The Law of *Khul‘* in Islamic Law and the Legal System of Pakistan

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This article argues that according to the majority of Muslim jurists, a woman cannot obtain *khul‘* without the consent of her husband. However, Imām Mālik and his disciples are of the opinion that the decision of arbitrators chosen by the state authority, court or the spouses for resolving dispute between the husband and wife can decide separation or union and such outcome is valid without specific delegation by the spouses and without their consent. The decisions of the Superior Courts in Pakistan are partially based on the Mālikī view and legislation has endorsed the position adopted by the Courts. It is argued that both the legislation as well as case law in Pakistan are based on the precedent set by the Prophet (peace be upon him). The Federal Shariat Court has also endorsed the existing Pakistani law on *khul‘*. The Recommendations of the Council of Islamic Ideology regarding *khul‘* are partially in conformity with the Qur’ān and the Sunnah.

Introduction

Islamic law provides numerous remedies to a Muslim wife in cases where harm (*ḍarar*) to her has been established to the satisfaction of a judge. In the subcontinent, under section 2 of the Dissolution of Muslim Marriages Act 1939 (‘DMMA’), a Muslim woman can obtain a divorce in case of her husband’s disappearance for four years, her non-maintenance for two years, imprisonment of the husband for seven years or more, failure of the husband to perform his marital obligations for a period of three years, the husband’s impotence, his insanity, and her maltreatment by the husband.[1] However, these grounds do not seem to have brought any positive change to the affected women in India, Pakistan, and Bangladesh. The primary reason for this is that grounds for divorce available under the DMMA are fault based. The complainant wife has to prove the offence. Matrimonial offences such as ill

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[1] There are two additional grounds available to a Muslim woman in Pakistan, i.e., that the husband has taken an additional wife in contravention of the Provisions of the Muslim Family Laws Ordinance 1961. This ground is also available to such a woman in Bangladesh but not in India. Another ground available to women in Pakistan is *li‘ān*, when a husband accuses his wife of *zinā* (adultery) the marriage is terminated by the court through a special procedure.

treatment and cruelty by the husband or his family are hard to prove, because such offences take place within the privacy of homes and those accused of wrongdoing tend not to testify for the women. For these reasons, a no-fault based remedy was badly needed in the subcontinent and elsewhere in the Muslim world. *Khul'* seems to provide an answer, but the issues surrounding *khul'* in Islamic law are complicated, as shall be explained below. As far as the judiciary is concerned the Lahore High Court ruled for the first time in the *Balqis Fatima* case in 1959,[2] that *khul'* should be available to a woman as of right and without the consent of the husband. This position was endorsed by the Supreme Court in the *Khurshid Bibi* case of 1967.[3] In Egypt, Law No. 1 of 2000 did exactly the same as was done by the Superior Judiciary in Pakistan.

This article gives special attention to the opinions of Mālikī exegetes and jurists in their interpretation of verse 4:35 of the Qur'ān. It examines the Ḥabība's episode[4] and asks whether it has precedential value. Furthermore, it evaluates the arguments of *fuqahā'* of various schools of thought regarding the issue of (in)validity of *khul'* without the consent of the husband and examines the Islamic nature of legislation on *khul'* in Pakistan as well as in Egypt. In terms of methodology, the opinions of Muslim exegetes are discussed in Part I, followed by an analysis of the Ḥabība's *ḥadith* in Part II. This is followed by an analysis of the opinions of Muslim jurists of various schools of thought and the reasons for their respective positions in Part III. Part IV evaluates selected decisions of high courts and the Supreme Court of Pakistan on *khul'* and asks whether these amount to judicial *ijtihād*. Part V discusses the Islamicity of section 10(4) of the West Pakistan Family Courts Act 1964 as amended in 2002. Part VI evaluates the views of the Council of Islamic Ideology (CII) and asks whether the CII has exceeded its mandate. Finally, Part VII provides a conclusion.

PART I: *Khul'* and the Qur'ān

[2] *Mst. Balqis Fatima v Najm-ul-Iram Qureshi*, PLD 1959 Lahore 566. For analysis of these and other cases on judicial khul' see Dr Muhammad Munir, 'Judicial Law-Making: An Analysis of Case Law on Khul' in Pakistan'(2014) 1(1) Islamabad Law Review 7 <http://www.iiu.edu.pk/wp-content/uploads/downloads/journals/ilr/volume1/ILR-VOL-1-1-Full. pdf> accessed 12 September 2015.

[3] *Mst. Khurshid Bibi v Muhammad Amin*, PLD 1967 SC 97. For criticism of *Khurshid Bibi*, see Doreen Hinchcliffe, 'Divorce in Pakistan: Judicial Reform' (1968) 2 Journal of Islamic and Comparative Law 19.

[4] Ḥabība bint Sahl was married to Thābit b. Qays b. Shamas. Other reports mention her name as Jamīla. Whatever her exact name she is reported to have obtained *khul'* from her husband. Details are given below.

Literally, the term *khul'* means 'extracting oneself'.[5] According to 'Alāuddīn Mas'ūd al-Kasānī, '[t]he *khul'* is lexically, '*al-naz'*' and '*al-naz'*' is to pull out/extract something from something.'[6] Thus, '*khala'ha* means that he has removed her from his marriage.'[7]In the technical sense, it is used for marital 'extraction',[8] and is the act of accepting compensation from the wife in exchange for her release from the marital tie. Ibn Ḥajr defines it as '[s]eparation of the husband from his wife for money consideration to be given to the husband.'[9] According to Ibn Rushd, 'the terms *khul'*, *fidya*, *ṣulḥ* and *mubara'a* refer to the same meaning, which is a transaction in which wife pays compensation for obtaining her divorce.'[10]

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[5] According to Ibn Manzur, the root of *khul'* is *khal'*. The verbal noun *khal'* refers to the act of extraction, removal, detaching or tearing out. In its real sense, *khal'* is generally associated with things or object, such as garments. See, Ibn Manzūr Muḥammad b. Mukarram, *Lisān al-'Arab* (Beirut: Dār Sadir 1955-56) 8:76-79. Jurjanī defines it as 'dissolution of marriage through taking money [by the husband].' See, 'Ali b. Muḥammad al-Jurjanī, *Kitāb al-T'arīfat* (Beirut: Dār al-Surur n.d.) 45.

[6] Kāsānī refers to two Qur'ānic verses, i.e., 7:43, 108, to explain the lexical meaning of *khul*'. The meanings of these verses are: 'We shall have removed all ill feeling from their hearts', and 'then he pulled out his hand.' 'Alauddīn Masu'd al-Kāsānī, *Badā'i' al-ṣanā'i' fī tartīb al-sharā'i'* (Muḥammad Yāsīn Darvīsh ed, Dār Ihyā' al-Turāth al-'Arabī, 2000) 3:227.

[7] Ibid. The controlling role of the husband is clear from the lexical and technical words used by Kāsānī.

[8] Badruddīn Maḥmud al-'Aynī, *al-Bināyh* (Muḥammad 'Umar ed, Dār al-Fikr, 1990) 5: 291.

[9] Aḥmad b. 'Ali b. Ḥajr al-'Asqalānī, *Fataḥ al-Bārī* ('Abdul 'Azīz b. Bāz & Muhībuddīn al-Khaṭīb ed, Dār al-Fikr n.d.) 9:396. Kamāl b. Al-Humām (d. 861) has defined *khul*' as 'putting an end to marriage for compensation by using the word *khul*' (*izalāt milk al-nikāḥ bi badalin bi lafz al-khul'*).' Kamāluddin b. Al-Ḥumām, *Sharḥ Fataḥ al-Qadīr* (Ghālib Al-Mahdī ed, Dār al-kutub al-'Ilmiyah, 2003) 4:188. Jurjānī shortened Ibn al-Humām's definition, when he stated 'putting an end to (the ownership of) marriage contract (*izalat milk al-nikāḥ*).' 'Alī b. Muḥammad al-Jurjānī, *Kitāb al-T'arīfāt* (Dār al-Surur n.d.) 45. Haskafī has attributed this definition, i.e., '*izalat milk al-nikāḥ*' to Ibn Nujaym. Muḥammad 'Allāuddīn al-Haskafī, *Al-durr al-mukhtār sharḥ Tanvīr al-abṣār* (Dār al-Fikr Press n.d.) 3:383. But Ibn Nujaym has himself attributed it to Kamāl b. Al-Humām. Sirājuddīn Ibn Nujaym, *Al-Nahar al-fā'iq* (commentary on 'Abdullah b. Aḥmad Al-Nasafī's *Kanz al-daqā'iq*, Aḥmad 'Izzu 'Inayāt ed, Dār al-Kutub al-'Ilmiya, 2002) 2:435. According to Al-Nasafī (d. 710 A.H.), 'It is to separate from marriage (*huwa al-fasl min al-nikāḥ*).' Ibn Nujaym adds to this by saying that although 'Separation [in this definition] is absolute whether compensation was paid or not but it is necessary to use the word *khul'* [for this transaction].' At 2:434.

[10] He then differentiates the term *khul'* in which she has to return all that the husband has spent on her, from *ṣulḥ* where she pays only partially, *fidya* where she pays more than she received, and *mubara'a* where she writes off her claim against the husband. Muḥammad b. Aḥmad Ibn Rushd, *Bidāyat Al-Mujtahid* (*The Distinguished Jurist's Primer*, Imran A. K. Nyazee tr, Centre for Muslim Contribution to Civilization 1996) 2: 79. Ibn al-'Arabī mentions that according to Imām Mālik, '*al-mubari'a* is *khul'* before consummation of marriage, and '*al-mukhli'atu*' is when she

While discussing *khul'*, *fuqahā'* and commentators of the Qur'ān refer to the Qur'ānic verse 2:229, which states:

> Divorce can be pronounced twice: then, either honourable retention or kindly release should follow. (While dissolving the marriage tie) it is unlawful for you to take back anything of what you have given to your wives unless both fear that they may not be able to keep within the bounds set by Allah. Then, if they fear that they might not be able to keep within the bounds set by Allah, there is no blame upon them for what the wife might give away of her property to become released from the marriage tie.

The crucial question on which exegetes differ concerns who is being addressed in the verse through the use of the term '*fa in khiftum*': Is it addressed to the *Ḥukkām* (state authority), which is represented by the courts, or is it addressed to both the partners? In other words, who will determine whether the two partners can or cannot live within the bounds set by God? Should the determination of that important point be the responsibility of a court, acting on behalf of the state, or should it be determined by the partners themselves? Moreover, what constitutes '*khawf*' (fear), mentioned in the verse? According to Imām al-Shāfi'ī, 'when one of them cannot keep within the bounds set by God, so both [are considered] unable to keep within the bounds of God.'[11]According to Abū Bakr al-Jaṣṣāṣ, '*illa un yakhāfā*' means 'if both of them thought'.[12] The fear that the 'two may not be able to keep within the bounds set by God', arises when either of them violates their marital duties[13] and/or transgresses upon mutual rights, or the rights of one or both of the partners are denied. The Qur'ānic verse provides, 'Women have the same rights against their men as men have against them.'[14] 'Ali b. Abī Ṭālib (May Allah be pleased with him) is reported to have said, '[There are three] phrases when uttered by the wife [to the

obtains *khul'* after consummation of marriage, and '*al-muftadiyatu*' is to redeem herself by paying some of her money, however, these terms are used interchangeably.' Abū Bakr Muḥammad Ibn al-'Arabī, *Aḥkām al-Qur'ān* ('Emād Zakī al-Baroudī ed, Al-Tawfikia n.d.) 1: 251.

[11] Muḥammad b. Idrees al-Shāfi'ī, *Kitāb al-Umm* (Aḥmad Badruddīn Ḥasun ed, Dār Kotaiba, 2003) 11:178.

[12] Abū Bakr Aḥmad al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, ed. Sidqi Muḥammad Jamīl (Dār al-fikr, 2001) 1:533.

[13] Violating marital duties is called '*nushūz',* and contrary to the popular belief, is also committed by men. Jaṣṣāṣ, *Aḥkām al-Qur'ān,* 1: 534; Manṣur b. Yūnus al-Buhūṭī, *Kashshāf al-Qina'* ('Alam al-Kutub, 1983) 5:209; 'Abdus Salām Saḥnūn, *al-Mudawwana al-Kubrā* (Dār al-Kutub al-'Ilmiya, 1994) 2:241; Muḥammad Amīn Ibn 'Abidīn, *Radd al-Muḥtār* (Dār al-Fikr, 1979) 3: 445.

[14] Qur'ān 2:228.

man], it becomes legal for him to take '*al-fidya*' (the compensation): When she tells him that I will not obey you, that I will not fulfil your promise on oath, and I will not purify myself after sexual intercourse with you.'[15] It is reported from 'Abdullah b. 'Abbās that 'her omission to keep within the bounds set by God is [treated as] disdain for the husband and a bad nature on her part.'[16] Jaṣṣāṣ has mentioned the full statement of Ibn 'Abbās as:

> Thus, if she says, "I swear by God [that] I will not fulfill your oath, and I will not agree to your request of sleeping with you in the bed, and I will not obey you. If she did this, it is allowed for him to take from her '*al-fidya*' but he should not take more than what he gave her (i.e., the dower) and let her go [provided] she caused the harm." Then, he [Ibn 'Abbās] recited, "but if they, of their accord, give up unto you aught thereof, then enjoy it with pleasure and good cheer," (4:4) and it is said, that when there is no harm or cheating [in obtaining it], then it is pleasure and good cheer as God described it.[17]

Qurtubī mentions that according to 'Attā b. Abī Rabāḥ, '*Khul*' and taking (compensation for the husband) become legal when the woman says to her husband: I hate you and do not like you or something similar.'[18]

Muḥammad Abū Zahra (d. 1974) argues that the situation in which both the partners cannot keep within the bounds set by God, arises in two ways: first, if the woman is *nāshizah* (violates her marital duties), disobedient, or coerced, such as the wife of Thābit b. Qays b. Shamas Al-Anṣārī (d. 11/632); second, when the man has a problem such that marital life with him is not possible anymore.[19]

Qurtubī argues that 'the majority of jurists are of the opinion that the addressees in the words of the Exalted '*wa in khiftum*' (And if you fear)[20] are the *ḥukkām* (state authorities). And the statement [of the Exalted] 'if they both want to set things right' [4:35] means the arbitrators according to ['Abdullah] Ibn 'Abbās,

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[15] Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 1:534.
[16] Ibid.
[17] Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 1: 534.
[18] Muḥammad b. Aḥmad al-Qurṭubī, *Al-Jāmi' li Aḥkām al-Qur'ān* (Samir al-Bukhārī ed, Riyādh: Dār 'Alam al-kutub 2003) 3:136.
[19] Muḥammad Abū Zahra, *Zahrat al-Tafāsir* (Cairo: Dār al-Fikr al-'Arabī n.d.) 2:777. He asserts that the verse is general and allows *nushūz* to be from either side. Moreover, when *nushūz* is from the man it is called '*zulm'* (cruelty) because he can divorce her and taking compensation in such a situation would be illegal. At 2:777-78.
[20] Qur'ān 4:35.

Mujāhid and others; that is, if the arbitrators wanted reconciliation, Allah will bring about reconciliation between the spouses.'[21]

The Tunisian scholar Muḥammad al-Ṭāhir b. 'Ashur (1879-1973) argues that 'if the spouses would be addressed [by '*tum*'], then the wording would be: '*fa in khiftum āullātuqimu aw ullātuqima*' (if you feared that you cannot keep or you [two partners] cannot keep…'[22] Abū Zahra argues that the addressees are either 'the group of Muslims because they cooperate with each other, as they got discord between the spouses, or it is to the group of women and men', and his preference is for the first meaning.[23]

Jurists differ in their opinions on the matter of whether *khul'* ought to be adjudicated or not; a topic which will be elaborated upon later when the various schools of thought come under discussion. In Pakistan, the Lahore High Court accepted the interpretation that the 'you' in the phrase 'if you fear' must be addressed to the state and the judicial officers of the state in the *Balqis Fatima* case. It clearly was not addressed to the two spouses, who are in this section referred to in the third person as 'they' and 'them.'[24]

Exegetes from the Mālikī school of thought discuss *khul'* under verse 4:35 which reads, 'If you fear a breach between the two, appoint an arbitrator from his people and an arbitrator from her people. If they both want to set things right, Allah will bring about reconciliation between them. Allah knows all, is well aware of everything.' Qurtubī argues that 'the arbitrators chosen by the state authority should see who is the cause of discord and once this is established they should dissolve the marriage through *khul'*.'[25] He further asserts that one arbitrator should be from the man's side and one from the woman's side because they know their problems better. However, 'if there is no one from the spouses' people who could be appointed as arbitrators, so other suitable persons may be appointed by the state authority.'[26] He argues that the arbitrators should remind the spouses about their union, so that they agree to remain together as husband and wife. And if they refuse to live as husband and wife and 'the arbitrators consider [sic] it appropriate to decree separation they

[21] Qurṭubī, *Aḥkām al-Qur'ān*, 5:175.
[22] Muḥammad al-Ṭāhir b. 'Ashur, *Tafsīr Al-Taḥrīr wa Al-Tanvīr* (Dār Saḥnūn, 1997) 2:408.
[23] Abū Zahra, *Zahrat al-Tafāsir*, 2:779. According to the *Zāhiriyah* school, *khul'* can only be affected if discord is from the wife, because when discord is from the husband taking of compensation is prohibited. Abū Zahra, *Zahrat*, 2:781.
[24] *Balqis Fatima v Najm-ul-Ikram Qureshi* PLD 1959 Lahore 566, 573.
[25] Qurṭubī, *Aḥkām al-Qur'ān*, 5:175.
[26] Ibid.

may decree separation. And decree of separation by them [arbitrators] is binding for the spouses whether it [the decree] coincided with or was against the decree of the local court and whether the spouses delegated them [the arbitrators] the authority to do so or not.'[27]

Ibn 'Ashur argues that verse 4:35 makes it obligatory to appoint arbitrators in case of a continuing dispute between the spouses which is denoted as '*shiqāq'* (breach or discord). Apparently the appointing authority is the ruler and state authority, and not the spouses because the verb '*ib'athu*' (appoint) is not addressed to the spouses. If they are appointed by the spouses, then the word '*al-ba'th*' would have no meaning in the verse.[28] He asserts that '[w]hatever decree is issued by the arbitrators is binding whether it be separation or union or *khul'*. And there is no say for the spouses in it because this is what arbitration is meant for.'[29]

In a nutshell, the Qur'ānic concept of *khul'* is: first, either of the partners may initiate it if he or she thinks that marital rights cannot be upheld in the marriage. Second, according to the preferred opinion of the majority of exegetes, the court has to determine the extent of discord, harm, aversion, coercion, etc. Third, and this is very crucial, the court must ascertain whether it can grant *khul'*, especially when the discord or harm is attributed to the woman and she is ready to pay compensation to her husband without the husband's consent, or is it conditional upon the consent of the husband? In other words, is *khul'* a consensual act or can the court put an end to the marriage by *khul'* without the husband's consent? The answer is not clear from the wording of the Qur'ān in verse 2:229 and this is why exegetes had to resort to *aḥādīth* regarding *khul'*. Fourth, Mālikī jurists also discuss *khul'* under the Qur'ānic verse 4:35 and conclude that *khul'* can be affected by the arbitrators and their decision shall be binding without the consent of the husband and the wife. Fifth, in case *khul'* is consensual (or even if it is not consensual or the consent of the husband is not required), then the court may put an end to the marriage and ask the wife to return the dower or what is agreed upon by both the partners as compensation for her freedom. Finally, there is no sin on the part of the spouses to receive such compensation. The apparent language of the verse 2:229 indicates that it is the wife who has to pay compensation to free herself, '*fima'fdatbehi*' (what the wife may give up [to her husband]).[30] To answer the remaining questions, we have to resort to *aḥādīth* of the Prophet (peace be upon him).

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[27] Ibid, 5:176.
[28] Ibn 'Ashur, *Al-Taḥrir*, 5:46.
[29] Ibid.
[30] This has been interpreted by Oussama Arabi that the 'woman to ransom (*taftadī*) herself from her husband by means of a negotiated settlement', thereby meaning that the consent of the husband

Part II: *Khul'* in *ḥadīth* literature

Many collections of *ḥadīth* have referred to the case of Ḥabība bint Sahl–wife of Thābit. The incident is described in four of the six authoritative compendia of the Prophetic reports. According to the report of Al-Bukhārī in his *al-jāmi' al-ṣaḥīḥ* (The Authentic Collection) section on *khul'*:

> It is reported from Ibn 'Abbas that the wife of Thābit b. Qays came to the Prophet (peace be upon him), and said: "I see no fault with Thābit's conduct or his religious demeanour, but I dislike ingratitude in Islam." The Prophet (peace be upon him) said: "Will you return his garden to him?" "Yes", she answered. The messenger of Allah said: (to Thābit): "Accept (*iqbil*) your garden and divorce her [*ṭalliqha* (once)]."[31]

In the second and third versions of the same incident, the Prophet (peace be upon him) is reported to have ordered Thābit (*'amarahu*) to divorce her in return for his garden.[32]

In the first version in Al-Bukhārī, the words '*iqbil*' (accept) and '*ṭalliqhā*' (divorce her) are used in the imperative form by the Prophet, but in the second one the indirect speech is very clear that Thābit's approval was not sought but the Prophet had ordered him. According to the report of Imām Al-Nasā'ī:

> Thābit b. Qays b. Shamas hit his wife and broke her limb and she was Jamīla bint 'Abdullah b. Uby. She complained to her brother who took her to the Prophet (peace be upon him) and the Prophet (peace be upon him) summoned Thābit and told him, "take (*khudh*) [from her] what

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is essential for *khul'*. See, Oussama Arabi, 'The Dawning of the Third Millennium on Shari'a: Egypt's Law no. 1 of 2000, or Women May Divorce at Will' (2001) 16(1) Arab Law Quarterly 17-8. This interpretation seems to be against the Ḥabība's episode described in the text above in which the consent of the husband Thābit b. Qays was not sought by the Prophet (peace be upon him).

[31]Muḥammad Ismā'il al-Bukhārī, *al-Jāmi' al-Ṣaḥīḥ* (Ḥadīth 4971, People's Edition n.d.). The *ḥadīth* is also available at <http://www.sunnipath.com/library/Hadith/H0002P0071.aspx> accessed 20 June 2011; also available at <http://hadith.al-islam.com/Page.aspx?pageid=192&BookID=24&TOCID=2943> accessed 20 June 2011.

[32] Ibid, *ḥadīth* no. 4972 and *ḥadīth* no. 4973 available at <http://www.sunnipath.com/library/Hadith/H0002P0071.as px> accessed 20 June 2011). In these two narrations the reporter is, 'Ikramah, who described her name as Jamīla but in all the versions in Al-Bukhārī she is simply Thābit's wife.

> you have given her and let her go (free) (*khalli sabilaha*). He said: "Yes."[33]

According to the collection of Abū Dāwūd, in which Ḥabība's case is reported:

> 'A'isha (the Prophet's wife) relates that Ḥabība bint Sahl was married to Thābit b. Qays b. Shamas, who hit her and broke a limb of hers. She approached the Prophet (peace be upon him) after dawn, and he summoned Thābit and told him: "Take (*khudh*) some of her money and separate from her." Thābit said: "Is this permissible, Prophet of God?" The Prophet said: "Yes." Thābit: "I gave her two gardens as dower and they are her property." The Prophet (peace be upon him) said: "Take them and separate from her (*fariqha*)", which he did.[34]

Ibn Māja, in his collection of *aḥādīth*, narrates on the authority of Ibn 'Abbās that this case is similar to Al-Bukhārī's first version of the case, with the difference that the Prophet (peace be upon him) 'has ordered Thābit to take only the garden and not more (than the garden).'[35]

According to the report of Aḥmad b. Ḥanbal:

> Sahl b. Abī Hathma related that Ḥabība bint Sahl was married to Thābit b. Qays Al-Ansari, who was an ugly man. She said: "Messenger of Allah: O, by Allah, were I not to fear God, I would spit in his face whenever he touches me." The Prophet (peace be upon him) said: "Would you give him back his garden?" She said: "Yes", and she gave it back. Then the Prophet (peace be upon him) separated them (*farraqa baynahumā*).[36]

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[33]Abū 'Abdur Raḥmān al-Nasā'ī, 'al-Sunan' (*hadith.islam) ḥadīth* no. 3497, available at <http://hadith.al-islam.com/Page.aspx?pageid=192&BookID=27&TOCID=1774> accessed 20 June 2011.

[34] Sulayman Abū Dawūd, *al-Sunan*, 4 vols (Muṣtafā Muḥammad Press n.d.) no. 2228.

[35]Abū 'Abdallah Ibn Māja, *al-Sunan*, ed. M. 'Abd al-Baqī, *ḥadith* no. 2056 available at http://hadith.al-islam.com/Page.aspx?pageid=192&BookID=29&TOCID=688 (last accessed 20 June 2011).

[36]Aḥmad b. Ḥanbal, *al-Musnad, ḥadith* no. 15663; also available at <http://hadith.al-islam.com/Page.aspx ?pageid=192&BookID=30&PID=15513> accessed 21 June 2011). Ibn Ḥanbal comments on this *ḥadith* that 'It was the first *khul'* in Islām.' Thābit's wife in the report surveyed is referred to as Ḥabība or Jamila, while in other reports she is simply Thābit's wife. Al-Bukhārī mentioned her as Thābit's wife in two narrations but in one report her name was mentioned as Jamīla. Ibn Ḥanbal, Abū Dāwūd, and Imām Mālik in his *Muwaṭṭā,* mention her name as Ḥabība, whereas Ibn Māja and Al-Nasā'i mention her name as Jamila. The Superior Courts in Pakistan,

In the report of Ibn Māja, as well as Abū Dāwud, Thābit – the husband – does not play any decisive role (as assigned to him by the legists) as the Prophet never asked for his consent for the separation. The crux of the matter is that according to the above reports, which are different versions of the same incident, *khul'* is not consensual and the consent of the husband is not essential. As will be explained below, however, the majority of *fuqahā'* of Ḥanafī, Shāfi'ī, Ḥanbalī as well Shī'a schools of thought purport that *khul'* cannot be granted by the court without the consent of the husband. The four compilers of *aḥādīth* collections who narrate Ḥabība's episode 'neither mention nor allude to her husband's approval as a condition for her divorce; on the contrary, what they all have in common is the command aspect of the Prophet's order to Thābit to take the compensation and separate from Ḥabība.'[37] Despite this 'imposed' passivity on the part of Thābit, the majority jurists have unanimously assigned a decisive role to the husband in *khul'*. According to Jaṣṣāṣ of the Ḥanafī school, the fact that both Thābit and Ḥabība were asked by the Prophet (peace be upon him) implies that *khul'* is consensual because the husband has been placed at the center point in this episode, otherwise the Prophet could have dismissed him completely and divorced Ḥabība entirely on his own.[38]

The conclusion that can be derived from this narrative is that the majority of legists differ from the *ḥadīth*, and to some extent from the Qur'ān, regarding *khul'*, especially regarding the approval of the husband. There is no doubt that the Qur'ānic verse was further explained by the Ḥabība's episode and that the Prophet's ruling has precedential value. Oussama argues that Muslim legists seem to allow the Qur'ānic implication of a consensual transaction to overrule the Prophetic ruling in the Ḥabība's *khul'* separation case.[39] However, Mālikī jurists differ from most Sunnī scholars on the issue of the consent of the husband. In addition, as explained above, there is no unanimity on the issue that the Qur'ānic verse 2:229 only allowed a consensual bargaining-based negotiated settlement as some exegetes have expressly mentioned that the word '*tum'* (you) is addressed to the state authority. The Ḥabība incident stands on its own and has not been overruled by the Qur'ān. Moreover, one has to analyse the opinions of jurists regarding verse 4:35 to reach a clear conclusion.

throughout their discussion regarding the *khul's* incident, referred to her as Jamila and, in some cases, the Courts mentioned that Thābit b. Qays had two wives. In this work the name, Ḥabība, has been used while referring to Thābit's wife.

[37] Arabi, *The Dawning of New Millennium*, 17.

[38] Jaṣṣāṣ, *Aḥkām al-Qur'ān* 1:539.

[39] Arabi, The Dawning of New Millennium, 17.

It is this precedent that provided the basis for the new law of *khul'* in Pakistan, as well as in Egypt.[40]

Part III: *Khul'* in *Fiqh* Literature

Khul' in the Ḥanafī School

Ḥanafī jurists fully acknowledge the *ḥadīth* of Ḥabība but unanimously assign the husband a decisive and controlling role in the process of *khul'*. Jassas points out that the fact that the Prophet had sought the opinions of both Ḥabība and Thābit, places the latter at the centre stage of the debate since the Prophet could have dismissed him completely and granted a divorce to Ḥabība himself.[41] Ḥanafī jurists insist that the consent of the husband is necessary for the validity of *khul'*. Abū Bakr al-Sarakhsi argues that *khul'* 'is a transaction that requires the consent of the [parties] like all other transactions.'[42] Kāsānī states that the basic element of *khul'* is 'offer and acceptance because it is *ṭalāq* for compensation, thus, there cannot be any separation without acceptance.'[43] In other words, for Kāsānī, a court cannot force anyone to enter into contractual relations, and therefore, it cannot grant *khul'* without the husband's consent. There is no disagreement among Ḥanafī jurists on this issue,[44]

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[40] The Egyptian Law No. 1 of 2000 declared that a married couple may mutually agree to separation (*khul'*); 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 returns to him the dower he gave to her, then the court is to divorce her from him. Article 20 of 'Law No. 1 of the Year 2000: Regarding the Promulgation of a Law to Organize Certain Conditions and Procedures of Litigation in Matters of Personal Status', *Al-Jarīda al-Rasmiyya* (The Official Gazette), The Arab Republic of Egypt, No. 4, 22 of Shawwal, 1420 AH; 29 January 2000, p. 14. However, the court does not decree divorce (*ṭaṭlīq*) via *khul'* except after attempting reconciliation between the married couple, and after appointing two mediators to attempt conciliation between them for a period that may not exceed three months, … and after a wife decides explicitly that she abhors living with her husband and there is no way to continue the married life between them, and that she is also afraid of transgressing the bounds set by God, because of this discord. The separation affected under Article 20 is an irrevocable divorce (*ṭalāq bā'in*); and the court's decision is, under all circumstances, not subject to appeal in any of the form and in any forum. At p. 15.

[41] Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 1:539.

[42] Muhḥammad b. Aḥmad al-Sarakhsī, *Kitāb al-Mabsūṭ* (Samīr Mustāfa Rubāb, Dār Iḥyā' al-Turāth al-'Arabī 2002) 6: 169.

[43] Kāsānī, *Badā'i'*, 3:229.

[44] Kamāl b. al-Ḥumām, *Fatḥ al-Qadīr* 3:199; Fakhr al-Din 'Uthmān al-Zayla'i', *Tabyin al-Haqā'iq* (Aḥmad 'Azzu 'Ināya ed, Dār al-Kutub al-'Ilmiya, 2000) 3:182-83; al-'Aynī, *al-Bināya*, 5:291; Aḥmad al-Qudūrī, *Mukhtsar al-Qudūrī* (Kāmil Muḥammad Muḥammad 'Uwayda ed, Dār al-Kutub al-'Ilmiyya 1997) 163; Maḥmud Ibn Mazā, *al-Muhīṭ al-Burhānī* (Aḥmad 'Azzu 'Ināya

all of whom consider *khul'* an irrevocable *ṭalāq*[45] and agree that adjudication is not necessary for affecting it as it can be concluded outside the court.[46] According to Abū Ḥanīfa, a man cannot retract his offer should he initiate *khul*', as he is governed by the rules of oaths; he has to wait for his wife to accept or reject his offer. She has to submit to the rules of compensation and is allowed to retract her offer before his response. Abū Ḥanīfa bases his reasoning on the principle that *khul'* is *bay'* (sale transaction) on the part of the wife, as she is buying back control over herself.[47] If the discord emanates from the husband, 'then it is not permissible for him to take any compensation in return for *khul'*.'[48] The apparent wording of the Qur'ān presumes that the woman pays compensation to free herself (*fimaaftadat behi*), so the discord is always assumed to be because of her. Kāsānī argues that:

> If the matter is resolved by a stranger, then he is allowed to order [her to pay] the equivalent of the dower, and if he ordered [her to pay] more or less [than the amount of dower], then, in case of more [amount], it is not binding without the consent of the woman and in case it is less, then [it is not binding] without the consent of the husband.[49]

Thus, Kāsānī – referred to as the king of '*ulamā'* (*malak al-'ulamā*) within the Ḥanafī school of thought – considers the consent of the husband necessary even if the amount of compensation to be given to him is less than the amount of dower. In other words, the husband according to the Ḥanafī school of thought, seems to have the equivalent of a veto regarding *ṭalāq* and *khul'*.

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ed, Dār Iḥyā' al-Turāth al-'Arabī 2003) 3:501; Ibn 'Abidīn, *Radd al-Muḥtār* 3:439-41; Zayn al-'Abidīn Ibn Nujaym, *al-Bahr al-Rā'iq* (al-Matba'a al-'Ilmiyya, 1894) 8 4:77-78.

[45] Al-Jaṣṣāṣ, *Aḥkām al-Qur'ān* 1:538; Al-Sarakhsī, *Kitāb al-mabsūṭ* 6:168; Kāsānī, *Badā'i'* 3:228. Kāsānī argues that *khul'*is 'a single irrevocable *ṭalāq* because it is divorce by using metaphorical words which is irrevocable in our school and because it is divorce for compensation (*ṭalāqbi al-'iwad*) and when the man accepted the compensation it is necessary that she should own herself as a result of paying compensation and she cannot redeem herself without irrevocable *ṭalāq* therefore it (*khul'*) is irrevocable *ṭalāq*'. At 228.

[46] Jaṣṣāṣ, *Aḥkām al-Qur'ān* 1:539; Al-Sarakhsī, *Kitāb al-mabsūṭ* 6:168-69; Kāsānī, *Badā'i'* 3:229. Kāsānī mentions that only al-Ḥasan and Ibn Sīrīn argue that *khul'* can be affected without the *Sulṭān* (state- authorized court).

[47] Al-Zayla'i, *Tabyin* 3:182; Kāsānī, *Badā'i',* 3:228.

[48] Kāsānī, *Badā'i',* 3:235.

[49] Ibid. According to Margīnānī, 'If the discord is because of her, we consider it disapproved that he takes from her more than he had given her.' However, 'If he takes back in excess (of what he gave her) it is valid for the purposes of adjudication. Likewise If he takes more when the discord is due to him.' Margīnānī, *Al-Hidāya,* 2:30.

Khul' in the Mālikī School

The linguistic formulations of the Mālikī jurists on *khul'* are not easy to understand and need an in-depth analysis to reach a clear conclusion on whether the consent of the husband is necessary for *khul'*. The confusion is mainly whether the Mālikīs consider the consent of the husband a legal necessity by implication or not. Imām Mālik has discussed the Qur'ānic verse 4:35, Ḥabība's ruling, and two cases involving neglectful husbands, and his legal formulations suggest that he gives the two arbitrators the main role in the dissolution of marriage, either by *ṭalāq* or *khul'*. In addition, he also presumes a negotiated settlement.[50] Certain points within the Mālikī school are clear and these are mentioned below.

In circumstances where it is difficult for a woman to live with her husband and she approaches the court, it must be clear that which one of the two is the cause of discord. When it is known to the court that the husband or the wife has caused the discord, the court shall attempt to bring about reconciliation. If this is not possible, then the court may dissolve the marriage.[51] The court shall order *khul'* if it finds that the husband was the cause of the discord. In this situation, the wife will be ordered to return the dower given to her by the husband. However, if it comes to the conclusion that the wife was the cause of the discord, it shall dissolve the marriage by divorce and shall order the husband to pay the dower if not yet paid. The court under the Mālikī school can issue a decree of *ṭalāq* or *khul'* without the consent of the husband and wife.[52]

If the court does not know which one of the two is to blame for the dispute, it has to appoint two arbitrators: one to represent each the husband and the wife. Mālikī jurists have elaborated on the role assigned to the arbitrators.[53] In general, they agree that the arbitrators may dissolve the marriage either by *ṭalāq* or *khul'* depending upon who is to blame for the dispute. Some Mālikī jurists have even stated that the court or the arbitrators can dissolve the marriage through *ṭalāq* or *khul'* without the consent of both the husband and the wife. This is evident from many classical Mālikī texts (*mutūn*), as well as commentaries on the main texts. While commenting on Qur'ānic verse 4:35, which reads 'If you fear a breach between the two, appoint an arbitrator from his people and an arbitrator from her people. If they both want to set

[50] Saḥnūn b. Sa'īd, *Al-Mudawwana al-Kubrā li'l Imām Mālik b. Anas* (Khayriyya Press, 1325 A.H.) 2: 231-232.
[51] Ibn 'Abdul Bar al-Qurtabī, *Al-Kāmil fī Fiqh Ahl Al-Madīna* (Makatabat al-Riyādh al-Ḥadītha, 1980) 2: 596.
[52] Ibn Juzī, *Al-Tashīl*, 1: 190-191.
[53] Ibid.

things right, Allah will bring about reconciliation between them. Allah knows all, is well aware of everything', Ibn Juzī al-Kalbī al-Garnāti states:

> Allah has mentioned what to do with a disobedient wife and how to deal with an obedient one, then he mentioned another situation, that is, when there is discord between the two which they cannot reconcile themselves and it is not known who caused it. So [in this situation the court] should appoint two Muslim arbitrators to investigate the matter between the two. And their decision has to be implemented whether it is the dissolution of marriage through *ṭalāq* or *khul'* without the consent of the husband.[54]

Ibn 'Abdul Bar – another leading Mālikī jurist – has said something similar. He argues:

> The spouses may appoint one arbitrator each without the intervention of the State authority. If the husband is the cause of discord they shall dissolve the marriage without anything. The arbitrators should not take anything from the wife [in this situation] with the condition that she is divorced [by the husband]. And it is said that it is allowed [to take something from the wife in this situation]; and if she was the cause of discord, they [the arbitrators] should take [money or compensation] from her as they think appropriate and it [the resultant separation] will be *khul'* and the two should be separated [their marriage be dissolved].[55]

Mālikī jurists have also explained the situation in which both the husband and the wife are equally blameworthy for the discord. According to 'Abdarī, 'the husband shall not be given anything if both the husband and the wife were equally guilty of discord.'[56]

Imām Mālik discusses three different versions of Ḥabība's case and seems to introduce the husband's consent in the third version, in which the Prophet (peace be upon him) invited Thābit and told him about his wife and about her willingness to return him the garden to which Thābit said: 'This is to my liking; Yes.' The Prophet said: 'Then she gives it back.'[57] Unfortunately, Imām Mālik is not very specific

[54] Ibid.
[55] Yūsuf b. 'Abdullah b. 'Abdul Bar al-Qurṭubī, *Al-Kāfī fī Fiqh Ahl al-Madīna al-Mālikī* (Maktaba al-Riyādh al-Ḥadītha, 1980) 2: 596.
[56] Muḥammad b. Yūsuf 'Abdarī, *Al-Tāj wal Iklil li Mukhtaṣar Khalīl* (Dār al-Fikr n.d.) 4: 17.
[57] Saḥnūn, *Al-Mudawwana*, 2: 235.

about whether the consent of the husband is necessary for *khul*'. Imām Mālik is more specific in the chapter on '*Hakamayn'* (the two arbitrators), where he gives an interesting opinion. On the role of the two arbitrators, Mālik states,

> If the arbitrators could bring in reconciliation [between the two], they should reconcile between the two [the husband and the wife]; then, it is lawful [for the two arbitrators] if the two [arbitrators] decided to dissolve the marriage between the two [the husband and the wife] without the [permission] of the state authority. And if the two [arbitrators] decided to take [compensation] from her [and give it to the husband] so that it becomes [separation by] *khul'*, they [the arbitrators] can do that.[58]

Imām Mālik's opinion gives the impression that the consent of the husband is not necessary for the validity of *khul'*. Above, we have given more precise opinions of other Mālikī jurists to clarify this issue. Since Imām Mālik does not mention his opinion in precise words on whether the consent of the husband is necessary for *khul'*, this made the issue confusing. However, the assertion of other Mālikī jurists clarifies the issue that the consent of the husband is not necessary in *khul'* and that it can be implemented without his consent.

According to 'Abdul Wahāb Baghdādī:

> In case of a dispute and eruption of a discord, if it is known that harm is caused by one of them it should be eliminated. However, if it is unknown which one of the two have caused the discord the State authority [court] shall send in two arbitrators one from the husband's side and one from the wife's side. The arbitrators should be jurists and fair and should investigate the matter and should do whatever they think is better for the husband and wife ranging from reconciliation to separation between the two regardless of the consent of the two [husband and wife] and whether the State authority [court] agrees or disagrees with their decision.[59]

Ibn Rushd has an interesting opinion regarding *khul'*. He states that, 'yet, the juristic reasoning is that *fida* (ransom) granted to a woman is something equivalent to what is possessed by the man; namely, (the right to) divorce. A man possesses repudiation

[58] Ibid, 2: 266.
[59] 'Abdul Wahab Baghdādī, *Al-Talqīn* (Dār al-kutub al-'Ilmiyah, n.d) 1:131.

when he pressurises a woman, while a woman possesses *khul'* when she wants to pressurise a man (her husband).'[60] It can be construed from this passage that Ibn Rushd treats *khul'* as a right possessed by a woman that is the equivalent of a man's right to divorce and that *khul'* is not dependent upon the consent of the husband. This passage is not clear about Ibn Rushd's opinion or the opinion of Mālikī school on the issue of consent of the husband. However, mentioning the crucial role of arbitrators, Ibn Rushd says:

> They [the jurists] disputed the agreed decision of the arbiters to separate them [the husband and wife], whether it would require the consent of the husband. Mālik and his disciples said that their decision about separation and union is valid without specific delegation by the spouses and *without their consent*. Al-Shāfi'ī, Abū Ḥanīfah and their disciples said that they have no right to separate them, except when the husband delegates such authority to them.[61]

Taqīuddīn al-Ḥilālī, a leading 20th century Mālikī scholar argues:

> Jurists differ regarding the issue of arbitrators; are they appointed by the state authority so that their ruling is binding without the consent of the spouses or are they proxies for the spouses? There are two opinions regarding this issue: the majority of scholars prefer the first opinion [i.e. their ruling is binding without the consent of the spouses] because of the Qur'ānic verse, 'appoint an arbitrator from his people and an arbitrator from her people', so they are named as '*hakamayn'* (arbitrators) and an arbitrator is allowed to rule without the consent of the disputant and this is the apparent meaning of the Qur'ānic verse [4:35].[62]

It is very clear from the above that Mālikī jurists have given a crucial role to arbitrators and they may decide to dissolve the marriage by *khul'* without the consent of the husband as well as the wife. In addition, Mālikī jurists consider *khul'* as *ṭalāq*.[63] As far as the amount of compensation is concerned, Ibn Rushd argues that according to Imām Mālik and a group of jurists, 'it is permitted to a woman to secure freedom with more than what has come to her from the husband, by way of dower.'[64]

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[60] Ibn Rushd, *Bidāya*, 2:81.
[61] Ibid, 2:119.
[62] Taqīuddin al-Ḥilālī, *Aḥkām al-Khul' fī al-Islām* (Al-Maktab al-Islāmī n.d) 12.
[63] Ibn al-'Arabī, *Aḥkām al-Qur'ān*, 1:250.
[64] Ibn Rushd, *Bidāya*, 2:80.

Khul' in the Shāfi'ī School

According to Imām al-Shāfi'ī, *khul'* just like *ṭalāq,* can only be affected by the husband.[65] He argues that:

> Where a man wants to separate from his wife and he intends divorce but does not intend a specific number, then the separation is a single irrevocable divorce (*fa al-khul' ṭatliqatan la yamliku fihi al-ruju'*); this is so because it is a sale (*bay'*) like other sales and it is not allowed for him to take possession of her money while continuing to possess her.[66]

Al-Shāfi'ī has narrated two versions of Ḥabība's incident: one from Imām Mālik and the other one from Ibn 'Uyayna. In the second version, Ḥabība complains of some 'harm' done to her person, which probably implies that the harm was of a physical nature. The Prophet (peace be upon him) ordered her husband, Thābit, to '[t]ake what she is giving you (*khudh minhā*)', which is repeated in both versions by al-Shāfi'ī.[67] Imām al-Shāfi'ī treats *khul'* as *ṭalāq*[68] and allows for it to be settled in or outside of a court 'as the paying of compensation and *ṭalāq* are permissible in the court as well as outside it.'[69]

Khul' in the Ḥanbalī School

While discussing the Prophet's ruling in the case of Ḥabība,[70] Ibn al-Qaiyam of the Ḥanbalī school of thought refers to the versions of Al-Bukhārī, Al-Nasā'ī, Abū

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[65] Al-Shāfi'ī, *Kitāb al-umm*, 11:183.

[66] Ibid. The wording used by al-Shāfi'ī gives the impression that a married woman is possessed by a man and, therefore, he is the controlling authority.

[67] Ibid, 11:177.

[68] Ibid, 11:180.

[69] Ibid, 11:179.

[70] Al-Khirāqī (d. 945), who is a classical authority of the Ḥanbalī school, has given three principles of *khul'*: first, 'If the woman loathes the man, and does not want to disobey God in preventing him from coming to her, it is presumed that she ransom herself from him'; secondly, 'The compensation ought not to exceed the amount he originally paid to her as dower'; finally, 'Were she is to separate from him otherwise [i.e., by paying him in excess of the dower], this would be reprehensible, but the separation would nevertheless be legally effective.' Abū 'Ali Ḥasan Ibn al-Banna's Commentary on al-Khiraq's Digest, *Kitāb al-Muqnī' fī Sharḥ Mukhtaṣar al-Khirāqī* ('Abd al-'Azīz al-Bu'aymī, Maktabat al-Rushd, 1993) 3: 952-953. Ibn Qudāma (d. 1223) has reproduced Al-Khirāqī's three principles verbatim. Muwāffaq al-Dīn Ibn Qudāma, *Al-Mughnī* (Manar Press, 1348) 8:173-176. Ibn Qudāma argues that since *khul'* 'is a transaction (*mu'āwāḍa*),

Dāwūd, and Al-Dār Quṭnī, and derives various rules pertaining to *khul*'. He argues that *khul*' is legal as stated in the Qur'ān in verse 2:229, and that the verse allows it with or without the permission of the *sulṭān* (state authority). The verse indicates that the resultant separation will be an irrevocable *ṭalāq* because God has named it '*fidya* (ransom) and if the (separation) would be revocable, as thought by some people, there would be no ransoming for the woman after paying him.'[71] The Qur'ānic verse '*fa lā junāhā 'alīhīmā fīmā aftadat bihi*' (there shall be no sin upon either of them for what the wife may give up [to her husband] in order to free herself), 'also indicates that taking more or less (than the amount of the dower) is allowed and that he can take more than what he gave her.' Ibn al-Qaiyam produces a ruling given by 'Uthmān b. 'Affān (d. 35/656) in which a woman paid as her *khul'* settlement everything she owned and 'Uthmān ordered the husband to take even her hair-band ('*Iqās*),[72] and that 'Umar b. Al-Khaṭṭāb was reported by a man whose wife had violated her marital duties (*nāshīza*) and 'Umar said (to him): 'separate from her (*ikhla'ha*) even if she gives (you) her earrings (*qirat*) [in compensation].'[73] Ibn al-Qaiyam discusses details of the difference of opinions of jurists and mentions that taking more than the amount of dower is reprehensible (*makrūh*) according to Imām Aḥmad b. Ḥanbal.[74] Ibn al-Qaiyam argues that '*khul*' is called *fidya* (ransom) because it involves the paying of the compensation (*al-mu'āwaḍa*) and therefore it is consensual.'[75]

According to Muḥammad b. Ḥazam (d. 456A.H.), if a woman thinks that she cannot obey her husband and fulfill his demands, then 'she may free herself if he agrees.' However, 'if he refuses (to divorce her), he cannot be forced (to do so).'[76] He goes on to say that a woman cannot be forced to free herself. '[A]nd the consent of both (the husband and wife) is essential for its legality (i.e., *khul'*). And if it (i.e., *khul'*) was affected without these two conditions (i.e., compensation from the wife and the consent of the husband), then it is invalid.'[77]

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similar to a sale or a marriage contract, it does not require a judge, and also because it is a dissolution of contract by mutual consent (*qaṭ' 'aqd bi al tarāḍī*).' At 8:174.

[71] Shamsuddīn Ibn al-Qaiyam al-Jawziyah, *Zād al-Ma'ād fī hadī e khayr al-'Ibād* (Aḥmad Alī Sulaymān ed, Mansūra, Dīr al-Ghad, 2009) 4:86.

[72] Ibid, 4:87.

[73] Ibid.

[74] Ibid.

[75] Ibid.

[76] Muḥammad b. Ḥazam, *Al-Muḥallā* (Aḥmad Muḥammad Shakīr ed, Dār al-Turāth n.d.) 10:235.

[77] Ibid.

The *Ahl al-Ḥadīth* in Pakistan also allow *khul'* if the wife abhors the man and has a natural hatred for him. 'Abdullah Roprī produces two versions of Ḥabība's case and concludes that mere aversion or abhorrence is enough for a woman to obtain *khul*'.[78] Although, Roprī does not explicitly mention whether the consent of the husband is necessary for *khul*', he advises that 'in such a situation the wife has the option of dissolving her marriage (*faskh e nikāḥ*) through '*Panchayat',* etc.'[79]

Khul' in the Shī'a school

According to Ḥillī of the Ithna 'asharīa (twelver) Shī'a school of thought, the specific words used for *khul*' are: when the husband says, 'you are redeemed for so much (*khala'tuki 'alā al-kazā*).'[80] *Khul*' is also allowed if the husband used the word *khul'* only without mentioning the word *ṭalāq*. But according to another opinion, the word *khul'* must be followed by the word *ṭalāq* to be valid.[81] *Khul*' is defined by the editor of Ḥillī's book as '[p]utting an end to marriage when the woman abhors her husband only in return for compensation from the woman.'[82] This means that if she abhors him she has to make an offer, which may be accepted or rejected by the husband. This makes the consent of the husband mandatory. The preferred view is that separation through this way is irrevocable *ṭalāq* and not *faskh*. 'If they agreed on *khul'*, then the husband cannot retract but she can retract in paying *fidya* during her '*iddat'* (waiting period) and he can retract if she offers to do it.'[83]

After discussing the opinions of the *fuqahā'* belonging to the various schools of thought, the picture that emerges is as follows: 1) all of the schools of thought permit *khul'* and cite verse 2:229[84] and Ḥabība's incident; 2) according to the Mālikī school, if the husband is the cause of the discord then he should not take or be given any compensation, but if the wife is the cause of the discord then she must pay compensation to the husband; 3) all the *fuqahā'* agree that the resultant separation

[78] 'Abdullah Roprī, *Fatawa Ahl al-Ḥadīth* (Muhammad Siddique ed, Idāra Ihyā' al-Sunna al-Nabawiya n.d.) 2:523.
[79] Ibid 2:522. Roprī has described such a separation as '*faskh e nikāḥ*' (at 2:522) and '*khul*'' (at 2:523). *Panchayat* is a council of elders in villages of Punjab in Pakistan and India for settling local civil disputes.
[80] Thus it is the husband who has to say it.
[81] Najmuddīn al-Muhaqiq al-Ḥillī, *Shar'ā'i al-Islām* (Al-Syad Ṣādiq Al-Shīrāzī ed, Dār al-Qārī 2004) 2:42.
[82] Ibid, fn 1.
[83] Ibid, 2:49.
[84] The Mālikīs also cite verse 4:35 of the Qur'ān as discussed above.

will be irrevocable, that is, a *ṭalāq*;[85] 4) the compensation to be paid may be the equivalent of, or more or less, than the amount of dower; 5) if they settled on more than what he gave her, it is morally reprehensible but legally binding; 6) the majority of schools disregard the ruling in Ḥabība's case and require the consent of the husband for *khul'*, however, the Mālikī jurists have reached a different conclusion based on verse 4:35 by allowing the arbitrators authority to put an end to marriage without the consent of the husband, even if the spouses have not delegated them the authority to do so; 7) the majority agree that *khul'* is consensual and the consent of both spouses is necessary, whereas the Mālikīs allow the arbitrators to dissolve the marriage by *khul'* without the consent of the husband or wife; 8) *khul'* can be settled between the partners with or without the intervention of state authority; 9) *fuqahā'* of all Sunnī schools have referred to the Prophet's ruling in the case of Ḥabība, in which in some narrations, the Prophet prohibited her from paying more than her dower but they (*fuqahā'*) consider paying more by the wife to be legally permissible.

The majority of jurists grant the husband an absolute right at the expense of his wife because of the notion of *qawāma.*[86] However, resort to a court in case of *khul'* seems unavoidable and the court must have a role to determine the issue of harm to the wife or hatred between the two parties in addition to determining the amount and extent of compensation. If a husband claims that they can live within the boundaries fixed by Allah but the wife says that they cannot, then whose claim should be accepted? It would require a third person to determine whether the wife cannot live with the husband and whether the level of hatred and aversion has reached the point of no return (irrevocable breakdown of marriage).

Part IV: *Khul'* and the Superior Courts in Pakistan: Interpreting Islamic Law or Judicial Ijtihād?

The Traditional View

The earliest reported case on *khul'* in the subcontinent– now India, Pakistan, and Bangladesh, is that of *Munshi Buzul-ul-Raheem* case,[87] in which the Judicial Committee of the Privy Council ruled that *khul'* was not available without the consent of the husband under Islamic law. Unfortunately, this case is applicable in

[85] Ṭalāq in which revocation is allowed but the couple can remarry with a fresh *nikāḥ* without the wife's intervening marriage (*ḥalāla*).

[86] The Qur'ān 4:34 states, 'Men are protectors and maintainers of women because Allah has made one of them excel over the other, and because they spend out of their possessions (to support them).'

[87] *Munshi Buzul-ul-Raheem v Luteefutoon-Nissa* (1861) 8 MIA 397.

India even today where it has not been overruled, however, the situation in Pakistan and Bangladesh is different. Gangrade argues that in India, it is uncertain whether a wife can ask for *khul'* against the wishes of the husband.[88] In *Umar Bibi v Mohammad Din*,[89] a Divisional Bench of the Lahore High Court rejected appeals by two women who were seeking divorce on the basis of *khul'* against the consents of their husbands and on the basis of incompatibility of temperament as grounds for their divorces. This view was upheld by a full bench of the same Court in *Sayeeda Khanam v Muhammad Sami*[90] in 1952. The questions before the Court were: 1) whether incompatibility of temperament constitutes a ground for divorce under Islamic law; and 2) whether discord (*shiqāq*) constitutes a ground for divorce under Islamic law. The Court answered both the questions in the negative. The Court held that the crucial role of the Prophet (peace be upon him) in the Jamīla episode discussed above, was that even the Prophet (peace be upon him) did not take it upon himself to dissolve the marriage; he had only ordered the husband to do so and the Prophet's role in this case was not that of a judge at all, but of a law-giver.[91] As explained above, the Court merely endorsed the traditional view of the Ḥanafī jurists.

Part V: *Judicial Ijtihād?*: *Islamic Law (Re)-Interpreted*

In 1959, a Full Bench of the Lahore High Court revisited the established law of *khul'* in Islam. In *Balqis Fatima v Najm-ul-Ikram Qureshi*,[92] the main question before the Court was '[whether] the wife [was] entitled to dissolution of marriage on restoration of what she has received from the husband in consideration of the marriage?' The Court answered the question in the affirmative by giving a fresh interpretation to verse 2:229, and held:

> This verse [2:229] admittedly permits the termination of a marriage by the wife passing consideration to the husband. The question for consideration is whether this termination can be affected only by agreement between the husband and wife or whether the wife can claim such termination even if the husband was not agreeable.[93]

[88] K. D. Gangrade, *Social Legislation in India* (New Delhi: Concept Publishing Co. 1974, reprint 2001) 26.
[89] AIR 1945 Lahore 51.
[90] PLD 1952 Lahore 113.
[91] Ibid, 123.
[92] PLD 1959 Lahore 566.
[93] Ibid, 573.

Justice Kaikaus argued that the 'you' in the phrase 'if you fear' [*khiftum*] must be addressed to the state and the judicial officers of the state but it clearly was not addressed to the spouse. In his view, a reference to the judge could possibly arise in circumstances where the wife wanted a divorce but the husband had refused his assent. Thus, it was for the judge to determine whether the parties would keep within the limits of Allah if the marriage were to continue. There is no point in referring the matter to a judge and in requiring him to make a determination if, in the end, he is powerless to do anything should he be convinced that the spouses could not remain within the bounds set by God. The Court concluded that the reference to the judge under the verse can only mean that he is entitled to pass an order dissolving the marriage even though the husband is not ready to divorce.[94]

In its understanding of verse 2:229, the Court deviated from the interpretation of this verse by Muslim exegetes discussed above. In this case the judges themselves interpreted verse 2:229 by directly relying on the Qur'ān itself and *aḥādīth* of the Prophet (peace be upon him), and by ignoring the opinions of the classical and the medieval jurists. In addition, the Court considered *khul'* as *ṭalāq* (divorce) rather than *fasakh* (dissolution of marriage). Thus, in the Court's view in *khul'*, the wife has to redeem herself in return for some consideration and a Court can dissolve the same if it was convinced that the spouses would not be able to live within the bounds set by God, and that the consent of the husband for the validity of *khul',* in such cases, was not necessary. The Court also argued that in the Jamīla's case discussed above the dissolution was directly ordered by the Prophet (peace be upon him) acting as a judge (rather than as a social or a political leader, as viewed by some authors), without commenting on the reasonableness of the attitude of the wife, and without seeking the consent of the husband.[95]

The Court relied upon the opinion of Maulānā Mawdūdī, who has deviated from the opinions of the majority of *fuqahā'* and has explicitly given the opinion:

> [A] Wife's right to *khul'* is parallel to the man's right of *talāq*. Like the latter the former too is unconditional. It is indeed a mockery of the Shariat that we regard *khul'* as something depending either on the consent of the husband or on the verdict of the *qazi*. The law of Islam

[94] Ibid, 573. The Court relied on Syed Abū al 'Alā Mawdūdī's *Huqooq-uz-Zawjain* for its interpretation of the verse. Carroll argues that, 'It is extremely unusual for the opinions of a living person not examined in the Court to be cited in a judicial decision.' Carroll, '"Qur'ān 2:229" A Charter Granted to the Wife? Judicial Khul' in Pakistan"' (1996) 3(1) Islamic Law and Society 103.

[95] PLD 1959 Lahore 566, 574, 586.

> is not responsible for the way Muslim women are being denied their right in this respect.[96]

The Supreme Court of Pakistan endorsed *Balqis Fatima* and rejected *Sayeeda Khanam*[97] when it decided the *Khurshid Bibi* case.[98] Commenting on verse 2:229, the Court gave its own interpretation while ignoring the opinions of the exegetes, and held:

> [W]here the husband disputes the right of the wife to obtain separation by *khula* [*khul'*], it is obvious that some third party will have to decide the matter and, consequently, the dispute will have to be adjudicated upon by the Qazi, with or without assistance of the *Hakams*. Any other interpretation of the Qur'ānic verse regarding *khula* [*khul'*] would deprive it of all efficacy as a charter granted to the wife. It is significant that according to the Qur'ān she can "ransom herself" or "get her release" and it is plain that these words connote an independent right in her.[99]

However, the Supreme Court put some limits on the wife's right to obtain *khul'*. The Court opined, '[T]he Qur'ānic condition must be satisfied that it is no longer possible for the husband and the wife to live together in harmony and in conformity with their obligations.'[100] The Lahore High Court in *Balqis Fatima* case had already observed:

> There is an important limitation on her right of *khul'*. 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, that a harmonious married state, as envisaged by Islam, will not be possible that he will grant a dissolution. The wife cannot have a divorce for every passing impulse.[101]

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[96] Syed Abū al 'Alā Mawdūdī's *Huqooq-uz-Zawjain* (9th edn, Lahore, 1964) 61, 71–79. This opinion is based on Ibn Rushd's view. See, Ibn Rushd, *Bidāya* 2:81. In his book *Islami Riyasat* (Islamic State) Moududi asserts that in a Muslim State 'a Muslim woman can obtain *khul'* through the Islamic judiciary.' Syed Abūl 'Alā Mawdūdī, *Islami Riyasat* (Lahore: Islamic Publisher 2010) 462.

[97] Both were conflicting decisions from equal Benches of the Lahore High Court.

[98] *Mst. Khurshid Bibi v Muhammad Amin* PLD 1967 SC 97.

[99] PLD 1967 SC 97, 117-118 (*per* S.A. Rahman, J).

[100] Ibid, 121.

[101] PLD 1959 Lahore 566, 593.

Carroll argues that the 'apprehension' or 'satisfaction' of the judge is 'essentially a subjective evaluation.'[102] It has to be supported by some material evidence. Justice Javed Iqbal of the Lahore High Court, tried to clarify the law for the lower courts, when he observed:

> If the Judge Family Court arrives at the conclusion that no reconciliation was possible, that the wife was determined to get the marriage dissolved, and that not dissolving the marriage would amount to forcing or compelling her to live in a hateful union with the husband, then he must dissolve the marriage on the basis of *khula* [*khul'*].[103]

The method used by the Courts in Pakistan to arrive at this new law of *khul'*, which is not based on the formulations of the various schools of thought in Islam, should be discussed here. In *Balqis Fatima*,[104] the Full Bench of the Lahore High Court ruled that the court can adopt a course different from that laid down by the classical jurists. Further, the Court opined:

> We are dealing with the interpretation of the Holy Qur'ān and on a question of interpretation we are not bound by the opinions of jurists. If we be [sic] clear as to what the meaning of a verse in the Qur'ān is, it will be our duty to give effect to that interpretation irrespective of what has been stated by the jurists.... Similar considerations apply to the interpretation of the traditions of the Prophet.[105]

The Supreme Court affirmed this principle in the *Khurshid Bibi* case, when it observed:

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[102] Carroll, 'Qur'ān 2:229: "A Charter Granted to the Wife? Judicial Khul' in Pakistan"' (1996) 3(1) Islamic Law and Society 110.

[103] *Muhammad Yasin v Rafia Bibi* PLD 1983 Lahore 377, 382. Justice Iqbal re-affirmed this principle in *Rashidan Bibi v Bashir Ahmad* PLD 1983 Lahore 549, 551. This principle was later approved by the Supreme Court in *Abdul Rahim v Shahida Khan* PLD 1984 S C 329, 332.

[104] PLD 1959 Lahore 566.

[105] Ibid, 584. See also, *Khurshid Jan v Fazal Dad* PLD 1964 Lahore 558; Justice Anwarul Haq was more specific on this point when he observed that 'the views of early jurists must be treated with utmost respect but the right to differ from them cannot be denied to the present-day courts, as such a denial will not only be a negation of the true spirit of Islam, but also of the constitutional and legal obligations of the courts to interpret the law they are asked to administer and apply in cases coming before them.' At 612. See also, *Rashida Begum v Shahab Din* PLD 1960 Lahore 1142 and *Zohra Begum v Sh. Latif Ahmad Munawar* PLD 1965 Lahore 695.

> The opinions of Jurists and Commentators stand on no higher footing than that of reasoning of men falling in the category of secondary sources of Muslim law, and cannot, therefore, compare in weight or authority with, nor alter the Qur'ānic law or the Aḥādīth. If the opinions of the jurists conflict with the Qur'ān and the Sunnah, they are not binding on Courts, and it is our duty, as true Muslims, to obey the word of God and the Holy Prophet (ati-ullah-waati-ur-Rasool).[106]

In 2002, the legislature amended section 10(4) of the Family Courts Act 1964 to provide summary dissolution of marriage in cases of *khul'* by requiring that 'the Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and also restore the husband the Haq Mehr [dower] received by the wife in consideration of marriage at the time of marriage.' The Islamicity of the above section, especially the new provision, was challenged in *Saleem Ahmad v The Government of Pakistan*[107] in the Federal Shariat Court. The Court observed:

> With great regard and utmost respect for the scholarship, 'Taqwa' and deep insight of the eminent Aimma Ezam and Ulema kiram this Court cannot declare any law or provision of law merely on the basis of views, verdicts and Fatawa issued by the honourable scholars whosoever they might be.[108]

The Court held that '[t]he impugned provision of law [i.e., S. 10(4)] was not found to be in conflict with any specific injunction contained in the Holy Qur'ān and Sunnah of the Holy Prophet (peace be upon him).'[109] The Court further observed:

> The courts are there to dissolve [sic resolve] the disputes that arise between the parties. They can decide all type of matters including, admittedly, dissolution of marriage on certain grounds. One wonders why they are not authorized to decide the case of Khula [*khul'*], if a

[106] *Khurshid Bibi v Muhammad Amin* PLD 1967 SC 97, 141.
[107] PLD 2014 FSC 43.
[108] Ibid, 50 (*per* Fida Muhammad Khan, J for the full Bench). The judgment was delivered on 25 August 2009, but was reported in 2014. At the time of writing this work the decision was pending in the Shariat Appellate Bench of the Supreme Court as Civil Shariat Appeal No. 1 of 2009 and Civil Shariat Appeal No. 2 of 2009.
[109] Ibid, 55.

> husband does not at all agree to the divorce of his wife and all the reconciliatory efforts fail.[110]

After discussing the various arguments, verses of the Qur'ān, *aḥādith*, and opinions of jurisprudents, the Court came to the conclusion that 'there is no specific verse or authentic Aḥadith that provides a bar to the exercise of jurisdiction by a competent Qazi to decree the case of Khula agitated before him by a wife after reconciliation fail.'[111] This was indeed a very bold decision and must be appreciated.

Under the above section, i.e., 10(4), obtaining *khul'* has become easier for women, but the problem is that *khul'* is availed as an alternative remedy. Usually, a complainant woman requests dissolution of her marriage on the basis of cruelty of her husband or in-laws or non-maintenance by her husband or any other remedy under the DMMA 1939, and requests *khul'* only as an alternative remedy. It is very unfortunate that in some cases, the judges only grant *khul'* and ignore all other remedies and order the wife to return her dower to the husband.[112] However, there are many cases in which the courts have corrected these aberrations and laid down the true exposition of the law of *khul'*.[113]

The Superior Courts in Pakistan have not considered themselves bound by *taqlīd* and, by seemingly resorting to *ijtihād*,[114] have asserted three rights: first, their right to independent interpretation of the Qur'ān and Sunnah, where necessary; second, their right to differ from the doctrines of traditionally authoritative legal

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[110] Ibid, 61.

[111] Ibid, 62-63.

[112] See for example *Hakimzadi v Nawaz Ali* PLD 1972 Karachi 540; *Bashiran Bibi v Bashir Ahmad* PLD 1987 Lahore 376; and *Bibi Anwar v Gulab Shah* PLD 1988 Karachi 602.

[113] See also *Zahida Bi v Muhammad Maqsood* 1987 CLC 57, it was held that the husband should not be given anything when he is the cause of dissolution of a marriage; see also, *Khalid Mahmood v Anees Bibi* PLD 2007 Lahore 626; *Munshi Abdul Aziz v Noor Mai* 1985 CLC 2546 Lahore; *Anees Ahmad v Uzma* PLD 1998 Lahore 52; *Karim Ullah v Shabana* PLD 2003 Peshawar 146. *Haseeb Ahmad v Shaista* PLJ 2008 Peshawar 205. The Court gave an interesting interpretation to section 10(4) of the Family Courts Act 1964 and held that dissolution of marriage on the basis of *khul'*, when other grounds exist would make *khul'* a 'mechanical process' and will deprive the wife to all other grounds of dissolution of marriage, other than *khul'*, and 'we cannot imagine that the proviso has been legislated to indirectly deprive women, of their all legally recognized grounds of dissolution of marriage, excepting *khul'*.' At 207.

[114] *Ijtihād* is the effort of the jurist to derive the law on an issue by expending all the available means of interpretation at his disposal and by taking into account all the legal proofs related to the issue. Imran A.K. Nyazee, *Theories of Islamic Law* (Islamabad: Islamic Research Institute, 1995, 3rd reprint 2009) 307.

texts of the various schools of thought in Islam, especially the Ḥanafī;[115] and third, their right to not follow the decisions of the Privy Council in this regard.[116] It is generally thought that the Superior Courts in Pakistan seem to have exercised *ijtihād* rather than *takhayur*[117] or *talfīq*[118] and have mainly relied on the Qur'ān and the Sunnah and not on the opinions of jurisprudents. However, section 2 of the Enforcement of *Shari'ah* Act, 1991 seems to be have added another source that Courts may take into consideration. Section 2 of the Act states that *'Shari'ah'* means the injunctions of Islam as laid down in the Qur'ān and [the] Sunnah. The explanation provided for section 2 states that:

> While interpreting and explaining the *Shari'ah* the recognized principles of interpretation and explanation of the Holy Qur'ān and Sunnah shall be followed and the expositions and opinions of recognized jurists of Islam belonging to prevalent Islamic schools of jurisprudence may be taken into consideration.[119]

It is noteworthy that the words 'may be taken into consideration' in section 2, are recommendatory only and not mandatory. Moreover, it is unclear what is meant by the word 'prevalent'; it apparently allows the judges to resort to *takhayur* or choosing the opinion of one school over that of the other(s), and not to strictly adhere to the interpretation of only one school of thought.

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[115] There are two important decisions on this point and both relate to the custody of children. *Rashida Begum v Shahab Din* PLD 1960 Lahore 1142 and *Zohra Begum v Sh. Latif Ahmad Munawar* PLD 1965 Lahore 695.

[116] See for example *Khurshid Jan v Fazal Dad* PLD 1964 Lahore 558 in which the Lahore High Court overruled *Aga Ali Khan v Altaf Hasan Khan* ILR (1892) 14 Allahabad 429, stating that 'The dictum of the Judicial Committee [of the Privy Council] in *Agha Mahmood Jaffar Bindanium v Koolsoom Beebee*, therefore, did not hold good for if a rule in a text book of whatever antiquity and high authority is in opposition to a clear injunction in [the] Qur'ān or an authentic ḥadīth of the Prophet (may peace be upon him), then undoubtedly the latter shall prevail and it is the bounden duty of the Courts to ascertain the correct rule of decision in all the matters enumerated above.' At 567 (*per* Muhammad Yaqub Ali, J).

[117] Literally favoring or choosing a position from one of the schools to the practical exclusion of the other three schools, as was done in 1939 when the DMMA was legislated where the Mālikī doctrines for dissolution of marriage were adopted so that a Muslim woman could get her marriage dissolved on the basis of various grounds.

[118] Literally 'patchwork', it is combining or mixing the positions of two or more schools to produce a hybrid ruling which does not belong, exclusively, to any of them.

[119] See section 2 of Shari'ah Enforcement Act 1991 (Act X of 1991).

A closer look, however, reveals that in the case of *khul'*, the Courts in Pakistan did not resort to *ijtihād per se* but rather applied the *Sunnah* of the Prophet (peace be upon him) in preference to the interpretations of Muslim jurists. In other words, the Courts deviated from the opinions of the majority of Muslim jurists only thinking that these opinions were not based on the Qur'ān and more specifically, the *Sunnah* of the Prophet. Since the topic of *ijtihād* and the modes of *ijtihād* are complex, any statement to the effect that the Pakistani Courts resorted to *ijtihād* regarding *khul'* would be a sweeping one.[120] *Balqis Fatima* and *Khurshid Bibi* are indeed very bold decisions, but these have deviated from the settled opinions of the majority of *fuqahā'* of Ḥanafī, Shāfi'ī and Ḥanbalī schools as well as the Shī'a school of thought. Moreover, in both cases, the judges have given the opinions of some scholars to support the view that the consent of the husband is not required in *khul'*, but the Courts needed to mention the vast literature within the Mālikī school to support its stance. This is why the '*ulamā* in Pakistan have managed to level a scathing attack on the precedent repeatedly upheld by the Superior Courts regarding *khul'*.[121] It is worth noting that the Superior Courts in Pakistan have repeatedly granted *khul'* to women summarily, especially after the 2002 amendment in the Family Courts Act 1964.[122]

Part VI: Recommendations of the Council of Islamic Ideology: The Return of Traditional View

[120] Under Islamic law there can be no *ijtihād* in texts that are definitive with respect to transmission as well as meaning. The Shāfi'ī jurists mention that: '*lā ijtihāda ma' al-naṣṣ*', i.e., there is no *ijtihād* with the *naṣṣ*. But the Arabic word *naṣṣ* in this principle does not mean 'text'. Instead, it is the name for a word or text that gives a single or definitive meaning. Nyazee argues that 'some writers have incorrectly interpreted this word to mean text for the purposes of this rule, which has the effect of eliminating a major part of the activity called *ijtihad*.' Imran A.K. Nyazee, *Islamic Jurisprudence: Usul al-Fiqh* (Islamabad: International Institute of Islamic Thought 2000) 266.

[121] Muḥammad Taqī 'Uthmānī, 'Islam me khul' kihaqiqat', in *Fiqi Maqalāt* (Karachi: Maiman Publishers 1996) 2:137-194. This is the most critical attack on any decision of the Supreme Court by a man of very high caliber, who himself served as judge of the Shariat Appellate Bench, Supreme Court for about two decades. 'Uthmānī argues that the Prophet (peace be upon him) was acting as a *muṣliḥ* (conciliator) and was giving only his advice; that he was not acting as a judge; that he was a political and social leader and people used to bring to him their social problems and so on. These arguments cannot be accepted, however, because if we agree that the Prophet was acting as a *muṣliḥ* in the case of Jamīla/Ḥabība, then it can be said that in all other civil cases brought to him he was acting as a *muṣliḥ* and not as a *qāḍī* (judge). This would mean that in all those the Prophet gave only his non-binding opinion. This is a thesis of dangerous proportion. A full rebuttal of 'Uthmānī's thesis is beyond the scope of this article.

[122] Some notable cases are: *Parveen Begum v Muhammad Ali* PLD 1981 Lahore 116; *Syed Dilshad Ahmed v Sarwat Bi* PLD 1990 Karachi 239.

The Council of Islamic Ideology makes recommendations to the Parliament, Provincial Assemblies, the President, or any Governor, on whether a proposed law is repugnant to the injunctions of Islam.[123] The Council's duties are only of an advisory and recommendatory nature. The Council has no independent power of enforcement. Articles 227-231 of the Constitution of Pakistan only established a process by which the Council may have advisory input on the 'Islamic' credentials of existing and proposed laws.[124] The Council made its recommendation regarding *khul'* to the Government of Pakistan, which is reproduced below:

> Therefore, in our opinion, a law should be enacted at the level of the state that, after a woman's written request for divorce, the husband must have an obligation to divorce her within 90 days. If the husband refuses to divorce her, the marriage shall stand dissolved after the passage of this time [90 days] except if the wife revokes her request. The husband should have no right to revoke after this. The wife must return assets and property given to her by the husband except dower and maintenance if demanded by the husband or else approach a court of law for the resolution of the conflict (of return of assets/valuables).[125]

There are several points to note. First, the Council's Recommendation seems to be a deviation from the apparent words of verse 2:229 of the Qur'ān,[126] according to which the wife pays something to free herself. Second, the Recommendation also seems to deviate from the precedent laid down by the Prophet in the Ḥabība's case, discussed above, in which she was asked by the Prophet to return her dower to her husband in return for her freedom from marriage. Third, the Recommendation is in accord with Islamic law, especially the Qur'ān and the Sunnah, in cases when the husband is the cause of discord. Finally, the Recommendation overlaps with section 10(4) of the West Pakistan Family Court Act 1964 as amended in 2002, which governs the existing law on *khul'*. However, the view of the Council seems to change with the change of its Chairman. On 27 May 2015, Mawlana Muhammad Khan Shirani, Chairman CII, opined that 'courts should refrain from dissolving '*nikāḥ*'

[123] See Articles 229 and 230 of the *Constitution of the Islamic Republic of Pakistan* (Islamabad: Ministry of Law, Justice and Parliamentary Affairs, 2010) 130-131.
[124] See Jeffrey A. Redding, 'Constitutionalizing Islam: Theory and Pakistan' (2004) 44:3 *Virginia Journal of International Law* 760, 770.
[125] Council of Islamic Ideology's meeting 171, *Annual Report*, 2008-9 (Council of Islamic Ideology 2009) 170. At that time, the CII was headed by Dr Khalid Mas'ud, the follower of Dr Fazlur Rahman.
[126] That is there shall be no sin upon either of them for what the wife may give up [to her husband] in order to free herself.

(marriage contract) in the name of 'khula' or separation.' He argued that '[k]hula is an agreement between two parties and it should not be granted until the husband agrees to it.'[127] Mawlana Shirani wishes to impose the views of the Ḥanafī school on Pakistani society, forgetting that the Council has to render advise according to the Qur'ān and the Sunnah of the Prophet (peace be upon him) only.

Conclusion

The main argument of the article may be reiterated here. The *jamhoor* (majority) of schools of thought argue that *khul'* is consensual between the husband and the wife. In their view, a judge cannot dissolve a marriage by *khul'* on the request of the wife without the consent of the husband. On the other hand, Mālikī jurists argue that the decree of the arbitrators is valid whether they order separation or union between the two, and it neither requires the consent of the husband nor of the wife. Mālikī jurists and exegetes focus on verse 4:35 of the Qur'ān rather than verse 2:229. The Superior Courts in Pakistan have been more sympathetic towards helpless women demanding *khul'* as compared to courts in India. The Federal Shariat Court has upheld section 10(4) of the Family Courts Act 1964 as not violative of the Injunctions of Islam. In addition, it ruled that it is not bound by the opinions of Muslim jurists. The Council of Islamic Ideology changed its views on the law of *khul'*. The Council had a radical view in 2008-9 about *khul'* under Dr Khalid Mas'ud, but it returned to the traditional view in 2015 under Mawlana Shirani. It is surprising that neither the Superior Courts, nor the Federal Shariat Court have dug deeper into the interpretation of verse 4:35 of the Qur'ān as understood by numerous Mālikī jurisprudents and exegetes who do not give the husband any controlling power in *khul'*. The CII has ignored verse 4:35, along with the Ḥabība/Jamīla precedent as well as the views of Mālikī jurists.

[127] 'Don't annul marriages in the name of Khula, CII Chief urges Courts' *The Express Tribune* (28 May, 2015) <http://tribune.com.pk/story/893494/dont-annul-marriages-in-the-name-of-khula-cci-chief-urges-courts/> accessed 8 August 2015.