent.

Iqbal was not a member of the *'ulamā'*, however his words were representative of a growing belief amongst the *'ulamā'* that the problem of divorce needed to be addressed and the ultimate power of the husband to grant divorce curtailed. Within one year of the publishing of Iqbal's lectures in 1931, Ashraf 'Alī Thānavī issued a new *fatwā* on the issue to resolve this problem.[313] This *fatwā* took the form of the famous treatise as mentioned above, *al-Ḥīla al-Nājiza li'l-Ḥalīla al-'Ājiza*. Thānavī cited two reasons for this treatise. (a) To clear Islam from an allegation that in the absence of a *sharī'a* judge Islam has not provided any way out to women who are in an unwanted marriage, and consequently renouncing Islam to get rid of their unwanted

[310] Ibid., 134.
[311] Ibid.
[312] Masud, *Ibqāl kā Taṣawwur-i Ijtihād*, 239–40.
[313] Thānavī, *Ḥīla-i Nājiza Ya'nī 'Auratōṇ Kā Ḥaqq-i Tansīkh-i Nikāḥ*, 119.

husbands, by providing an option of delegation of divorce to the wife (*tafwīḍ al-ṭalāq ilā al-zawja*) and (b) Educating people including judges and governments about the limits of the Mālikī School for judicial separation of husband and wife.[314] Recall his previous *fatwā* in 1913 where he declared that the marriage of the woman who had renounced Islam has been annulled no matter what the motive of renunciation was. Now, however, Thānavī had to change his position.

Unlike his first *fatwā* that only presented the dominant view of the Ḥanafī school, Thānavī now was driven to look further into the Ḥanafī School and presented three opinions in an attempt to solve the problem of apostasy. The first, which was the focus of his initial *fatwā*, citing the *Hidāya*, stated that the marriage of an apostate woman was to be annulled but with consequences that would ultimately bring her back to Islam and her initial husband.[315] The second, proposed by scholars of Balkh, Samarqand, and Bukhara, stated that if her apostasy was merely to get out of her marriage it would not be annulled.[316] The third opinion, found in *al-Nawādir* of al-Shaybānī and connected directly to Abū Ḥanīfa himself, stated that the woman's apostasy would be accepted and her marriage annulled. However, she then theoretically becomes property of the Muslim ruler as a concubine. The ruler may not take legal possession of her (for example by sleeping with her or selling her to someone else) but would then be bought by her husband for any price, or for free.[317]

Feeling the threat to Islam posed by Christian missionaries, Thānavī preferred the second option.[318] By choosing this opinion, Thānavī did not address the issue of the misery faced by women looking to get out of their undesirable marriages. Rather, he was interested in stopping the process of apostasy (*irtidād*). This also shows that he and other *'ulamā'* were open to accepting a change of opinion on the issue albeit within the confines of the Ḥanafī School.

To solve the question of the Ḥanafī restriction of divorce, Thānavī looked elsewhere and suggested two different solutions. The first was that the woman should seek *khul'*,[319] which still required the husband's consent. Thānavī explains that the wife should try to convince her

[314] Ibid., 11–14.
[315] al-Marghīnānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, n.d., 1:215.
[316] Ḥasan b. Manṣūr al-Ūzjandī Qāḍīkhān, Fatāwā Qāḍīkhān, 2:267 quoted in Thānavī, *Ḥīla-i Nājiza Yaʿnī ʿAuratōṇ Kā Ḥaqq-i Tansīkh-i Nikāḥ*, 112.
[317] Ibn al-Humām, *Fatḥ al-Qadīr*, n.d., 3:429.
[318] Masud, Messick, and Powers, *Islamic Legal Interpretation*, 201.
[319] Thānavī, *Ḥīla-i Nājiza Yaʿnī ʿAuratōṇ Kā Ḥaqq-i Tansīkh-i Nikāḥ*, 171.

husband to grant the *khul*ʿ but does not suggest any *ijtihād*ic view on this issue that husband's consent may be overruled in this situation. The second was to seek judicial divorce (*al-tafrīq al-qaḍā'ī*) which could only be granted by a Muslim judge and in special circumstances. In line with his former proposal he urged the British government to appoint Muslim judges across India who could decide upon such divorce cases. The special circumstances that he included in his *fatwā*, where judicial divorce could be issued were, (a) if the husband is impotent, (b) if he is insane, (c) if he is lost or absent, and (d) if he refuses to pay her maintenance. As the British government was unlikely to grant such a request, this required adopting a ruling from the Mālikī School where a committee of upstanding members of the community could rule unanimously in the place of the judge (*qā'im-i maqām*) and grant the divorce.[320]

Masud interprets this change of the *fatwā* of Thānavī as a positive indicator for reform, and cites the Shāfiʿī scholar Yaḥyā b. Sharaf al-Nawawī (d. 676/1277) to argue that as long as the *fatwā* is still based within a particular school and not the product of independent *ijtihād* it can supersede the initial *fatwā*.[321] However, Thānavī's new *fatwā* did not solve the issue at hand. On the contrary, he made the issue worse. Each of the options provided placed an even larger burden on the woman seeking divorce. It closed the door of apostasy, which was the only practical way that she could receive a divorce and gave her new options which required a large burden of evidentiary proof. In the case of impotence, for example, she had to prove that her husband had been unable to have intercourse with her for an entire year, been given a chance to seek medical treatment, but still was unable to perform sexually. In the case of her husband's absence, she was required to wait for four years before the annulment would be granted.

There was one opinion provided in the *fatwā* which would help women in new marriages. Thānavī suggested that, based again on the Mālikī School, the husband should transfer the right of divorce to their wives within the marriage contract (*tafwīḍ al-ṭalāq*).[322] In this situation, women would no longer have to seek their husband's consent to divorce and could do so automatically. However, this did not solve the problems of Muslim women who were already married and whose contracts had not adopted this approach.

[320] Ibid.
[321] Masud, Messick, and Powers, *Islamic Legal Interpretation*, 202.
[322] Thānavī, *Ḥīla-i Nājiza Yaʿnī ʿAuratōṇ Kā Ḥaqq-i Tansīkh-i Nikāḥ*, 167–69.

What is important to note here is that in each of these new situations Thānavī's *fatwā* cites the Mālikī School, based on an alternative methodology from the Ḥanafīs. This is significant because the Mālikī School is famously more lenient than the Shāfi'ī and Ḥanbalī in family matters such as marriage and divorce. For example, in the case of an absent husband the Ḥanafī School would have required the wife to wait for 90-100 years[323] while the Mālikīs only required a four-year waiting period.[324] Also, in the Ḥanafī School the judicial divorce (*al-ṭalāq al-qaḍā'ī*) could only be performed by a judge, something very difficult in British India due to the small number of Muslim judges on the bench. In the Mālikī School, on the other hand, such a divorce could be issued by the community,[325] the option chosen by Thānavī in his *fatwā*.[326]

The selection of opinions from the Mālikī School is not new to legal reformers looking for more lenient opinions in personal law. In the same period Egyptian lawmakers chose the same approach, using the opinions of the Mālikī School to construct their Law 25 of 1920 and Law 25 of 1929.[327] As this reform had already taken place in the 1920s in Egypt, it is possible that both Thānavī and Iqbal were influenced by this move in their own quest for reform. They wanted to be certain about their application of the Mālikī rulings, however, and therefore called upon scholars from Medina to provide the authoritative Mālikī opinion.

These arguments were given in the courts (from the Mālikī school) and lawyers started to use this *fatwā* to influence divorce proceedings. In one of the cases mentioned above (*Sardar Mohammad v. Mt. Maryam Bibi*), the lawyers for the husband used Thānavī's *fatwā* to encourage the court to cancel the annulment. Citing the second preferred opinion of the *fatwā*, to prevent the woman from using apostasy as a *ḥīla* the divorce should not be annulled. The judge vehemently refused this argument and ruled that the use of the Mālikī School was not established law in British India.[328] Such changes, which would allow the judge to grant the petition of the husband, could only take place if there was a change made through legislation.

[323] al-Marghīnānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, n.d., 2:424.
[324] Ibn Rushd, *Bidāyat al-Mujtahid*, 3:75.
[325] al-Aṣbaḥī, *Al-Mudawwana al-Kubrā*, 2:266–70.
[326] Thānavī, *Ḥīla-i Nājiza Ya'nī 'Auratōṇ Kā Ḥaqq-i Tansīkh-i Nikāḥ*, 171–72.
[327] For details of these Egyptian laws and the process of their codification see Shaham, "Judicial Divorce at the Wife's Initiative," 217–57.
[328] Sardar Mohammad v. Mt. Maryam Bibi, All India Reporter at 666.

Such changes in the legislation would take place a few years later. With the influence and backing of the *'ulamā'*, the Indian Parliament would pass two acts which would greatly change the status of Muslim marriages and alter the ability for women to obtain a divorce. These new laws will now be discussed in detail.

Admitting the Muslim right to implement *sharī'a* in personal matters: Muslim Personal Law (*Shari'at)* Application Act, 1937

Colonial rulers allowed the application of customary law in matters of marriage and divorce. However, this principle is not admitted as having the force of law according to the principles of Islamic jurisprudence.[329] As was mentioned above the application of Ḥanafī rules and customary law on Muslim personal matters created unrest amongst the Muslims of India in the early twentieth century. In addition to the question of granting divorce which was already discussed, due to customary practice in India Muslim women were not able to secure their due right in inheritance as guaranteed by the *Sharī'a* and were subject to discrimination. The *Sharī'a* required that in the case of siblings, she receive half the inheritance of a man, but according to the dominant practice in India women regularly received much less. Thānavī wrote a treatise on this issue as well entitled *Ghaṣab al-Mīrāth* (Usurpation of Inheritance) that was published in 1933 from Deoband, in which he asked for the renunciation of the un-Islamic custom relating to inheritance.[330] *Ghaṣab al-Mīrāth* grew to form a movement, initially started to persuade the government to reform inheritance laws for Muslims. It quickly grew, however, to become a rallying cry for reform in the whole of Muslim personal law. As a result, on the recommendations of Muslim scholars, the Muslim Personal Law (*Shari'at)* Application Act, 1937 was enacted.[331] The Act was introduced with the statement of objects that highlighted the purpose of the Act in the following words:

> For several years past it has been the cherished desire of the Muslims of India that customary law should in no case take the place of the Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. Jami'at-al-'Ulama, the greatest Muslim religious body, has supported the demand and invited the attention

[329] For a study of custom in Islamic law, see Tahir Mahmood, "Custom as a Source of Law in Islam," *Journal of the Indian Law Institute* 7, no. 1/2 (1965): 102.
[330] See Ashraf 'Alī Thānavī "Ghaṣab al-Mīrāth", Deoband, 1933.
[331] Mahmood, *Family Law Reform in the Muslim World.*, 168.

> of all concerned to the urgent necessity of introducing a measure to this effect. Customary law is a misnomer inasmuch as it has not any sound basis to stand upon and is liable to frequent changes and cannot be expected to attain at any time in future the certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called customary law is simply disgraceful. The Muslim women organizations have condemned customary law as it adversely affects their rights and have demanded that the Muslim Personal Law (Shariʿat) should be made applicable to them. The introduction of Muslim Personal Law will automatically raise their position to which they are naturally entitled. In addition to this, the present bill if enacted, would have a salutary effect on the society because it would ensure certainty and definiteness in mutual rights and obligations of the public. Muslim Personal Law (Shariʿat) exists in the form of a veritable code and is too well known to admit any doubt or entail any labour in the shape of research which is the chief feature of customary law.[332]

Two things are important to note from this statement of objective: customary law is detrimental to the status of women and is disgraceful because it has no sound basis to stand upon, and secondly that it keeps changing. The new Act claimed to raise the status of women and at the same time ensure certainty and definiteness in rights and obligations. This was to overcome the problem of "inconsistency" and "arbitrariness" of Muhammadan law as well.

With regard to the dissolution of Muslim marriages and other matters of personal status, Section 2 of the Muslim Personal Law (Shariʿat) Application Act, 1937 provides that the law of the *Sharīʿa*, and not any custom or usage, will apply to all Muslims in India in the following matters: (a) marriage, various forms of its dissolution including *ṭalāq*, *īlā*, *ẓihār*, *liʿān*, *khulʿ* and *mubāraʾa*, gifts, dower, maintenance, guardianship, (b) intestate succession (except the questions relating to agricultural lands), and (c) gifts, trusts and waqfs (with the exception of charities and endowments).[333]

The act is clear that instead of customary law, it is the *sharīʿa* that shall govern Muslim affairs. However, the act does not specify that how the *sharīʿa* will be implemented and who shall have the authority to provide *sharīʿa* ruling. It also remains silent on choice between one *fiqh* school to another when it comes to apply strict Ḥanafī rules regarding the dissolution of

[332] The Gazette of India 1935, Part V, 1321, see ibid., 168–69.
[333] Ibid., 169.

marriage versus Mālikī rules that are less stringent in case of judicial divorce. It can be assumed that by this Act the government did not intend to move from the established Ḥanafī nature of Indian Muslim society. Recall the discourse between the *'ulamā'* of India on apostasy as legal device to dissolve marriages by Muslim women in the late nineteenth and early twentieth century, and suggested solutions by Thānavī in the form of his famous *fatwā al-Ḥila al-Nājiza,* were not codified in this Act. Although this Act recognized *sharīʿa* for Muslims in matters of personal status however, the need for reforms in Ḥanafī method of dissolution of Muslim marriage remained as it was prior to the enactment of the Act of 1937. This led Muslims of colonial India to continue their legal efforts on the floor of the legislative assembly in order to bring the desired change for safeguarding Islam from the allegation of providing no recourse to a Muslim woman who is stuck in an unwanted marriage. Hence the promulgation of Dissolution of Muslim Marriages Act, 1939 was a milestone in the history of reforms in Muslim family laws in India where fault-based judicial divorce was instituted in law and several grounds were provided where a Muslim woman could seek separation through court if the husband refuses to pronounce divorce.

Recognition of Fault-Based Divorce: The Dissolution of Muslim Marriages Act of 1939

Such changes to outline the specific circumstances in which a judicial divorce would be granted would come in 1939 with the Dissolution of Muslim Marriages Act (DMMA). It was initially presented as a bill to the Central Legislative Assembly on 17 April 1936 by Qazi Muḥammad Aḥmad Kāẓmī, who was also a lawyer in Allahabad. With the implementation of this new act, women were given the opportunity to divorce in nine circumstances, labeled "Grounds for Decree for Dissolution of Marriage," where the husband was at fault. These were the following,

i. That the whereabouts of the husband have not been known for a period of four years;
ii. That the husband has neglected or has failed to provide for her maintenance for a period of two years;
iii. That the husband has been sentenced to imprisonment for a period of seven years or upwards;
iv. That the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years, continues to be so;
v. That the husband was impotent at the time of the marriage;

vi. That the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

vii. That she, having been in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years, provided that the marriage has not been consummated;

viii. That the husband treats her with cruelty that is to say

a. Habitually assaults her or makes her life miserable by ill-treatment, or of conduct even if such conduct does not amount to physical, or

b. Associates with women of evil repute or leads an infamous life

c. Attempts to force her to lead an immoral life, or rights over it, or

d. Disposes of her property or prevents her from exercising her legal practice, or

e. Obstructs her in the observance of her religious profession, or

f. If he has more wives than one, does not treat her equitably in accordance with the instructions of the Qur'an;

ix. On any other ground which is recognized as valid for the dissolution of marriages under Muslim Law.[334]

Through the implementation of this act several important changes have taken place. Firstly, the dominant opinions of the Ḥanafī School have now been changed to incorporate the rulings from the Mālikī School. Those opinions introduced by Thānavī into the Indian context have now been enshrined in legislation, allowing the courts to use them in granting divorce to women who want to get out of their marriages. Article Four of the law specifically addressed this point, stating that "the renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage: provided that after such renunciation, or conversion, the woman shall be entitled to obtain a degree for the dissolution of her marriage on any of the grounds mentioned in Section Two."[335] The ninth circumstance would have theoretically allowed this to take place, however the woman still had to go to the court and request that her marriage be annulled. Secondly, it has closed the door of apostasy (*irtidād*) as a legal device (*ḥīla*) and replaced it with a list of new options for divorce.

[334] Ibid., 182–83.
[335] Ibid., 183.

Finally, it granted more power to the judiciary, solving the problem of judges who were unwilling to adopt customary changes to the law. Through the last point of the Act judges now had the ability to grant divorce on their own and will no longer need to conduct investigations or come up with their own interpretations of the law. As for the inclusion of cruelty in the list of grounds acceptable for dissolution of Muslim marriage, Carin Karim Yafit states:

> One difference that benefited Pakistani women was the inclusion of cruelty in the catalog of divorce grounds, constituting the only instance in which Pakistani law adhered more closely than Egyptian law to liberal Maliki rules. Cruelty in the DMMA is spread out over six sub-clauses, ranging from the severe—such as physical assault—to the relatively less extreme—such as taking multiple wives without treating them equitably, leading an infamous life, disposing of the wife's property, or obstructing her observance of religion.[336]

The Dissolution of Muslim Marriages Act, 1939 represents an acceptance of many requests of the *'ulamā'* and shows the influence that they exerted in the creation of the law. Most of the points discussed in the act are verbatim applications of the *fatwā* of Thānavī. His political party, the Jam'iyyat 'Ulamā' al-Hind, was the primary force that pushed for the creation of the law.[337] Their opinions had to this point been rejected by the courts and therefore focused their efforts in changing legislation. It did not address one of their major concerns, that more Muslim judges be appointed to adjudicate in the marital affairs of Indian Muslim but did allow for British judges to take up the reigns of Muslim personal status.

Left out of the DMMA was the issue of *khul'* which, according to the Ḥanafī tradition as mentioned in Chapter One, still required the consent of the husband. If the wife went to the court and requested a *khul'* the judge was still required to ask the husband whether he wanted to grant it. This is important to note as it also reflects the desires of Thānavī in his *fatwā*. He never deviated from the Ḥanafī approach in this issue and continued to require the husband's consent. It was only if the husband was unwilling to provide the *khul'* that the wife should then approach the courts and ask for a judicial divorce (*al-ṭalāq al-qaḍā'ī*).[338] This was the approach

[336] Yefet, "The Constitution and Female-Initiated Divorce in Pakistan," 576.
[337] Masud, *Ibqāl kā Taṣawwur-i Ijtihād*, 246–47.
[338] Thānavī, *Ḥīla-i Nājiza Ya'nī 'Auratōṇ Kā Ḥaqq-i Tansīkh-i Nikāḥ*, 171.

adopted by the DMMA, and further shows the direct influence of the *'ulamā'* – and Thānavī's new *fatwā* – in the creation of the law.

From the point of view of women, on the one hand the DMMA has now given them a range of legal avenues through which to seek divorce. On the other hand, it has created the additional hurdle of proving her case in court and that divorce could only ultimately be issued by a judge. The burden of proof was now placed entirely on the wife, who had to provide concrete forms of evidence that she had, for example, not received maintenance from her husband. This is not the case for a man who could always proclaim divorce without the need to go to the court and prove why he wanted to divorce. There was also the added element of social shame. For example, a wife who chose to argue that her husband was impotent or of ill repute had to provide sensitive personal information about her husband to the court, making his inability to sexually perform or his moral status a matter of public record. Due to family pressures this was unlikely to take place except in the most extreme of cases, as a man would rarely admit in open court that he was physically unable to have intercourse with his wife.

The DMMA was welcomed by Muslim women and *'ulamā'* alike as a victory. Women were emboldened by the possibility of receiving judicial divorce, while the *'ulamā'* could now claim that they played a significant role in the legislative process. The religion of Islam would now be protected from acts of apostasy used solely as a legal device (*ḥīla*) and judicial divorce became the only method through which a woman could obtain a divorce that did not require the husband's consent. However, as the law was applied in the courts the DMMA's shortcomings started to surface. For example, court cases regularly dragged on for years and it could take as long as a decade for a woman to obtain a divorce, leaving her subject to significant harm from her disapproving husband in the meantime. Filing a court case was also an expensive endeavor. If a woman was filing for judicial divorce because her husband refused to pay her maintenance, she had little to no financial resources to pay for an attorney to represent her interests for such a long time without relying upon her family. Finally, the list of grounds for judicial divorce provided by the DMMA was not an exhaustive list and only covered instances where the husband was directly at fault. If a woman simply didn't like her husband or wanted to leave him for someone else through no fault of the husband, she had no choice but to request a traditional divorce (*ṭalāq*) or *khul'*, both still requiring his consent.

The shortcomings of the DMMA could not be addressed because of the nature of the colonial legal system. As personal law for Muslims was now codified, judges did not have the authority to change the law themselves and could only follow what was written in the code. These shortcomings would also not surface until later, in the 1950s. In the meantime, significant political changes took place. British colonialism officially ended in 1947 and the Indian Subcontinent was partitioned into the newly-formed states of India and Pakistan. These new independent legal systems would need time to experiment with the implementation of the laws created during the colonial period, and therefore no major changes to the law were introduced through court practice or legislation until the new states could establish their authority and find the necessary political will to make change.

Conclusions

As was mentioned in the introduction and elucidated throughout this chapter, the colonial period in South Asia went through three phases. During the first British authorities allowed Muslims to govern themselves in matters of personal law and allowed for the appointment of Muslim judges (*qāḍī*s) to adjudicate matters. This slowly changed throughout the 19th century as British judges took more control, however these judges regularly sought out *fatwā*s from the *'ulamā'* upon which to base their judgements. These judgements were also based upon customary law, particularly in the financial rights of the woman in inheritance and her right to seek divorce. Because of the strictness of customary law which was based upon Ḥanafī rules a crisis ensued where women began using apostasy as a legal device (*ḥīla*) from within the tradition to get out of marriages. The customary law also created problems in inheritance as women were regularly deprived of their legal right of inheritance.

In the second phase of legal development this crisis reached its epitome where the *'ulamā'*, women, and British judges found themselves at an impasse. The rules of the Ḥanafī school and the reliance on customary law were no longer tenable for either side. For the *'ulamā'*, Islamic Law was being abused by Christian missionaries and women to receive marriage annulments. For women their only option to leave an undesirable marriage was to leave the religion and subject themselves to both societal shame and the certainty of eternity in Hell. Finally, for the British judges the question of apostasy was difficult to ascertain, and efforts made by courts to investigate the sincerity of intent were constantly rebuked by the High Court upon

appeal. The solution, therefore, could only come through reform in the Muslim family law in line with larger global movements of human and women's rights.

That reform would take the shape of new legal approaches and *fatwā*s created by the *'ulamā'* that would incorporate elements from other schools of Islamic Law (*takhayyur*). Choosing the approach of the Mālikī School, scholars like Thānavī consulted scholars of Medina to provide a solution through his new *fatwā* (*al-Ḥīla al-Nājiza*). This sought to both end the problem of apostasy by invalidating its effects on divorce while also providing new options for judicial divorce (al-*ṭalāq al-qaḍā'ī*). His position had also significantly changed within the last few decades, from allowing apostasy to annul marriages to now rejecting their annulment.

In the third phase of development, these reforms would then take the shape of legislation, beginning with the Shari'at Application Act of 1937 in which a Muslim's right to apply *Sharī'a* in matters of personal status was codified. Based on Thānavī's treatise regarding inheritance (*Ghaṣab al-Mīrāth*), Muslim women would now be guaranteed their *shar'ī* right through the Act. The second law is the Dissolution of Muslim Marriages Act of 1939 which incorporated the other opinions of Thānavī and the Jam'iyyat 'Ulamā'-i Hind into legislation. Women would now have the right to seek judicial divorce on a number of grounds in which her husband was at fault. The DMMA represented the changing role of the state and the *'ulamā'*s acceptance of that new role particularly in matters of family law. From the onset of British colonialism, family matters were strictly the realm of the *'ulamā'*. They were the main actors through the issuance of *fatwā*s, and the courts regularly applied the opinions of the *'ulamā'*. Now they are the primary actors in the legislative process and their new approaches enshrined in law, and changes are no longer taking place through customary law.

The next chapter will continue to follow this process of legal change and chart how the DMMA played its role in liberating women and resolving their problems in the newly-independent state of Pakistan. A particular focus will be placed on how the laws of the colonial period were applied in an independent context, where Muslim judges at all levels interpreted and ultimately sought to change the laws created by non-Muslim colonial officers.

Chapter 3

The Pakistani Judicial System and Legislative Intervention in *Khul'*

Introduction

Following the Partition of India and Pakistan in 1947 the newly-formed nation of Pakistan believed that the principles and practice of the religion of Islam should form the basis of life within the state.[339] The Preamble of the country's first constitution in 1956 (as well as subsequent constitutions in 1962 and 1973) outlined this purpose by stating,

> Whereas sovereignty over the entire Universe belongs to Allah Almighty alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust...Wherein the Muslims of Pakistan should be enabled individually and collectively to order their lives in accordance with the teachings and requirements of Islam, as set out in the Holy Quran and Sunnah.[340]

Muhammad Qasim Zaman has described how statements like these represented both a strong yet ambiguous claim to the Islamic nature of the state. "The modernists," in his view, "may have intended them as little more than symbolic affirmation of the new state's Islamic identity."[341] Although not as overtly committed to the *Sharīʿa* as the later Constitution of 1973, which mandated that all existing laws be brought "into conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah,"[342] the foundation of Pakistan was nevertheless far more explicitly religious than its Indian neighbor, which established itself as a "democratic republic," further clarified as "secular" in an amendment in 1976 and confirmed by the Supreme Court.[343]

In the first few decades following Partition and the formation of Pakistan, the country's judicial system underwent little substantive change. It was only beginning in the 1960s where, under the rule of General Muhammad Ayub Khan and as a result of the country's rapid industrialization, did the courts undergo major structural change.

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[339] Barbara Daly Metcalf and Thomas R Metcalf, *A Concise History of Modern India* (Cambridge: Cambridge University Press, 2006), 215.
[340] G. W. Choudhury, *Documents and Speeches on the Constitution of Pakistan* (Dacca, East Pakistan: Green Book House, 1967).
[341] Zaman, *The Ulama in Contemporary Islam*, 88.
[342] The Constitution of the Islamic Republic of Pakistan, 1973, Part IX: Islamic Provisions, article 227, section 1.
[343] Supreme Court of India, Aruna Roy and Others v. Union of India and Others, WP (Civil) no. 98/2002.

As was seen in the previous chapter family law, particularly rules related to the dissolution of marriage, took center stage in the establishment of Muslim identity in the Subcontinent. According to one observer,

> Prior to the partition of India and Pakistan, matters relating to marriage, divorce, dower, inheritance and succession and family relationship were governed by customary laws as well as by the religious laws modified by the customs, subject to certain modifications by legislative enactments.[344]

The *'ulamā'* during this period also began to employ their power, growing in the last decades of British rule to exert their influence in the law with the passing of the Dissolution of Muslim Marriages Act (DMMA) in 1939. This new law formed the backbone of separation procedures limiting the British judges' ability to rely upon customary practices and solve the dilemma of women leaving Islam in order to obtain a divorce. It also worked to curb the perceived growth and danger of Christian missionaries, who were encouraging women to convert out of their religion in order to more easily obtain a divorce.

This chapter therefore continues the discussion of the development of family law in post-Partition Pakistan, charting the judicial and legislative developments regarding family law in general from Partition to the present day. It begins with a survey of the development of the jurisdiction of the family courts, moving from a system in which a diverse range of courts handled cases to one where a single all-encompassing venue would have the power to adjudicate in family matters. Along with this consolidation was the development of new special procedural rules that would give more leeway in the presentation of evidence and reduce the burden on women who often did not have the same legal resources as men. The chapter then turns to the 2002 amendments which brought *khul'* fully into the legislative sphere. These amendments, quickly adapted from other movements within the Muslim world, brought with them a new dilemma for both the courts and Muslim women, forcing them into the process of *khul'* even if they had a legitimate claim for divorce under the DMMA. This dilemma would continue until further amendments in 2015. Through these observations the chapter argues that the development of *khul'*, although seen in the literature as one of judicial effort, was a more

[344] Naheeda Mehboob Ilahi, "Family Laws and Judicial Protection". Available at http://www.supremecourt.gov.pk/ijc/articles/21/1.pdf. Last accessed 13 January 2019.

complicated process that brought in all elements of the Pakistani legal system, including the legislature and executive orders.

Post-Partition Pakistani Family Law Courts

From the time of Partition until the middle of the 20th century cases of family matters were heard and decided by different courts, as there was no concept of specialized family courts.[345] Civil courts adjudicated the recovery of dowry articles, dower and the dissolution of marriages,[346] as they had the jurisdiction to try all "suits of a civil nature"[347] under the Code of Civil Procedure 1908 (CPC).[348] On the other hand, criminal cases were heard by the criminal courts' hierarchy[349] established under the Code of Criminal Procedure 1898 (CrPC).[350] Interestingly, the applications for maintenance of wives or children were filed before the magistrates' courts under repealed chapter XXXVI of CrPC (sections 488-490).[351] Questions relating to the guardianship of minors were dealt with by a specially designed Guardian Court created by the Guardian and Wards Act 1890 (GWA).[352]

The first step towards independent family courts and laws to govern them was taken in 1961 with the Muslim Family Laws Ordinance (MFLO), drafted as a result of the recommendations of the "Commission on Marriage and Family Laws" constituted by the Government of Pakistan in August of 1955.[353] The commission was headed by Justice Abdul Rashid, former Chief Justice of Pakistan and comprised of Dr. Khalifa Abdul Hakim, Maulana Ehtishamul Haq, Mr. Enayat-ur-

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[345] However, revenue courts under the Land Revenue Act, guardian court under the GWA 1890 and small causes courts are examples of specialized courts existing at the time of creation of Pakistan.

[346] Dissolution of Marriage Act 1939 (Act No. VIII of 1939) provided various grounds to a wife for seeking dissolution of marriage through a court decree.

[347] Section 9 of CPC reads: "9. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

[348] Available at https://www.ma-law.org.pk/pdflaw/CODE%20OF%20CIVIL%20PROCEDURE%201908.pdf. Last accessed 28 December 2018.

[349] Magistrates' courts and sessions courts.

[350] Available at http://www.fmu.gov.pk/docs/laws/Code_of_criminal_procedure_1898.pdf. Last accessed 28 December 2018.

[351] Chapter XXXVI of CrPC was omitted vide the Federal Laws (Revision and Declaration) Ordinance, 1981 (Ordinance XXVII of 1981).

[352] Accessible at https://www.ma-law.org.pk/pdflaw/The%20Guardian%20and%20Wards%20Act.pdf. Last accessed on 28 December 2018.

[353] Accessible at http://punjablaws.gov.pk/laws/777a.html. Last accessed 28 December 2018.

Rehman, Begum Shahnawaz, Begum Anwar G. Ahmad and Begum Shamsunnihar Mahmood.[354] Each member of the commission was a prominent figure in Pakistani legal, religious, and civil society circles of the time. The committee's first president, Khalifa Shujaʿ-ul-Din, passed away after the commission's first meeting while Enayat-ur-Rehman was from East Pakistan (currently Bangladesh) and was only given the final approved report. The commission was charged with three tasks:

1. Answer the question: Do the existing laws governing marriage, divorce, etc. require modification in order to give women the proper place according to Islam?
2. Report on the establishment of special courts for cases affecting women's rights.
3. Report on the right to divorce through a court or by other judicial means.

During the process of its work the commission added the revision of procedural laws within their purview, as modification of family statutes and the creation of new courts could only be done in concert with the power to affect the way those cases were presented and adjudicated.[355]

The commission's final report, issued on 20 June 1956, suggested various reforms to the existing laws governing marriage, divorce, and provision of inheritance to orphaned grandchildren. The report's introduction claimed that all of their recommendations were "in complete conformity with the principles of Islam as enunciated in the Holy Qur'ān and Sunna" and hoped that these recommendations would "usher an era of domestic happiness."[356] Additionally, the report took aim at the country's existing legal system, calling it based upon Anglo-Muhammadan Law which was "conservative, rigid and in many respect [sic] undefined" and that, with the creation of the new state of Pakistan, it is necessary to remould the lives of Muslims and laws according to the fundamentals of Islam.[357] The report used Iqbal as its backing, citing a passage from his *Reconstruction of Religious Thought* where he argued for the re-opening of the gates of *ijtihād* and encouraged the state through its parliament to have complete authority in legislation.

Regarding the issues relevant to this dissertation, the commission's report dealt with two questions under the headings "Divorce Sought by the Wife" and "Dissolution of Marriage by

[354] Ahmad, *Marriage Commission Report X-Rayed: A Study of the Family Law of Islam and a Critical Appraisal of the Modernist Attempts to "reform" It.*, 33–34.
[355] Rashid, "Report of the Commission on Marriage and Family Laws," 37.
[356] Ibid., 51.
[357] Ibid., 45.

Court," providing its recommendations through a questionnaire that was subsequently distributed to the public. The questions under the first heading were:

1. Do you regard the provisions of the DMMA, 1939, satisfactory or would you enlarge or amend them in any particular?
2. Would you embody the *Khul*ʿ form of *ṭalāq* in a legislative enactment to make it more certain and precise?

The Commission responded in the negative to the first question while in response to the second question recommended that "supplementary legislation may be undertaken to make the *Khul*ʿ form of *ṭalāq* more certain and precise." In an additional question asked under the second heading, asking about for grounds of *Khul*ʿ *ṭalāq*, the Commission recommended that incompatibility of temperament should not give the wife a right to demand a divorce except in the *Khul*ʿ form.[358]

There was not a universal agreement to the commission's final report as Ehtishamul Haq, the only traditionally-trained jurist amongst the group, wrote a detailed opposition to the new law and particularly criticized the issuance of the public questionnaire, arguing that it was not their position to answer to matters of Islamic jurisprudence.[359] Additionally, he was also against the committee's representation of the Islamic tradition, beginning with the translations and interpretations made of the Qur'ān and the *Ḥadīth*, arguing that they had been altered by the other members in order to fit the commission's desires.[360] When approaching the juristic discourse the commission, in Ehtishamul Haq's opinion, also focused on minor points of disagreement to show that classical jurists differed on matters in which there was actually widespread agreement. This was done, in his view, to purposefully highlight differences between jurists to allow the commission to justify its own divergent findings. Finally, Ehtishamul Haq was opposed to what he called the "new definition" of *ijtihād* taken up by the commission, arguing that it diverged from the traditional methods of interpretation and was therefore invalid.[361]

[358] Ibid., 62.
[359] Ahmad, *Marriage Commission Report X-Rayed: A Study of the Family Law of Islam and a Critical Appraisal of the Modernist Attempts to "reform" It.*, 254–55.
[360] Ibid., 255.
[361] Rashid, "Report of the Commission on Marriage and Family Laws," 256–57.

Additionally, liberal groups within Pakistan who were against the overtly religious tones of the commission's report and its traditionalist makeup, criticized the report for being too conservative and not taking more significant steps towards the reform of the country's family laws. The commission's report attempted to avert this anger by stating "If the reforms proposed by the Commission are welcomed by the liberal and enlightened section of the public and receive legislative sanction they will form an important contribution to the scheme of reconstruction demanded by all who are not fossilized by tradition or blinded by sheer authoritarianism.[362]

As a result, the controversy surrounding the makeup and results of the Commission on Marriage and Family Laws meant that the legislative changes that they requested were only applied five years later in the Muslim Family Laws Ordinance (MFLO). Under section 9 of the MFLO, a wife (or wives) may file an application seeking a certificate specifying adequate (or equitable in case of more than one wife) maintenance to be paid by the husband. Although the MFLO took significant steps to develop an independent jurisdiction for family matters, cases continued to be adjudicated following the pre-Partition system.

The commission's other set of judicial changes, or the establishment of special courts to deal with matters of family disputes, would not be implemented until 1964 with the West Pakistan[363] Family Courts Act (FCA).[364] Initially, these courts were designed to deal with six matters:

1. Dissolution of marriage
2. Dower
3. Maintenance
4. Restitution of conjugal rights
5. Custody of children

[362] Ibid., 45–46.

[363] Before fall of Dhaka in 1971, Pakistan was divided into two parts: East Pakistan and West Pakistan. East Pakistan is now an independent country Bangladesh since 1971 and the West Pakistan became "Pakistan". All the laws that were enacted for present 'Pakistan' were having prefix "West Pakistan". Now the words "West Pakistan" are no more in use and are removed from the statute book. However, many a writing and court judgments still use the pre-fix West Pakistan while referring to the Family Court Act and many other legislations just ignoring that this pre-fix is no more to be used after amendments in law for the present Pakistan after cessation of East Pakistan (now Bangladesh). See, the Family Court (Amendment) Act, 1996 (Federal Act X of 1996) accessible at http://www.na.gov.pk/uploads/documents/1329730880_671.pdf. Last accessed 13 January 2019.

[364] http://punjablaws.gov.pk/laws/177.html. Last accessed 28 December 2018.

6. Guardianship.

Although this legislation meant an important step forward, there were still many aspects of family law that were handled by other courts. Cases of dowry or other types of personal property disputes between the husband and the wife, for example, were still considered as civil matters and could only be solved by the relevant civil court. This caused significant procedural hardship, particularly for women with limited financial resources, as she typically had to file multiple cases across different venues in order to reach an amicable solution. As will be discussed later, the evidentiary requirements in civil court were stringent and could cause a case to drag on for years, even though the family court could issue its rulings much more quickly. Therefore, over time subsequent amendments were made to the law that expanded the jurisdiction of the family courts to currently encompass ten areas,[365]

1. Dissolution of marriage [including Khula][366].
2. Dower.
3. Maintenance.
4. Restitution of conjugal rights.
5. Custody of children [and the visitation rights of parents to meet them][367].
6. Guardianship.

[7. Jactitation of marriage.][368]

[8. Dowry.][369]

[9. The personal property and belongings of a wife and a child living with his mother.

10. Any other matter arising out of the Nikahnama.][370]

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[365] See the Family Courts Act 1964, as adapted by the province of Punjab after 18th Amendment in the Constitution of Pakistan. The FCA is accessible at http://punjablaws.gov.pk/laws/177.html. Last accessed 14 January 2019.
Square brackets reflect the changes in the original Schedule I made through different amending Acts and Ordinances.

[366] Inserted by the Family Courts (Amendment) Ordinance 2002 (LV of 2002).

[367] Added by the Family Courts (Amendment) Ordinance 2002 (LV of 2002).

[368] Added by the West Pakistan Family Courts (Amendment) Act, 1969 (I of 1969).

[369] Added by the Family Courts (Amendment) Act, 1997 (Federal Act VII of 1997).
Note: This amendment shall not effect pending cases (section 3 *ibid*).

[370] The following new entry 9 was added by the Family Courts (Amendment) Ordinance 2002 (LV of 2002) and substituted by the Family Courts (Amendment) Act 2015 (XI of 2015):
"9. Personal property and belongings of a wife."

The most important and general of these is the final area, and gave the family courts the ability to deal with anything directly related to the marriage contract, regardless of whether it would have normally been dealt with in a civil or criminal court.

With the establishment of specialized family courts, the application of the CPC and the law of evidence[371] for trial of family suits was ousted to allow family courts to function without the technicalities of laws of procedure and evidence.[372] The ordinary civil procedure, for example, was lengthy and complicated and required applications, replies, replications, issuing of briefs, arguments, all to reach a final decision in the lower court. Further time and a similar process was needed for a case to reach a first appeal, second appeal, or judicial review, meaning that a more complicated case could stay within the courts for several years.

In the process of presenting evidence, the requirements for acceptance in the courts such as corroborating witnesses and certification are no longer required. This worked particularly in the favor of women, who typically faced problems in providing evidence to their claim as they were unaware of the requirements or did not have access to the resources necessary to fulfill them. For example, documentary evidence required nothing other than to present it to the judge, giving him the ability to determine its veracity and admit or reject it. The concept of interested witnesses, or that a person who has a close family or other interest to a disputant is not acceptable, was removed and a wife could now bring her close family members as witnesses for her suit and their statements would carry full and independent weight.

However, the jurisdiction of criminal courts continued alongside the family courts continued until 1981 when Chapter XXXVI of the CrPC was finally abolished. From that point forward, family courts were also empowered to deal with the issue of maintenance of wives and children. However, this was not the exclusive domain of family courts in this regard, and other courts could still intervene as section 21 of the FCA protects that concurrent jurisdiction by stating,

[371] Prior to 1984, the Evidence Act, 1872 (Act I of 1872) was holding the field. However, on promulgation of the Qanun-i-Shahadat Order 1984 (Order X of 1984), the 1872 law was repealed.

[372] Munir, Muhammad Amir, Family Courts in Pakistan in Search of 'Better Remedies' for Women and Children (September 1, 2006). Lawasia Journal, pp. 191-226, 2006. (see p.197) Available at SSRN: https://ssrn.com/abstract=1922837. Last accessed 30 December 2018.

> Nothing in this Act shall be deemed to affect any of the provisions of Muslim Family Laws Ordinance, 1961, or the rules made thereunder.[373]

Guardian Courts could still handle particulars regarding the custody and guardianship of children, and a Union Council could hear issues regarding claims of maintenance.

Dissolution of Marriage Procedure

With the above evolution of family court jurisdiction established, this chapter will now turn to the question of *khul'* under Pakistani procedural laws prior to the enactment of the FCA in 1964 and until 2002 when the word '*khula*' was officially inserted into the FCA. The 2002 amendment brought a fundamental change in the law of dissolution of marriage in context of the DMMA and will be discussed in detail in the final section of this chapter.

a. Dissolution of Marriage prior to FCA 1964:

The DMMA of 1939 provided various grounds on the basis of which a marriage may be dissolved by a wife through the intervention of the court. *Khul'* was not one of the rights in this law. Each of these grounds required a significant amount of time in adjudication and, in addition to the already long timeline, the DMMA includes two additional points of procedure:[374]

> (a) no decree passed on ground (i) [That the whereabouts of the husband have not been known for a period of four years] shall take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court he is prepared to perform his conjugal duties the Court shall set aside the said decree; and
>
> (b) before passing a decree on ground (v) [That the husband was impotent at the time of the marriage] the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfied the Court within such period, no decree shall be passed on the said ground.

As can be seen, this stretches out the situation even longer, allowing the husband significant leeway and ability to prove that the grounds upon which his wife is seeking dissolution have

[373] Its title is "**21. Provisions of Muslim Family Laws Ordinance, 1961 not affected.**" See The Family Courts Act 1964, accessible at http://punjablaws.gov.pk/laws/177.html. Last accessed 28 December 2018.

[374] This law is available at http://lgkp.gov.pk/wp-content/uploads/2014/03/Dissolution-of-Muslim-Marriages-Act-1939.pdf. Last accessed 14 January 2019.

been remedied. Under the prevailing law at the time of the DMMA's implementation, only a civil suit for dissolution of marriage could be filed by a Muslim woman on the available grounds mentioned in the DMMA. Prior to the present enactment constituting civil courts in Pakistan, i.e., the Civil Courts Ordinance 1961, the Punjab Courts Act 1918[375] provided various classes of civil courts to hear and adjudicate civil cases. Thus, a suit for dissolution of marriage under the DMMA had to be filed before a civil court. There are number of important decisions by the hierarchy of civil courts where the question of dissolution of Muslim marriage came for adjudication on various grounds mentioned in the DMMA.

In a suit for the dissolution of marriage, *Noor Bibi v Pir Bux*,[376] the Sindh High Court was approached with the question of whether a dissolution of marriage can be ordered where the husband has failed to maintain wife on account of her own conduct. It was held by Judge Tayabji that the DMMA has no additional words in its clause (ii) of Section 2 and thus, without going into the question of the wife's conduct or non-availability of right to maintain, if it is established at evidence that she was not maintained, the order must be decreed. The Sindh Court also discussed the concept of *khul'* in this judgment, although the DMMA was silent about *khul'* or no-fault divorce. The Lahore High Court viewed this matter differently, ruling that if a wife failed to establish her right to be maintained she could not seek divorce for non-maintenance.[377]

In another case, *Jannat v Rahim Bakhsh*,[378] the erstwhile Baghdad-ul-Jadid High Court[379] followed yet another view. This was a case where the High Court heard the second appeal under the law. The civil court had ruled for the dissolution of marriage under DMMA in favour of the wife, on the grounds that her husband had refused to give her maintenance. However, as per the provisions of the CPC and the Punjab Courts Act 1918 an appeal was maintainable, thus, the district court allowed the appeal and dismissed the suit of the wife, as the court ruled that the only reason the wife had not received maintenance was because she was first at fault. The wife then filed a second appeal before the High Court. In this instance, the wife lost her appeal as the

[375] Accessible at http://www.lawsofindia.org/pdf/haryana/1918/1918HR6.pdf. Last accessed 14 January 2019.
[376] Noor Bibi v. Pir Bux PLD 1950 Sind 36.
[377] Aishan Bibi v. Sain, PLD 1952 Lahore 460 (DB).
[378] Jannat v. Rahim Bakhsh, PLD 1952 Baghdad-ul-Jadid 47.
[379] After creation of Pakistan and establishment of High Courts under the Constitution, it is now working as a constitutional bench of the Lahore High Court.

court ruled that, unless the wife established her entitlement to maintenance first, she could not claim divorce based on the failure of the husband to maintain her.

This case clarifies that the procedure to move a suit for dissolution of marriage was to file within the civil courts. There was a right of first appeal without any conditions, however a second appeal could only be filed when certain specified grounds in the law were alleged. This was governed by Section 41 of the Punjab Courts Act 1918 which stated,

> 41. (I) An appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court on any of the following grounds, namely:
>
> (a) the decision being contrary to law or to some custom or usage having the force of law;
>
> (b) the decision having failed to determine some material issue of law or custom or usage having the force of law;
>
> (c) a substantial error or defect in the procedure provided by the Code of Civil Procedure, 1908, or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits.

In *Jannat v. Rahim Bakhsh* the wife was unable to prove any of the above grounds, and therefore the High Court rejected her ability to appeal.

Prior to the implementation of the FCA in 1964, the right of appeal and second appeal was provided in Part VII of the CPC. The first appeal was a statutory right of an aggrieved party. However, second appeal to High Court was only possible if the conditions mentioned in section 100 of the CPC are fulfilled. The case law on dissolution of marriage was developed under ordinary civil court regime until the promulgation of the FCA in 1964. A suit for dissolution of marriage was to meet all the requirements of CPC as well as the Evidence Act.

Thus, a wife could only win a dissolution order if she was able to prove with evidence any one or more of the grounds mentioned in section 2 of the DMMA. *Khul'* was developed as one of these reasons later through subsequent cases. Some of these landmark cases will be discussed in detail in the following chapter, particularly the point of judicial *ijtihād* in the creation of *khul'*. However, it is important here to note some of the other smaller steps taken by the judiciary in this matter, particularly in the interpretation and procedure outlined in the DMMA.

In *Sayeeda Khanam v Muhammad Sami*,[380] the full bench of the Lahore High Court held on second appeal that incompatibility of temperament or even hatred could not be grounds for seeking dissolution of marriage under the DMMA. It was in 1959 when the famous *Balqis Fatima*[381] case was decided by the Lahore High Court where it was held that the wife can claim divorce on the basis of *khul*‘ without consent of the husband and that courts can grant such *khul*‘ to discontinue hateful union or ‘holy deadlock.’ This decision then was affirmed in an important judgment of the Supreme Court known as *Khurshid Bibi* case,[382] also adjudicated on second appeal, where it was held that the courts in Pakistan are akin to the *kazi*s [*sharīʿa* judges] who can dissolve the marriage between the spouses if they cannot live within the bounds ordained by God. The concept of *khul*‘ was therefore incorporated into the DMMA through these judicial pronouncements as an interpretation of section 2(ix) which states that a dissolution of marriage can be granted “any other ground which is recognized as valid for the dissolution of marriages under Muslim Law.”

At the time of the above decision, the FCA had only been recently enacted to provide speedy justice for family cases in the form of family courts established under this new law and removing the procedures outlined by the CPC.

b. Dissolution of Marriage after the promulgation of the FCA in 1964:

The Supreme Court of Pakistan in *Mst. Yasmeen Bibi v Muhammad Ghazanfar Khan*,[383] remarked about the situation of the administration of family law justice in ordinary civil courts, prior to promulgation and enactment of the MFLO and FCA by stating the following,

> Before [the] promulgation and enactment of the Muslims Family Laws Ordinance, 1961, and the West Pakistan Family Court Act, 1964, such matters were dealt with by the Civil Courts or Criminal Courts with regard to the maintenance allowance, which was a cumbersome, lengthy and tiring procedure. For getting the final relief of her grievances, the wife had to wait for years for recovery of dower, maintenance and other ancillary matters. *In cases of dissolution of marriage, it had to consume years and after getting the decree*

[380] Mst. Sayeeda Khanam v. Muhammad Sami, PLD 1952 Lahore 113.
[381] Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi, PLD 1959 Lahore 566.
[382] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97.
[383] Civil Petitions No.357 and 358 of 2016, decided on 28.04.2016. Available online at http://www.supremecourt.gov.pk/web/user_files/File/C.P._357_2016.pdf. Last accessed 21 January 2019.

> *by that time, majority of the wives had to become grey haired and much beyond the remarriage-able age, beside incurring heavy expenses on getting the relief with regard to a meager amount of maintenance, dower etc.*[384]

Apart from establishing specialized family courts, the laws also provided for the appointment of more female judges in the courts. Previously, there were few female judicial officers (civil judges or magistrates). The FCA, therefore, categorically stated that the government shall appoint at least one family court presided over by a female judge.[385] It was then held in *Adnan Afzal v Capt. Sher Afzal*[386] that the FCA had "brought about only procedural changes and not affected any substantive right." The Court also used the term 'better remedies' for women and children in the form of family courts.[387] Thus, in *Mukhtar Ahmad v Umm Kulsom*,[388] the Lahore High Court held, per Afzal Zullah J, that the "inquisitorial method" of judging, being a hallmark of Islamic jurisprudence, had to be applied in absence of application of the law of evidence as the application of this law is excluded by the FCA for the speedy disposal of cases.

During this period, new cases were brought to the court that established the concept of dissolution of marriage on the basis of *khul'*, when no other grounds from the DMMA could be proven. Procedurally, this was done keeping in view the "statement and attitude of the parties" before the court, following the new less stringent evidence rules. In the case of *Fida Hussain v Nasim Akhtar*[389], for example, the Lahore High Court confirmed that the principles of the Evidence Act have been excluded from their application to the Family Courts and the evidence of the wife alone was deemed sufficient to grant her a decree of *khul'*. This judgment discussed in extensive detail the admissibility of evidence of father, brother and daughter in context of the FCA provision where the law of evidence has been excluded for its strict application. As had

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[384] Ibid., Emphasis added.

[385] Ibid., para 12; See also Muhammad Amir Munir, "Family Courts in Pakistan in Search of 'Better Remedies' for Women and Children," *Lawasia Journal* 2006 (September 1, 2006): 191–226. Available at SSRN: https://ssrn.com/abstract=1922837. Last accessed 21 January 2019.

[386] Adnan Afzal v. Capt. Sher Afzal, PLD 1969 SC 187, at 193.

[387] The words 'better remedies' were first used by the Supreme Court of Pakistan while interpreting the Preamble of the Family Courts Act, 1964 ('FCA') in Adnan Afzal v. Capt. Sher Afzal PLD 1969 SC 187, 193 and affirmed in Muhammad Azam v. Muhammad Iqbal, PLD 1984 SC 95, 145. See generally, Munir, "Family Courts in Pakistan in Search of 'Better Remedies' for Women and Children," 191–226. Available at SSRN: https://ssrn.com/abstract=1922837. Last accessed 21 January 2019.

[388] Mukhtar Ahmad v. Umm Kulsom, PLD 1975 Lahore 805.

[389] Fida Hussain v. Nasim Akhtar, PLD 1977 Lahore 328.

been done in the issue of judicial *khul'*, the judiciary again looked beyond the Ḥanafī tradition and towards a broader understanding of the Qur'ān and *Ḥadīth* in order to conduct their own independent reasoning (*ijtihād*) and produce a ruling that both allowed the evidence rules to be reduced while at the same time remaining attached to religious obligations. The court was fully aware of these consequences and stated,

> In the present case the only question is whether assuming the evidence of the father to be inadmissible, which it is not, the evidence of a brother and the plaintiff is sufficient to prove the case of dissolution of marriage against the petitioner. It is clear from the pronouncements recorded above that Hanafi school would strictly speaking consider this to be insufficient, although it would be sufficient according to the vast majority of the learned.

The judgement then cited the case of *Mst. Khurshid Bibi v. Babu Muhammad Amin*,[390] in which the Supreme Court had explicitly discouraged blindly following the Ḥanafī School (*taqlīd*) and encouraged the development of the law according to the interpretation of the Qur'ān and Sunna, based on the famous *Ḥadīth* of Muʿādh ibn Jabal.

In the justification of its ruling, the court cited that Prophet Muhammad during his life had on multiple occasions accepted evidence that was contrary to later Ḥanafī jurisprudence. Namely, he

1. Decided the case on the evidence of the testimony of a woman plaintiff;
2. On the testimony of one female witness;
3. On evidence produced by both the parties;
4. On the evidence of witnesses and the oath of the plaintiff;
5. On the oath of the defendant; and
6. On the evidence of two or more witnesses and the oath of the defendant[391]

According to Ḥanafī jurisprudence, which was relied upon by the lower court, only the presence of multiple male witnesses, who had no connection to the parties involved in the case, could be seen as acceptable in front of the court.

[390] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97.
[391] Ibid.

The courts went further to hold under the FCA, in *Muhammad Yaqub v Shagufta*[392] decided by the Lahore High Court, that a wife is not required to come with "logical, objective and sufficient reasons" to dissolve her marriage. The only requirement is to see if the union will be hateful, then *khul'* has to be granted.

Khul' also started to be used more commonly as an alternative relief for wives when the evidence presented for other DMMA grounds failed.[393] In *Bibi Anwar v Ghulam Shah*,[394] Judge Tanzil-ur-Rehman held that if on evidence it is established that the husband and wife could not live together as such within the limits prescribed by God, a court can pass a decree of *khul'*. In this case, the two lower courts dismissed the wife's suit for dissolution of marriage on the grounds that she could not establish grounds for such a dissolution of marriage and that a *khul'* could not be issued. In *Ghulam Zohra v. Faiz Rasul*,[395] Judge Saad Saood Jan held that the decision of two courts below to dismiss the suit of the wife seeking dissolution of her marriage on the basis of *khul'* needed to be decided in view of her averment and statements that she is not able to keep the limits of Allah with the respondent. Although in this case the wife took the stance that she had developed hatred towards her husband, the courts in the following cases have observed that the wife could not establish hate as a matter of fact, as it is a subjective feeling of the wife. In the case *Farida Khanum v Maqbool Ilahi*,[396] Justice Malik Muhammad Qayyum has held that if the wife establishes her claim of dissolution of marriage on grounds mentioned in DMMA *and khul'*, then it is not necessary to direct her to forego her right of maintenance or the unpaid dower. She is entitled to these rights in such a case as it is in a case where *khul'* is the *only* method of dissolution when she has to forego such rights, which is not the case here. The court therefore made the distinction here that if suit for dissolution of marriage is established on other grounds from the DMMA, then even if this fact is also established that wife cannot live within the bounds of Allah (the requirements for *khul'*), the dissolution of marriage will not result in depriving her to claim her right to maintenance or to the dower.

[392] *Muhammad Yaqub v Shagufta*, 1981 CLC 183.
[393] For example, *Muhammad Aslam v Kausar Parveen*, 1987 CLC 256.
[394] PLD 1988 Karachi 602.
[395] 1988 MLD 1353.
[396] 1991 MLD 1531.

In another instance of the case of *Masseerat Bibi v Muhammad Bashir,*[397] the Azad Jammu and Kashmir Shariat Court took up a matter where the suit for dissolution of marriage was required to be decreed on the basis of cruelty of the husband and in alternative on the basis of *khul'*. Although cruelty was established in the evidence presented, the family courts decreed the suit on the basis of *khul'* only. The Shariat Court of AJK then set aside the decree on the basis of *khul'* and a decree of dissolution on the basis of cruelty was accordingly passed to dissolve the marriage and she was not required to remit her dower.

In the case of *Shaukat Hayat v. ADJ Rawalpindi* from 1991, a wife was granted *khul'* on the fact that she hated her husband so much that she would be unable to live with him. Although the wife had additionally filed for dissolution of marriage under the DMMA, the court found that there was little evidence to back her claims other than a strong hatred for her husband. Using that basis and the failure of numerous attempts at reconciliation between the couple, the court held that "to separate spouses would be better than to force them to live in an atmosphere perpetually surcharged with mutual distrust and hatred towards each other."

In this case, a suit for dissolution of marriage was decreed on the basis of *khul'*, based largely on the wife's request for it and her lack of desire to continue living with her husband. In yet another case, however, in *Muhammad Abbasi v. Samia Abbasi,* 1992 CLC 937, (Malik Muhammad Qayyum, J.), after 5 years, it was again remanded by the high court holding that *khul'* cannot be granted based merely on the wife's request for it. This judgment, however, was against the earlier precedent established through the *Bilqis Fatima* and *Khurshid Bibi cases.* Particularly in Mst. Zarina Bibi v. ADJ, Jhang and others from 1993, the court ruled that the *khul'* "need not come out with any logical, objective and sufficient reasons for dissolution of marriage."

In one final instance from the Peshawar High Court in Saffiya Bibi v. Fazal Din in 2000, the court allowed the wife to obtain a *khul'* simply because of her proclamation that she would be unable to hold to the rights of God if she were to continue in her marriage. This ruling was against the understanding of her husband, who claimed that "the decree of dissolution of marriage on the basis of *khul'* can only be granted when the petitioner could prove through convincing evidence." This case has shown two points. The first is that the *khul'* can be obtained through simply the desire of the wife and no additional evidence or proof is needed. The second

[397] 1996 MLD 692.

is that the lower courts, although the precedent for *khul'* existed, refused to intervene and it was only the higher courts that would grant the *khul'*.

Ultimately, despite the introduction of *khul'* by the courts, the dissolution of marriage on other grounds mentioned in the DMMA continued to constitute the majority of cases in the family courts. For example, a second wife was granted dissolution if she was not informed about her husband's first marriage.[398] In another case where the parties were married as non-Muslims but later on converted to Islam, it was held that the marriage can be dissolved under the provisions of FCA notwithstanding the fact of their earlier registration of marriage under Christian law.[399]

The way through which judges used legal reasoning (*ijtihād*) by engaging the Islamic legal tradition to develop a right to *khul'* will be the subject of the following two chapters. The remainder of this chapter will chart how the legislation itself changed in 2002, which saw the amendment of the FCA to include *khul'*. Although these amendments were designed to provide another way out and help women obtain a dissolution of their marriage, as will be seen, the amendments caused significant problems in its application as it limited the procedural options available to judges.

Bringing *Khul'* Into the Law: The Family Law Amendments of 2002

The process of *ijtihād* by the higher courts created a precedent that allowed lower judges to issue a *khul'* even though the DMMA and the Family Courts Act had not given them this ability. Prior to the 2002 amendments to Section 10 of the FCA with respect to a suit for dissolution of marriage, it was required in its sub-section (4) that if no compromise or reconciliation between the parties is possible, the court has to frame the issues and to call for evidence of parties. The law stated,[400]

> (4) If no compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for recoding evidence.

[398] *Aurangzeb vEjazul Hassan Khan*, PLD 1984 Peshawar 1949.
[399] *Saadia bibi v Iqbal Masih,* 1986 CLC 2322.
[400] *See*, for details, *Report of Law and Justice Commission of Pakistan on The Family Court (Amendment) Ordinance 2001*, Report No. 33 (Islamabad: Law and Justice Commission of Pakistan), 45, accessed March 31, 2019, http://ljcp.gov.pk/nljcp/#3.

At that time, the Schedule of the FCA, which gave jurisdiction to a family court to hear and decide matters provided in it, provided the entry No.1 dealing with the dissolution of marriage as under simply the "Dissolution of marriage."[401] The existing law did not use the word "*khul*'" as one of the grounds for dissolution of marriage, albeit some courts were still granting *khul*' decrees on the basis of established precedents set by the superior courts.

Across the Muslim world in the early years of the 21st century, there were moves by numerous states to make *khul*' a statutory resolution for women. Most notably in Egypt, Law 1 of 2000, entitled "The Law on Reorganization of Certain Terms and Procedures of Litigation in Personal Status Matters,"[402] granted women the unilateral right to obtain a *khul*' if they were willing to:

1. Go through a three-month period of arbitration,
2. Explicitly claim in front of the court that they hate living with their husband and are afraid to cross the limits of God, and
3. Renounce their outstanding financial rights to the husband and pay back the dower.

The introduction of *khul*' was not the only change made, and the new law also recognized informal marriages (*'urfī*), and allowed women to obtain passports and travel internationally without the consent of their husbands.

Nadia Sonneveld commented that this law represented one of the most controversial changes made to Egyptian family law, showing how its opponents argued that,

> the law was merely for rich women who wanted to divorce their husbands for frivolous reasons, for example, to marry another man. In general, women were perceived to be irrational and, when no longer controlled by their husbands or under the supervision of a judge, women would misuse the right to divorce. They would abandon their families and their children in order to marry more handsome or wealthier men, leave their children to grow up like vagabonds and in the process Egyptian family life would be destroyed.[403]

[401] Ibid., 61.
[402] The Arab Republic of Egypt, "Law No. 1 of the Year 2000: Regarding the Promulgation of a Law Regulating Certain Situations and Procedures of Litigation in Matters of Personal Status."
[403] Sonneveld, *Khul' Divorce in Egypt*, 1.

It is unclear why such changes to the law were made in the Muslim World at the same time, Welchman has cited pressure from international women's and human rights organizations.[404] Sonneveld, while acknowledging this pressure, countered this by saying that the laws were criticized as unjust by many of those same organizations, including Human Rights Watch (HRW).[405]

The Law Commission, the Executive, and the Dilemma of 2002

In Pakistan, the need to amend the FCA and incorporate the concept of *khul'* had already been felt for decades, as the precedents established by the courts were consistently challenged by the *'ulamā'* (as will be seen in Chapter 5), and the Law and Justice Commission felt the need to propose amendments in the FCA to amend the law suitably. Thus, in its Report No. 33, a proposed addition to section 10 of the FCA was made:

> (5) In a suit for dissolution of marriage on the sole ground of Khula, the Court shall determine and restore to the husband benefits, derived by the wife in consideration of marriage and pass decree of dissolution of marriage.[406]

However, when the draft was put up for its approval by the legislature – and eventually put into law by an executive order from President Parvez Musharraf without seeking legislative approval - instead of adding this sub-section (5), the President promulgated an amending Ordinance 2002 to bring different changes in the FCA with respect to the suits for dissolution of marriage. These amendments were incorporated into the existing sub-section (4) to give a new dimension for dissolution of marriage suits.

Thus, the Family Courts (Amendment) Ordinance, 2002 (Ordinance No. LV of 2002)[407] was promulgated and the following was added as a proviso to section 10(4) of the FCA:[408]

> "Provided that notwithstanding any decision or judgment of any Court or tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and shall also restore to the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage."

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[404] Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press, 2007), 43.
[405] Sonneveld, *Khul' Divorce in Egypt*, 2.
[406] *Report of Law and Justice Commission of Pakistan on The Family Court (Amendment) Ordinance 2001.*
[407] [Gazette of Pakistan Extraordinary, Part-1,1st October, 2002].
[408] Section 6 of the Ordinance (LV of 2002).

According to the same Ordinance, the Schedule for the FCA was also amended. Here the word "khula" was added and the entry now reads as "Dissolution of marriage [including *Khula*]."[409] Henceforth, family courts become the primary statutory forum for the dissolution of marriage on the basis of *khul'* as well, a position that was earlier available only under the judge-made law.

The 2002 Ordinance, although successfully adding *khul'* as an option for dissolution of marriage and helping women who previously were held at the will of the court, caused a number of problems for the existing law and, particularly in procedure, rendered the DMMA ineffective. Firstly, the amendments did not bring any changes to section 2 of the DMMA to add *khul'* as one of the grounds for dissolution of marriage with intervention of the court, although the law dealt with the substantive rights of a wife to seek dissolution of her marriage. It was only considered as an extension of item 10 of section 2 which grants dissolution, "on any other ground which is recognized as valid for the dissolution of marriages under Muslim Law." As this provision was so general, it was felt that there was no need to add another item specifying *khul'*.

The result of this interpretation, and the specific wording of the FCA amendments to grant a dissolution "forthwith," meant that now the court's only option was to immediately pass a decree of dissolution of marriage when a compromise or reconciliation failed. Additionally, the requirement to frame issues for proof of a claim of a wife as per the alleged grounds available to her in the DMMA were withdrawn. The courts were only to pass a decree granting the husband the dower paid at the time of marriage.

The effect of this was that under almost all circumstances *khul'* would be the only option. This was quite damaging to the financial status of women who had applied for dissolution under different sections of the DMMA. For example, had a husband failed to provide his wife maintenance for two years (item 2 of section 2), when the wife approached the court under the DMMA she would be asked to provide solid evidence that she had truly received nothing from her husband. Upon proving this evidence, the judge would then demand that the husband pay his wife's maintenance. If the wife refused to accept the delayed maintenance, and insisted on the dissolution of marriage, the judge would issue a dissolution (*faskh*), which would simply annul the marriage without any consequences upon the wife. With the new amendments, however, if the same situation occurred, the wife would be ultimately granted a dissolution and

[409] Section 20 of the Ordinance (LV of 2002).

forced to return the entirety of her dower to her husband, even though she had a completely legitimate grounds for dissolution and could, had the DMMA been properly applied, retained her dower.

In another example, in the case of *Muhammad Kamran v. Mst. Samera Majeed & Others*, a woman had filed for divorce based on the failure of her husband to pay maintenance.[410] However, the court, basing their ruling on the 2002 amendments, granted her an automatic *khul'* when the couple could not be reconciled and ordered her to repay the dower. She then appealed the case, additionally arguing that her husband owed her maintenance for her waiting period (*'idda*). The appeals court eventually rejected her case, ruling that according to the amendments of 2002, the court was required to immediately issue the decree of dissolution once and require the wife to return the dower. There could be no further financial claim upon the husband regarding the marriage and that, once the dissolution had been issued on the basis of *khul'*, no other claims on the DMMA can be made.

Unraveling the Dilemma and Cementing Another: The Amendments of 2015

In 2005, the Law and Justice Commission reconvened to discuss the issue. Feeling the same problems faced by the courts – that the DMMA was now ineffective – they attempted to reassert the initial suggestions described in their 2001 report that *khul'* should be mentioned as a new ground for dissolution under the DMMA, and that the other grounds mentioned in Section 2 should still remain valid. "By inserting the above (2002) proviso," the commission's final report argued, "it has now become mandatory for the Family Court to order for restoration of Haq Mehr to the husband irrespective of dissolution of marriage claimed by the wife on any ground as contained in Section 2 of the DMMA other than Khula."[411]

In their deliberation, they pointed out that the law when amended "should be sensitive to the plight of those women who seek dissolution of marriage on the ground of Khula but have no means to return the amount of Mehr." They recognized the Islamic consequences of such changes, and stated that although *khul'* was an "Islamic right," it was also "subject to the return of benefits derived by the wife out of the marriage contract."[412]

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[410] Muhammad Kamran v. Mst. Samera Majeed & Others, YLR 2018 Lahore 1251.
[411] *Report on Amendment of Section 10 of the West Pakistan Family Courts Act, 1964*, Report No. 73 (Islamabad: Law and Justice Commission of Pakistan), 8, accessed October 12, 2019, http://ljcp.gov.pk/nljcp/#4.
[412] Ibid.

A few years later in 2009 the Council of Islamic Ideology (CII), an advisory body created by the Constitution of 1962 to advise the government on the creation of new laws and to ensure that the legal system was in line with the requirements of Islam, developed its own report on the 2002 amendments and suggested their own changes to the law. Firstly, they suggested that there be a clear distinction of *khul'* as a separate category of dissolution, neither within the traditional categories of *ṭalāq* or *faskh*.

> If a man is asked by his wife to grant a divorce and he does, this should be considered as *khul'*. If he does not grant the divorce and then the court takes action to dissolve the marriage, then this is *faskh*.[413]

The Council's recommendations went even further, suggesting that women should have the same right to end their marriage through *khul'* as their husbands did through *ṭalāq*. In their assessment,

The Family Courts Act, 1964 further empowers the Courts to dissolve marriage on

> grounds of *khul'* on wife's remission of the right to dower (Haqq-i-Mehr). The existing law does not provide such absolute right of divorce to wife as it does to the husband. Consequently, in order to secure her right as well to wriggle out of an unhappy union. A wife under the law of land can seek dissolution of marriage, but unlike husband, only through decree of court on a payment of such consideration as fixed by the court.[414]

This second recommendation, that women be placed on a completely equal footing as men when it came to the right to divorce, angered religious scholars of all shades who declared it against Islam, claiming that the Council had gone astray. As a result, the government distanced itself from the recommendations of the Council and sent them back to the CII for review.[415]

Finally, the Federal Shariat Court in 2014 made a landmark ruling in the case of *Saleem Ahmad v. Government of Pakistan*, confirming the position of *khul'* in the law. The case was brought by a group of attorneys who argued that the *khul'* amendments of 2002 were against the proclamations of Islam. In their view, "Khula' can be granted at the instance of the wife only

[413] Council of Islamic Ideology (Pakistan), *Muslim 'Ā'ilī Qawānīn Ordinance 1961: Naẓarthānī Awr Safārishāt* (Islamabad: Council of Islamic Ideology, 2009), 9.
[414] Ibid.
[415] Nasir Iqbal, "1961 Muslim Family Laws Not Comprehensive: CII Chief," *Dawn*, January 2, 2009, https://www.dawn.com/news/336921/1961-muslim-family-laws-not-comprehensive-cii-chief.

with the consent of her husband, per terms mutually agreed upon. The Qazi has no authority to order dissolution of marriage by way of Khula' if the husband does not agree to it."[416]

In its ruling, the Court strongly confirmed the validity of *khul*' as the exclusive right of the woman to obtain a dissolution of her marriage without the need for her husband's consent. When analyzing the relevant Qur'ānic verses and *Ḥadīth* used by the jurists to require the husband's consent, the court ruled that,

> The Ayaat and Ahadith relied upon by the petitioners neither specifically relate to the issue of Khula' nor to the lack of authority of a Qazi duly authorized by an Islamic State to resolve the disputes between husband and wife. The interpretation of the said Verses and Ahadith is also not unanimous.[417]

The recommendations of the Law and Justice Commission, the Council of Islamic Ideology, and the view of the Federal Shariat Court would remain limited within their jurisdiction for almost an entire decade until the government of Nawaz Sharif finally decided to address the issue faced in the courts and implement the commission's report with a legislative change. In 2015, the following new changes were made to the FCA:

> [(5) In a suit for dissolution of marriage, if reconciliation fails, the Family Court shall immediately pass a decree for dissolution of marriage and, in case of dissolution of marriage through khula, may direct the wife to surrender up to fifty percent of her deferred dower or up to twenty-five percent of her admitted prompt dower to the husband.][418]
>
> [(6) Subject to subsection (5), in the decree for dissolution of marriage, the Family Court shall direct the husband to pay whole or part of the outstanding deferred dower to the wife.][419]

These amendments made significant changes to the law, all intended to revive the previous grounds of the DMMA and deal with the dilemma created by the 2002 amendments. Firstly, the word "forthwith" was exchanged for "immediately." Although there is little difference in their

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[416] Saleem Ahmad v. The Government of Pakistan, PLD 2014 Federal Shariat Court 43.
[417] Ibid.
[418] New sub-section (5) inserted by the Family Courts (Amendment) Act 2015 (XI of 2015), see http://punjablaws.gov.pk/laws/177.html#_ftn37.
[419] New sub-section (6) inserted by the Family Courts (Amendment) Act 2015 (XI of 2015), see http://punjablaws.gov.pk/laws/177.html#_ftnref38

meaning linguistically, "forthwith" in the context of the previous amendments carried an implied meaning that there was no alternative option other than to issue *khul*ʿ while "immediately," read along with the rest of the sentence, indicated that there were alternative grounds upon which a dissolution of marriage could occur. Secondly, the amount of the dower to be returned was changed to be significantly less, either up to one half of the delayed dower (*mu'ajjal*) or one quarter of the prompt dower (*muʿajjal*). The judge was left with the discretion as to the final amount, and could in theory order that the wife return none of her dower if he felt that the wife had other financial constraints. Finally, the amendments gave the right to the judge to force the husband to give his wife the full delayed dower in the case of a divorce on grounds other than *khul*ʿ.

In the courts, there are several cases that illustrate this development. In the 2016 case of *Muhammad Shahid Farooq v. Judge Family Court & Others*,[420] a wife had filed for the dissolution of her marriage based on the non-payment of maintenance, non-performance of matrimonial obligations, and subjecting her to maltreatment, all grounds under the DMMA. The court agreed and issued the dissolution decree, ordering the husband to pay the full amount of the delayed dower. The husband disagreed and claimed that, according to the 2002 amendments, as there was no reconciliation the dissolution was a *khul*ʿ and required the wife return to him the full dower. In appeal, the court ruled according to the 2015 amendments, that Section 10(4) applies only to situations of *khul*ʿ, which this was not, and affirmed the dissolution on the other grounds brought by the DMMA.

Although this represented an important step forward and successfully returned the DMMA to relevance, the amendments of 2015 maintained another problem for women. Under the law, women are not asked whether they are willing to return their dower to their husband, a requirement under the traditional Islamic approach to *khul*ʿ. Rather, full authority is given to the judge, and from 2015 onwards the judge may now additionally determine the amount of which the wife shall be forced to pay back. This amendment, although it was issued with the desire to help women financially, falls short of the Islamic requirements mentioned in the *Ḥadīth* of Thābit b. Qays. Primarily, it ignores the fact that the Prophet asked Ḥabība (the wife) whether she was willing to forego her dower and receive a divorce. The current state of the law, even

[420] Muhammad Shahid Farooq v. Judge Family Court & Others 2016 CLC Note 103.

though it attempts to provide women with more financial independence, by ignoring the Prophet's method in granting the *khul'* means that it continues to lack religious legitimacy and, as we will see in subsequent chapters, continues to stoke debate amongst the *'ulamā'* as to its concurrence with the *Sharī'a*.

Conclusion

The purpose of this chapter was to illustrate the development of the Pakistani legal system regarding family issues and the dissolution of marriage. This was a balanced system in which multiple actors – the legislature, judiciary, and executive – worked to check one another's actions and ultimately develop the law.

The Muslims of Pakistan inherited Muslim family law from the British justice system that, although was said to be based on their *sharī'a*, was in fact confined only to the imitation of the Ḥanafī tradition established during the pre-modern period, particularly with the Mughals when the *Fatāwā 'Ālamgīriyya* and *al-Hidāya* were compiled. These personal law rules never changed during the colonial period and, as was seen in Chapter Two, the *'ulamā'* always resisted change to the law. This trend changed near the end of the colonial period when the DMMA was enacted in consultation with *'ulamā'* such as Ashraf 'Alī Thānavī who enjoyed a celebrated position among the clergy.

Within the post-Partition court system, the evolution of family courts and specific laws governing the rights of the wife and children showed that Pakistan developed a speedy and exclusive justice system for women in family matters during the second half of the twentieth century. Initially family matters were heard by regular courts, including criminal courts, but later specific courts were established to adjudicate family matters. During the early 1960s new legislation was introduced in concert with the family court system, designed to free the courts from the procedural and evidentiary requirements of the civil and criminal systems while providing new opportunities for women to achieve an easier and more efficient ruling on the dissolution of her marriage.

However, statutory changes remained slow and limited, and therefore it was the judiciary of Pakistan that took the initiative to further amend Muslim personal law in line with the changing nature of social circumstances. Cases from 1959 and 1967 were landmarks in this regard when in the matter of dissolution of marriage, the woman's initiation was given weight

and her right to *khul'* was admitted if she forgoes her dower. However, these precedents were not easy for the lower judiciary to implement and the wife still had to wait for almost a decade before she could receive a final decree of separation on the basis of *khul',* despite her willingness to return the dower.

This gap in Muslim Family Law Ordinance of 1961 was finally removed when the 2002 amendments to Family Courts Act were made and family courts were granted the direct authority to issue *khul'* decrees if the wife is not ready to reconcile. The judges were made bound to immediately issue the degree of *khul'* by ensuring that she returns the dower. This amendment however, caused a serious conflict with the Dissolution of Muslim Marriages Act, 1939 as it practically made impossible for judges to issue dissolution degree except on the grounds of *khul'.* This situation not only created unrest among husbands, whose wives were granted *khul'* against their will and consent, but also among the women who never requested a *khul'* but wanted annulment of marriage on other justified grounds in the DMMA such as the husband's failure to provide maintenance.

It is interesting to note that the 2002 amendments were challenged in the Federal Shariat Court who, in 2014, finally decided in favour of the legislation and declared it in conformity with the principles of *sharī'a*, although neither husbands nor wives were happy with the final outcome of the implementation of this amendment.

The legislature kept discussing this issue and established commissions to furnish a solution in their reports, which was finally materialized when the commission submitted a draft amendment to separate *khul'* from other DMMA forms of dissolution of marriage. It was further proposed to give the judges discretion to determine the amount of *Mahr* that is to be returned. Based on these recommendations, amendments in 2015 separated *khul'* from the other forms of dissolution and set an upper limit of 50% dower money in case of *khul'.* Although it was an important development, these amendments left one issue missing from the *khul'* law of Pakistan: that it still does not ask the wife if she is ready to forego her dower, a requirement of the *Ḥadīth.*

As the work of the judiciary was critical in the development of Pakistani law, the following chapter will now turn to the details of the cases that brought *khul'* into existence in the Pakistani legal system. Specifically, it charts the judicial implementation of the concept of *ijtihād* and shows how, over the decades, the courts responded to the legislative environment discussed in this chapter and helped move the system forward.

Chapter 4

Development of *Khul'* Law in Pakistan – Analytical Study of Case Law on *Khul'* Adjudicated by the Superior Judiciary between 1956 and 2001 – Judicial *Ijtihād*, Interpretive Approach, and Self-Claimed Juristic Authority of the Courts

Introduction

As was seen in Chapter Two, during the colonial period the Ḥanafī School was strictly adhered to and *khul'* was seen as only an agreement between spouses without judicial interference. The introduction of the DMMA made it somewhat easier to seek judicial divorce but *khul'* remained a territory that no political or judicial authority could enter except with the husband's consent. It was only after Partition – and the creation of Pakistan in 1947 – that the judiciary started to exercise *ijtihād* and granted first *khul'* against the consent of the husband in 1959.[421] This chapter seeks to explore the construction of judicial *ijtihād* through an analysis of three landmark cases decided in 1952, 1959 and 1967.[422] These cases, along with the legislative and procedural changes discussed in Chapter Three, provide the full interpretative background through which *khul'* developed within the post-Partition Pakistani legal system. Karin Carmit Yefet considers judicial *ijtihād* a step towards gender equality in Pakistan. She contends that "the Pakistani judiciary has liberalized women's fundamental right to marital dissolution, thus minimizing blatant gender inequality in divorce."[423]

This chapter will examine the ways in which the hermeneutic engagement by the higher judiciary and *'ulamā'* alike with the scriptural sources (the Qur'ān and Sunna) have been a regular and ubiquitous feature of discursive intellectual traditions in the early modern Indian Subcontinent and post-independence Pakistan. In that context, the chapter will examine Martin Lau's contention that the role of Islam in the legal system of Pakistan is to a large degree determined by its higher judiciary.[424] Building on Lau's work, the chapter argues that non-textual cultural, social, political and economic factors – both internal and external – played a significant role in such interpretive revisions.

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[421] Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi, PLD 1959 Lahore 566.
[422] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97.
[423] Yefet, "The Constitution and Female-Initiated Divorce in Pakistan," 615.
[424] Martin Lau, *The Role of Islam in the Legal System of Pakistan*, The London-Leiden Series on Law, Administration and Development, v. 9 (Leiden; Boston: M. Nijhoff, 2006), 36.

As this chapter deals with the developments made by the Pakistani judiciary, its organization is based on the landmark cases that took significant steps in the development of the law. It begins with a brief discussion of a case from pre-Partition, but one that would form the grounds for the three subsequent cases. It then moves to the later cases.

No Divorce on Grounds of "Incompatibility of Temperaments:" 1945 and 1952

In a landmark appeal case of *khul'* in 1944 the Lahore High Court rejected the trial court decision that *khul'* could be given independently of the husband's consent based on an incompatibility of temperaments.[425] The court warned against such decisions and declared that it will be detrimental to family system if these grounds are admitted for *khul'*. The decision of the Court was strictly within the position of Ḥanafī school. Chief Judge Abdur Rahman, who was heading the appeal bench, highlighted the dangers in such divorce in the following words,

> It will then become possible for any woman to get rid of the marriage tie--fickle minded and impressionable as she temperamentally is--on account of a passing fancy and besides being open to the objection that she would be taking advantage in that case of her own wrongful act and conduct, it will make the marriages more or less a farce.[426]

Judge Rahman suggested that women should not become impatient, rather they should focus on positive aspects of marriage. It is particularly because despite extreme incompatibility of temperament between the spouses, there remains love, satisfaction and blessing especially after the birth of children.[427]

The justification sought for the granting of divorce was based on Section 2, Clause 9 of the DMMA which states that a woman could be given an annulment of her marriage on, "any other ground recognized as valid under Muslim Law." In this case the wife and her attorney argued that her dislike of her husband, or simply her desire to no longer live with him, was sufficient to approach the court and ask for an annulment according to the DMMA. The court disagreed, however, and ruled that simply disliking one's husband was no grounds for judicial annulment.

[425] Mst. Umar Bibi v. Mohammad Din, (1944) ILR 25 Lahore 542.
[426] Mst. Umar Bibi v. Mohammad Din, (1944) ILR 25 Lahore 542.
[427] Ibid.

Mst. Sayeeda Khanam v. Muhammad Sami, Lahore (1952)[428]

The case of 1945, the justification of "incompatibility of temperament," and the court's view on the matter would come to the forefront again in 1952 in the case of Mst. Sayeeda Khanam v. Muhammad Sami. In this case, the couple in question had been in a dispute for years. The husband believed that his wife had been cursed with the evil eye of envy (*manḥūs*) and was a troublemaker. Everything she touched, according to him, became spoiled, and therefore he was uncontrollably cruel to her. He often accused her of infidelity stating that if she were to step into the kitchen, because of her curse she would no doubt be tempted to have an affair with the cook. When any male family member visited and stayed more than a few hours, he would also begin to suspect his wife of having an affair. When she refused these accusations and claimed that she had never been unfaithful to her husband, he would claim that it was just another symptom of the curse and beat her in punishment.

Her husband was so infatuated with the idea of his wife being cursed that he feared her curse could spread anywhere. He forbade her from washing her hair or taking a bath, as her curse could run off her body and into his home. He had also forgone sexual relations with her and refused to pay her any form of maintenance for years.

Following years of abuse, the wife finally approached the court and requested an annulment of the marriage based on multiple grounds, five of which are directly cited within Section 2 of the DMMA:[429]

1. That her husband had failed to maintain her for a period exceeding two years (Clause 2)
2. That he had failed to discharge marital obligations without a reasonable cause for a period exceeding three years (Clause 4)
3. That he was cruel to her (Clause 8)
4. That he had falsely accused her of immorality (Clause 9)
5. That he had deprived her of her dower (Clause 8d)
6. That he had obstructed her from doing her prayers (Clause 8e)

[428] Mst. Sayeeda Khanam v. Muhammad Sami, PLD 1952 Lahore 113.

[429] *Pakistan: The Dissolution of Muslim Marriages Act* [Pakistan], 1939, available at: https://www.refworld.org/docid/4c3f1c632.html [accessed 11 September 2019]

7. That there was a "clash of temperaments," he was of an irritable nature and changing demeanour and, as a result, she hated him (Clause 9).

The lower court, following an investigation of the evidence presented by the wife, refused the validity of all the grounds listed above except the third and the fourth. The third is clearly stated in the DMMA and the wife had brought an eyewitness to testify to that effect. One of her friends, while visiting the wife at their home, had witnessed her friend's husband beating her with a broom. The fourth ground, according to the judge, was in compatibility with Islamic Law as it was the basis for another form of divorce accepted within Islam: imprecation (*li'ān*)[430] and therefore, constituted grounds under Section 2, Clause 9 of the DMMA which allowed for an annulment as long as it was additionally accepted within Islamic law. Based on these two grounds alone, therefore, the lower court judge granted the judicial separation (*faskh*).

The husband then appealed to the District Court and demanded that the appellate court quash the lower court ruling and return his wife to him. The court first looked at the question of cruelty, siding with the husband and ruling that no cruelty had been proved. The evidence provided by the wife had been successfully rebutted by the witnesses provided by the husband. The court then took issue with one statement made by the wife in the proceedings where she stated, "our temperaments are so conflicting that it is impossible for us to pull together."[431] The wife's focus on this ground as the primary one for seeking separation from her husband caused the judges to consider this as her main point and that the other claims were baseless. The judges believed her statement to be true and ruled that they should be separated. However, as separation sought on the grounds of "incompatibility of temperaments, dislike, or hatred" had already been rendered unacceptable by the court in 1945, the judge had no choice but to rule in favor of the husband and quash the lower court's ruling "so long as he did not give her an excuse for seeking the cancellation of her marriage, the union must continue."[432]

The wife was clearly displeased with this result and appealed once again to the Lahore High Court, claiming that the ruling in the 1945 case was unfair and that her dislike of her husband – and his ill treatment of her – did still constitute valid grounds to seek judicial

[430] If a husband charges his wife with adultery, the wife may claim divorce by suit, but *li'ān* does not *ipso facto* operate as a divorce. See Mulla, *Principles of Mahomedan Law*, 166. For details of *li'ān* in Islamic *fiqh* see al-Marghīnānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, n.d., 2:270.
[431] Mst. Sayeeda Khanam v. Muhammad Sami, PLD 1952 Lahore 113.
[432] Ibid.

separation. The case was first reviewed by a single judge, who quickly suggested that it be passed on to the full bench of the High Court. In his report, he suggested that there are two issues that the court needs to discuss. The first is the validity of the 1945 case, while the second was to suggest that there was an additional ground for divorce that could be used under Section 2, Clause 9 of the DMMA. Citing an explanation of the *Ḥadīth* collection of al-Bukhārī entitled *'Umdat al-Qārī*, the judge argued that disagreement between the parties, known in Arabic as *shiqāq*, is considered as valid grounds for divorce within Islamic Law.

Shiqāq, according to Qur'ān 4:35 and the interpretation of the judge, means "a breach or separation into two from a condition of unity."[433] This term should be interpreted to include "incompatibility of temperaments" as cited in the case from 1945 as, according the judge:

> The expression is not a term of art and learned counsel for the parties in the course of an exhaustive argument have been unable to furnish us with any authoritative judicial interpretation of the expression. In the ordinary dictionary meaning, "incompatibility" may be rendered as "incapacity for harmonious combination or association", "incapacity for appearing or being thought of together or of entering into a system of theory or practice." "Temperament" may be defined as "constitution or frame of mind", "disposition" "character of mind or mental reactions which are characteristic of an individual.". With reference to the parties to a marriage, the expression "incompatibility of temperament" must be understood in relation to the various forces acting on the couple which compel or induce them in the direction of harmonious and happy association...Where, therefore, it is found that there is such a lack of agreement between the couple as to fall within the full meaning of the expression "incompatibility of temperament", this must be traced to a total lack of sympathy between them, such as induces a resistance to mutual adaptation, despite the various influences, guiding the couple in that direction. There should and must be basically hatred or aversion on the part of one or both of the parties to the marriage to produce such a result.

[433] Qur'ān 4:35. The verse reads: "*wa in khiftum shiqāq baynihimā fa-'b'athū ḥakaman min ahlih wa ḥakaman min ahlihā, in yurīdā iṣlāḥan yuwaffiq Allah baynahumā, in Allah kān 'alīman khabīrā*." (If ye fear a breach between them twain appoint (two) arbiters one from his family and the other from hers; if they wish for peace Allah will cause their reconciliation: for Allah hath full knowledge and is acquainted with all things.)

Therefore, the court should overturn the ruling of 1945 and find in favor of the wife's petition, granting her a divorce on the grounds of "incompatibility of temperaments."

The judge's suggestion of changing the interpretation of the Arabic term *shiqāq*, which would have stretched beyond the traditional understanding of the *fiqh*, represents the first indication of judicial *ijtihād* beyond the realm of the *'ulamā'*. This is not only the first time that an appellate court has sought to change *fiqh* rulings in the newly-created state of Pakistan but, as was seen in Chapter Two, even the British judges were unwilling to accept any change in the precedent established by the Ḥanafī School unless it was done by legislation and with the consent and support of the *'ulamā'*.

For the High Court judge in the quotation provided above, the social circumstances of the couple have proven that both the husband and wife have no desire to continue in the marriage, aside from the husband's obstinance to grant his wife a divorce or consent to her *khul'*. This therefore warranted looking into the fundamental texts of Islam and finding an alternative approach. *Shiqāq* provided the answer and, with a bit of linguistic hermeneutics, the solution to the wife's problem could be found.

The full bench of the High Court, headed by Chief Justice A.R. Cornelius, dealt with a case by fully analyzing the approach of the earlier single judge. The court's report begins with a detailed definition of "incompatibility of temperaments" and the *Ḥadīth*s mentioned by the single judge. Ultimately, the court found the single judge's presentation lacking. "Speaking with great respect to the view of the learned Single judge," the court announced, "it seems that the texts of revealed scripture do not support his view."[434]

Regarding the *Ḥadīth* of Thābit b. Qays, which the single judge had cited as evidence of a separation that was granted to a wife on no other grounds than her dislike of the husband, the Justice Cornelius took the alternative opinion within the Islamic tradition. Citing al-Rāzī he stated, "I would regard that as an act of creation and establishment of the institution of khula in Islam, for the guidance of all husbands similarly situated, rather than as a decree awarded by the Holy Prophet acting either in the capacity of a judge or as Head of the State of Islam."[435] In his view, therefore, this was not guidance to the courts to issue judicial separation, but rather a

[434] Mst. Sayeeda Khanam v. Muhammad Sami, PLD 1952 Lahore 113.
[435] Ibid.

call for husbands to treat their wives in a particular way if they came forward asking for a divorce.

He then approached his own definition of *Shiqāq* as found in Qur'ān 4:35. In the view of Justice Cornelius this term cannot be taken out of its scriptural context and should be connected to the meanings of other similar terms in the previous verse (4:34). He cites an Aḥmadī scholar[436] Maulvī Muḥammad 'Alī (President of Aḥmadiyyah Anjuman Ishā'at Islam, Lahore) and his translation of the Qur'ān to support his argument. According to 'Alī,

> There are two words, *nushūz* and *i'rāḍ*, used here. The former literally means *rising*. You say *nushizat al-mar'a* as meaning *the wife was* or *became disobedient to her husband, and exalted herself against him, and resisted him and hated him and deserted him.* And you say *nushiza ba'luhā 'alayhā* meaning *her husband treated her unjustly and was unkind to her, or estranged himself from her, or disliked or hated her*. *I'rāḍ* is literally *turning away, avoiding, shunning or leaving a thing*. Hence I render the first word as *ill-usage* and the Second as *desertion*, as order is generally indicative of the comparative strength of the significance in the absence of other considerations.[437]

In Verse 34, the word *nushūz* refers to the wife's disobedience of her husband. The second similar term, *i'rāḍ*, appears again in Verse 128 of the same chapter when referring to the husband's failure to fulfill his marital obligations to his wife. The main difference between these two instances is that the former results in the term discord (*shiqāq*) in the following verse, while the latter does not. Therefore, in the view of Justice Cornelius, *shiqāq* must be connected to the concept of *nushūz* mentioned in Verse 34 and can only mean a discord that takes place between the couple as a result of the wife's disobedience.

When the wife creates discord in the marriage and breaches her underlying contractual responsibilities to be obedient to her husband (*shiqāq*), the solution is for the community to bring forth representatives (*ḥakamayn*) to develop a solution for them. The Qur'ān is silent in this section about the capabilities of these representatives, however Justice Cornelius suggests that their only power is to reconcile between the parties. Citing Verse 128, when the husband creates

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[436] Muhammad Ali, *The Religion of Islam: A Comprehensive Discussion of the Sources, Principles and Practices of Islam* (Columbus, Ohio: Ahmadiyya Anjuman Isha'at Islam, 1990), 495–500.
[437] Muhammad Ali, *The Holy Qurán: Containing Arabic Text with English Translation and Commentary* (Woking [Surrey]: Islamic Review Office, 1917), 236–37.

discord, and *shiqāq* is not mentioned, the only remedy required is reconciliation (*ṣulḥ*) between the couple, meaning that the marriage contract does not bind the husband to be obedient to his wife.

If the couple seeks reconciliation but they fail, Justice Cornelius then moves to Verse 130 which states "But if they disagree (and must part), Allah will provide abundance for all from His all-reaching bounty: for Allah is He that careth for all and is Wise."[438] He then cites Sayed Amīr 'Alī (d. 1928), a Muslim jurist and former judge who served in Calcutta High Court and Bengal High Court, to describe the procedure available for the couple to separate. "The opinion of the learned writer Syed Amir Ali," stated Justice Cornelius, "is that where there is nothing except incompatibility of temperament, aversion, hatred and dislike, the marriage can only be dissolved by the method of mutual agreement; it could of course also be dissolved by the husband acting unilaterally." These two solutions are not available as the husband in the case at hand is unwilling to grant such a divorce. The representatives of the community (*ḥakamayn*) have no power to do any more, and therefore the state and the judge could intervene. "Where the husband does not agree [to the separation], the matter is one for the jurisdiction of the judge."

Justice Cornelius then concludes his opinion by presenting the *fiqh* approaches from each school on the issue of judicial intervention, citing major texts from each tradition. "The existence of doubt among the principal Imams on this point is clear," he said, "and it is also clear that three of the four [Ḥanafī, Shāfi'ī, and Ḥanbalī] favour the view that the hakama cannot grant a divorce unless they be authorised to do so by the husband."[439] He ultimately chose not to follow the minority Mālikī opinion in this matter and ruled that the case was not strong enough to warrant judicial intervention. "I am accordingly of the opinion that under Muslim Law," he concluded, "such matters as incompatibility of temperaments, aversion or dislike cannot form a ground for a wife to seek dissolution of her marriage, at the hands of a Qazi or a Court, but they fall to be dealt with under the powers possessed by the husband as well as the wife under Muslim Law, as parties to, the marriage contract."

[438] Abdullah Yusuf Ali, *The Holy Qur-an: Arabic Text with an English Translation and Commentary* (Delhi: Kitab Pub. House, 1973).
[439] Mst. Sayeeda Khanam v. Muhammad Sami, PLD 1952 Lahore 113.

Although the Lahore High Court ruled against the granting of the divorce the bench, led by Chief Justice Cornelius, made several important legal contributions and represent the first major step in judicial *ijtihād* in the realm of Muslim divorces post-Partition. Instead of following the previous understandings of the *'ulamā'* and the rules of *fiqh,* the court in this case began its argument by looking at the linguistic definition and legal implications of the terms in question. Looking directly at the primary sources, placing them in context, and engaging in the intellectual discourse of Islamic law meant that the judges were no longer standing on the sidelines of the issue – as they had done for most of the British period – and are now working their way through the texts on their own.

With regards to the intervention of Justice Cornelius, he carefully approached the Qur'ānic verses regarding marital discord and placed them in context with one another to reach the ultimate definition of *shiqāq.* This was not in line with the methodology of the past, and Justice Cornelius could have easily approached the *fiqh* works immediately without the need to consult the Qur'ān himself. He chose not to, however, and rather embarked on a hermeneutical process that would result in the limitation of the definition of *shiqāq* and prohibit the granting of judicial divorce unless for the most extreme of reasons, in opposition of the more liberal view of the single judge.

Justice Cornelius was also careful to make sure that his interpretation was given religious legitimacy. Working as a Catholic judge in a majority Muslim society, and indeed a state created specifically around an Islamic framework, he was unable to approach the Qur'ān entirely on his own, as will judges of the cases presented later in this chapter. Rather, he was forced to cite other Muslim scholars to back his understanding and grant it the stamp of Islamic legitimacy. That process of legitimacy also took a step away from contemporary Pakistani *'ulamā'* with Justice Cornelius citing the work of Sayed Amir Ali, a graduate of the Aligarh Muslim College who worked directly with the British, married a British woman, retired to England following his judicial service and was buried in Sussex as his primary source for instruction on the Qur'ān and Islamic Law.

As someone who did not know Arabic, Justice Cornelius also needed help in interpreting the primary sources of Islamic Law, which he achieved by consulting mostly colonial translations and sources. For example, the dictionary definitions he used were from Lane's

Dictionary, initially published in 1863.[440] The citations from Miskhāt al-Maṣābīḥ, a *Ḥadīth* collection, were from the English translation of al-Hajj Mawlana Fazul Karim.[441]. These translations, particularly that of Lane, should not be considered neutral and other scholars have already pointed out that the process of translation during the colonial period should be understood as an attempt by Muslim scholars to reproduce European forms of knowledge.[442]

Another important point was limiting and changing the role of the representatives from the community (*ḥakamayn*) found in Qur'ān 4:35, allowing the judiciary to intervene. Typically, if reconciliation between the husband and wife failed, the representatives would only then have the right to separate the couple with the husband's consent. Justice Cornelius has understood that as the end of the representatives' power but opened the door for a further step to take place: the intervention of the judiciary to take place when other processes mentioned in the Qur'ān failed.

Interestingly missing from this conversation was the option of *khul'* which, up to this point in the case law, is still understood as a reference to an agreement which requires mutual consent, initially discussed in the case of *Moonshee Buzl-ul-Raheem v. Luteefut-oon-Nissa*[443] from 1861. Justice Cornelius, when discussing options for the wife when reconciliation fails, suggests that the wife seek "khula' or by reference of the injury, as a justiciable issue, to the proper authority, for the wife cannot (except in the rare case of special delegation) divorce herself, and she has no power to compel the husband to divorce her."

Khul' for "Not Being Able to Observe the Limits of God:" 1959

Later in the same decade, another case would come to the courts that would further develop the interpretive changes of Justice Cornelius in the ability of the judiciary to intervene in cases of martial discord. In this case (*Mst. Balqis Fatima v. Najm-Ul-Ikram Qureshi*)[444] a woman had concluded a marriage contract with her husband on 7 October 1949 but had never gone to live with him because, before her departure, the wife's family discovered that her new husband had

[440] Edward William Lane, *Arabic-English Lexicon*, Rev. format ed. (Cambridge, England: Islamic Texts Society, 1984), 616.
[441] Mst. Sayeeda Khanam v. Muhammad Sami, PLD 1952 Lahore 113 at 137.
[442] Shaden M Tageldin, *Disarming Words: Empire and the Seductions of Translation in Egypt*, FlashPoints 5 (Berkeley: University of California Press, 2011), 6.
[443] Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa, 8 Moo Ind App.
[444] Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi, PLD 1959 Lahore 566.

continued relationships with "women of ill repute." This caused a major dispute between the two families, and the wife's father refused to send her to live with such an immoral husband.

This was part of a larger family dispute that found its origin in pre-Partition India. The family of the husband and wife were from the same area and had come to live in the same areas of Pakistan. On 2 January 1952 the wife filed for a dissolution of marriage according to the DMMA on two grounds:

1. That the husband had failed to provide maintenance for a period of more than two years (Clause 2); and
2. That the husband was associated with women of ill repute (Clause 8b)

Following her filing of the case the husband filed one of his own, but this time in criminal court. He claimed that his father-in-law and brother-in-law had cheated him out of 2,500 Rupees that the husband had given to the family to purchase jewelry for his wife. This case eventually resulted in a compromise between the parties, with the husband agreeing to retract his criminal complaint – and let his in-laws out of pre-trial detention – if the question of the money would be transferred to the civil courts.

The case was pending in the court for several years and, in the meantime on 23 August 1954 the husband filed his own case demanding the restitution of conjugal rights. The lower court decided to consolidate the two cases and ruled in favor of the wife, granting her divorce on the first grounds that her husband had failed to pay her maintenance. The court rejected the second grounds as there was not any significant evidence presented to the court. It also required that the husband pay his (now former) wife the proper maintenance that she was due during this period.[445]

The husband then filed an appeal with the District Court, blaming the wife for never having come to live with him in the first place. It was her, and not the husband, who was ultimately responsible for not receiving the maintenance and, as she did not live with him, he had no opportunity to pay. He also requested the restitution of his conjugal rights. The court agreed and dismissed the financial claim of the wife but also refused to restore the conjugal rights of the husband, arguing that "relations between the parties had become so strained that it would not be proper to pass a degree in favor of the husband for restitution of conjugal

[445] Ibid.

rights."[446] The judge also quashed the annulment of the marriage, stating that the wife would continue to live with her father. In the view of the court, the lower court had issued its ruling based on the idea that the wife had a right to two years of maintenance. The opposite had now been proved, and it was the wife's fault for not going to her husband's home (*ruḳhṣatī*). She therefore had no right to claim the maintenance, nor any right to call for annulment of her marriage based on non-payment.

Both the husband and wife then appealed to the High Court of Lahore, the wife to get her marriage dissolved, and the husband to restore his conjugal rights. Both judges (Badi-uz-Zaman Kaikaus and Shabbir Ahmad) agreed with the district judge that the wife was not entitled to maintenance and had no grounds to dissolve the marriage. The wife then responded that although she might have no grounds for dissolution according to the DMMA, she had the right to *khul*ʿ that could take place by the forfeiture of her financial claim against the husband. The two judges, following the presentation of the attorneys for the wife, believed that this issue was one of law and could only be answered by the full bench of the High Court.

They framed their report to the full bench by asking two questions: "Whether under Muslim Law the wife is entitled to khula as of right?" and "Is the wife entitled to dissolution of marriage on restoration of what she has received from the husband in consideration of marriage?"[447] They asked because, in their view, there were *fiqh* sources that saw *khul*ʿ as requiring mutual consent. The two judges wanted to avoid this question and therefore chose to word their questions carefully to garner a more neutral response.

During the proceedings of the High Court, the entirety of the family dispute came to the forefront. For example, the husband claimed that he had developed a sexual relationship with his wife for a while, and it was only when her father discovered their relationship that they were forced to schedule a marriage. The wife countered by stating that she had loved him but did not any longer. "I ruined my reputation [of chastity] for you,"[448] she claimed. The husband then brought forward as evidence sexually explicit love letters, which he said proved that it was not the desire of the wife to stay at her home but because her family forced her. The court refused to enter those letters into evidence, stating that they had been written in the early 1950s and

[446] Ibid.
[447] Ibid. para 2 of the judgement of the Division Bench.
[448] Ibid. para 7 of the judgement of the Division Bench.

the feelings of the wife contained within might no longer be held by her. Other accusations flew, with the wife at one point claiming that her husband had viciously attacked her brother in an attempt to murder him, to which the husband strongly disagreed, and the court found baseless.

Fully convinced that the couple was in no position to continue living together, nor could any serious compromise ever be reached between the feuding families, they gave each party one last chance to reconcile the situation. The wife, in front of the court, stated that she was unwilling to stay with her husband, "at any cost." The husband wanted to convince his wife to continue with the marriage. "Let her come to my home for two days," he said, "and then she will want to stay with me." The judge disagreed, arguing that to this point the marriage was unconsummated and could be more easily dissolved. Had the wife spent even one night with her husband it would be highly likely that the marriage would become consummated, changing the rules of the waiting period (*'idda*) and potentially complicating the divorce process should she still refuse.

Following this series of events, the full bench of the High Court gave their response. "The wife is entitled to a dissolution of marriage on restoration of what she received in consideration of marriage if the Judge apprehends that parties will not observe the limits of God" based on the Qur'ānic verse 2:229. The burden of proof in this situation would fall upon the wife, to convincingly show the court that there was such serious discord between the couple that they could not possibly live together.

This does not mean that a wife can come to the court at any time and obtain a *khul'*. "If she is prepared to restore the benefits that she received, there is an important limitation on her right," the court ruled. "It is only if the judge apprehends that the limits of God will not be observed, that is, in their relation towards one another, the spouses will not obey God."

The court began its justification by first tackling the Qur'ānic verse mentioned by the smaller bench (Qur'ān 2:229). The question at hand was, like the discussions found in Chapter One, whether the verse's mention of the plural "you," in "if you fear," referred to the judiciary or not. The High Court believed that it meant that the judiciary could, and should, intervene, and that the court's intervention must take place without the husband's consent. Were the judiciary able to pass an order for divorce when the husband's consent, it would be unnecessary. Therefore, "the reference to the Judge can only mean that he is entitled to pass an order even

though the husband does not agree."[449] To support this opinion, the court then cited the two available versions of the *ḥadīth* of Thābit b. Qays.

No fault of the husband is required in these circumstances, and merely the hatred of the wife is sufficient to prove to the court that the separation should occur. "In neither case did the Holy Prophet make any pronouncement as to the reasonableness of the attitude of the wife," the ruling remarked, "He was just satisfied that the husband and wife could not amicably live together."

Contradictory to the majority of the *fiqh* opinions, the consent of the husband was also not required in the view of the court. "He [the Prophet] never asked for the consent of the husband," the court ruled. The Prophet, by beginning with asking the wife to return her dower and not seeking the approval of the husband, meant that his consent was not necessary for the *khul'* to take place. They also discuss in detail the other viewpoints within the collections of *fiqh*, focusing on the opinions that support the judiciary's intervention in *khul'*.

The court then presented the opinion of modern scholars, beginning with Abū al-A'lā Mawdūdī who the court described as a "distinguished religious scholar." In Mawdūdī's work *Ḥuqūq al-Zawjayn* he had fully described the ability of the wife to take *khul'* as one of her rights. Quoting Mawdūdī, "Muslim Law just as it has given to the husband the right to divorce the wife with whom he cannot pull on has also given to the wife the right to get a khula from her husband whom she hates and with whom she cannot live."[450] The ruling also quoted the modern Indian scholar Abul Kalam Azad and his Qur'ānic exegesis on the terms of *shiqāq,* using his explanation to argue that when there is discord within the marriage the option of *khul'* is available. "If on the object of the marriage being defeated, separation has not been allowed to the parties," wrote Azad, "this would have been a cruel limitation of the right of free choice and society would have been deprived of a happy married state of life."[451]

Finally, the judges of the High Court presented the approach of Arab courts and rulings from the Middle East. There, according to the High Court, the predominant view was that the

[449] Ibid. para 4.
[450] Ibid. para 10.
[451] Ibid. para 20.

legally binding tie between a husband and a wife was "love."[452] If that love was no longer present in the marriage, the couple had three options:

1. The spouses continue in the marriage despite the dispute between them, which will create ill will and rancor amongst the couple
2. There is a physical separation without divorce, but this will be an offence against morality
3. The couple is divorced, which will both destroy the family and create ill will out of a situation that should be a blessed one[453]

The most appropriate solution, and the one that causes the least harm to the couple and society, is the third option and the granting of a divorce. However, who should do it? Were the husband to desire divorce he could do so easily, securing his own financial rights. Were the wife to desire divorce, on the other hand, it would put both the rights of the husband and wife in jeopardy. The husband could treat her unfairly and refuse to support the divorce or pay for her maintenance, while the wife could, after receiving the divorce from her husband, refuse to return to him the amount of his dower owed. Therefore, to protect both the rights of the husband and wife when the desire to divorce comes from the side of the wife the court must intervene.

However, are there any limitations on the authority of the judge to dissolve the marriage? It could be limited to *shiqāq,* as previous courts have observed. However, there are many other examples found within the *fiqh* where the judge can terminate the marriage without there being any major breach of rights. For example, many of the acceptable grounds for divorce within the Ḥanafī School do not require any major conflict to be in existence between the couple, such as insanity or impotence. Therefore, according to the court, "His [the judge's] jurisdiction is based on the simple fact that Islam regards the marriage contract as being capable of termination. It has to be terminable because it is not a reasonably possible view that a marriage must continue even though the husband misbehaves or is unable to perform his obligations or for no fault of the wife it would be cruel to continue it."[454]

[452] Ibid. para 21.
[453] Ibid. para 21.
[454] Ibid. para 22.

The case of *Mst. Balqis Fatima v. Najm-Ul-Ikram Qureshi*, therefore, represents the first instance where the authority of the judiciary has now been fully applied to allow the judiciary to exercise *ijtihād* and grant a *khul'* to a wife without the consent of the husband. As this was the first time that a court had taken such authority, the judgement took care to ensure that their understanding would be acceptable and prevent responses from the *'ulamā'*. They began that justification by asserting that they are not against any ruling from within *fiqh,* particularly the Ḥanafī School. "No Hanafi authority has been cited before us which may deal with the question as to whether the wife is entitled to a divorce on restoration of benefit," the ruling stated, "and it cannot be said that we are in direct conflict with any Hanafi authority. Parties are admittedly Hanafis. In fact, before us no ancient jurist has been cited at all who may have discussed the question."[455]

It is important to note here, however, that from the quote above the court has not undertaken its own investigation of the appropriate *fiqh* rulings. Rather, they have only relied upon those rulings that have been brought before them, most likely by the attorneys of the wife, to construct their ruling.

When asserting their compatibility with the Ḥanafī School the judges go even further, arguing that the very concept of adhering to a legal tradition (*taqlīd*) is a modern invention. Citing Sir Abdul Rahim's work entitled *The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafi'i and Hanbali Schools,*[456] the court argued, "It was not until very modern times that attempt was made by means of the doctrine of Taqlid to confine the Court and the jurists to one of the four Schools of law as distinguished from the others." Prior to the modern period, judges could rule according to whatever legal tradition they felt was closest to the practical circumstances of the case. This is well-established in the Islamic tradition, and judges should not be bound at all to the rulings of the *fuqahā'* who are controlled by the rules of *Usul al-Fiqh*.

As judges are not bound to the rules of the *fuqahā'*, they can then approach the fundamental texts of religion on their own. Most importantly, they could understand the *Ḥadīth* of Thābit b. Qays in the way that they felt most appropriate for modern circumstances – not requiring the consent of the husband. Judges could also interpret their own boundaries through

[455] Ibid. para 25.
[456] Abdur Sir Rahim, *The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafi'i and Hanbali Schools.*, [2nd ed.]. (Lahore: All Pakistan Legal Decisions, 1963).

a general understanding of the Qur'ānic verses and were not bound to instances of *shiqāq* as had previously been argued.

In addition, to secure the position of this new ruling and solidify the judiciary's authority in the granting of *khul'*, the 1959 case analyzed the arguments of the case of *Umar Bibi v. Muhammad Din* (1945). It took issue with two points decided by the case, the first being that the judge had no authority to grant the *khul'* as the right existed with the husband and wife. In response, the 1959 court argued that the previous judges had denied the right of *khul'* to a woman without even consulting the relevant Qur'ānic verses, and only relied on the definition of *khul'* given in the *fiqh* works of *al-Hidāya* and *al-Durr al-Mukhtār*.

The second point was that in the case from 1945 the court was concerned that if the *khul'* was granted on the grounds of an incompatibility of temperaments the flood gates would open, and that any woman would be able to seek a *khul'* on the lightest of grounds. The new ruling of 1959 responded to this by saying that this is a situation in which there is a pressing need for the court to intervene. Particularly given the facts of the case here, there was no possible way that the couple could have worked out their problems, and the only way that the situation could be resolved was through a separation. This option is presented in the *fiqh,* namely from within the Mālikī School, and therefore the previous judge should have taken it.

The case of *Mst. Sayeeda Khanam v. Muhammad Sami*, Lahore from 1952 was also observed. The current court believed that the previous ruling had gotten close to issuing the correct ruling but was unfortunately bound by the mistakes made in the case of 1945 and could not move further, even though the wife was clearly in misery. Speaking specifically about the definition of the arbiter (*ḥakam*) presented in the Qur'ānic verse, the current court criticized the view of Justice Cornelius, who held that the term referred to "representatives of the community" who had a direct connection to the couple and could present the pressure necessary to convince them to reconcile or separate. The current court now disagreed and stated, "No authority has been quoted for this interpretation and it is not suggested that the word 'hakam' has ever been used in the Arabic language in the sense of a tribal elder." The proper translation, and that which is backed by the interpretation of the Qur'ān, is that it should be the family relatives of each spouse. It is not limited to that definition, however, and the Tafsīr of al-Ḥaqqānī mentions that, "if people of the family be not available, any right-minded person can be appointed."

Beyond understanding the justification of the court's ruling as religiously legitimate and its dismantling of the previous judgements on the issue of *khul'*, the High Court ruling of 1959 has also shown how the judges are approaching their *ijtihād*. As has already been presented above, the court is willing now to search out its own definitions of terms, create a comparison between different Qur'ānic verses outside of the traditional view of the *fuqahā'*, and choose opinions from alternative *fiqh* schools that fit the circumstances of the case.

Additionally, the judiciary is also interested in applying general changes in methodology when approaching the *Ḥadīth*. For example, in the court's justification of its interpretation of the *Ḥadīth* of Thābit b. Qays, the tradition argued that Thābit had accepted the return of the dower he had given to his wife not because he was ordered to do so. Rather, he accepted its return due to his love of the Prophet and his willingness to do anything asked of him voluntarily. The Prophet's statement to accept the return of the dower was merely a piece of advice (*mashwara*) and could not be understood as a command. The court, in its ruling, has now presented the exact opposite. There are many other instances from the life of the Prophet where advice was given and in each circumstance the Prophet made it clear that it was advice. In this instance, there was no indication that the Prophet was merely advising Thābit, and the language used is clearly that of a command. It is not becoming of the Prophet to confuse his Companions by ordering them to do something through advising them, and therefore the *khul'* given by the Prophet must have taken place without the consent of the husband.

Through this example, the judiciary is not only seeking to reinterpret the linguistic understanding of the Qur'ān and *Ḥadīth* but is now also prepared to use general principles about the nature of Prophethood in their analysis. This is an important shift in the type of *ijtihād* taking place through the court's judgement and should be understood as an additional step beyond what was presented in the earlier case of *Mst. Sayeeda Khanam v. Muhammad Sami* of 1952.[457]

Therefore, the High Court had fully answered the question posed to them by the lesser bench and stated that yes, a woman has the right to *khul'* as long as she is willing to forgo her financial benefit, meaning her dower. In addition, the ruling of the court has gone much further, and attempted to give the judiciary absolute authority to intervene in divorce matters.

[457] Mst. Sayeeda Khanam v. Muhammad Sami, PLD 1952 Lahore 113.

Previously limited to *taqlīd* of the Ḥanafī School and following the opinions of Muftis, they now could take whatever steps they felt necessary.

Once this reference had been returned to the Division Bench, they ruled in favor of the wife and granted her a *khul*‘ with the condition that she returns 2,500 Rupees to her husband, which she had received in the form of ornaments from her husband. This amount was paid by the counsel of the husband in front of the court and the dissolution was granted. The court also denied the claim of the husband to restore his conjugal rights and declared that the two parties would share the court costs, a burden usually placed on the losing party.

A Full Departure from Ḥanafī Discourse: 1967

Although the judgment in the 1959 case meant that the judiciary now had the legal grounding to intervene at their will, problems remained for the complete application of the court’s new interpretation of *khul*‘. The most important of these was the fact that although the decision in 1959 was rendered in the High Court of Lahore, an important venue for the country’s most populous province, Punjab, it did not hold the weight of the country’s highest court, the Supreme Court. As a result, the strength of the 1959 judgment as precedence was not as powerful as it could become, and the judiciary would have to wait for almost another decade before such a case would reach the Supreme Court and allow judges to test the analysis of the High Court of Lahore.

Another important problem with the 1959 case was the position of *taqlīd.* Although this was not mentioned in the division bench’s question to the full bench, as was seen above the High Court judges took up the very validity of *taqlīd* as a practice applicable to the judiciary. In their view, the requirement that judges had to follow the rulings of the Ḥanafī school and propagated by the *‘ulamā’* was a modern invention and there was no evidence in the classical tradition that a judge had to follow a particular school. On the contrary, they were welcome to choose rulings from other schools of law depending on the circumstances of the case and could even reinterpret the rulings of classical jurists in order to reach a conclusion that they felt best fit the case. This understanding was highly controversial and required further investigation and would be taken up in detail by the Supreme Court in 1967.[458]

[458] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97.

Finally, between these two cases there had been new legislation which made significant changes to the procedure for marriage and divorce in Pakistan. Known as the Muslim Family Laws Ordinance of 1961 (MFLO) and discussed in Chapter Three, it was produced by a Law Commission established in 1956 whose job was to recommend to the government legislative changes to Muslim family laws. This commission was setup in accordance with the provisions of the newly-formed 1956 Constitution, which required the establishment of a new law commission that would review the country's laws to ensure that they comply with the *sharīʿa.* This constitution did not last long and was replaced with another in 1958, but the work of the commission continued, and their recommendations taken up by the then President, General Ayyub Khan who issued the MFLO as law.

For the current discussion, the importance of the MFLO was that it amended the DMMA by adding an additional ground for dissolution of marriages, namely Clause 2a of Section 2 which stated, "that the husband has taken an additional wife in contravention of the Muslim Family Laws Ordinance, 1961." Missing from the MFLO was the situation of *khulʿ*, which the Law Commission had recommended be introduced into legislation but never followed by a discussion in Parliament. That change would ultimately come through the courts, and the 1967 case would be considered in later decades as a landmark development in the judiciary's role of *khulʿ* as it filled the gaps left by the MFLO. According to Lucy Carrol,

> Although there is no provision in the Ordinance concerning a wife's right to divorce in the absence of either grounds or her husband's consent, the recommendation of the Commission has been achieved through another agency. It was the judiciary which came to the succour of unhappy wives trapped in 'hateful unions.' The courts have created and recognized a form of divorce, a judicial khul', which while greatly enlarging a wife's right to seek dissolution of her marriage, is a novel innovation in the classical Hanafi law.[459]

The final position of the court, and the justification for judicial *khulʿ* made by Justices S.A. Rahman and S.A. Mahmoud, will be discussed in detail in Chapter Five, as it was their approach to the law that formed the basis for the rebuttal of Muhammad Taqi Usmani of the Deobandi tradition. However, in this chapter it is necessary to discuss the details of the case, the steps

[459] Lucy Carroll, "The Muslim Family Laws Ordinance, 1961: Provisions and Procedures— a Reference Paper for Current Research," *Contributions to Indian Sociology (NS)* 13, no. 1 (January 1, 1979): 128, doi:10.1177/006996677901300105.

taken by the parties and the questions posed to the courts, and a general overview of the justification given by the courts in their judgments.

Musst. Khurshid Bibi v. Babu Muhammad Amin (1967) – Khanpur (Rahim Yar Khan)

This case involved a woman who had been married to her husband when she was only six years old, because of what is referred to as a marriage of exchange (*watta satta*). Common in rural Pakistan and Afghanistan, it involves the simultaneous marriage of the female family members of two individuals within the same small community. It often helps solve problems of families that are unable to find suitable wives for their sons, but always occurs without the consent of the women.

She spent several years with her new husband, and according to statements she would make to the court there were no significant problems in the marriage. However, it eventually became apparent that she was incapable of bearing children. Her husband then took a second wife, who could have children, and his treatment of the first wife worsened. According to her statements he refused to give her maintenance, beat her, and refused to allow her to visit her family. At one point, he suggested that he would divorce her and force her to marry his brother to keep her in the same home. When she reported this suggestion to her family, her brother filed a criminal complaint under Section 100 of the Code of Criminal Procedure, which allows for warrants to be granted to search for and retrieve individuals who have been wrongfully confined.

The wife, now being removed from the home, has filed suit with the lower court asking for the dissolution of her marriage based on the cruelty suffered above and under the new Clause 2a that her husband had taken a second wife. The husband filed a case of his own for the restitution of conjugal rights. The lower court judge on 21 January 1960 dismissed the claims of the wife as baseless and said that upon cross-examination she had mentioned that her husband had treated her well in the beginning, and therefore these new claims had no merit. He also restored the conjugal rights of the husband.

The wife then filed another civil case on the 29th of the same month, but now in a different district (Lyallpur, now Faisalabad) more than 500 kilometers away. She did so for as this was the home of her family and not her husband, meaning that she could file the case safely with the full support of her family and potentially a more neutral judge.

In this case she claimed that her husband had orally divorced her and, alternatively, that her marriage be dissolved by way of *khul'* as she was prepared to renounce her dower. Her justification for the *khul'* was that "it had become impossible for the spouses to live together as husband and wife." This was the same statement used in the High Court's rulings of 1959, showing a shrewdness on the part of the wife's attorneys in appealing to a decision that had already been made in the court. The husband denied all of her claims, saying that he had never orally divorced her nor was he going to consent to *khul'*. According to him, "their relations being neither so unhappy nor so strained as to make it impossible for them to live together."[460] He also claimed that he had given more than adequate maintenance to her given both of their social conditions, and that he had spent more than 2,000 Rupees on their marriage.

Based on these arguments the courts ascertained that there were four issues framed that needed to be addressed:

1. Whether the court had the proper jurisdiction to try the suit (in the hometown of the wife and not the husband);
2. Whether the suit was barred by *res judicata* (the fact that a ruling had already been issued by another court);
3. Whether the husband had divorced his wife orally;
4. Whether the wife is entitled to a *khul'*, and if so, on what grounds;
5. What relief can the court give to each party (which declaration to grant, what kind of financial compensation to give)

The first two points were not discussed, and the case went forward. The statement of the court was that these points were "not pressed by the defendant," however the position of the court could be more easily explained through the presentation of the wife's attorneys. With regards to the first point, the court of Lyallpur does have jurisdiction because, assuming her claim of an oral divorce is accurate, she would no longer be allowed to stay in her husband's home and would naturally move back to live with her family in Lyallpur. There was also another legal provision within the Criminal Procedure Code that allows for a case to be transferred from one court to another if one party claimed a physical threat. As the wife had already claimed that her husband had abused her physically, it stands to reason that her family and her attorneys could

[460] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97 at 22.

have made such a claim. With regards to the second point, the wife's attorneys most likely claimed that new events had taken place, the oral divorce, which had not been given to her at the time of the previous case, and therefore the prevention of the court's intervention by *res judicata* was not present.

The court then approached the third issue, which was answered in the negative. The husband clearly denied in front of the court that any oral divorce had taken place, and the wife had no evidence to show that it had taken place. For the fourth and point, the court sided with the wife and granted the *khul'*, however the court provided no explanation as to upon which grounds the *khul'* was being granted.

The husband then appeals the case to the District Judge of Lyallpur against the decision of the lower court. The court rules in favor of the husband, observing that the wife had admitted that her husband had treated her well, and that it was only after he took a new wife that she had begun to dislike her husband. The district judge questioned her testimony and credibility, stating that "the plaintiff had not come with clean hands, or with a straightforward story." Rather, this was "a matter of obstinacy (*zid*) on her part."[461]

Unhappy with this result, the wife then appealed to the High Court of West Pakistan, where the case was placed in front of the single bench. The judge dismissed the appeal on three grounds. The first focused on the specific circumstances of the case, namely the exchange (*watta satta*). The judge viewed that the wife's claims of her husband's ill treatment are unfounded as her husband, whose own sister is in the home of his brother-in-law, would never mistreat his wife due to the fear of reprisal upon his sister. This exchange has ensured that no cruelty shall ever exist on the part of the husband, according to the judge, and therefore any claim made by the wife of ill treatment must be dismissed. The second was that the wife's refusal to live with her husband was unreasonable. Upon questioning, she said that she had demanded a separate residence from her husband as he was to take a second wife. When the judge approached the husband, he responded that he had no money to provide her with another home. It is not required in Islam for a husband to provide a new home for his second wife, especially if he cannot afford it, and therefore the wife's refusal to move into her husband's home has no basis. The third and final ground was that the wife had no right to *khul'* as she, when making her initial

[461] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97.

statements to the lower courts, did not acknowledge that she was willing to give up part of her dower. As has been seen elsewhere in this dissertation the forfeiture of the wife's dower is the critical element of all *khul*‘ cases and, therefore the judge saw no seriousness in her claim to *khul*‘.

As was mentioned above, the key to understanding the judge's decision was the influence of local cultural circumstances. The High Court Judge, although fully aware of the previous cases and their impact on the development of the law, felt that the presence of the exchanged marriages between the two families and the dynamics of their rural background rendered the case outside the realm of judicial intervention. The mechanisms for solving the problems of the marriage were already in place, and therefore an intervention into the realm of *khul*‘ was unnecessary. Had he chosen to do so, the judge could have implemented *khul*‘ without any further interpretive effort, as the precedent already existed. His choosing not to therefore reflects the importance of local custom and seems to have little to do with any affiliation or reverence to the *‘ulamā’*.

The wife then appealed to the Supreme Court of Pakistan and challenged the interpretation of the High Court. In her opinion, the circumstances of the case were not the deciding factor and the question should be posed to the highest court in the land as to whether the legal changes undertaken by the judiciary in the case of 1959 should now apply to her situation. The court agreed with her proposal, granting her judicial *khul*‘ and accepting the foundations of the 1959 ruling. The court also sent the case back to the family court with regards to the final payment required by the wife to finalize the *khul*‘. The husband, according to *al-Hidāya* which was cited by the court, had the ability to request more than simply the dower as payment. As the dower had not yet been paid by the husband – as the wife had refused to come and live with him – the Supreme Court recommended that the lower courts evaluate all the gifts that had been given to the wife. If the husband requested the return of everything that he had provided to her thus far the judge could order it, placing a rather heavy price on the wife to receive her *khul*‘.

The resulting decision, penned by Justices S.A. Rahman and S.A. Mahmoud, represented the completion of the judiciary's expansion of authority and constituted a full rupture from previous Ḥanafī discourse. Now, regardless of what was present in the DMMA, the MFLO, or the previous rulings made by the judiciary, women could be granted a decree of *khul*‘ by any family

court judge, without the consent of the husband, and without the need to prove any fault or reason other than her strong dislike of her husband and a willingness to give up her dower. Although the position of the court will be presented in detail in Chapter Five, it is important here to mention two points where the Supreme Court cemented the understanding of the 1959 High Court and departed from the traditional discourse: *taqlīd* and *ijmā'*.

As was mentioned in the 1959 ruling, the High Court believed that the concept of following the rulings of only the Ḥanafī School was a modern invention and had never applied to the judiciary in the past. The Supreme Court in 1967 has now taken up that ruling and confirmed it. The court's decision stated,

> The learned Imams [of the four orthodox schools of Sunni *fiqh*] never claimed finality for their opinions, but due to various historical causes, their followers in subsequent ages, invented the doctrine of taqlid, under which a Sunni Muslim must follow the opinions of only one of their Imams, exclusively, irrespective of whether reason be in favour, of another opinion. There is no warrant for this doctrinaire fossilization, in the Quran or authentic Ahadith.[462]

The very founder of the Ḥanafī School, Abū Ḥanīfa, himself believed that his opinions were not to be understood as final. Citing the common 12th century encyclopedia of Muslim sects, *al-Milal wa al-Niḥal* by Abū 'l-Fatḥ al-Shahrastānī, Abū Ḥanīfa reportedly stated "this is my opinion and I consider it to be the best. If someone regards another person's opinion to be better, he is welcome to it (for him is his opinion and for us ours)." The translated quote provided by the court, however, did not capture the full meaning of the Arabic wording. The original Arabic does not mention only the term "best" but rather "this is the best that we have been capable of reaching (*aḥsan mā qadarnā 'alayhi*)."[463] This means that Abū Ḥanīfa didn't simply accept the existence of multiple opinions but also the presence of other methodologies and ways of understanding the law, each according to the capabilities of the legal interpreter (*qudra*). Had the court used a better English translation it would have provided them with even further grounds to argue for the expansion of their *ijtihād*.

[462] Ibid.
[463] Abū 'l-Fatḥ Muḥammad b. 'Abd al-Karīm al-Shahrastānī, *Al-Milal wa 'l-Niḥal*, vol. 1 (Beirut: Dār al-Kutub al-'Ilmiyya, 1992), 221.

With regards to consensus (*ijmā'*), the Supreme Court's ruling undertook to move beyond the standard definition established within the schools that only the *'ulamā'* of a certain period can produce a legal consensus. Rather, the court looked at the approaches of the judiciary from other Muslim jurisdictions and cited the laws of Iraq, Egypt, Tunisia, Morocco, Jordan, and Syria to show that in countries of across the Muslim world there was an understanding that a woman could receive a judicial separation from her husband upon any presentation of evidence of harm. In each of these jurisdictions the couple will be referred to arbitrators who will attempt to solve their dispute, however the final authority to separate rests with the judge.

By approaching other Muslim jurisdictions, the Supreme Court in its ruling sought the legitimacy of other, notably Arab, court systems that had already taken steps to reform their laws of divorce. In each of these systems, for example in Egypt, the changes in the legislation were constructed by an evolution in the understanding of the *sharī'a* and the role of the judge and had received approval of the country's main religious establishments such as Al-Azhar. Using such authority, which the Supreme Court knew would be respected by the *'ulamā'* of Pakistan, the court attempted to solidify its ruling and prevent opposition.

Conclusion: The Role and Authority of Judicial *Ijtihād*

In the cases of 1952, 1959, and 1967 the Pakistani judiciary intervened in family law cases and slowly developed their own interpretation of the law. Citing Qur'ānic verses, *Ḥadīth*, and *fiqh* opinions from scholars from both the past and present the judges moved beyond the religious discourse which had been dominated by the Ḥanafī School and expanded the authority of the judiciary to allow them to issue *khul'* against the consent of the husband. According to Zubair Abbasi these interpretations of the judiciary should be understood as *ijtihād* in the classical sense, as they are engaging in what he calls "independent legal reasoning."[464] Judges engaging in *ijtihād*, in the opinion of Abbasi, were not breaking from the understanding of the past. "Theoretically," he said, "as functionaries of the state, judges did not play a role in the lawmaking process in the traditional Islamic legal system. In practice, however, judges played an important role in the development of Islamic Law."[465] In the Mughal Period, for example, the

[464] Abbasi, "Judicial *Ijtihād* as a Tool for Legal Reform," 384.
[465] Ibid., 406.

compilation of the *Fatāwā ʻĀlamgīrī* was done by a board which included members of the judiciary.

Judges in contemporary Pakistan, however, fulfilled none of the requirements necessary to conduct *ijtihād* according to the Islamic model. The question of who can perform *ijtihād* was one of significant debate and arguably changed over the centuries. In the decades immediately preceding the introduction of European influence, the requirements of *ijtihād* had once again been brought to the forefront, with a new generation of scholars advocating the reinvigoration of *ijtihād* to solve the problems faced by what they saw as a declining Muslim World. According to the 18th century South Asian scholar Shāh Walī Allāh al-Dehlawī (d. 1762), for example, there were three categories of individuals who could undertake *ijtihād*: one who has the full authority of *ijtihād* (*mujtahid muṭlaq muntasab*), one who can perform *ijtihād* only within their school of law (*mujtahid fi al-madhhab*), and one who is experienced within their school but can only discern different opinions (*mutabaḥḥir fi al-madhhab*). Even for the third and lowest category, Shāh Walī Allāh required that the person

> be of sound intelligence, knowledgeable of Arabic and styles of rhetoric, understanding the levels of preponderance in Islamic Law. This person can only give a *fatwā* in two circumstances: if he can rely on a correct opinion traceable to his teacher (*imām)* or the issue in question is widely cited in popular books.

No judge cited above, particularly a non-Muslim foreigner like Justice Cornelius, would have fit into this category. In their judgments they were only reliant upon the opinions that had been presented to them by the attorneys of either party and there is no indication that they presented any specific knowledge about the Ḥanafī School nor any rules of Islamic legal interpretation. None of judges cited in the cases above had any level of Arabic and, as was cited above, drew their definitions of Arabic terms from dictionaries produced by Orientalist scholars. Even their interpretation of Qur'ānic verses came from contemporary, non-*'ulamā'* sources. According to the classical tradition, therefore, the judges of Pakistan had no authority to conduct *ijtihād*.

The question which then poses itself is from where did the Pakistani judiciary find the authority or willingness to take such a grand step away from the *'ulamā'*, and by the 1950s so strongly condemn the very practice of *taqlīd* of the Ḥanafī School as a modern invention? To answer this question, one must return to the position of the *'ulamā'* themselves in the colonial period. Seeing the moral dilemma that strict adherence to the Ḥanafī School caused Muslims,

leading women to leave Islam and risk eternity in hell just to get away from their unwanted husbands, the *'ulamā'* were the first to step away from the concept of *taqlīd* . As was seen in the work of Ashraf 'Alī Thānavī, for example, suggestions were made to follow the rulings of the Mālikī school, and British judges were eventually instructed by law (the DMMA) to move beyond only the understanding of the Ḥanafī tradition to help Muslims in the Subcontinent find ways to solve the problems of daily life.

In contemporary Pakistan as well, the idea of *ijtihād* by other individuals than those cited in the tradition, such as the state, became popular among other contemporary intellectuals who called for reform and change to the traditional methods. Muhammad Iqbal, for example, argued that in the modern period *ijtihād* should be done by the Parliament. The collective wisdom of the Muslim community, and the authority to implement the new interpretations, rested now only with Parliament. The *'ulamā'*, who have now been reduced to operating only in small and isolated circles, are no longer relevant to the society and cannot be called upon to solve its problems.

The *ijtihād* of the Parliament was never actually applied in Pakistan, however there were other state institutions that did so such as the Council of Islamic Ideology. Established by the Constitution of 1962 as the Advisory Council of Islamic Ideology, this was a state-sponsored body comprised of *'ulamā'* from all schools of thought, judges, and other academics with knowledge of Islam who were to advise the Parliament in the creation of laws that were in compliance with the *Sharī'a*. According to the Constitution,

> **Article 200**: The Council shall consist of such number of members, being not less than five and not more than twelve, as the President may determine.
>
> **Article 201 (2)**: The President shall, in selecting a person for the appointment to the Council, have regard to the person's understanding and appreciation of Islam and of the economic, political, legal, and administrative problems of Pakistan.

There were no specific requirements that the members of the council had to be from the *'ulamā'*, nor were there any of the requirements of *ijtihād* mentioned from the Islamic tradition. Regardless, the council regularly engaged in *ijtihād*, for example giving individuals the right to inherit from their grandfathers when their father had passed away earlier. In the traditional understanding of Islamic law if a person's father had died before their grandfather, the generational gap that existed barred the distribution of inheritance to the grandchildren. The council changed this understanding, using the Qur'ānic concept of bequeathment (*waṣiyya*)

which allowed individuals to give up to one third of their estate away to whomever they chose before being distributed according to fixed percentages.

The most important factor to understand from this development of *ijtihād* was the second half of Article 201 (2) defining the construction of the Council of Islamic Ideology, namely that members shall understand and appreciate the "economic, political, legal, and administrative problems of Pakistan." Local factors, and not an attachment to the Islamic tradition, is what drove reform in the law. This was the same approach taken by the *'ulamā'* during the British period, and the contemporary judiciary has now used the same justification to take the next step.

The interference of the judiciary in an area traditionally controlled by the *'ulamā'* did not go unnoticed, however, and the religious authority of the judiciary to undertake *ijtihād* will become the main point of discussion for those who wished to rebut the court judgments metioned here. The Deobandi response to the judiciary and particularly that of Muhammad Taqi Usmani, one of Pakistan's most respected members of *'ulamā'*, will therefore be examined in detail in Chapter Five.

Chapter 5

Question of Legitimacy and Moral Dilemma – *'Ulamā"*s Refusal to Accept *Khul'* Legislation - *Fatāwā* Nullifying Court Issued *Khul'* Decrees

The previous three chapters charted the legislative and judicial history of the question of divorce and *khul'* in the South Asian context. It began in Chapter Two, which covered the development of the Muslim laws of divorce in the British colonial period and showed how British judges, while initially giving precedent to customary law and the strict interpretation of the Ḥanafī School, eventually changed their approach with the influence of the *'Ulamā'* and new legislation through the DMMA (1939) to allow for new interpretations based on the acceptance of opinions from other schools (*takhayyur*). Chapter Three then carried this development further into post-Partition Pakistan where Muslim judges and legislators were in control of the development of the law. Instead of creating a new legal system they chose to continue with the precedents of the colonial period. Departing from those precedents, Chapter Four then outlined the role of case law and showed how the Pakistani judiciary exercised their own independent interpretation of the law (*ijtihād*) to create new pathways for divorce by returning to the sources themselves.

The judicial undertaking of *ijtihād*, particularly in the realm of *khul',* was controversial in the eyes of the *'ulamā'*. For them, the judiciary was entering a realm that they had controlled for centuries. During the colonial period, for example, British judges were unwilling to go beyond the *fatwā*s produced by the *'ulamā'* and refused to allow themselves the right to adjudicate in matters where the *'ulamā'* had ultimate authority until the law was changed through legislation. Even when the law was changed with the Shariʿat Application Act of 1937 and the DMMA of 1939 it was done because of pressure placed on the legislature by the *'ulamā'* and these new laws were constructed based on their recommendation. In post-partition Pakistan the judges of the Supreme Court created an exception to the authority of the *'ulamā'* in cases of *khul'* and gave the right of a woman to seek a *khul'* without the need to obtain her husband's consent. In Chapter Three, it was mentioned that in 2002 President Parvez Musharraf issued an Ordinance that enshrined the interpretation of the Supreme Court into legislation, meaning that a woman could seek *khul'* and obtain it from the court if she was willing to return

her dower, and without the consent of her husband.[466] Additionally, two landmark cases were mentioned in the previous chapter, *Bilqis Fatima v. Najmul-Ikram* (1959)[467] and *Khurshid Bibi v. Baboo Muhammad Amin* (1967)[468] where the judges showed their willingness to approach the *fiqh*, Qur'ān, and *Ḥadīth* on their own terms.

This chapter will therefore look at the response of the *'ulamā'* to the intervention in Islamic Law made by the Pakistani judiciary. It begins by focusing on the work of a Deobandi scholar, Muḥammad Taqi Usmani (born 1943), who himself served as a judge on the Shariat Appellate Bench of the Supreme Court and Federal Shariat Court for several years.[469] He wrote a detailed treatise entitled *Islām mēn Khul' kī Ḥaqīqat* (The Reality of *Khul'* in Islam), first published in 1970 in the journal of Dar al-Ulum Karachi *al-Balāgh*, and then in the form of a small booklet in 1996, where he challenged the ruling of the Supreme Court in both of the cases mentioned above.[470] Following a presentation and analysis of his argumentation this chapter will then present the alternative approach of another faction of the *'ulamā'*, the Ahl-e Ḥadīth, who disagreed with Usmani and concurred with the interpretation of the court and the government's legislation of 2002.

This chapter argues that the legislation of 2002 and the court cases upon which it is built are justified according to the principles of the *Sharī'a*. Some *'ulamā'*, such as Usmani, by opposing the acceptance of *khul'* in the Pakistani context have created a moral dilemma for those who want to stay within the boundaries of the law and the *Sharī'a*. A woman who approaches the court and obtains a judicial *khul'* without proving the fault of the husband has acted correctly

[466] Munir, "Family Courts in Pakistan in Search of 'Better Remedies' for Women and Children," 197.
[467] Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi, PLD 1959 Lahore 566.
[468] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97.
[469] Muhammad Taqi Usmani is one of the most revered Deobandi scholars of Pakistan who enjoys considerable scholarly standing not only in South Asia but also in the Arab world. Usmani is the younger son of Muftī Muḥammad Shafī' - a student of Ashraf 'Alī Thānavī who wrote famous juristic exegesis of the Qur'ān entitled Ma'ārif al-Qur'ān. Taqi Usmani is a prolific author who wrote, in both Urdu and Arabic, several commentaries on classical *ḥadīth* collections, and numerous juridical opinions (including those issued as a judge on the Shariat Appellate Bench of the Supreme Court of Pakistan). He has extensively contributed in contemporary political, religious, and economic debates, especially but not only with reference to Pakistan. See Muhammad Qasim Zaman, *Ashraf 'Ali Thanawi: Islam in Modern South Asia* (Oxford: Oneworld, 2007), 122–23.
[470] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat*, 229–66. Originally published by Maiman publishers Muhammad Taqi Usmani, *Islām Mēn Khul' Kī Ḥaqīqat [The Reality of Khul' in Islam]* (Karachi: Maiman Islamic Publishers, 1996).

according to the law. After completing her waiting period, she is legally entitled to marry another person of her choice. When made aware of the dominant view of *'ulamā'* like Usmani, however, she then faces the possibility that her divorce was religiously invalid and that she should still be with her previous husband. Had she remarried her status is now that of an adulterer (*zāniya*) and guilty of one of the greatest sins in Islam. She is therefore trapped between the moral requirements of her religion and the practical necessities of daily life.

This dilemma could, and should, be solved by highlighting the approach of other *'ulamā'* in the country such as that of the Ahl-e Ḥadīth, Ḥanafī *'ulamā'* who recognize woman's right to *khul'* equal to man's right to divorce, and recognizing the right of the state to intervene in questions of Islamic Law. This is particularly the case when the state acts in concert with bodies such as the Council of Islamic Ideology who have the support from the *'ulamā'*. For pragmatic reasons as well strict adherence to the Ḥanafī School is untenable and the contemporary *'ulamā'* of Pakistan should return to the approach of others such as Thānavī who found no problem in looking to the rulings of another school.

Mufti Muhammad Taqi Usmani

Mufti Muhammad Taqi Usmani is one of the leading Islamic scholars alive today. He is an expert in the fields of Islamic Jurisprudence, Economics, *Ḥadīth* and Taṣawwuf. Usmani was born on 5th Shawwāl 1362 A.H. in Deoband[471] in the District of Sahāranpūr, India. He is the son of Muftī Muḥammad Shafī', the author of famous exegesis in Urdu *Ma'ārif al-Qur'ān*. He started his early education in Deoband but migrated to Pakistan in May 1948 along with his father where initially he studied with different teachers in Karachi. In 1951, his father established Dar al-Ulum Karachi, where he completed his Dars-i Niẓāmī syllabus. Among his teachers Mufti Muḥammad Shafī', Muftī Rashīd Aḥmad Ludhyānvī, Mawlānā Akbar 'Alī, Salīm Allāh Khān, Qārī Ri'āyat Allāh

[471] The seminary at Deoband was founded in 1866 and was established as a response to the devastating events of the Indian Uprising in 1857. Its founder, Muhammad Qasim Nanotvi, believed in disengagement from the political authority and that the 'ulamā' should withdraw from society. As a result, he and the teachers that went with him chose a village 180 kilometers north of Delhi, the country's political center. It has since become one of the most important and influential institutions for Islamic learning in the Indian Subcontinent, and its methodological impact has spread to the entire Muslim world. For more on the Deobandi movement, see Barbara Metcalf, "The Madrasa at Deoband: A Model for Religious Education in Modern India," *Modern Asian Studies* 12, no. 1 (1978): 111–34; Metcalf, *Islamic Revival in British India*; Metcalf and Metcalf, *A Concise History of Modern India*, 143; Peter Hardy, *The Muslims of British India*, digital edition (Cambridge: Cambridge University Press, 2007), 170–73.

and Mawlānā ʻAbd al-Subḥān are noteworthy. He specialized in fatwā by completing a two-year degree from the department of *Iftā'* of Dar al-Ulum Karachi. In addition to his madrassa education, he also obtained regular law degree from Sindh Muslim College, Karachi.[472]

Immediately after his education he started to teach in Dar al-Ulum Karachi, initially Arabic language, and then *fiqh*, *ḥadīth* and *tafsīr* classes became his specialty. His lessons of Tirmidhī and Bukhārī are famous among students. He has authority to teach *ḥadīth* from his father Mufti Muhammad Shafīʻ, Mawlānā Idrīs Kāndhalwī, Qārī Muḥammad Ṭayyib, Mawlānā Salīm Allāh Khān, Muftī Rashīd, Mawlānā ʻAbd al-Subḥān Maḥmūd, ʻAllāma Ẓafar Aḥmad Usmānī, Mawlānā Zakariyyā Kāndhalwī, and Shaikh Ḥassan Mishāt.

Under the supervision of his father, he started a research journal *al-Balāgh* from Dar al-Ulum Karachi in 1967, the journal that will be used to publish a detailed critique on Supreme Court's land-mark judgement on *khulʻ* that will change the definition of *khulʻ* in Pakistan for ages to come.[473] Usmani also served as Judge Federal Shariat Court and Shariat Appellate Bench of Supreme Court of Pakistan. He is also a member of Islamic Fiqh Council, Jeddah. On the basis of his expertise and several publications on Islamic banking and modes of Islamic finance, he has served on the *sharīʻa* advisory boards of Islamic banks in several countries.[474] He is a prolific author and has authored more than sixty books and several articles and pamphlets on different topics of Islam. *Islām Mēn Khulʻ kī Ḥaqīqat* [The Reality of *Khulʻ* in Islam] is the work that exclusively treats the issue of *khulʻ* and rejects the idea of *khulʻ* without the consent of the husband. In what follows, this chapter shall discuss this work and explore the arguments brought forward by Usmani in support of his thesis, in addition to analyzing such views in contemporary legal developments on the issue of *khulʻ*.

Usmani's Critique of the Judiciary: The Reality of *Khulʻ in Islam*

Usmani's most important intervention to the question of *Khulʻ* in the Pakistani system was his work entitled *Islām mēn Khulʻ kī Ḥaqīqat* (The Reality of *Khulʻ* in Islam). First published as an article in two installments in the Dar al-Ulum journal *al-Balāgh* in 1970,[475] Usmani criticized the role of

[472] Ḥāfiẓ Muḥammad Akbar Shāh Bukhārī, *Akābir ʻUlamā'-i Deoband* (Lahore: Idāra-i Islāmiyyāt, 1999), 551.
[473] Ibid., 552.
[474] See his autobiography available at his own website, "Mufti Muhammad Taqi Usmani: Profile," *Mufti Muhammad Taqi Usmani*, accessed May 23, 2019, https://muftitaqiusmani.com/en/profile/.
[475] Muhammad Taqi Usmani, "Islām Mēn Khulʻ kī Ḥaqīqat: Suprīm court ke aik faiṣla ke dalā'il par tabṣira (part 1)," *al-Balāgh Monthly* 4, no. 4 (July 1970): 15–29; Muhammad Taqi Usmani, "Islām Mēn Khulʻ kī

the judiciary in their undertaking of *ijtihād*, and strongly argued against the justification that had been given by judges ruling in favor of granting a woman a no-fault divorce. This article was then published together with Thānavī's *fatwā* – mentioned in detail in Chapter Two – in 1996.[476] It is this printed edition of Usmani's earlier opinion that is much more well-known and popular and, before discussing the content of the work itself, it is important to explain why Usmani and a publishing house related to him chose to re-print an article that was more than 25 years old and how that article has had such an important impact on the discussion of *khul'* in Pakistan.

During the 1990s the question of women's rights again came to the forefront in Pakistani public discourse. Women's rights movements, frustrated with the pace of reform and the power that the *'ulamā'* had in the realm of family law, called for the government to create new solutions that would give them rights equal to that of men. These calls were further enhanced by the election of Benazir Bhutto (d. 2007) to the office of Prime Minister in 1993.[477] This was the second time that she had been brought to power, after first winning the election in 1988 following the sudden death of martial law administrator General Zia-ul-Haqq in a plane crash.

The Bhutto family, particularly Benazir's father Zulfiqar Ali Bhutto, had been in politics since the 1960s and represented the progressive reform movement in the country. Despite the popular affiliation of Bhutto with the political left, his government introduced crucial changes to the Pakistani legal system with the support of the *'ulamā'*, namely the Constitution of 1973 which contained provisions pertaining to the Islamic nature of the state.[478] He was also instrumental in the declaration of the Ahmadi minority as non-Muslims. That movement had been brought to an abrupt end with the military coup of General Zia-ul-Haqq in 1977, and Bhutto was subsequently executed in 1979.

The arrival of Benazir to power in 1988 and then in 1993 galvanized reform movements particularly in the realm of women's rights. They believed that this was the opportunity that

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Ḥaqīqat: Suprīm court ke aik faiṣla ke dalā'il par tabṣira (part 2)," *al-Balāgh Monthly* 4, no. 5 (August 1970): 21–45.

[476] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat [The Reality of Khul' in Islam]*.

[477] Anita M. Weiss, "Straddling CEDAW and the MMA: Conflicting Visions of Women's Rights in Contemporary Pakistan," in *Family, Gender, and Law in a Globalizing Middle East and South Asia*, ed. Kenneth M. Cuno and Manisha Desai (Syracuse: Syracuse University Press, 2009), 167–68.

[478] Articles 227-231, "The Constitution of the Islamic Republic of Pakistan - Part IX: Islamic Provisions," accessed May 23, 2019, http://www.pakistani.org/pakistan/constitution/part9.html.

they had been waiting for and now had the legitimacy of democratic elections.[479] The 1988 Manifesto of Pakistan People's Party pledged that it would "reform Personal Law and bring it in line with the demands of contemporary socioeconomic realities."[480] In family law these calls for reform focused on the right of a woman to divorce. However, between 1988 and 1999, despite several important policy and institutional measures to empower women, including the elevation of Women's Division to Ministry of Women's Development,[481] no major gender-based legislation for women was undertaken during this period.[482] In the courts, as has been seen in the previous chapter, judges had exercised the right of *ijtihād* to grant such divorces without the husband's consent and against his will. These rulings were only taking place in the higher courts, however, and were not followed by the lower courts which usually continued to follow the DMMA. Therefore, most women found themselves trapped in the judicial system, and only those who had the money and patience to wait for years to reach a higher court could expect the judge to rule in their favor.

With this legislative milieu in place the *'ulamā'* felt it necessary to respond academically to these calls for reform. Through the efforts of judges in the higher courts their authority was in danger of being eroded. The traditional position of the *fuqahā'* was also under threat, and legislation could mean that the law of Pakistan would be based on judicial *ijtihād* and not the time-honored precedent that had governed Muslims for centuries. This is where Usmani provides his intervention. In the introduction to the 1996 and 2017 publications, Usmani mentions that he chose to reprint this article in manuscript form, "because now, the courts are still acting upon the decision of the Supreme Court rendered by Justice Rahman. However, that is against the *Sharī'a*."[483]

In his work, Usmani challenged the opinion of Supreme Court Justices S.A. Rahman and S.A. Mahmood in his justification of the case *Mst. Khurshid Bibi v. Baboo Muhammad Amin* (1967). The details of this case were provided in Chapter Four, but it is necessary to briefly recall the

[479] Anita M. Weiss, "Benazir Bhutto and the Future of Women in Pakistan," *Asian Survey* 30, no. 5 (1990): 434, doi:10.2307/2644837.
[480] Ibid.
[481] Ibid., 443.
[482] Naeem Mirza, "Seven Pro-Women Laws in Seven Years: Women Parliamentarians Demonstrate Commitment and Ability to Serve Women," *Legislative Watch* 38 (December 2011): 4.
[483] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat*, 10; Usmani, *Islām Mēn Khul' Kī Ḥaqīqat [The Reality of Khul' in Islam]*, 2.

facts here. A woman had approached the lower court and requested that her marriage be dissolved because her husband had taken a second wife. Her husband counter-sued for the restitution of conjugal rights and claimed that she had no grounds to seek divorce. The lower court agreed with the husband and dismissed the claims of the wife, restoring his conjugal rights. The wife subsequently brought a new suit in another city and claimed that her husband had orally divorced her. She further argued that even if the court found, otherwise she should be granted a divorce on the basis of *khul'* because the differences between her and her husband could not be reconciled. When this case finally reached the Supreme Court, the five-member bench ruled unanimously that the wife is entitled to receive a *khul'* as long as she shows that she is unable to continue to live with her husband. Justice S. A. Rahman, writing the court's detailed justification for its ruling, "observed that spouses are placed on equal footing with respect to their rights and obligations. He equated a husband's right to *ṭalāq* with a wife's right to khula."[484]

Usmani in his critique began by providing a general overview of the religious basis of *khul'*. He quoted the Qur'ān, *Ḥadīth*, and numerous sources from each school of *fiqh*. Through this introduction Usmani challenged the very need for a couple to approach the courts to obtain a *khul'*. In his view, "According to the four eponymous scholars of Islamic Law and the majority of jurists this is a matter of mutual consent and there is no need to approach the court."[485] *Khul'* is therefore a personal matter and the courts have no jurisdiction to intervene in this matter. If a couple approaches the court and the woman seeks a *khul'* the judge should only advise them to reach an agreement amongst themselves and cannot force one party, namely the husband, to divorce his wife without consent.

Following this introduction Usmani then rebutted each of the arguments of S.A. Rahman and the Pakistani judiciary in its decision, questioning the ability of judges to exercise *ijtihād* in the matter of divorce. The following subsections will present each of these rebuttals, organizing them in order of the source presented by each side.

Qur'ān

In support of the court's judgement Justice S.A. Rahman quoted the Qur'ānic phrase "Women have rights against men, similar to those that men have against them, according to the well-

[484] Muhammad Zubair Abbasi and Shahbaz Ahmad Cheema, *Family Laws in Pakistan* (Karachi: Oxford University Press, 2018), 162.
[485] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat*, 232.

known rules of equity" and stated that "[i]t would therefore be surprising if the Qur'āndid not provide for the separation of the spouses, at the instance of the wife, in any circumstances."[486] Usmani critiqued judge's use of this verse as evidence by presenting three points. Firstly, he said that Justice Rahman disregarded the second part of the verse which states, "but the men have a degree over them (in responsibility and authority). And Allah is Exalted in Might and Wisdom." If the entirety of the verse were taken into account, Usmani argued, it clarifies that there are some rights that are exclusive to men.[487] For Usmani, there are a number of situations in which a man is to be given more authority than the woman. One of these would be to give the man ultimate authority in granting divorce.

Usmani then continued to a second point by saying that if one were to take the Justice's interpretation of the first part of the verse and "if we take the interpretation that, in the dissolution of marriage, both parties are equal, the woman should have the right to divorce (*ṭalāq*) the man, to which the Justice himself does not agree."[488] This is because the man's right to divorce is not conditional nor contingent on any financial compensation. *Khul'*, on the other hand, is contingent on the woman ransoming herself by returning her dower to the husband. Therefore, women and men cannot be considered "on equal footing" with regards to divorce as the Justice argued.

For the third point, Usmani took issue with Justice Rahman's interpretation of the word "equality" between spouses, understood through the verse 228 of Sūrat al-Baqara. This wide interpretation of the concept of equality stands in opposition to the classical interpretation of the verse, which is only meant to refer to the equality of spouses *during* marital life (*mu'āsharat*).[489] He cited the famous theologian and exegete Fakhr al-Dīn al-Rāzī (d. 606/1210) who interpreted this verse in the following manner, "The true purpose of marriage is not fulfilled unless each party considers the rights of the other (*murā'iyyān ḥaqq al-ākhar*). These rights are many, and we will mention a few of them here."[490] Al-Rāzī then provides a list of these

[486] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97 at 114.
[487] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat*, 235.
[488] Ibid., 236.
[489] Ibid.
[490] Fakhr al-Dīn Muḥammad b. 'Umar al-Rāzī, *al-Tafsīr al-Kabīr*, 3rd ed. (Beirut: Dār Iḥyā al-Turāth al-'Arabī, 1999), 440.

rights, none of which include divorce. Rather, when explaining the next phrase of the verse he wrote,

> The husband has the ability to divorce her. When he does so, he can revoke that proclamation, whether the wife desires it or not. As for the woman, she does not have the right to divorce her husband. After divorcing, she does not have the right to revoke it. She is also not capable of preventing her husband from revoking his proclamation of divorce.[491]

Usmani also mentioned the explanation of al-Qurṭubī (d. 671/1273) with reference to his famous exegesis *al-Jāmiʿ li Aḥkām al-Qur'ān* regarding this phrase, where he stated "He [the husband] can release the contract, while she cannot."[492]

From these preceding arguments Usmani argued that Justice Rahman should not rely on only the first part of the verse and disregard the following phrase. Just because a woman does not like her husband she cannot force him to give the *khulʿ* as the Qur'ān has clearly shown that the right to divorce is in the realm of his rights and there is no established equality between the sexes in this matter.[493]

Following this verse Rahman's ruling then cited the main Qur'ānic statement legislating the concept of *khulʿ,* which states:

> A divorce is only permissible twice: after that, the parties should either hold Together on equitable terms, or separate with kindness. It is not lawful for you, (Men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by Allah. If ye (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she give something for her freedom. These are the limits ordained by Allah; so do not transgress them if any do transgress the limits ordained by Allah, such persons wrong (Themselves as well as others). (Qur'ān 2:229)[494]

Usmani takes up Rahman's stance on this verse's granting of the responsibility of *khulʿ* to the judiciary, a debate which was already present in the classical Islamic tradition. Rahman also

[491] Ibid., 441.
[492] al-Qurṭubī, *al-Jāmiʿ li Aḥkām al-Qur'ān*, 1964, 3:125.
[493] Usmani, *Islām Mēn Khulʿ Kī Ḥaqīqat*, 237.
[494] Ali, *The Holy Qur-An.*

gives the examples of *li'ān* (imprecation)[495], *īlā'* (a pronouncement by the husband of abstention from sex with his wife. It leads to divorce if observed for a determined period),[496] '*innīn* (sexually impotent),[497] and *mafqūd al-khabar* (disappearance of the husband)[498] to reinforce the concept of judicial authority, stating that in each of these cases judges have the right to intervene and annul a marriage. He also cited exegetical, *ḥadīth* and *fiqh* sources to argue that a judge can also intervene when a woman has developed an "incurable aversion" of her husband.[499]

Usmani began his rebuttal of this point by conceding for the sake of argument that most of the classical scholars interpreted this verse as referring to judges. If the second opinion, for which Usmani cited the contemporary exegesis of Thānavī, is held to be true and the interpretation of the verse referred not to the judges but to the husband and the wife, the entire argument of Rahman would be invalid. Judges would have no role to play in the exercise of *khul'* against the will of the husband.[500]

If the former assumption is made the intervention of judges should be only to advise the husband to grant a divorce and not force him to do so. The very words presented in the verse, "if you fear", do not indicate that a judge *must* intervene to separate the couple. Rather it opens the door of possibility which should in most circumstances only refer to an advice (*mashwara*)[501] to the husband. He then posed the following rhetorical question, "Since it is established that *khul'* can take place with the mutual consent of the parties, then why did God address this matter to the political/judicial authority?"[502] The answer to this is found in the social context within which this verse was revealed. At the time of Revelation the political authority and the judges

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[495] If a husband charges his wife with adultery, the wife may claim divorce by suit, but *li'ān* does not *ipso facto* operate as a divorce. See Mulla, *Principles of Mahomedan Law*, 166. For details of *li'ān* in Islamic *fiqh* see al-Marghīnānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, n.d., 2:270.

[496] The ruling about *īlā'* is derived from the Holy Qur'an 2:226. For details see al-Marghīnānī, *al-Hidāya fī Sharḥ Bidāyat al-Mubtadī*, n.d., 2:259.

[497] Ibid., 2:273.

[498] As discussed in Chapter 2, Ḥanafīs and Mālikīs have significantly diverging opinions on the waiting period after which the wife of disappeared husband could remarry. The Ḥanafī school would have required the wife to wait for 90-100 years, see Ibid., 2:424. As for the Mālikīs they only required a four-year waiting period, see Ibn Rushd, *Bidāyat al-Mujtahid*, 3:75. However, all schools agree that the right to pronounce divorce in this situation belongs to judge. The woman must approach court to seek separation.

[499] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97 at 116.

[500] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat*, 238.

[501] Ibid.

[502] Ibid., 239.

they appointed were not only to act as an absolute resolver of disputes but held the additional roles of arbitrator, a Mufti, and an advisor. Muslims approached them for each of these various reasons and therefore this verse ordered them to only supervise or advise them to reach a mutual agreement. We cannot conclude that, merely because judges are addressed in this verse, that they are immediately granted the full ability to issue final judgements against the will of one, or both, parties.[503]

Usmani then gave two hypothetical examples to elaborate on this point. The first imagines a situation in which a couple approaches the court but neither are prepared to conclude the *khul'*. Neither is the wife prepared to pay back her dower nor the husband prepared to give a regular divorce. Should the judge, interpreting the verse to grant him full authority to separate the couple by force, do so? "Obviously not," argued Usmani. The second hypothetical imagines a situation where the wife has transgressed against her husband (*nushūz*) but the husband refuses to give her the divorce unless she agrees to renounce all claims to the dower. Will the judge then force the woman to enter into a *khul'*? Again, Usmani argued "obviously not. No person can draw the conclusion from the mere presence of the phrase '*fa-in khiftum*' that in the above cases a judge has been given the authority to pronounce an annulment of the marriage by force."[504]

Finally, Usmani brought the opinion of Ibn Qayyim al-Jawziyya (d. 751/1350) regarding the interpretation of the Qur'ānic phrase "*fī mā iftadat bihi*." The word to describe the wife's payment of her dower to the husband is that of a "ransom," meaning that it is an issue of compensation. Compensation, according to Ibn Qayyim, can only take place with the consent of both parties and one cannot be forced to accept compensation from another.[505]

The crux of the argument made by Usmani is that the Qur'ān is reassuring the couple that already has a desire to divorce that they can seek out the courts to help them resolve the dispute. Using the complete context of these verses a couple that fears that they may not be able to follow the rules of God in their marriage could approach a court to help them in their situation. Judges are not then allowed to force a party to accept a divorce against their will, but

[503] Ibid.
[504] Ibid.
[505] Muḥammad b. Abī Bakr Ibn Qayyim, *Zād al-Maʿād fī Hady Khayr al-ʿIbād*, vol. 5 (Beirut: Muʾassasat al-Risāla, 1994), 178.

rather should at the most offer them religiously-sanctioned advice which they may choose to take or not. If, for example, a husband takes that advice and permits a *khul'* he can rest assured that he has not violated the tenants of his religion and sinned, but rather is following a permissible path of leaving the marriage. This is Usmani's main point when addressing the Qur'ānic verses presented by Rahman, believing that Rahman has stepped outside the bounds of his authority.

The final step of Usmani's critique of the opinions provided by the court was to provide what he called affirmative arguments from the Qur'ān that would establish his stance. These verses could be used for their clear and external meaning, without the need for interpretation. Usmani quoted the verse cited by the court (2:237). In this verse, which discusses situations of divorce where the marriage has not yet been consummated, the husband is required to pay half of the dower to his wife unless she or "the one who has the knot of marriage in his hand (*alladhī bi yadihi 'uqdat al-nikāḥ*)" forego the payment.[506] The court in its ruling used the exegesis of scholars who interpreted this person as the guardian of the wife (*walī*) and not the husband. Usmani, on the other hand, dismissed this explanation of this verse and brought a *Ḥadīth* from Dāraquṭnī that affirmed the phrase used in the verse refers to the husband. In the view of Usmani, this is affirmative proof that the husband is the only person who has the right to divorce. There are two narrations of this *Ḥadīth*, one whose chain of authority is good (*ḥasan*) and the other is elevated (*marfū'*).[507] In this *ḥadīth* the Messenger of Allah said, "guadian of the marriage tie is the husband."[508] The *ḥadīth* is an exegesis of the verse 2:237.

Within the rules of exegesis, if there is an explanation of a *Ḥadīth* provided by an authentic narration from the Prophet himself there is no room for the introduction of another.[509] Therefore, in the opinion of Usmani, the court erred in its citation of other opinions

[506] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat*, 259.

[507] *Ḥasan* (good) refers to *Ḥadīth*s whose validity is not so strong but they are necessary for establishing important points of law. *Marfū'* (elevated) refers to *Ḥadīth*s that are traced to the Prophet, whether or not the chain of narrators is complete. See Robson, J., "Ḥadīth", in: *Encyclopaedia of Islam, Second Edition*, Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs. Consulted online on 23 May 2019 <http://dx.doi.org.proxy3.library.mcgill.ca/10.1163/1573-3912_islam_COM_0248>

[508] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat*, 260.

[509] 'Abd al-Raḥmān b. Abī Bakr Jalāl al-Dīn al-Suyūṭī, *al-Itqān fī 'Ulūm al-Qur'ān* (Cairo: al-Hay'a al-Miṣriyya al-'Āmma li 'l-Kitāb, 1974), 4:200.

and should focus only on that connected directly to the Prophet.[510] However, Masud has argued that the Qur'ānic phrase "he may forgive in whose hand is the marriage tie" (*ya'fū alladhī bi yadihi 'uqdat al-nikāḥ*) having a masculine gendered pronoun led jurists to infer that the authority to dissolve belongs only to men.[511] Masud questions this inference of jurists on several grounds. According to him,

> [t]he verse mentions 'marriage tie', not the right to divorce. It is incomprehensible how this verse could be interpreted as a general principle meaning that only men have the authority to dissolve a marriage contract? If the right to dissolve marriage is restricted only to those who are authorised to marry then why does this right not belong to women, whom the Qur'an authorises to conclude marriage contract? ... The verse is dealing with the question about a particular case of divorce where the marriage has not been consummated and the husband has not paid the dower. The question is: who has the right to forego the due? It seems quite logical to say it is wife who forgoes that right because it is due to her. In case she is minor or incapable for some other reasons to take that decision, her guardian may decide on her behalf. It is quite problematic to give this right to the husband. How can he forego what he owes to his wife?[512]

Masud argues that there are two possible meanings in the traditional approach: that this right of holding the 'marriage tie' belongs to the guardian of the wife (*walī*) or the husband. The latter could not be possible, as the Qur'ān prohibits men holding women against their will and that they should not take back what they have given to their wives – meaning their full dower. Due to the complex exegesis required to place the rights of marriage solely in the hands of the husband, in this case it must fall to the former (the *walī*). As a result, once the marriage is concluded the right would exist for the wife to request a dissolution of her marriage in exchange for the return of her dower as mentioned in the *Ḥadīth*.[513]

Finally, Usmani cited the second part of the verse, which states "and the remission (of the man's half) is the nearest to righteousness" (*wa an ta'fū aqrab li al-taqwā*). Using the exegesis

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[510] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat*, 260.
[511] Muhammad Khalid Masud, "Interpreting Divorce Laws in Pakistan: Debates on Shari'a and Gender Equality in 2008," in *Interpreting Divorce Laws in Islam*, ed. Rubya Mehdi, Werner Menski, and Jorgen S. Nielsen (Copenhagen: DJØF Publishing, 2012), 49.
[512] Ibid., 49–50.
[513] Ibid., 50–52.

of Abū El-Su'ūd al-'Imādī,[514] Usmani stated that here the addressee is the husband who is requested to pay the full amount of the dower. It would not be an expression of piety for the guardian if he were to forgive the half that was due to the wife as it is not his right to do so. Forgiving someone from fulfilling a right that is not due to you is not piety, and therefore the verse clearly is referring to the husband.[515]

By citing these affirmative arguments from the Qur'ān the judges wished to show that someone other than the husband holds the "knot" of marriage in their hands. This could include the guardian (*walī*) and, by extension, the judiciary. Usmani countered this argument by showing that, through the clear interpretation of the verse, it is only the husband who holds the affairs of the marriage in his hand. He is the only one who can tie it, and therefore only he can remove it.

Ḥadīth and the Precedent of the Rightly-Guided Caliphs

When discussing the *Ḥadīth* of al-Bukhārī in which the wife of Thābit b. Qays approached the Prophet seeking a divorce, S.A. Rahman argued that the consent of the husband is not necessary because the Prophet gave her the *khul'* without seeking the consent of her husband. By doing so the Prophet used his own judicial authority to allow the wife to leave the marriage by merely giving back her dower. Therefore, contemporary judges in Pakistan had the right to do the same.[516]

Usmani responded by saying that the citing of this *Ḥadīth* as evidence for the unilateral granting of *khul'* is incorrect. He argued that there is another narration of the same case, from the collection of al-Nasā'ī, in which the husband was commanded to accept the return of his wife's dower and to let her leave (*khudh alladhī lahā 'alayk wa khalli sabīlahā*),[517] to which he complied. In this case, according to Usmani, the husband agreed to the *khul'* and the *Ḥadīth* can therefore only be used as legal evidence for cases in which the husband consents. It cannot be used, as Rahman has argued, as a blanket rule to cover all cases of *khul'*, particularly those in which the husband does not consent. In those situations, the judge can only take the position as

[514] Muḥammad b. Muḥammad b. Muṣṭafā Abū El-Su'ūd al-'Imādī, *Irshād al-'Aql al-Salīm ilā Mazāyā al-Kitāb al-Karīm* (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, n.d.), 1:235.
[515] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat*, 261.
[516] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97.
[517] al-Nasā'ī, *Al-Mujtabā Min al-Sunan*, 6:186, Bāb 'iddat al-mukhtali'a, *ḥadīth* # 3497.

an advisor.[518] Usmani then cites the famous explanation of al-Bukhārī by Ibn Ḥajar al-'Asqalānī, who sated, "It [the wording of the *Ḥadīth*] is a matter of guidance (*hidāya*) and reconciliation (*iṣlāḥ*), not a required ruling (*ījāb*)."[519]

Specifically regarding the commandment of the Prophet to the husband, to which he responds in the affirmative, for Usmani this is clear evidence that it is not the role of the judge to enact the *khul'* and that it requires the husband's consent. He cited the opinion of al-Jaṣṣāṣ, who said "If the right of separation was to the political authority (*Sulṭān*), based on his knowledge that the couple will not be able to maintain the limits of God, the Prophet would have not asked the husband. Instead, he would have done it by himself, returning the garden to the wife and granting the *khul'* on his own authority."[520] The position of al-Jaṣṣāṣ is authoritative because, according to Usmani, no other *fiqh* scholar has presented an alternative approach.

After discussing the *Ḥadīth* Usmani then moved to the precedent of the second Rightly-Guided Caliph Umar. S.A. Rahman in his judgement cited the ruling of 'Umar in a case of *khul'* which stated "If women seek *khul',* then do not deny it to them."[521] Although Rahman used this to claim judicial authority to grant *khul',* Usmani argued that it is proof of the opposite. Those being addressed in Umar's statement are not the judiciary but rather men. If a woman seeks *khul'* from her husband, he should then grant it. The authority is not taken out of his hands, but the situation should never reach the point where a couple would need to approach a court as the husband should, following the decree of Umar, grant such a *khul'* if requested by the wife.

Juristic Discourse (*fiqh*)

Usmani then tackled the issues raised by the court found in the discourse of jurists (*fiqh*). Firstly, he addressed the question of whether the granting of a *khul'* should be considered as an instance of divorce (*ṭalāq*) or an annulment of the marriage contract (*faskh*). This issue was important because if *khul'* is considered an annulment of the marriage contract, the judges argued that the judiciary may then use its authority to separate the couple since the *fiqh* literature gives them

[518] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat*, 254.
[519] al-'Asqalānī, *Fatḥ al-Bārī Sharḥ Ṣaḥīḥ al-Bukhārī*, 9:400.
[520] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat*, 254–55; al-Jaṣṣāṣ, *Aḥkām Al-Qur'ān*, 2:95.
[521] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat*, 256; al-Bayhaqī, *Al-Sunan al-Kubrā*, 7:515, hadith # 14854. 'Abd al-Raḥmān b. Abī Bakr Jalāl al-Dīn al-Suyūṭī, *Al-Durr al-Manthūr Fi 'l-Tafsīr Bi 'l-Ma'thūr*, vol. 1 (Beirut: Dār al-Fikr, n.d.), 275.

gives significant space to intervene. If it is merely an instance of divorce, then the *fiqh* gives precedence to the husband and there is almost no space for judicial intervention.

Rahman, in his judgement, took the opinion of *faskh* and used *fiqh* rulings of ʿAbd Allāh b. ʿAbbās, Aḥmad b. Ḥanbal, al-Shāfiʿī, and Dāwūd al-Ẓāhirī to argue that a *khulʿ* falls in the realm of judges and does not require the consent of the husband.[522] For Usmani, however, a *khulʿ* could be considered as an annulment (*faskh*) but nowhere in the *fiqh* literature does this entail that the judge then has the authority to issue it without the husband's consent. By claiming the *khulʿ* as an annulment it only means that the total instances of divorce available to the husband, of which there are a total of three, have not been affected by the proclamation of *khulʿ*. Rahman in his argument had taken the opinion of the Ḥanbalī School in declaring *khulʿ* an annulment but, in the opinion of Usmani, Rahman should then hold himself to the entirety of the school's approach. For the Ḥanbalīs *khulʿ* is a contract that necessitates mutual consent (*ʿaqd bi al-tarāḍī*) and is similar to the annulment of a sale contract (*iqāla*). Rahman was also selective in the opinion of al-Shāfiʿī, and only chose his earlier opinion while still in Iraq. This changed when al-Shāfiʿī moved to Egypt and now the majority of the school views *khulʿ* as an instance of divorce (*ṭalāq*). In both the old and new opinions the role of the judge was not changed, and the judge can still not force the husband to divorce without his consent.[523]

Rahman then argued that if one were to assume the position of the "orthodox" Ḥanafī jurists who believe that *khulʿ* should be considered as a divorce the question still remains: what is a woman to do when a husband is unwilling to let her out of an unwanted marriage? Such matters are not discussed in the *fiqh* literature in detail, leaving room for new interpretation through *ijtihād*.[524] Rahman proposed that this should be done by allowing judges to issue what he called a "divorce by *khulʿ* (*ṭalāq-i khulʿ*)." Usmani rebutted this argument by saying that just because the issue is not discussed specifically in *fiqh* works does not mean that it is open for *ijtihād*. One cannot find a statement that "The right of divorce belongs only to the husband and not to the wife." This is clear to the jurists and needs no further elaboration and mentioning it would be redundant.[525] Similarly regarding *khulʿ* one cannot find a *fiqh* statement that "*Khulʿ*

[522] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97 at 116.
[523] Usmani, *Islām Mēn Khulʿ Kī Ḥaqīqat*, 246.
[524] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97 at 112.
[525] Usmani, *Islām Mēn Khulʿ Kī Ḥaqīqat*, 248–49.

requires consent of both the husband and wife" because, in the opinion of Usmani, "it is so well-known (*ma'rūf*), famous (*mashhūr*), agreed upon (*muttafaq 'alayh*) and assumed (*musallam*) that the *fuqahā'* mention it rarely. They mention it in their definition of *khul'* as a matter of principle (*uṣūlī ṭaur par dhikar kar dete hain*.)"[526] He then cited the *Fatāwā 'Ālamgīriyya* and al-Ḥaṣkafī who stated "[*Khul'*]'s conditions are those of divorce (*ṭalāq*)." *Khul'*, therefore, is like other commercial agreements which require offer and acceptance (*ījāb wa qubū*l).

Usmani then concludes this portion of the argument by saying that, whether understanding *khul'* as an instance of divorce or an annulment, jurists agree that it is done with the mutual consent of both the husband and wife, and no external party can force their hand. The above argument provided by the court, according to Usmani, is therefore irrelevant to the construction of the ruling and does not impact the role of the judge.[527] Arguing that there is either a silence in the *fiqh* or a juristic disagreement on the issue of consent is irrelevant, and the court's citation of minority opinions cannot change the overwhelming understanding found in the *fiqh*.

For the final point of Rahman's justification from the *fiqh* he cited the opinions of Imam Mālik, Awzā'ī, and Isḥāq who held that in the Qur'ānic verse *fab'athū ḥakaman* (appoint (two) arbiters),[528] that the arbiters brought by the husband and wife have the right to separate them without the consent of either the husband or the wife. He also cited Ibn Ḥazm's discussion on the role of the arbiters to support this point.[529] Usmani agreed that this is the opinion of the Mālikī School, however this is not the understanding of any other Sunni schools of law. It is also contradicted by the last part of the verse, *in yurīdā iṣlāḥan yuwaffiq Allāh baynahumā* (if they both desire reconciliation, Allah will cause it between them),[530] that this command is not for the separation but rather for reconciliation to save the marriage. Usmani quoted a long passage of al-Shāfi'ī on this point, concluding that the arbiters cannot force the couple to separate as long as they have not authorized them to do so. He also said that Rahman ignored the conclusion of

[526] Ibid., 249.
[527] Ibid., 250.
[528] 'Alī, *The Holy Qur'ān* surah 4, verse 35.
[529] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97 at 117.
[530] 'Alī, *The Holy Qur'ān* sura 4, verse 35.

Ibn Ḥazm which stated, "There is nothing in the verse or the *Ḥadīth* that [suggests] the arbiters can separate [the couple]. This right is also not for the ruler (*ḥākim*)."[531]

Usmani then approached the points of Justice Mahmood who provided two additional elements from the *fiqh* to justify the position of the court. The first was a quotation from *Bidāyat al-Mujtahid* by the Mālikī jurist Ibn Rushd, who stated that "As the divorce is placed in the hand of the man when he dislikes his wife, so is *khul'* placed in the hand of the woman when she dislikes her husband."[532] Justice Mahmood translates this passage of Ibn Rushd from an Urdu translation in the following words,

> And the philosophy of khula is this, that khula is provided for the woman, in opposition to the right of divorce vested in the man. Thus, if trouble arises from the side of the woman, the man is given the power to divorce her, and when injury is received from the man's side, the woman is given the right to obtain khula.[533]

This opinion places *khul'* on equal footing with divorce and, according to the interpretation of Justice Mahmood, means that whatever the rights and conditions are given to the husband in the case of divorce, those will be given equally to the woman in the case of *khul'*. Usmani responded to this point by stating four points. Just a few lines before the quote of Justice Mahmood Ibn Rushd mentioned that there is agreement amongst the majority of scholars that *khul'* is permissible only with the agreement of both parties. Ibn Rushd made the statement of equality between divorce and *khul'* because, by performing the *khul',* the woman has a way of getting out of the marriage. There is therefore an opportunity for either the man (through divorce) or the woman (through *khul'*) to remove themselves from the marriage. This does not entail a discussion of the details nor the conditions required for this to occur.[534] The second point is that if the *khul'* was equal to the divorce it should not require any payment to the husband as is the situation with divorce, which is not the case.[535] The third point is that, had *khul'* been equal to divorce, women would not need to approach the court, an aspect that even the judges do not agree to. The fourth and final point is that Ibn Rushd only mentioned this

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[531] Abū Muḥammad ʿAlī b. Aḥmad b. Saʿīd Ibn Ḥazm, *Al-Muḥallā*, ed. 'Abd al-Ghaffār Sulaymān al-Bandārī, 1st ed., vol. 9 (Beirut: Dār al-Kutub al-'Ilmiyya, 1933), 248; Usmani, *Islām Mēn Khul' Kī Ḥaqīqat*, 253.
[532] Ibn Rushd, *Bidāyat al-Mujtahid*, 3:90.
[533] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97.
[534] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat*, 257.
[535] Ibid., 257–58.

statement as a non-binding element of underlying reasoning (*al-fiqh fīhi* or *al-sirr fīhi*). It can have no impact on the ruling itself (*ḥukm*) and should only be understood as the personal wisdom of the jurist.[536]

The second element provided by Justice Mahmood was that the Ẓāhirī scholar Ibn Ḥazm in his *al-Muḥallā* mentioned that if a judge fails to reconciliate between the couple he could separate them by means of *khul'*. Ibn Ḥazm therefore supports the power of the judge to interfere in the matter of divorce. Usmani called out this statement as an outright misquotation of Ibn Ḥazm and expressed his astonishment at the judge's lack of knowledge of *fiqh*.[537] On the contrary, Ibn Ḥazm categorially and harshly denied the right of the judge or any other arbiter to interfere. Ibn Ḥazm, as cited by Usmani, stated "It is not for the arbiters to separate the couple, neither by *khul'* nor by any other means" (*wa laysa lahumā an yufarriqā bayn al-zawjayn lā bi-khul'in wa lā bi-ghayrih*.)[538]

Usmani's Intervention

Following his criticism of the ruling provided by the Pakistani judiciary Usmani then provides his own positive arguments from the Qur'ān, *Ḥadīth*, and dominant *fiqh* works from every school of law. He also quoted *al-Mughrib fī Tartīb al-Muʿrib* of Abū al-Fatḥ Nāṣir b. 'Abd al-Sayyid al-Muṭarrizī (d. 610/1213) where in the definition of *khul'* it is said that when the husband accepts the offer of the wife and divorces her, it is said that he gave *khul'* to her "*fa idhā ajābahā ilā dhālik fa-ṭallaqahā qīl khalaʿahā.*"[539] Through this amalgamation of evidence Usmani attempted to prove that the opinion of Islamic Law, from every aspect, is clear in the understanding that *khul'* can only take place with the consent of both parties.

Most of this discourse has already been discussed in Chapter One. Here it is only necessary to mention which texts from each school that Usmani mentioned. For Ḥanafī opinions he cited *al-Mabsūṭ*[540] by al-Sarakhsī; the Mālikī position is represented though *al-Muntaqā sharḥ*

[536] Ibid., 258.
[537] Ibid., 258–59.
[538] Ibn Ḥazm, *Al-Muḥallā*, 9:246.
[539] al-Muṭarrizī, *Al-Mughrib Fī Tartīb al-Muʿrib*, 1:151, Bāb al-khā' ma' al-lām.
[540] al-Sarakhsī, *al-Mabsūṭ*, 6:173.

al-Muwaṭṭa'[541] by al-Bājī and *Bidāyat al-Mujtahid*[542] by Ibn Rushd; for Shāfiʿī authorities he quoted the eponym's own work *al-Umm*[543] and the *al-Muhadhdhab*[544] by al-Shīrāzī; for Ḥanbalī position he relied on *al-Mughnī*[545] by Ibn Qudāma and *Zād al-Maʿād*[546] by Ibn al-Qayyim; and finally for Zāhirī school he quoted passages from *al-Muḥallā*[547] by Ibn Ḥazm. These texts are the most recognized by each school and the most cited. Hence, Usmani's reference to these sources highlights that his opinion is reflective of "correct" opinions of majority of schools. Any deviation from these opinions, according to Usmani, would be deviation from *sharīʿa* rulings.[548]

After citing these authorities Usmani closed the treatise by mentioning that there are instances where a judge could separate the couple, which are the same reasons as were outlined in the DMMA of 1939 and discussed in detail in Chapter Two. This is because, according to Usmani, rights that exist between a couple fall into two categories: the legal and the religious (*qānūn*^{an} and *diyāna*^{tan}).[549] Legal rights are those which are necessary for the purposes of the marriage such as maintenance, intercourse, and procreation. If these rights are not being fulfilled by the husband, the court can enforce them. If the husband refuses to fulfill these rights, or cannot by means of insanity or absence, only then can the judge intervene and force the couple's separation.[550] Religious rights, on the other hand, are those that have no legal value, nor can the court enforce the fulfillment of those rights. Treating a wife well, loving her, and being kind to her are examples of these rights which have no quantifiable or measurable value. According to Usmani, no court can interfere the matters and a judge cannot declare a divorce based on a violation of these rights.[551]

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[541] Abū al-Walīd Sulaymān b. Khalaf al-Bājī, *Al-Muntaqā Sharḥ al-Muwaṭṭa'*, vol. 4 (Cairo: Maṭbaʿah al-Suʿāda, 1914), 61.
[542] Ibn Rushd, *Bidāyat al-Mujtahid*, 3:90.
[543] Muḥammad b. Idrīs al-Shāfiʿī, *Al-Umm*, vol. 5 (Beirut: Dār al-Maʿrifa, 1990), 214.
[544] al-Shīrāzī, *Al-Muhadhdhab*, 2:489.
[545] Ibn Qudāma, *Al-Mughnī*, 7:324.
[546] Ibn Qayyim, *Zād Al-Maʿād*, 5:178.
[547] Ibn Ḥazm, *Al-Muḥallā*, 9:511.
[548] Usmani, *Islām Mēn Khulʿ Kī Ḥaqīqat*, 261–64.
[549] Ibid., 266.
[550] Ibid.
[551] Ibid.

The Moral Dilemma and the Role of the *'Ulamā'*: Critiquing Usmani

Throughout his critique Usmani's central question was to challenge the belief of the Pakistani judiciary that judges could exercise *ijtihād* and change the long-existing approach in the works of *fiqh*. This had not been done by the Supreme Court until the 1960s regarding *khul'*, and throughout most of the modern period judges were unwilling to undertake the role of interpretation traditionally left to the fuqaha. During the British Period, as was seen in Chapter Two, judges of the lower courts attempted to intervene in Muslim personal law by investigating the authenticity of women who claimed to have committed apostacy and sided with husbands to restore their conjugal rights. This was repeatedly rejected by the High Courts and Muslim personal law was left largely to the realm of custom which was controlled by the *'ulamā'*. When change to the law did come with the Shari'at Application Act of 1937 and the DMMA of 1939 it was under the direction of and at the behest of the *'ulamā'*, with judges only allowed to work within the constraints that they had produced. This attitude remained largely the same following the Partition of India and the creation of the new Muslim-majority state of Pakistan. The judiciary, although now controlled by Muslims and not British officers, took over two decades to intervene in the law and exercise *ijtihād*.

The Supreme Court's ruling in the case of *Mst. Khurshid Bibi v. Baboo Muhammad Amin* was, therefore, a watershed in the role of the court. This was not the first time the issue of *khul'* had been brought to the lower courts and, as was seen in Chapter Four, another case from 1952 asked the courts to approach the primary sources and go against the rulings of *fiqh* but judges refused. In 1959 the High Court, one step below the Supreme Court, had begun the process of *ijtihād*,[552] but it was only with the case in 1967 where the full weight of the judiciary was tilted away from the *fuqahā'*,[553] prompting the criticism of Usmani.

For Usmani, the secularly-trained judiciary did not qualify for the exercise of *ijtihād* because they were not members of the *'ulamā'* class. According to his treatise, the *'ulamā'* should be defined as those who are graduates from traditional madrasas. If a judge received his education from a state-run university, even if that university had a religious pedagogy such as the International Islamic University of Islamabad (IIUI), he would not be considered as a member of the *'ulamā'*. Usmani made this clear in his description of S.A. Rahman when stating,

[552] Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi, PLD 1959 Lahore 566.
[553] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97.

> Mr. Justice S.A. Rahman has a high degree of respect in our hearts. He is a respectable person of knowledge (*qābil-e iḥtirām dānishwar*), and by his writings he has valuably contributed in the service of the nation. But, with regards the matter at hand, his stance is in contradiction to the majority of the Muslims (*jumhūr ummat*) and incorrect according to the *Sharīʿa* (*Sharʿī iʿtibār sē nā darust hai*). For this reason, we would like to comment on his arguments.[554]

By using the term "person of knowledge" and not scholar (*ʿālim*), Usmani is politely indicating that S.A. Rahman's opinion does not carry the weight of religious legitimacy. His legal rulings, particularly since they are in opposition to the "majority of Muslims" and the "*Sharīʿa*," make it imperative upon him to respond and provide the correct religious approach regarding the matter.

Another interesting point is to note that through their interpretation, both the judges of the Supreme Court and Usmani based their opinion on traditional *fiqh* texts. Although the court has challenged the views of the *fuqahā'* and returned to the primary sources of the Qur'ān and *Ḥadīth* they still felt it necessary to cite minority opinions of the *fuqahā'*, as has been seen above. For the judges, the assumed presence of difference of opinion between *fiqh* scholars gave them room to intervene. Justice Mahmood, for example, in his ruling stated, "If the opinions of the jurists conflict with the Qur'an and the Sunna, they are not binding on Courts, and it is our duty, as true Muslims, to obey the word of God and the Holy Prophet."[555]

For Usmani's rebuttal of this position the difference between the *fuqahā'* was minor and therefore irrelevant. *Ijtihād*, in his opinion, could only be undertaken when a significant difference existed between the jurists. In the situation of *khulʿ* the overwhelming body of evidence showed that there was no role for the judges to intervene. *Taqlīd* in this matter, therefore, was the only path necessary.

The reaction of Usmani, although based on a point-by-point rebuttal of the court's decision, was based more on a fear of the shifting power balance between the *'ulamā'* and the judiciary. Since the foundation of Pakistan, an Islamic state by definition, the *'ulamā'* had taken a commanding role in the formation of the country's legal system. Through these court rulings, however, their influence was under threat. When it came to the idea of *khulʿ* the *'ulamā'* were not

[554] Usmani, *Islām Mēn Khulʿ Kī Ḥaqīqat*, 235.
[555] Mst. Khurshid Bibi v. Baboo Muhammad Amin, PLD 1967 SC 97 at 113.

against the authority of the state and judiciary *per se*, rather they were against the idea that the judiciary could work without them and take religious authority into their own hands. It was upon this background that the *'ulamā'* and Usmani felt that the judiciary, decidedly not *'ulamā'* by training, were taking up the reigns of religious authority. Therefore, Usmani had to intervene to protect the role of the *'ulamā'* in the formation of the law. He chose *khul'* and one of the most landmark cases of the judiciary to stage his rebuttal.

It is possible to suggest that Usmani changed his opinion regarding *khul'*. The new law allowing women to seek *khul'* without her husband's consent came into effect in 2002, and this treatise is from 1970s when it was published in Usmani's self-run Urdu journal *al-Balāgh*,[556] from Dar al-Ulum Karachi. Its book-form edition published in 1996[557] is still prior to the passing of the *khul' law*. However, since the law's passing Usmani has published new editions of the book, the latest in June of 2017, from his own publishing house (Dār al-Ishā'at, Karachi).[558] These new editions have introduced no changes or updates to Usmani's position, and it is therefore understood that he continues to hold to this opinion. This can also be confirmed from his *fatwā* collection published in 2007 (*Fatāwā Uthmānī*) where he says,

> *Khul'* is a matter of agreement between the husband and wife and is dependent upon their mutual consent. Therefore, if the husband agrees to conduct the *khul'* then the marriage will end. However, if he does not agree to *khul'* then, according to the *Sharī'a*, he cannot be forced to do so.[559]

In a collection of his speeches titled *Dars-i Tirmidhī*, Usmani dealt with the question "is *khul'* right of the wife?" He stated,

> In our era an issue has been created around *khul'* by so-called 'renewers' of religion (*mutajaddidīn*). Although it is agreed upon by all the *'ulamā'* that consent of both parties is necessary for *khul'* and no party can force the other to accept it, these so-called renewers claim that the woman can obtain *khul'* against the husband's will through the court. Some time ago the Supreme Court of Pakistan gave a decision in line with this

[556] Usmani, "Islām Mēn Khul' kī Ḥaqīqat: Suprīm court ke aik faiṣla ke dalā'il par tabṣira (part 1)"; Usmani, "Islām Mēn Khul' kī Ḥaqīqat: Suprīm court ke aik faiṣla ke dalā'il par tabṣira (part 2)."
[557] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat [The Reality of Khul' in Islam]*.
[558] Usmani, *Islām Mēn Khul' Kī Ḥaqīqat*.
[559] Muhammad Taqi Usmani, *Fatāwā Uthmānī*, ed. Muhammad Zubayr Haq Nawaz, vol. 2 (Karachi: Maktabat Ma'ārif al-Qur'ān, 2007), 445.

opinion, and now all courts are acting upon this decision as a precedent. However, this decision is against the Qur'ān, Sunna, and the majority of the *fuqahā'* (*jumhūr*).[560]

Although Usmani in his treatise effectively challenged the right of the judiciary to intervene in cases of *khul'* his critique leaves many unresolved problems. Perhaps the most important of these is that, through denying the religious authority of the judges to undertake *ijtihād*, it places women in a difficult position. They are now – particularly following the *Khul'* Law of 2002 – able to obtain a legal separation from their husbands without consent or evidence of fault on the part of the husband. However, this judgement comes without the religious sanction of the *'ulamā'*. If the ruling of the judges is incorrect religiously, the wife has not actually received a divorce according to the religion of Islam. If she were to then remarry her marriage to her new husband would be illegitimate and subject her to the moral quandary of committing adultery (*zinā*) with her new husband. Believing in the validity of Islamic Law this would necessitate the worldly punishment of death by stoning and eternity in Hell. Usmani's critique provides no solace for these women, leaving them trapped between a legal system that allows them to obtain a *khul'* without religious sanction but with frightening religious consequences.

This dilemma was elucidated in the opinion of another contemporary Ḥanafī scholar Muftī Muḥammad Na'īm of al-Jāmi'a al-Binūriyya al-'Ālamiyya, Karachi. In his *Tafsīr Rūḥ al-Qur'ān* he mentioned that, "If the court decides unilaterally in favor of the woman and issues a decree of *khul'*, it is not valid according to the *Sharī'a*. In this case, the woman's marriage to another man will be forbidden (*ḥarām*) and considered adultery (*zinā*)."[561]

There is a way that Usmani and the *'ulamā'* could have gotten out of this dilemma and presented another option from within the *fiqh* tradition. A minority opinion within the Mālikī School does allow for the granting of a judicial *khul'* without the husband's consent,[562] which has already been presented in Chapter One. If Thānavī just a century earlier was able to cross school boundaries to produce the grounds for fault-based divorce that would be legalized through the DMMA why could Usmani not do the same in the case of no-fault based divorce?

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[560] Muhammad Taqi Usmani, *Dars-i Tirmidhī*, ed. Rashīd Ashraf Sayfī (Karachi: Maktabat al-Rushd, 1414), 3:497.

[561] Mufti Muḥammad Na'īm, *Tafsīr Rūḥ Al-Qur'ān*, 2nd ed. (Karachi: Maktabat al-Jāmi'a al-Binūriyya al-'Ālamiyya, 2017), 1:755.

[562] Khālid Sayf Allāh Raḥmānī, *Jadīd Fiqhī Masā'il* (Delhi: Qazi Publishers and Distributors, 1991), 2:194-95.

Lucy Carroll, in her article on judicial *khul'* in Pakistan, presented yet another issue created by the court in its interpretation of judicial *khul'*. In her view,

> The economic position of the divorced wife is an all or nothing affair: if she succeeds in a suit on grounds under the DMMA, she retains her full *mahr* (assuming the marriage had been consummated) and gifts received from her husband; if she loses on her main pleas and has to settle for a judicial *khul'*, she loses everything.[563]

Judicial *khul'*, therefore, although representing an important advancement in the ability of Pakistani women to obtain a divorce, "imposes a severe (and frequently unjustified) financial penalty on the woman."[564]

To complete the critique of Usmani's treatise, it is important to take into consideration the fact that he, and the school of Dar al-Ulum Karachi, are not the only representatives of the *'ulamā'* in the country. To this point, majority mention of the *'ulamā'* has been from the point of view of Usmani. There were others, however, that agreed with the court's interpretation and supported their efforts of *ijtihād*. The most important group in this discussion was the *Ahl-i Ḥadīth*, to which the rest of this chapter will now turn.

Charting Another Path: The Opinion of the *Ahl-i Ḥadīth*

The movement of the *Ahl-i Ḥadīth* (People of the *Ḥadīth*) traces its roots to mid 19th century Bhopal and the religious scholars Ṣiddīq Ḥasan Khān (1832-1890) and Nazīr Ḥusayn (1805-1902). Similar in methodology to the Salafi movement from the Arabian Penninsula, the *Ahl-i Ḥadīth* reject the concept of following a particular school of law or legal interpretation (*madhhab*), and rather seek to conduct *ijtihād* on their own through a direct engagement with the Qur'ān and Sunna.[565] They also believe in the importance of following the opinions of a living scholar and believe that all elements of the religion that are not directly brought from the Qur'ān and the Sunna are an innovation (*bid'a*) and should be opposed.[566] In Pakistan the movement is widespread and they have centers in every major city in the country, although their number of

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[563] Carroll, "Qurʾan 2:229: 'A Charter Granted to the Wife'? Judicial *Khul'* in Pakistan," 125.
[564] Ibid., 126.
[565] Sh Inayatullah, "Ahl-i Ḥadīth," *Encyclopaedia of Islam, Second Edition*, April 24, 2012, http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/ahl-i-hadith-SIM_0380?s.num=0&s.f.s2_parent=s.f.book.encyclopaedia-of-islam-2&s.q=ahl+i+hadith.
[566] Ibid.

followers is much smaller than that of the Deobandis or the Barelvi movements. Ideologically and politically, the *Ahl-i Ḥadīth* are closer in thought to the Deobandis.

As was mentioned in Chapter One the opinions of the *fiqh* schools almost universally do not recognize the right of a wife to obtain a *khul‘* without her husband's consent. There is only a single minority opinion within the Mālikī School that, with a bit of further interpretation, could allow such a situation to occur.[567] However, the *Ahl-i Ḥadīth* movement, which is by definition not bound to the methodology of the *fiqh* schools (*taqlīd)*, do not have to look to the schools in order to find an answer to a legal question. Rather, they can directly approach the fundamental sources of the law – in much the same way that the Pakistani judiciary had in the cases mentioned in Chapter Four – to reach their own conclusion. Through viewing their collective opinions on the issue during the late 19th and early 20th century the *Ahl-i Ḥadīth* movement support the current interpretation of the Pakistani judiciary in granting the right of a woman to *khul‘* without the husband's consent.

Early Opinions

Although the works of the founder of the *Ahl-i Ḥadīth* movement, Ṣiddīq Ḥasan Khān (d. 1890), do not specifically mention the question of husband's consent in *khul‘*, there is a statement made that requires agreement of spouses for *khul‘* and in the absence of such agreement it is mentioned that the ruling of the court shall prevail.[568] The first *fatwā* on the matter of *khul‘* in the *Ahl-i Ḥadīth* movement comes from Nazīr Ḥusayn Dehlawī (d. 1902). He was asked about a hypothetical man (Zayd) who had married a woman (Hinda), but had become afflicted with a skin disease, and Hinda had no desire to approach him or touch him for the last four years. Hinda wanted a *khul‘*, but Zayd disagrees, so how was she to proceed according to *sharī‘a*?[569] Nazīr Ḥusayn answered by saying that if Hinda seeks *khul‘* then it is appropriate for Zayd to agree to grant her *khul‘* and release her from his matrimonial tie. Keeping Hinda in the marriage would lead her to be ungreatful to the blessings of the marriage (*mu'addī ilā kufr ni‘mat al-zawj*), and that their situation is similar to that of the story of the Companion Thābit b. Qays mentioned in

[567] Ibn Rushd, *Bidāyat al-Mujtahid*, 3:90.
[568] Ṣiddīq Ḥasan Khān, *Al-Rawḍa al-Nadiyya Sharḥ al-Durar al-Bahiyya* (Cairo: al-Maktaba al-Tawfīqiyya, n.d.), 2:216.
[569] Sayyid Muḥammad Nazīr Ḥusayn, *Fatāwā Nazīriyya*, third edition (Gujranwala: Maktabat al-Ma‘ārif al-Islāmiyya, 1988), 3:62.

Bukhārī.[570] In another *fatwā* from the same collection, a couple approached Nazīr Ḥusayn that was constantly fighting with each other and sought a religious solution. Ḥusayn responded that the husband should divorce her and if he refused, the woman should pay the husband some money (returning her dower) to receive a *khul'*. This marriage must end because, if the couple continues to fight, they are violating the limitations placed upon their marriage by God (*Ḥudūd Allāh*) as explained in the Qur'ān.[571] In a third and final *fatwā* from this collection a husband was physically abusing his wife. She asked for a divorce, but he refused to give it to her. What was she to do, ask for a divorce, a *khul'*, or an annulment? Ḥusayn responded in the same manner as the second *fatwā*, quoting the *Ḥadīth* of Thābit b. Qays to support the idea that the husband must give a *khul'* to his wife.[572]

In each of these three *fatwās*, Nazīr Ḥusayn's position was clearly still in line with the *fiqh* opinions. However, with the next major figure within the school, 'Abd Allāh Roprī (d. 1384/1964), there are two opinions where he expands beyond that of Nazīr Husayn. In the first, a woman approaches the Muftī and says that, although he is a good and religious person, she simply dislikes his physical appearance. Roprī responded by suggesting that she approach the community council (*panchāyat*) and seek a *khul'* from them, which they could grant without the husband's consent.[573] In the second *fatwā*, issued on 7 October 1932, a question was asked whether a wife could get her marriage annulled if her husband was impotent. Roprī responded by saying that, since the government of India was under the control of Infidels (the British), the wife should approach the community council (*panchāyat*) which will force her husband to agree to the *khul'*. If the husband ultimately disagrees the community council could then issue a *fatwā* of their own for annulment (*faskh*).[574] Roprī adds another element to this *fatwā*, stating that if there was no community council, the wife could approach any upstanding member of the community – the landholder (*chawdhary*), a neighborhood tax collector (*lambardār*), or any religious scholar ('*ālim*) – who will then be able to grant her an annulment.[575]

[570] Ibid., 3:63.
[571] Ibid., 3:72-73.
[572] Ibid., 3:78-79.
[573] 'Abd Allāh Roprī, *Fatāwā Ahl-i Ḥadīth*, ed. 'Abd al-Salām Muḥammad Ṣiddīq (Lahore: Nu'mānī Kutub Khāna, n.d.), 522–23.
[574] Ibid., 520–21.
[575] Ibid.

In the *fatwās* of Roprī new steps have been taken beyond the opinion of Ḥusayn, most importantly the idea that *khul‘* can be granted without the consent of the husband. This opinion was based primarily on the presentation of the *Ḥadīth* of Thābit b. Qays, and is presented without any further explanation or interpretation. Additionally, Roprī also expands the realm of who can end the marriage and grant a *khul‘* or *faskh*, placing more emphasis on the authority of the community councils and upstanding Muslim members of the community. This can be explained in two ways: firstly, the now firm belief that India was under the rule of non-Muslim British colonial officers, and that only a Muslim judge could make sound judgments in Muslim family law, meant that other Muslims had to be sought out other than the British judges sitting in the courts. Secondly, the community and its governing council would be the group most impacted by any decision to divorce against the will of the husband and could most clearly understand the couple's circumstances and issue the most appropriate ruling. Finally, in the opinions of Roprī the concepts of *khul‘* and *faskh* seem to blend together and are spoken about simultaneously. By speaking of these two terms together Roprī is granting legitimacy to other forms of community authority, beyond the specific rights of the husband, to grant a divorce.

Contemporary Opinions

The opinions above are from earlier scholars of the movement, whose *fatwās* moved away from the *fiqh* and towards allowing a woman to receive either a *khul‘* or a judicial annulment without her husband's consent. More recently, opinions of other scholars within the *Ahl-i Ḥadīth* movement have reinforced this approach. The first of these comes from the Shaykh al-Ḥadīth of the Jāmi‘a Islāmiyya in Lahore, Thanā' Allāh Madanī, a prominent member of the *Ahl-i Ḥadīth ‘ulamā'* whose opinions regularly feature in two of the movement's largest journals: *Muḥaddith* and *al-I‘tiṣām*. The first of this two *fatwās* on this issue responded to two questions: If the court issues a *khul‘* without a husband's consent, is it valid according to the *Sharī‘a*? and, if the husband agrees to grant a divorce with conditions which are then rejected by the wife and the court and a *khul‘* is issued against him, is it valid according to the *Sharī‘a*? Madanī responded by stating that *khul‘* in general is an acceptable practice but under certain conditions: (1) that the desire to divorce should come from the wife and done only when she is in extreme hardship, (2) that the woman should offer some of her dower (*māl*) to her husband, and (3) that the husband should

not allow the relationship to reach the point that she needs to seek *khul‘*, as in this situation the husband should grant her a divorce without the need for any payment.[576]

In his second *fatwā* a woman approached the court and was granted a *khul‘* and was ordered to pay her husband 5000 Rupees. Her husband refused to accept the money and continued to claim that she was his wife. In the meantime, she had remarried. Was her marriage valid according to the *Sharī‘a*? Madanī responded to this question by stating that the judicial separation was valid and if any woman feels dislike or hatred against her husband, or is being harmed by him, she can seek *khul‘* from the judiciary. The 5000 Rupees ordered by the court should therefore be accepted by the husband and the judgement carried out. Her husband also had no right to take her back during the waiting period, and therefore her new marriage was valid.[577]

A similar opinion can also be found in the *fatwā* of ‘Abd al-Sattār Ḥammād who listed two opinions amongst previous scholars, that the judicial *khul‘* is either acceptable or not. Ḥammād, in his “humble opinion (*nāqiṣ ra’y*),” believes that the first opinion is correct, and that judicial *khul‘* should be recognized and accepted as in accordance with the *Sharī‘a*.[578] Through the *fatwās* of Madanī and Ḥammād there is a careful acceptance of judicial *khul‘*. While not denying the traditional decision from scholars of *fiqh*, both scholars have sought to chart a different path.

There are other scholars within the *Ahl-i Ḥadīth* movement, however, that are much more accepting of judicial *khul‘*. Muftī ‘Abd Allāh Amjad Chatwī, in his *fatwā* on the issue, uses the *Ḥadīth* establishing the principle of causing no harm (*la ḍarar wa lā-ḍirār*) to state that when a woman approaches the court in search of a separation from her husband, she must therefore be going through considerable hardship. The courts – and all Muslims for that matter – have a religious obligation to remove that hardship. When the court decides to grant her a *khul‘* without her husband’s consent that judgment must be accepted as in accordance with the *Sharī‘a*, as it follows with the application of the principle of no harm in Islam.[579]

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[576] Thanā’ Allāh Madanī, “Aḥkām-o Masā’il: Khul‘ Ba-Dharī‘a ‘Adālat,” *Al-I‘tiṣām (Weekly), Lahore* 46 (September 16, 1994).
[577] Thanā’ Allāh Madanī, “Aḥkām-o Masā’il: Khul‘ Ba-Dharī‘a ‘Adālat,” *Al-I‘tiṣām (Weekly), Lahore* 47, no. 22 (June 16, 1995): 9–10.
[578] Ḥāfiẓ ‘Abd al-Sattār Ḥammād, *Fatāwā Aṣḥāb al-Ḥadīth* (Lahore: Maktaba Islāmiyya, n.d.), 2:321, 3:374.
[579] Ḥammād, *Fatāwā Aṣḥāb al-Ḥadīth* see appendix of volume 3.

The most categorical of these opinions, however, is that of Ṣalāḥ al-Dīn Yūsuf. Head of the famous religious publishing house Dār al-Salām, Yūsuf in his *fatwās* on judicial *khul‘* actually blame the *fiqh* of the Ḥanafī School as part of the problem. Yūsuf states that although on the surface Ḥanafīs claim to have given a woman way out by incorporating the doctrine of *khul‘*, that is merely a "denial in the garb of acceptance."[580] By placing so many qualifications on the woman to receive a *khul‘*, the least of which being her husband's approval, is tantamount to denying the concept of *khul‘* altogether and traps women within undesirable marriages. The issue must be resolved, and the wife given a way out, either by the community council (*panchāyat*) or the court. Regardless of which of these two bodies is approached by the wife and her family, their ruling will take the place of the divorce (*qā'im maqām-i ṭalāq*) as if it had been issued by the husband. The wife would be required to uphold a one-month waiting period, but would then be allowed to remarry without the fear of committing adultery as her previous marriage was never lawfully concluded.[581]

Additionally, Yūsuf also attacks the opinion of Usmani directly, stating that giving preference to his opinion, which is based on the blind imitation (*taqlīd*) of previous Ḥanafī Scholars, is completely wrong and counterproductive to the needs of the current reality.[582] The true nature of *khul‘*, according to Yūsuf, is found clearly in the texts of the Qur'ān and Sunna, citing the *Ḥadīth* of Thābit b. Qays. There is no need, therefore, to seek out the understandings of other scholars, particularly when those opinions serve no purpose other than causing serious harm to women. Yūsuf also takes issue with Usmani's classification of Pakistani judges as "so-called renewers (*mutajaddidīn*)," stating that this is an aggressive denial of the *khul‘* that is found within the Qur'ān and the Sunna.[583]

Mufti Muḥammad Shafī‘ (d. 1976), father of Muḥammad Taqi Usmani, was also an exegete whose exegesis enjoys high degree of acceptance within the Ḥanafī-Deobandi circles of the Indian Subcontinent. His exegesis *Ma‘ārif al-Qur'ān* is written on the *fiqhī* methodology where all *fiqh* issues are discussed in detail and an effort has been made to provide solutions of

[580] Ḥāfiẓ Ṣalāḥ al-Dīn Yūsuf, "'Awrat Ko Ṭalāq Kā Ḥaqq Tafwīḍ Karnā, Sharī‘at Mein Tabdīlī Hay [Granting Right to Divorce to the Woman Is an Alteration in Sharī‘a] Part 2," *Muḥaddith* 45, no. 4 (362) (September 2013): 57.
[581] Ibid., 57–58.
[582] Ibid., 60.
[583] Ibid.

contemporary issues within the Qur'ānic framework. While Shafī' discussed all the verses dealing with *aḥkām* (*fiqh* rulings) and provided his detailed opinion on them, he opted to remain silent while explaining verse 2:229 that dealt with the issue of *khul'*.[584] Ṣalāḥ al-Dīn Yūsuf notes that Shafī''s silence on this subject proves that despite being a Ḥanafī-Deobandi exegete and scholar, he was not convinced with the Ḥanafī position and wouldn't want to go against the school's teachings hence he chose to remain silent on this subject. Such attitude is a proof that Ḥanafī position on *khul'* is contrary to Qur'ān and Sunna.[585]

For Yūsuf, as well as the other scholars mentioned from the *Ahl-i Ḥadīth* movement, the question of judicial *khul'* was not about the power and authority of the *'ulamā'* as it clearly was in the treatise of Usmani. The true point was in the methodology used to approach a religious ruling. For Usmani, the only way that a ruling could be considered sound was whether it had been previously held by a majority of scholars within a particular school, in this case the Ḥanafīs. For the *Ahl-i Ḥadīth*, however, it was the rulings reliance upon sound texts that gave it legitimacy. Previous generations, without denying them proper respect, could have erred in their interpretation of the texts or used their interpretation to apply the texts to completely different contexts than that of contemporary Pakistan.

Using the methodology of the *Ahl-i Ḥadīth* movement as an alternative to the approach of Usmani helps to more adequately conceptualize what is going on within the Pakistani judiciary. Here judges, instead of approaching the rulings of the Ḥanafī School, chose to directly interpret the Qur'ān and Sunna according to their needs. By doing so, they were exercising their ability to engage in juristic interpretation (*ijtihād*). This was completely out of line for the judiciary according to Usmani, and they had no right to do so. Additionally, even Usmani in his intervention was unwilling to provide alternatives, and rather chose to continue with the standard *fiqh* interpretation of *khul'*.

The incorporation of the opinions of *Ahl-i Ḥadīth* also makes clear the presence of the power dynamics that exist between different types of *'ulamā'* and the state, particularly the judiciary. Usmani, although an important member of the *'ulamā'* and one of the most highly-respected religious scholars in the country, does not represent the final word in Pakistani

[584] Muftī Muḥammad Shafī', *Ma'ārif Al-Qur'ān: Sūra Fātiḥa Wa Baqara* (Karachi: Idārat al-Ma'ārif, 1994), 1:499-515.
[585] Yūsuf, "'Awrat Ko Ṭalāq Kā Ḥaqq Tafwīḍ Karnā, Sharī'at Mein Tabdīlī Hay," 64.

religious discourse. There are others, in this case from the *Ahl-i Ḥadīth*, who can provide alternative methodologies to the interpretation of the law to grant religious legitimacy to the workings of the judiciary. This has to be carefully negotiated, however, as the *Ahl-i Ḥadīth* movement is the least-followed Sunni methodology in the country.

Middle Voices within the Ḥanafī Tradition

Aside from the approach of the *Ahl-i Ḥadīth*, there are other voices from within the Ḥanafī tradition that present a slight alternative to the outright rejection of scholars like Taqi Usmani and the full acceptance of the legitimacy of the state judiciary from the *Ahl-i Ḥadīth.* In the *fatwā*s of the Jāmiʿat al-ʿUlūm al-Islāmiyya, Binori Town, Karachi, published in their monthly journal *Bayyināt,* for example, their official stance on the matter of judicial *khulʿ* begins by stating that women, not having the proper knowledge of Islam, approach the courts and ask for the issuance of the *khulʿ* in order to get relief from the abuse they suffer by their husbands. The courts, due to their equally ignorant position regarding matters of religion, grant that *khulʿ* by simply following through with the petition of the wife and not exploring other Islamic legal avenues through which the problem could be solved.[586] In these cases, if there is a legitimate ground for the dissolution of the marriage – such as physical abuse – and the religiously legitimate witnesses provided by the parties to the case would testify to the presence of those grounds, the decision of the court can be understood as religiously legitimate as a dissolution "*faskh*,"[587] following the principle of removing differences between scholars in a situation of difficulty (*rāfiʿ li'l-khilāf*).

The work of the Pakistani judiciary, according to this *fatwā*, is merely a mistake in the legal terms used, and what the judiciary calls *khulʿ* should be called *faskh.* The presence of this mistake does not, however, render the decision of the judiciary invalid, but simply one that has a small error in name rather than substance.[588]

Alternatively, another scholar from India, Khālid Sayfullāh Raḥmānī of the Islamic Fiqh Academy, recently argued in 1991 that in cases of *khulʿ* the Ḥanafī position that the husband's

[586] Muftī 'Abd al-Qādir, "Khula Lenay Kā Ṣaḥīḥ Ṭarīqa [The Correct Way to Obtain Khulʿ]," *Bayyināt* 57, no. 12 (1995/1415): 60.
[587] Ibid., 60.
[588] Ibid.

consent is required should be dismissed and the court has the right to force the husband to accept the returned dower and grant the divorce to his wife.[589]

Each of these opinions come with serious problems and have therefore not been taken up into the mainstream. For example, the position of the Jāmiʿat al-ʻUlūm al-Islāmiyya – suggesting that the declaration of *khul*ʻ is just a mistake in naming of the process – provides no better alternative to help women find ways out from their marriages. Had she been able to provide witnesses or evidence under some article of the DMMA, she would not have needed to ask the court for a *khul*ʻ in the first place, as a full dissolution of the marriage with her retaining her full dower would have been available to her. The opinion of Sayf Allāh Raḥmānī, on the other hand, presents nothing new to the discussion, as the judiciary through interpreting and applying the concept of *khul*ʻ have already taken the matter into their own hands. A court "forcing" a husband to accept the returned dower and release his wife is already effectively taking place – exactly what someone like Taqi Usmani has a problem with – and therefore this opinion would not add or provide an alternative to the current situation.

Conclusion: The *Khul*ʻ Law of 2002 and the *Sharīʿa*

The purpose of this chapter was to highlight and critique the published opinions of Mufti Muhammad Taqi Usmani with regard to judicial *khul*ʻ. His approach, which criticized the judiciary for taking power away from the *'ulamā'* and challenging their authority, suggested that the courts had not religious right to intervene in the marital affairs of a couple when there was no fault from the husband and force him to separate from his wife without his consent.

Despite Usmani's criticism, however, the understanding of the judiciary reflected in the opinions of Justice S.A. Rahman and S.A. Mahmood became the standard interpretation of the law and was eventually enshrined in legislation with the *Khul*ʻ Law of 2002. This law was passed by President Parvez Musharraf, who had taken over as the military administrator in 1999 following the removal of the democratically elected Prime Minister Muhammad Nawaz Sharif. Within his first few years in office, Musharraf enacted a string of reforms that focused particularly on the rights of women. In addition to the *Khul*ʻ Law of 2002, Musharraf also passed the Protection of Women (Criminal Laws Amendment) Act 2006 which amended the Hudud Ordinances of 1979 to separate cases of *zinā* (adultery with mutual consent) from those of

[589] Raḥmānī, *Jadīd Fiqhī Masā'il*, 2:193-95.

rape.[590] Until this point, women who reported a rape who could not provide the satisfactory number of witnesses were subject to then having the tables turned against them and being accused of committing adultery.[591] With the new amendments made by the Women's Protection Act women would now be protected from such prosecutions and, even in cases of adultery, the main punishment would fall upon the man alone.[592]

Recent scholarship has suggested that Musharraf's reforms were the result of pressure to force Pakistan's legal system to conform with international human rights regimes. About the role of women, the UN in 1979 had passed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which Pakistan had ascended to in 1996.[593] It was therefore the need to conform with the UN that Musharraf enacted these reforms. While this might be true with regards to some of the reforms passed, the content of the *Khul*ʿ Law of 2002 was already considered officially part of Pakistani law since the court cases mentioned above and in Chapter Four.

The problem following the court cases, and the *Khul*ʿ Law as well, was that it needed religious legitimacy to become accepted by a majority of Pakistan's population. Usmani's opinion, which has been republished as recently as 2017, undermines that legitimacy. By doing his utmost to protect the authority of the *'ulamā'* and challenge the rights of the courts, however, Usmani put millions of Pakistani women in an uncomfortable moral dilemma, particularly when choosing to remarry. Usmani's critique is also constantly reinforced by televangelists from both the Deobandi and Barelvi tradition and their television shows, which are watched by millions, continue to question the role of the judiciary and throw their legitimacy, and the consciences of Pakistani women, into uncertainty.

By presenting the approach of an alternative movement in the country, the *Ahl-i Ḥadīth*, religious legitimacy can be granted to the judgements of the Pakistani courts. Their understanding solves the moral dilemma created by the opposition of the Deobandi *'ulamā'* to

[590] Munir, "The Protection of Women (Criminal Laws Amendment) Act, 2006."
[591] Asifa Quraishi, "Her Honour: An Islamic Critique of the Rape Provisions in Pakistan's Ordinance on Zina," *Islamic Studies* 38, no. 3 (1999): 406–7.
[592] Munir, "The Protection of Women (Criminal Laws Amendment) Act, 2006," 90.
[593] Weiss, "Straddling CEDAW and the MMA: Conflicting Visions of Women's Rights in Contemporary Pakistan," 163.

judicial *khul‘* and removes the fear that women could face an eternity in Hell when remarrying if their previous marriage was removed by the judiciary.

The approach of the *Ahl-i Ḥadīth* was also taken up by the Federal Shariat Court in 2014, which was tasked with ascertaining the *Khul‘* Law’s adherence to the *Sharī‘a*. They consulted *‘ulamā’* from across the Pakistani religious spectrum and ultimately issued a ruling confirming that the law was in line with the *Sharī‘a*.[594] Amongst those consulted during this process was Ṣalāḥ al-Dīn Yūsuf. He was more conservative here than in his independent *fatwās* cited above, and he said that in general situations *khul‘* should take place with the mutual consent of both parties. However, if the husband does not respond to or listen to the wife’s justified request and makes trouble for both families the judge can issue the *khul‘* decree. Once issued, the judgment of the court will be considered as in the place of the husband’s divorce.[595]

Therefore, the role of judicial *ijtihād* in the expansion of *khul‘* undertaken by the Pakistani judiciary should be considered as in line with the *Sharī‘a*. Granting *khul‘* to wives who found themselves in an undesirable marriage did not come as a result from external pressure and, through the application of the methodology of the *Ahl-i Ḥadīth*, can receive the legitimacy of the *‘ulamā’*. Most importantly, the work of the judiciary in this matter shows one of the most important principles of juristic interpretation, and one forgotten by Usmani: that various opinions exist to provide a way out of a conflict and make life easier for Muslims.

[594] Saleem Ahmad v. The Government of Pakistan, PLD 2014 Federal Shariat Court 43.
[595] Ibid.

Conclusion

The purpose of this dissertation has been to highlight the dilemma faced by Pakistani women when it came to dissolution of marriage, and to show how the judiciary took up the reigns of reform in the second half of the twentieth century to help solve that dilemma. They did so by implementing a form of independent legal interpretation, within the classical Islamic tradition of *ijtihād,* where they stepped beyond the boundaries of all the schools of classical interpretation and re-approached the foundational texts of Islam to find a way out for Pakistani women.

Through the tools of *ijtihād*, the Pakistani judiciary developed a new understanding of the concept of *khul'*. For centuries this device, in which a woman voluntarily gives up her dower in order to obtain a dissolution of marriage from her husband, required his consent. This left her trapped in a difficult situation, as all the other forms of ending a marriage were solely in the hands of the husband.

The ability of a woman to legally separate from her husband in South Asia, beginning with the traditional approach of Islamic jurisprudence and extending to the present situation in the new state of Pakistan, has proven to be a complex dilemma. Within the Ḥanafī legal tradition of Islamic Law, a woman finds herself with almost no option to separate from her husband without his complete consent. Only in a few limited cases such as when he has been missing for 80 years or has been proven impotent (and he must have been given adequate time to seek medical help and improve his condition) can a wife secure a judicial proclamation of the dissolution of her marriage.

This inability of a woman to remove herself from an unwanted marriage left her with no recourse to improve her life and subjected her to potentially years of physical and mental abuse and family strife. These internal fights often led to women choosing to take strong decisions to, for example, give up her faith to escape her marriage or worse, take her own life. Men, on the other hand, had multiple outlets. They could issue a divorce at any time or take a second, third, or fourth wife.

At the end of the colonial period and with the events of Partition creating the new state of Pakistan, the young country's judiciary felt that they were finally in a position where they could intervene and change the interpretation of the law. After almost a century of their home being governed by non-Muslims, they now lived in a country that was constitutionally defined

as adhering to the Qur'ān and Sunna, and that the authority had been invested in them to make the change and give women the right to separate from their husbands.

Although it was the judiciary that took many important steps it was only at the highest levels that those advances were made. Chief among these was the re-interpretation of *khul'* found in the Qur'ān and *Ḥadīth* to remove the requirement of the husband's consent. Without the strength of actual law, however, this precedent was largely ignored by the lower courts that remained conservative and reluctant to do anything more than simply apply the law on the books. If a woman wanted to take advantage of this new interpretation she had to spend years (and a significant amount of money as well) appealing her case until she finally reached a high enough court that could issue her a *khul'* decree.

It was only in the 21st century and as similar movements were taking place in other countries within the Muslim World when the Pakistani government decided to amend the law and grant a unilateral process of *khul'*. Unlike what had been done with the DMMA, where the *'ulamā'* and other stakeholders came together to create a law to change the British approach to custom, these new amendments were simply an adaptation of what was already happening in other jurisdictions. Once put in place the law faced significant problems and, although it was heavily altered in 2015 to change the law, the problem was still not solved for Pakistani Muslim women. This is particularly due to the position of the *'ulamā'*, many of whom maintain the position that a *khul'* issued by the judiciary holds no religious legitimacy and that, if the woman chooses to remarry, she is committing the crime of adultery as she was never properly divorced from her husband. This problem was partially solved in a case before the Federal Shariat Court in 2014, that gave religious legitimacy to the judicial interpretation.

Chapter Summaries

Chapter one began the discussion of this dilemma by outlining in detail the treatment of *khul'* in classical Islamic law by engaging with the four Sunni schools and their interpretation of the concept within the Qur'ān and Sunna. All four schools agree that a *khul'* becomes effective only if the husband consents to it. That is based largely on the Qur'ānic verse 2:229 and the infamous *ḥadīth* regarding Thābit b. Qays. Jurists dealt with this *ḥadīth* at length and concluded that the case of Ḥabība bint Sahl, that was decided by the Prophet in her favour by asking her to return the garden to her husband Thābit b. Qays, was in fact an advice to Thābit from the Prophet to which Thābit responded in affirmative and finally divorced his wife. As a result, once a woman

enters into a marriage contract, it is almost impossible for her to come out of the union without the agreement of her husband, even if she is living a miserable life. There are a few exceptions to this rule where a judge may rule in favour of wife if she proves that her husband is for example permanently impotent, has disappeared, or completely fails to provide her maintenance.

This chapter argued that, once the classical position on *khul'* was established along with the establishment of the four schools, no change occurred until the modern period when scholars and judges began to revisit the issue in the light of Qur'ān and Sunna by using a methodology of cosmopolitan *fiqh* or pragmatic eclecticism where scholars benefited from all available juristic opinions of different schools and depending upon the circumstances do not hesitate to choose the non-preferred opinion.

The second chapter dealt with the foundations that paved the way for change in the fourteen-century long stagnant opinion to open new paths for women. What played a fundamental role in this massive change was women's use of the legal device (*ḥīla*) of apostasy to get out of an unhappy marriage. The *'Ulamā'*, who had long been silent, now began to move against the use of this device and saw the plight of women as a threat to Muslim identity in the Subcontinent. For example, Ashraf 'Alī Thānavī's new *fatwā* against classical Ḥanafī opinion of automatic dissolution of marriage in case of apostasy proved that juristic opinions are not final and cannot always be adhered to, a position that later judges and legislators took while declaring *khul'* without the consent of the husband permissible.

The result of these changes was the Dissolution of Muslim Marriages Act of 1939, which outlined several grounds upon which a woman could obtain a divorce from the judge. The new law placed more power in the hands of the judiciary to intervene and allowed British judges to no longer fully rely upon the established custom of the *'ulamā'* and was simultaneously championed by the *'ulamā'* as a victory of their authority and their ability to influence the construction of the law. Following the Partition of South Asia and the creation of the new state of Pakistan, however, judges would eventually depart entirely from the traditional understanding of Islamic Law, creating a strong rift between the judiciary and the religious establishment.

Chapters Three and Four then turned to the next phase of developments towards the provision of the full right of *khul'* to women until the modern day, with Chapter Three beginning by describing the development of the Pakistani court system and the statutes that governed

them. The chapter argued that the Pakistani legal system during the second half of the twentieth century represented a joint effort by all areas of the government. From the creation of a new specialized family court system in 1964 to the relaxation of evidence laws, the Pakistani judiciary, legislature, and executive worked together – albeit with little mutual coordination – to find solutions for the problems faced by women.

The culmination of that project was the enactment of amendments in 2002 when courts were given for the first time the jurisdiction to rule on *khul*ʿ cases without the consent of the husband. This enactment, made in haste, created yet a new dilemma for women. Since the law of 2002 forced Family Courts to issue *khul*ʿ decree, it practically made the DMMA ineffective, causing a new hardship to women where they were forced to return their dower even if they have not asked for a *khul*ʿ. This issue was finally resolved in 2015 when DMMA and *khul*ʿ were once again separated.

Chapter Four then focused on the role of judicial activism during the twentieth century. Several landmark cases were discussed in which the judiciary took a position that it is incumbent upon them, as judicial representatives of an Islamic state created by and for Muslims to shape their lives according to the principles of the *sharīʿ*a, to re-evaluate the issue of *khul*ʿ directly from the Qur'ān and Ḥadīth. In doing so, the judges gave significant importance to the *ḥadīth* of Ḥabība and Thābit and two Qur'ānic verses, 2:229 and 4:35 interpreting three of these direct commandments of God and Prophet granting absolute authority to judges in case of *khul*ʿ petition.

This chapter argued that the activism of Pakistani judges, although it did not fit into the classical parameters of *ijtihād* determined by classical jurists, formed a type of neo-*ijtihād* employed to resolve a problem that had remained untouched for centuries. Judges were clear in their judgements that they are not bound to follow any juristic opinion or jurist (*faqīh*) and are free to do their own interpretation (*ijtihād*), deriving their legitimacy from the interpretation of different Qur'ānic verses.

The *'Ulamā'* of Pakistan held serious objections to this process, and several prominent scholars issued statements declaring the work of the judiciary – and eventually the legislature in 2002 and 2014 – as against Islamic Law. Chapter Five deals in detail with one of those opposition scholars, Mufti Taqi Usmani, who wrote a strong criticism of the Supreme Court's *ijtihād* in 1967.

Chapter 5 deals with the dilemma created by Mufti Taqi Usmani and like *'ulamā'*. Despite having a seal of Federal Shariat Court on the Amendment of 2002, *'ulamā'* consider that the wife remains in marital contract with her husband and her remarriage with another person constitutes adultery, causing a serious moral issue for the women who have received court decree and marriage to another person.

This chapter argues that it is imperative on the *'ulamā'* class of Pakistan to exert further effort in the issue of *khul'* and do *ijtihād* to resolve this dilemma. This is necessary because remaining as such has several other problems such as the question of legitimacy of an Islamic state, its inability to enact laws in conformity with *sharī'a*, limitations on the authority of a Muslim *qāḍī*, and so on.

Two issues were dealt with in this dissertation that both show the historical complexity of *khul'* and outline the dilemma that Muslim men and women alike have faced - and continue to face - within the development of the Pakistani legal system.

The Role and Authority of the *'Ulamā'*

The first issue raised is the role of the *'ulamā'* in the new Pakistani state. As was seen in Chapter Two, the *'ulamā'* played a critical role in the development of Muslim family law during the colonial period, as British colonial officers were reluctant to interfere in an area of the law so heavily influenced by local religious custom. Therefore, when the issue of apostacy became apparent, it was the *'ulamā'* that led the charge in calling for reform and developing the DMMA of 1939.

Following Partition, however, the *'ulamā'*s role and influence in the Pakistani legal system has been much more precarious. In the eyes of reformers, activists, and many elite members of the public, the *'ulamā'* are barriers to reform. Their attachment to the centuries-old rulings of the Ḥanafī School makes their opinions unsuitable for a modern state in the 20th century. This belief is precisely what led the judiciary to approach the Qur'ān and Sunna on their own, bypassing the authority of the *'ulamā'* in order to construct their own interpretation of Islamic law.

On the other hand, the *'ulamā'* retain a significant level of authority at the social level. The ability of Mufti Taqi Usmani to claim that women who receive a *khul'* from the judiciary have not been religiously released from their marriage is, by itself, clear evidence that the *'ulamā'* still have a significant voice within the country. The *'ulamā'* also continue to be heavily

involved in the legislative process, with Taqi Usmani himself serving as a judge on the Federal Shariat Court and a member of the Shariat Appellate Bench of the Supreme Court of Pakistan. Currently, Fida Muhammad Khan, a traditionally-trained Muslim scholar from the Deobandi School, sits on the Federal Shariat court, as required by the country's constitution.[596]

What this dissertation sought to highlight is that, when discussing the question of the authority of the *'ulamā'*, it is important to *not* discuss the *'ulamā'* as a monolithic class. In the particular issue of *khul'*, for example, it has already been shown that the *Ahl-i Ḥadīth* have presented an alternative path that allows courts the authority to issue *khul'* proclamations that carry the full legitimacy of Islamic law. Through understanding that there are multiple voices within the *'ulamā'* on a diverse range of issues such as family law and *khul'*, observers can more carefully chart the impact of traditional religious scholars on the development of the legal system. When one particular individual or legal tradition – here Mufti Taqi Usmani and the Deobandis – creates a societal issue through their interpretation, all is not lost. Other schools and interpretations can be sought out and the opportunities for interpretation are still available.

What is *Ijtihād*?

A second issue critical to the thesis of this dissertation is the question of judicial reasoning (*ijtihād*) and its ability to be applied in the modern period by the Pakistani judiciary. For the judges working on the case of *khul'*, *ijtihād* closely followed the classical understanding, or that it is the exertion of mental energy in the search for a legal opinion to the extent that the faculties of the jurist become incapable of further effort. In other words, *ijtihād* is the maximum effort expended by the jurist to master and apply the principles and rules of *uṣūl al-fiqh* (legal theory) for the purpose of discovering God's law.[597]

The judges took this definition at face value and believed that they, with the authority of Pakistan as a constitutionally Islamic state, could intervene in these issues beyond the realm of the *'ulamā'* and fill the gap that they had created. By doing so, they ignored most of the other more deeper understandings of *ijtihād* in the premodern sense. Primarily, almost none of these judges were qualified as *mujtahids*, with many lacking even the most basic requirements of Arabic knowledge. Although they had the help of jurisconsults, particularly in their later rulings,

[596] Constitution of Pakistan, Art. 203(c), Clause 3(a).
[597] al-Āmidī, *Al-Iḥkām Fī Uṣūl al-Aḥkām*, 2:379-81; al-Shawkānī, *Irshād Al-Fuḥūl Ilā Taḥqīq al-Ḥaqq Min ʿIlm al-Uṣūl*, 2:232–33.

they relied mostly on English and Urdu translations of the primary texts. Even their approach to the Qur'ān was through the medium of translation, further reducing their ability to approach the intricacies of the primary texts.

What the judges also ignored was the nature of their role as a top-down representative of the modern state, something that was not considered during the premodern period. Through their intervention in matters of family law they created yet another gap of religious authority and sparked a conflict with the *'ulamā'* that has continued unabated to this day. Although, particularly with the new legislative amendments brought in force in 2015, this has given women an important *legal* avenue to end their marriages, they have done so without the power of religious authority. Additionally, instead of performing legal interpretation within the realm of Islam, the judiciary has exacerbated the division between the religious and the secular, and the law and the *Sharī'a*.

Because of this division, *ijtihād* in its modern Pakistani version should not be seen as *truly Islamic ijtihād*, rather a form of neo-*ijtihād* that works within the confines of the overwhelming authority of the modern state. It uses the state's powers of coercion to force changes in the law and removes the inherently pluralistic nature of the premodern Islamic legal system.

This is not necessarily a problem without end and, as was seen in Chapter Five, other groups of the *'ulamā'* have supported the decisions of the government and the judiciary in their attempts to reform. The Pakistani judiciary also found support for their efforts through the works of modernist *'ulamā'* like Iqbal and others who argued for an expanded definition of *ijtihād*. These writers, who saw the suffering of South Asian Muslims under the restrictive rulings of the *fiqh* discourse, called upon rulers and, in the case of Iqbal, the right of the society to develop new interpretations of the *Sharī'a* to fit the needs of the society.

It is actually the dilemmas faced by the people, in this case women who desire to get out of their unwanted marriages, that defined the direction needed in legal developments. In this aspect, the *ijtihād* of the Pakistani judiciary can be seen as in line with premodern understandings. Acting as part of what Hallaq would call the "social network" of the legal culture of the *Sharī'a*, the judges are just one part of a larger structure, promoted by some – albeit not all – of the influential *'ulamā'* of the country. In this system and as mentioned above, however, the *'ulamā'* find themselves relegated to a position of opposing or accepting the changes *post facto*.

Status of the Law and the Future

To confirm that this remains the opinion of Mufti Taqi Usmani, this dissertation submitted the question of *khul‘* to the institution founded by his father and which he currently runs: Dar al-Uloom Karachi. Sent on December 23, 2018, the question was framed as the following:[598]

> In the Name of Allah the Most Beneficent, Most Merciful
>
> Al-Salāmu ‘Alaykum wa-Raḥmat Allāh wa-Barakātuh,
>
> The issue [at hand] is that, after a dispute a woman has filed a suit for dissolution of marriage on the basis of *khul‘*. The husband does not want separation at any cost and has clearly expressed [such] in court. However, the court’s position is that according to Pakistani law once the woman files for dissolution of marriage by *khul‘* and she is not ready to reconcile then the court has no other option but to issue the *khul‘* decree. The question is, in this situation when the husband denies *ṭalāq* or *khul‘* completely and in no case is ready to pronounce it, does the court have a *shar‘ī* right to unilaterally issue a *khul‘* decree to the wife? What is the *shar‘ī* status of such a decree? After this decree is the woman still bound by the marriage to her husband or she is free to marry whomever she deems appropriate?
>
> Please inform according to the *shar‘ī* point of view.

On January 15, 2019 the following response was received from Dar al-Uloom:

> In the name of Allah the Most Beneficent, Most Merciful
>
> The Answer, with the help of the Right Inspirer
>
> For *khul‘* to be valid, according to the *sharī‘a*, agreement of husband and wife is necessary. Therefore, without the agreement of the husband the court’s decision of *khul‘* or the dissolution of marriage (*faskh-i nikāḥ*) is not valid according to the *sharī‘a*. Likewise, the marriage does not end due to this decision of the court as per the *sharī‘a* (*shar‘an*), nor it is permissible for her to marry someone else. However, if from the husband’s side a reason exists from among the reasons for dissolution of marriage (*faskh-i nikāḥ*) then court’s decision could be valid according to the *sharī‘a*. But the ruling of that could only be given after looking into all the documents issued by the court. Therefore, if the court has issued the *khul‘* decree unilaterally, the ruling (*ḥukm*) of it could be sought after

[598] The original question and *fatwā* can be found in Appendix 1

sending us all the court documents. _____ And Allah the Praiseworthy and Exalted knows the best.

The *fatwā*, first drafted by Mufti Muḥammad Ḥassān Sakharwī, was also confirmed by a more senior Mufti named Mufti ʻAbd al-Raʼūf Sakharwī. It confirms that the position of Mufti Taqi Usmani and the religious institution he is responsible for has remained the same since his initial opposition expressed in 1970. In its original draft, however, the above *fatwā* went even further, suggesting that no matter what opinion was issued by the court – *khulʻ* or *faskh* – it would be illegitimate according to Islamic Law. This was quickly altered by the confirming Mufti, who scratched out the ruling regarding dissolution.

More importantly, the reviewer also insisted on the repeated insertion of the word *Sharīʻa*. The *fatwā* in Urdu begins with it (*sharʻan*) and it is included in every sentence of the *fatwā*'s body. This repetition highlights the place of authority that Dar al-Uloom is attempting to occupy within the mind of the person asking for the *fatwā*. This is also evident through the *fatwā*'s suggestion that the court's ruling could be considered valid if Dar al-Uloom was given the opportunity to review all of the relevant records. The judiciary, therefore, still does not have the authority to grant rulings according to Islamic Law, and their rulings must be subject to a religious "review" by the those who have true religious legitimacy.

Within this suggestion of verification is also the belief that, in contrast to the Pakistani Constitution, that the Muftis of Dar al-Uloom believe that there are two parallel legal systems functioning in the country. On the one hand are the rulings of the Pakistani courts which, although carrying some legal weight and consequence, cannot interfere with the understanding of religion. On the other hand is the *Sharīʻa*, guarded only by the legitimacy of the *'Ulamā'* (of Dar al-Uloom) who should verify the rulings of the court in order to make it suitable according to Islam.

This new *fatwā*, confirming the position of Dar al Uloom Karachi and Mufti Taqi Usmani, highlights the significant challenges facing the Pakistani legal system as it attempts to further regulate the question of *khulʻ*. As was seen above, there is a belief amongst at least some Deobandi *'ulamā'* that Pakistan's legal system is no longer (or never was) Islamic. For a state that claims in its constitution to follow the *Sharīʻa*, this is a serious issue that must be addressed if any further legal developments are to take place. Left unresolved, this issue could result in a breakdown of

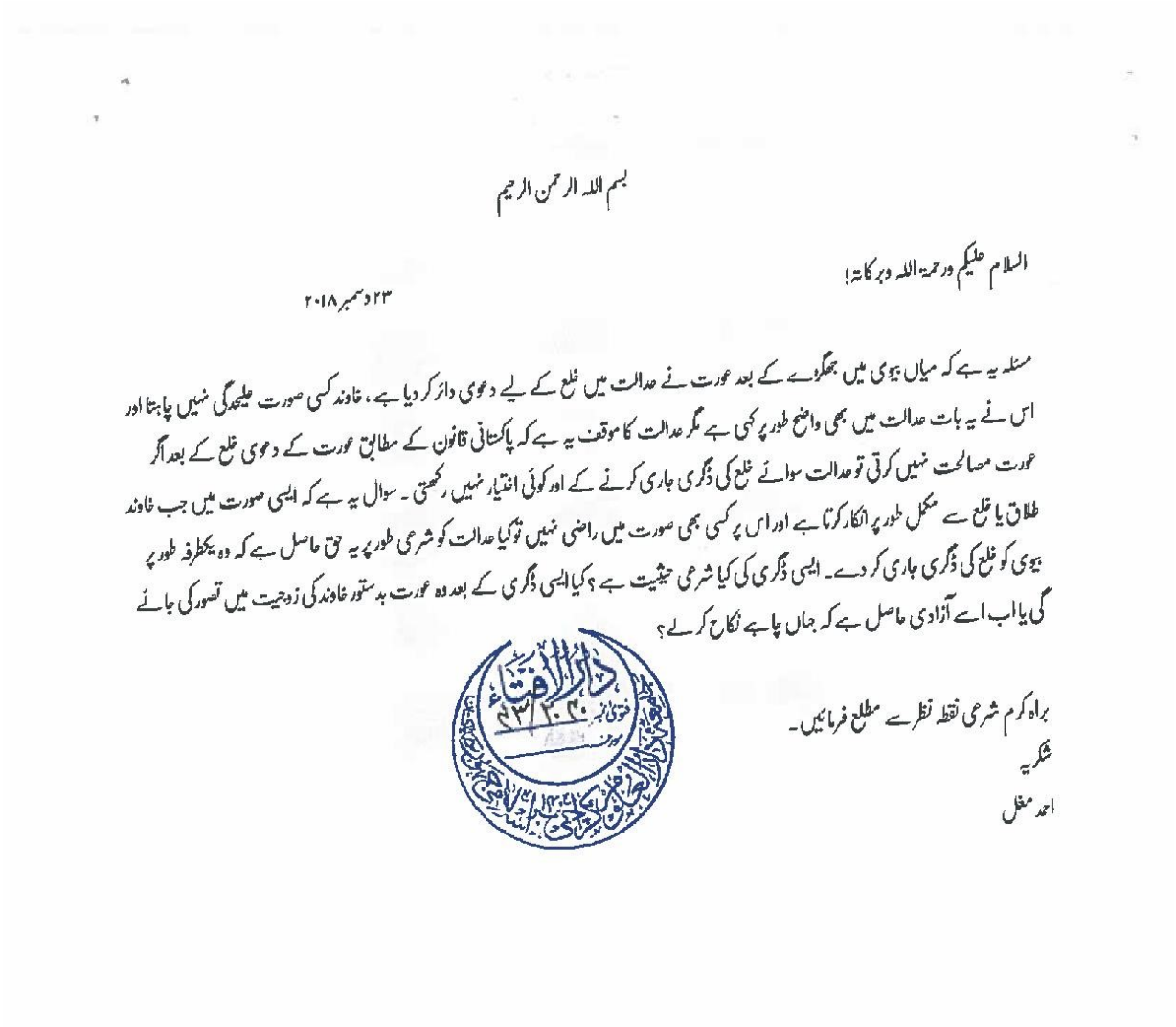
the legal system altogether, with groups refusing to accept the laws of the Pakistani legislature as they are not in conformity with the *Sharīʿa*.

As for the judiciary, while this dissertation argues that they do have the authority of *neo-ijtihād*, they must work to overcome the question of legitimacy in the eyes of both the *'ulamā'* and the Pakistani people. Searching out the opinions of other religious schools, opening a greater dialogue with the *'ulamā'*, and bringing the diverse groups of the Pakistani system together would be an important first step towards reconciling the problems that exist within the law and society.

Appendix

Fatwā of Taqi Usmani that he gave recently in response to my direct question to him.

In order to affirm that Mufti Taqi Usmani has not changed his position since, I tried to contact him by phone but could not reach him, later I was told to contact him by email and ask your question. I send him the following email:



بسم اللہ الرحمن الرحیم

السلام علیکم ورحمۃ اللہ وبرکاتہ!

۲۳ دسمبر ۲۰۱۸

مسئلہ یہ ہے کہ میاں بیوی میں جھگڑے کے بعد عورت نے عدالت میں خلع کے لیے دعوی دائر کر دیا ہے، خاوند کسی صورت علیحدگی نہیں چاہتا اور اس نے یہ بات عدالت میں بھی واضح طور پر کہی ہے مگر عدالت کا موقف یہ ہے کہ پاکستانی قانون کے مطابق عورت کے دعوی خلع کے بعد اگر عورت مصالحت نہیں کرتی تو عدالت سوائے خلع کی ڈگری جاری کرنے کے اور کوئی اختیار نہیں رکھتی۔ سوال یہ ہے کہ ایسی صورت میں جب خاوند طلاق یا خلع سے مکمل طور پر انکار کرتا ہے اور اس پر کسی بھی صورت میں راضی نہیں تو کیا عدالت کو شرعی طور پر یہ حق حاصل ہے کہ وہ یکطرفہ طور پر بیوی کو خلع کی ڈگری جاری کر دے۔ ایسی ڈگری کی کیا شرعی حیثیت ہے؟ کیا ایسی ڈگری کے بعد وہ عورت بدستور خاوند کی زوجیت میں تصور کی جائے گی یا اب اسے آزادی حاصل ہے کہ جہاں چاہے نکاح کر لے؟

دار الافتاء فتوی نمبر ۲۰۲/۲۳

براہ کرم شرعی نقطہ نظر سے مطلع فرمائیں۔

شکریہ

احمد مغل

بسم اللہ الرحمن الرحیم

السلام علیکم ورحمۃ اللہ وبرکاتہ! ۲۳ دسمبر ۲۰۱۸

مسئلہ یہ ہے کہ میاں بیوی میں جھگڑے کے بعد عورت نے عدالت میں خلع کے لیے دعوی دائر کر دیا ہے، خاوند کسی صورت علیحدگی نہیں چاہتا اور اس نے یہ بات عدالت میں بھی واضح طور پر کہی ہے مگر عدالت کا موقف یہ ہے کہ پاکستانی قانون کے مطابق عورت کے دعوی خلع کے بعد اگر عورت مصالحت نہیں کرتی تو عدالت سوائے خلع کی ڈگری جاری کرنے کے اور کوئی اختیار نہیں رکھتی ۔ سوال یہ ہے کہ ایسی صورت میں جب خاوند طلاق یا خلع سے مکمل طور پر انکار کرتا ہے اور اس پر کسی بھی صورت میں راضی نہیں تو کیا عدالت کو شرعی طور پر یہ حق حاصل ہے کہ وہ یکطرفہ طور پر بیوی کو خلع کی ڈگری جاری کر دے۔ ایسی ڈگری کی کیا شرعی حیثیت ہے ؟ کیا ایسی ڈگری کے بعد وہ عورت بدستور خاوند کی زوجیت میں تصور کی جائے گی یا اب اسے آزادی حاصل ہے کہ جہاں چاہے نکاح کر لے ؟

براہ کرم شرعی نقطہ نظر سے مطلع فرمائیں۔

شکریہ

احمد مغل

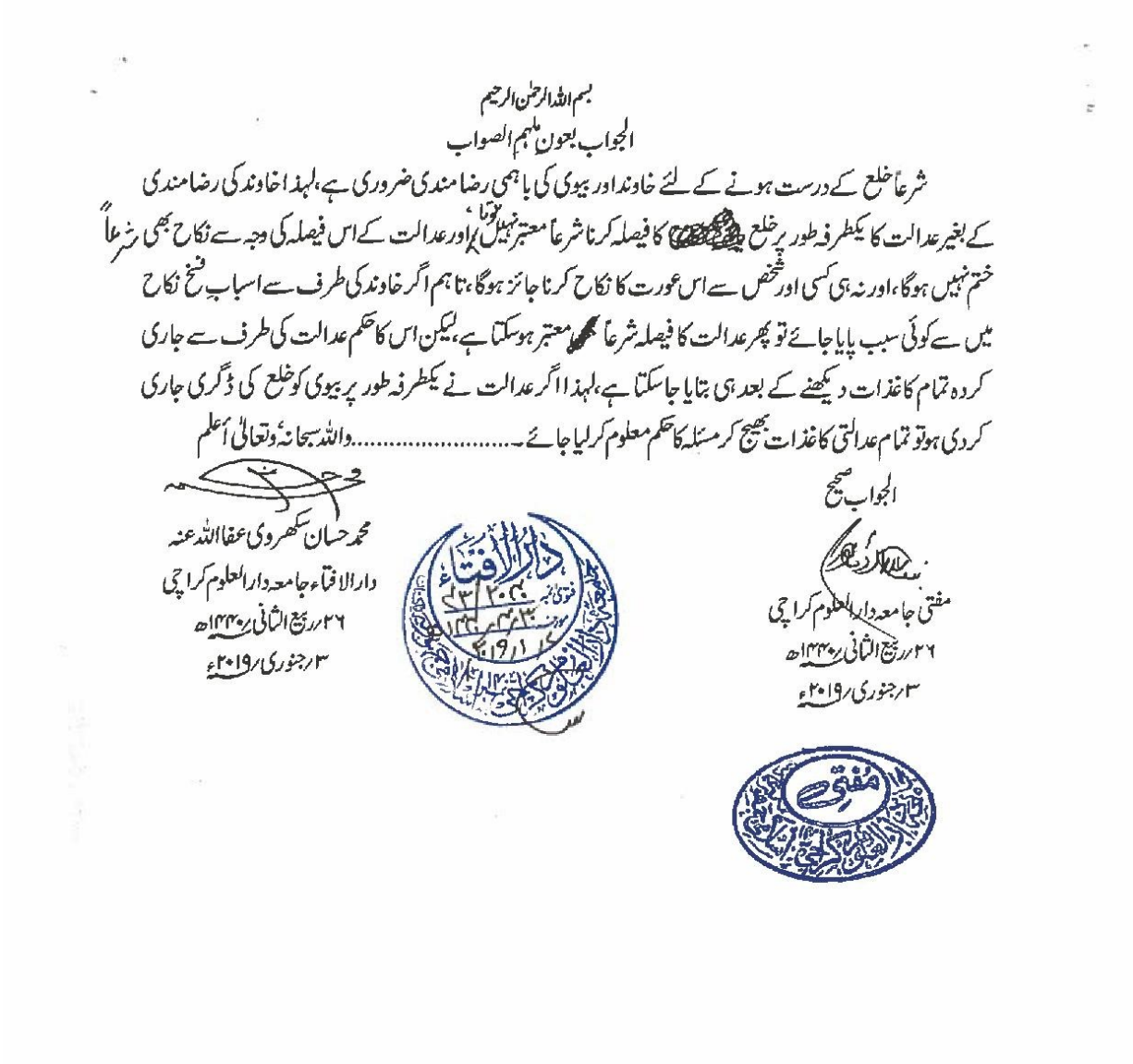
In the name of All the most beneficent, the most merciful
Al-Salam Alaikum wa-Rahmat Allah wa-Barakatuh!

23 December 2018

The issue is that after a dispute the woman has filed a suit for dissolution of marriage on the basis of khul‘*. The husband does not want separation at any cost and he has clearly expressed in court. However, the court's position is that according to Pakistani law once the woman files for dissolution of marriage by* khul‘ *and she is not ready to reconcile then the court has no other option but to issue* khul‘ *decree. The question is that in this situation when the husband denies ṭalāq or* khul‘ *completely and in no case is ready to pronounce it, does a court has legal (*shar‘ī*) right that it unilaterally issue* khul‘ *decree to wife? What is the legal status of such decree? After this decree, is the woman considered still in a marital tie with her husband, or she is free to marry wherever she deems appropriate?*

*Please inform according to legal (*shar‘ī*) point of view.*
Thank you
Ahmad Mughal

In response to my question the following *fatwā* was sent to me on January 15, 2019 by email:



بسم اللہ الرحمٰن الرحیم

الجواب بعون ملہم الصواب

شرعاً خلع کے درست ہونے کے لئے خاوند اور بیوی کی باہمی رضامندی ضروری ہے، لہذا خاوند کی رضامندی کے بغیر عدالت کا یکطرفہ طور پر خلع [illegible] کا فیصلہ کرنا شرعاً معتبر نہیں ہوتا، اور عدالت کے اس فیصلہ کی وجہ سے نکاح بھی شرعاً ختم نہیں ہوگا، اور نہ ہی کسی اور شخص سے اس عورت کا نکاح کرنا جائز ہوگا، تاہم اگر خاوند کی طرف سے اسباب فسخ نکاح میں سے کوئی سبب پایا جائے تو پھر عدالت کا فیصلہ شرعاً [illegible] معتبر ہوسکتا ہے، لیکن اس کا حکم عدالت کی طرف سے جاری کردہ تمام کاغذات دیکھنے کے بعد ہی بتایا جاسکتا ہے، لہذا اگر عدالت نے یکطرفہ طور پر بیوی کو خلع کی ڈگری جاری کردی ہو تو تمام عدالتی کاغذات بھیج کر مسئلہ کا حکم معلوم کرلیا جائے۔..... واللہ سبحانہٗ وتعالیٰ اعلم

محمد حسان سکھروی عفا اللہ عنہ

دارالافتاء جامعہ دارالعلوم کراچی

۲۶ ربیع الثانی ۱۴۴۰ھ

۳ جنوری ۲۰۱۹ء

دارالافتاء

فتویٰ نمبر ۱۴۳/۲۰۰

مورخہ ۲۶/۴/۱۴۴۰

۳/۱/۲۰۱۹ء

الجواب صحیح

[illegible]

مفتی جامعہ دارالعلوم کراچی

۲۶ ربیع الثانی ۱۴۴۰ھ

۳ جنوری ۲۰۱۹ء

مفتی

In the name of Allah the most beneficent the most merciful
The Answer with the help of the Right Guide

For khul‘ *to be valid, according to sharīʿa, the agreement of husband and wife is necessary, therefore, without the agreement of the husband courts making decision of* khul‘ *is not valid according to* sharīʿa*. Likewise, the marriage does not end due to such decision of court as per sharīʿa* (sharʿan)*, nor it is permissible for her to marry someone else. However, if from the husband's side a reason exists from among the reasons for dissolution of marriage* (faskh-i nikāḥ) *then court's decision could be valid according to* sharīʿa*. But the ruling of that could only be given after looking into all the documents issued by the court. Therefore, if the court has issued* khul‘ *decree unilaterally, ruling* (ḥukm) *of it could be sought after sending us all court documents.*
_____ *And Allah is the Praiseworthy and Exalted knows best*

Signed

Muḥammad Ḥassān Sakharwī (May Allah pardon him)
Dar al-Ifta Jamia Dar al-Uloom Karachi
26 Rabīʿ al-Thānī 1440 AH
3 January 2019

Seal

Dar al-Ifta bearing No. 2040/43
Dated: 30/4/1440 AH
7/1/2019

The answer is correct

Signed

Mufti Jamia Dar al-Uloom Karachi
26 Rabīʿ al-Thānī 1440 AH
3 January 2019

Seal
Mufti, Jamia Dar al-Uloom Karachi, Islamic Republic of Pakistan

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