

A MUSLIM WOMAN'S RIGHT TO A *KHUL'* IN PAKISTAN: MARITAL RELIEF OR MARITAL PAIN?

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ABSTRACT

This study examines the female-initiated divorce right of *khul'* in Ḥanafī jurisprudence and its practical implementation in Pakistan. Previous research presents Ḥanafī jurisprudence as only allowing a *khul'* with the consent of the husband coupled with a financial liability placed upon the wife. This thesis argues that there has been a fundamental misunderstanding of the *khul'* under Ḥanafī *fiqh*, which is capable of providing divorce rights to women without the husband's consent and financial recompense. This research also illustrates the judicial activism exhibited by the Pakistani courts, which has created a no-fault *khul'* surpassing existing statutory provisions. To date, there have been no studies on the efficacy of these developments, so this research assesses the extent to which these new liberal divorce laws have filtered down into Pakistani society. Through qualitative interviews and participant observations, this study examines married Muslim women's perceptions of the *khul'* and the obstacles that female litigants face whilst trying to utilise the *khul'* in the Lahore courts. The findings reveal that whilst the *khul'* has empowered some women within the marital domain, religious and cultural norms as well as practical problems within the courts have curtailed the potential of the *khul'* as a liberating tool in marriage.

DEDICATION

Through the Blessings of Almighty Allah and the *waslia* of His Beloved Prophet (s.a.w.). I dedicate this work to his eminence Shaykh-ul-Islam Dr Muhammad Tahir ul Qadri and his tireless efforts to promote Islam as a religion of peace, moderation and tolerance.

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ABBREVIATIONS

S.A.W. Salla Allahu ‘alayhi wasallam. May the peace and blessing of Allah be upon him

R.A. Radiyallahu ‘anhu. May Allah be pleased with him

LAW CASES

A.I.R. All Indian Law Reports

C.L.C. Civil Law Cases

K.L.R Key Law Reports

M.L.D. Monthly Law Reports

P.L.J Pakistan Law Journal

P.L.D. Pakistan Legal Decisions

P.S.C. Pakistan Supreme Court Cases

P.L.R. Peshawar Law Reports

Y.L.R. Yearly Law Reports

Kar. Karachi

Lah. Lahore

Pesh. Peshawar

TRANSLITERATION KEY

ي/آ/أ	ā	ظ	ẓ
ب	b	ع	ʿ
ت	t	غ	gh
ث	th	ف	f
ج	j	ق	q
ح	ḥ	ك	k
خ	kh	ل	l
د	d	م	m
ذ	dh	ن	n
ر	r	ه	h
ز	z	و	ū/w
س	s	ي	y/ī
ش	sh	ة	a
ص	ṣ	ء	ʾ
ض	ḍ	أ	a
ط	ṭ	إ	i

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CHAPTER ONE

INTRODUCTION: A WOMAN'S RIGHT TO A *KHUL'* AND MARITAL EMANCIPATION IN PAKISTAN

This study is a socio-legal investigation regarding law, empowerment and access to legal remedies for married women in Pakistan. Women's lives in Pakistan are shaped by gender disparities vis-à-vis the home, state and society. This research is therefore a critique of the law on *khul'* and examines whether this female-initiated divorce right can provide an effective legal remedy for married women in Pakistan. Islamic law is often criticised for the gender disparities inherent in its laws of divorce¹. Men have a unilateral right to divorce their wives at will, through the utterance of the word *talāq* (I divorce you), whilst a woman must seek redress through the courts if she wishes to initiate a divorce without the consent of her husband². One such right is the *khul'* where a wife may ask her husband for a divorce³. In British colonial India and the first fifteen years of post-independence Pakistan, the '*ulamā*' (Muslim scholars) and the judiciary interpreted the *khul'* as being conditional upon a husband's explicit consent coupled with the compulsory

¹ Amira Mashhour, "Islamic Law and Gender Equality—Could There be a Common

² Classical Ḥanafī jurisprudence specifically mentions only a limited number of grounds for a woman to seek a judicial divorce, assuming that she will seek a *khul'* in all other situations. These grounds include impotence, insanity of the husband, putative widowhood of 90 years, a false accusation of adultery, apostasy and a marriage contracted before the age of puberty. A husband can also delegate the right of divorce to his wife, known as *talāq-ul-tafwīd*, which will be inserted into the marriage contract. See John Esposito with Natana DeLong-Bas, *Women in Muslim Family Law* (Syracuse: Syracuse University Press, 2001), 32-34

³ Hisham M. Ramadan, *Understanding Islamic Law: From Classical to Contemporary* (New York: Alta Mira Press, 2006), 120-121.

return of the *mahr* (dower) by the wife. This was presumed to be the correct position under Ḥanafī jurisprudence and ultimately rendered the *khulʿ* obsolete, since most husbands were unwilling to facilitate a female-initiated divorce⁴. In 1939, the Dissolution of Muslim Marriages Act was passed in India, providing new but limited statutory fault-based grounds for Muslim women to divorce their husbands⁵, but the *khulʿ* itself remained a defunct remedy. In 1959 the Pakistani judiciary finally passed a landmark decision allowing women to be granted a *khulʿ* irrespective of their husbands' wishes. Despite a faltering start, the *khulʿ* has now become an indispensable right utilised by Pakistani women when initiating a divorce.

An examination of judicial statistics on family law cases reveals that female-initiated divorces have been steadily rising⁶. It has been estimated that there has been a 30 per cent rise in *khulʿ* applications over the last few years⁷, leading many religious

⁴ Lucy Carroll, "Talāq-i-Tafwīd and Stipulations in the Marriage Contract: Important Means of Protecting the Position of a South Asian Muslim Wife," *Modern Asian Studies* 16, no. 2 (1982): 277-309.

⁵ The 1939 Dissolution of Muslim Marriages Act remains applicable in Pakistan post-independence but the judiciary has been very reluctant to enforce its provisions in favour of wives. See Chapter Four for a detailed analysis.

⁶ See *Judicial Statistics of Pakistan: Annual Report 2013* (Secretariat, Law & Justice Commission Pakistan, 2013). Accessed May 16th 2016. <http://www.ljcp.gov.pk/Menu%20Items/Publications/2013/2013.pdf>. During interviews with judges, lawyers and clerks, it was ascertained that 75 to 80 per cent of all family cases were *khulʿ* applications. In 2013, 15375 family cases were initiated in the district courts of Lahore, with an additional backlog of 10427 cases pending from the previous years. If a conservative estimate of 75 per cent is used to work out possible *khulʿ* applications, it would appear that 7820 divorce applications were lodged in the court during 2013, with a backlog of 7820 cases.

⁷ See "Divorce rate surges", *The Nation News*, available at <http://nation.com.pk/lahore/03-Mar-2014/divorce-rate-surges> last accessed

clerics to denounce the current law on *khul'* as un-Islamic⁸. They claim that Ḥanafī *fiqh* does not allow a court to pass a *khul'* without a husband's consent and demand its repeal. Despite its growing popularity, there have been no in-depth studies of the legal nature of the *khul'* in Pakistan and the ability of women to initiate *khul'* proceedings; nor are there any official statistics on the number of women specifically seeking a *khul'*. This research is therefore significant, as it will provide a new theological understanding of *khul'* under Ḥanafī jurisprudence, which has been used to curtail women's rights to divorce in the Indo-Pak subcontinent. This research will seek to show that Ḥanafī *fiqh* can in fact be used as a liberating force to empower rather than disempower women within the marital arena whilst also serving as the basis for further reforms. This research is also important because it will review and assess the effectiveness of current legislation on female-initiated divorce rights. It will provide a unique insight into the perceptions of Muslim married women regarding the *khul'* and how these perceptions can either be a deterrent to female empowerment in divorce or a motivation to bypass social and cultural obstacles to obtain marital freedom. The field study will also seek to reveal

October 20th 2015; "Divorce rates climb" Pakistan Today, available at <http://www.pakistantoday.com.pk/2011/06/26/city/lahore/divorce-rates-climb/> last accessed October 20th 2015, "Divorce rate rising 30% yearly over incompatibility", Daily Times, Available at <http://archives.dailytimes.com.pk/karachi/03-Mar-2007/divorce-rate-rising-30-yearly-over-incompatibility> last accessed October 20th 2015.

⁸ "Khul' Without Husband's Consent is Un-Islamic: CII," The Express Tribune, February 18th 2016, accessed May 9th 2016 <http://tribune.com.pk/story/1049717/khula-without-husbands-consent-is-un-islamic-rules-cii/>; "Why Aren't any Religious Scholars Denouncing Council of Islamic Ideology's Blatant War on Women?" The Nation, February 27th 2016, accessed May 9th 2016 <http://nation.com.pk/blogs/27-Feb-2016/why-aren-t-any-religious-scholars-denouncing-council-of-islamic-ideology-s-blatant-war-on-women>

the efficacy of the *khul'* as a tool for empowering women within the marital arena and provide important suggestions for law reform.

1.1 The Rationale for the Research

The subordinate status of women in Muslim countries has become the focal point of much academic writing in recent years⁹. The revival of Islamic norms throughout the Muslim world is often equated with increased oppression towards women, symbolised by the wearing of the veil and segregation of the sexes¹⁰. Combined with pre-existing patriarchal cultural and societal structures, the violation of women's rights has become the focus of governments, NGOs and women's rights activists in recent years¹¹. The personal status laws of a particular state can also be symptomatic of women's low position in society¹², particularly laws relating to

⁹ See Chitra Raghavan et al. *Self-Determination and Women's Rights In Muslim Societies*, (Brandeis Series on Gender, Culture, Religion and Law, 2012); Lila Abu-Lughod, *Do Muslim Women Need Saving?* (Harvard University Press, 2013); Vrinda Narain, *Gender and Community; Muslim Women's Rights in India* (University of Toronto Press, 2001); Haideh Moghissi ed, *Women and Islam: Critical Concepts in Sociology*, (Routledge, 2005).

¹⁰ Esposito and DeLong-Bas, *Women in Muslim Family Law*, 105.

¹¹ See Naz K. Modirazdeh, "Taking Islamic Law Seriously: NGOs and the Battle for Muslim Hearts and Minds," *Harvard Human Rights Journal* 19 (2006): 191-192. Modirazdeh notes an increased focus on economic, military and media issues in the Muslim world, particularly after the events of 9/11. See also Aziza al-Hibri, "Islam, Law and Customs: Redefining Muslim Women's Rights", *American University International Law and Policy* 12 (1997): 1, 4.

¹² Essam Fawzy, "Muslim Personal Status Law in Egypt: The Current Situation and Possibilities of Reform Through Internal Initiatives", in *Women's Rights and Islamic Family Law: Perspectives on Reform*, ed. Lynn Welchmann (London: Zed Books, 2004), 27.

divorce and polygamy¹³. The subordination of women within the domestic sphere can create a platform for their subjugation in other spheres of life: thus, advocating reform within these parameters has wider consequences for women in the economic, social and political arena¹⁴. Pakistan is no exception to this phenomenon and an examination of women's position within the family domain reveals that many of them are subject to stringent patriarchal norms¹⁵.

Although Pakistan was the first Muslim country to have a female prime minister and women who belong to the middle upper classes have won some levels of emancipation¹⁶, many women in Pakistan are subject to immense poverty¹⁷ and high levels of illiteracy¹⁸. Within the family domain, the birth of a baby girl is met

¹³ Esposito, *Women in Muslim Family Law*, 134. Esposito notes the efforts of the Tunisian, Somalian and Egyptian governments to improve women's rights in marriage and divorce.

¹⁴ See Bharathi Anandhi Venkatraman, "Islamic States and United Nations Convention on the Elimination of all Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?" *American University Law Review* 44 (1995): 1949, 1950-51. Venkatraman considers CEDAW a "brand apart from other treaties because it seeks to...influence cultural values that prescribe the traditional roles of men and women in marriage, family relations and other situations that are fertile ground for sexual stereotypes".

¹⁵ Maliha Gull Tarar and Venkat Pulla, "Patriarchy, Gender Violence and Poverty amongst Pakistani Women: A Social Work Inquiry," *International Journal of Social Work and Human Services Practice Horizon Research Publishing* 2, no. 2 (2014): 56.

¹⁶ Thamina Rashid, "Empowerment and Subordination of Pakistani Women," in *Pakistan: From the Rhetoric of Democracy to the Rise of Militancy*, ed. Ravi Kalia (London: Routledge, 2011), 85-104.

¹⁷ According to the Gender Inequality Index (GII), which reflects gender-based inequalities in three dimensions —reproductive health, empowerment and economic activity—Pakistani women have a GII value of 0.56, ranking the nation at a very low 123rd out of 146 countries (Human Development Report 2013).

¹⁸ Historically, Pakistan spends very little on education: a meagre 2.1 percent of its GDP in 2012. In 2011, Pakistan's overall literacy rate was already low, at 58 per cent, whilst women's literacy was even lower, at just 46 per cent, with only 18.3 per

with disappointment and even despair, and from the outset it is presumed that a daughter is a temporary visitor, her birth family merely an ephemeral pit-stop, since she ultimately belongs to her future husband and his family. Saigol (1995) discusses the impact of traditional knowledge systems and argues that a woman is generally considered a social burden or liability for the family and is always compelled to think that marriage is considered to be her major goal in life¹⁹. From an early age, senior women of the family will begin a process of indoctrination as to the correct norms of behaviour to follow. Girls are taught to be respectful and courteous at all times: in reality, this can translate into submissiveness, obedience and readiness to surrender in practical terms²⁰. If a girl wishes to assert her legal or religious rights,²¹ she will be viewed as rebellious and recalcitrant and ostracised if necessary in order to force her to submit. Throughout her life, she will be expected to submit: before marriage, to the authority of her father and brothers, and later, after marriage, to her husband's authority²² and that of the more senior women in his household. Moreover, her value and status in her husband's family are only truly

cent of women gaining secondary or higher education between 2006 and 2010 (Human Development Report 2013).

¹⁹ Robina Saigol, "Domestic Knowledge Systems and Patriarchy", in *Unveiling the Issues: Pakistani Women's Perspectives on Social, Political and Ideological Issues*, eds. Nighat Said Khan et al. (Lahore: ASR Publications, 1995), 142.

²⁰ A common proverb that many Pakistani women have heard whilst growing up is "*Dolli bap ki ghar say our janaza shohar kai ghar say*," meaning "She will leave her father's house as a bride and only emerge from her husband's house in her coffin."

²¹ A right to marry a person of her choice or insist upon inheritance rights, for example.

²² Most recently on May 26th 2016 the Pakistan Islamic Council of Ideology proposed amendments to the Women's Protection Bill arguing a husband was allowed to 'lightly beat his wife' if she is disobedient. See Tim Craig, "Pakistani husbands can 'lightly beat' their wives, Islamic council says". Accessed May 26th 2016. <https://www.washingtonpost.com/news/worldviews/wp/2016/05/26/pakistani-husbands-can-lightly-beat-their-wives-islamic-council-says/>

cemented when she has borne him a child, particularly a son, since her participation in the family is directly linked through her children²³. The embodiment of a good pious Pakistani Muslim girl is reflected in her ability to look after her husband and her future extended family²⁴. Even where families are able to afford maids and housekeepers, a woman's sphere of responsibility still remains within her household and how well she is able to manage her family affairs²⁵.

Perhaps one of the biggest obstacles that women face within the family domain is domestic violence. Intimate Partner Violence (IPV) is a stark reality faced by many women in Pakistan, with an alarming number of women having experienced verbal, physical or sexual abuse from their husbands²⁶. Moreover violence is not limited to IPV but expands to abuse and insults by the wife's in-laws and sisters-in-law too²⁷. Unfortunately domestic violence is deeply embedded within the culture and fabric

²³ Anna Winkvist and Humaira Akther, "God Should Give Daughters to Rich Families Only: Attitudes Towards Childbearing Among Low-Income Women in Punjab, Pakistan," *Social Science and Medicine* 51, no. 1 (2000): 81.

²⁴ Zehra Arshad, *The Economic Contribution of Pakistani Women Through Their Unpaid Labor* (Islamabad: Society for Alternative Media and Research and Healthbridge, 2008), iii.

²⁵ It has been noted that 79 per cent of Pakistani women can be labelled as homemakers, spending up to eight hours a day performing major tasks of cooking, cleaning and fetching water, and a total of sixteen hours if other minor household chores are included. See Zehra Arshad, *The Economic Contribution of Pakistani Women through their Unpaid Labour*, 6-9.

²⁶ T. S. Ali et al. "Dowry Practices and their Negative Consequences from a Female Perspective in Karachi," *Pakistan Health* 5 (2013): 85.

²⁷ T.S. Ali, and I. Bustamante-Gavino, "Prevalence of and Reasons for Domestic Violence Among Women From Low Socioeconomic Communities of Karachi," *Eastern Mediterranean Health Journal*, 13 (2007): 1417-1426.

of Pakistani society as a result of systemic and endemic abuse²⁸. Whether or not Islam allows violence towards women is a contentious issue. The majority of Muslims would agree that Islam does allow chastisement, albeit mild chastisement. Although others disagree,²⁹ they are in the minority, and many Pakistani men consider physical chastisement of their wives as a divinely given right protected by the Qur'ān³⁰. It has been reported that 80 per cent of households have experienced some form of domestic violence³¹ and that this covers a wide area of abuse. Marital violence in Pakistan includes verbal abuse, sexual and physical abuse, hitting,

²⁸ Manar Waheed, "Domestic Violence in Pakistan: The Tension Between Intervention and Sovereign Autonomy in Human Rights Law", *Brook Journal of International Law*, 29 (2003-2004): 939.

²⁹ See Muhammad Tahir-ul-Qadri, *The Glorious Qur'an; English Translation* (London: Minhaj-ul- Qur'ān Publications, 2012), 56, who provides a translation negating the right to strike 'rebellious' wives. He translates the Qur'ānic verse 4:34, which is often used to justify men beating their wives as "...But those women whom you fear will disobey and defy, admonish them; and (if they still do not approve) separate them (from yourselves) in beds and (if they still do not improve) turn from them, striking a temporary parting". See also Sisters in Islam and Yasmin Masidi, *Are Muslim Men Allowed to Beat their Wives?* (Kuala Lumpur: United Selangor Press, 2009); Amina Wadud, *Qur'an and Woman Rereading the Sacred Text from a Woman's Perspective*. (New York: Oxford University Press, 1999).

³⁰ Khanum Shaikh, "New Expressions of Religiosity: Al-Huda International and the Expansion of Islamic Education for Pakistani Women," in *Women and Islam*, ed. Zayn. R. Kassm (Westport: Praeger, 2010), 178.

³¹ R. Coomeraswamy (2005) "The Varied Contours of Violence against Women in South Asia. Key Gender Issues in South Asia: A Resource Package," Technical Papers presented at the 5th South Asia regional ministerial conference celebrating Beijing Plus Ten (Islamabad: United Nations Development Fund for Women (UNIFEM), 2005); Hina Jilani, and E. Ahmed, "Violence against Women: The Legal System Institutional Responses in Pakistan" in *Violence, Law and Women's Rights in South Asia*, ed. S. Gooneselere (Thousand Oaks: Sage, 2004), 148-206. The Pakistan Institute of Medical Sciences has also reported that 90 per cent of married women have reported some form of sexual or physical abuse. See Carol Anne Douglas et al, "Pakistan: Women's Rights Activists Falsely Accused," *Off Our Backs*, 32 (5/6) May 1 2002.

kicking, slapping, rape and murder³². Moreover, those women who are brave enough to file complaints are subject to further abuse, not just from the family but also from police authorities³³. The failure of state institutions to provide relief to victims of domestic violence only increases the likelihood of reoccurrence with no deterrent, trapping women between the perpetrators of the crime and the law and its enforcers³⁴

As well as being kicked, slapped, beaten and sexually abused, many Pakistani women are doused in acid, set on fire or mutilated in other ways³⁵. A common form of attack is known as ‘stove-burning’, where the alleged abuser claims that the woman’s clothes caught fire or that an unstable gas cooker, as commonly used in poorer Pakistani homes, exploded and burnt her. In reality, many of these incidents occur as a means of controlling women to ensure that dinners are made on time, the house is kept clean or that other domestic abuse is not officially reported³⁶. The abuser, most often the husband, will douse the woman in kerosene in the kitchen and then set her on fire using the stove³⁷. Many terrible crimes have been reported in Pakistan and highlighted by the media, and one can only wonder about those that

³² F. Clitella and J. Willet, “Creating a Safe Haven in Pakistan,” *International Social Work* 53, no. 3 (2010): 409.

³³ *Crime or Custom? Violence Against Women in Pakistan* (Human Rights Watch, 1999), 52-68

³⁴ Hina Jilani, *Human Rights and Democratic Development in Pakistan* (Human Rights Commission, 1998), 140-141.

³⁵ See Critelli and Willet, “Creating a Safe Haven in Pakistan,” 409, who note that nose cutting is a particularly gruesome act of degradation and humiliation evident in Pakistan.

³⁶ Elizabeth Schneider, *Battered Women and Feminist Law Making* (New Haven: Yale University Press, 2000), 21-22.

³⁷ *Crime or Custom? Violence Against Women in Pakistan*, 30.

go unreported³⁸. Another, more culture-specific form of domestic violence is called 'honour killings', where women are literally killed as a way of restoring honour to a family which feels that it has lost it due to some alleged action by the female in the family³⁹. Tragically, hundreds of women are killed every year under the pretext of honour, which again only reflects those numbers that have actually been reported, with most going unreported⁴⁰. The shame and dishonour that surrounds any women who seek redress is so great that even when women experience severe beatings and mutilations, police and other law enforcement officials impede them from seeking redress by discouraging complaints⁴¹. It appears that the state and its enforcement agencies are not only incapable but also unwilling to protect women against violence and bring the perpetrators of these crimes to justice⁴². There are no special domestic violence units or specialised training,⁴³ and police officers often treat these cases as private familial issues based on culture and custom rather than as the

³⁸ *Women in Pakistan: Disadvantaged and Denied their Rights, Human Rights are Women's Rights* (Amnesty International, 1995). "Woman Set on Fire by Husband" The Express Tribune. Accessed October 6th 2014. <http://tribune.com.pk/story/274811/woman-set-on-fire-by-husband-and-in-laws/>

³⁹ These types of honour killings have become commonplace in Pakistan and occur not only as a result of divorce cases but also for much more minor and trivial reasons. They can occur 'when a wife does not serve a meal quickly enough or when a man dreams that his wife betrays him'. See *Women in Pakistan: Disadvantaged and Denied their Rights*, 3.

⁴⁰ Radhika Coomaraswamy, "Human Security and Gender Violence," *Economic and Political Weekly* 40, no. 44/45, (2005): 4731.

⁴¹ Human Rights Watch, *Crime or Custom?* 45.

⁴² See Shahnaz Khan, *Zina, Transnational Feminism and the Moral Regulation of Pakistani Women* (Vancouver: UBC Press, 2006), 66, who details the infamous Saima Sarwar case where a woman was shot dead in front of her lawyer for attempting to instigate a divorce against her husband. Despite avid media attention and the public nature of the slaying, the perpetrators of the crime were never brought to justice.

⁴³ Human Rights Watch, *Crime or Custom*, 52. In Lahore and Karachi, it was noted that none of the victims of domestic violence had their cases handled according to the Pakistani Criminal Procedure Code.

perpetration of a crime⁴⁴. Police officers will disregard many complaints or proceed to belittle the complainant, trivialising the matter⁴⁵. Instead, they encourage victims of abuse to reconcile with their abusers⁴⁶ rather than risk dishonour through public disclosure⁴⁷. By encouraging reconciliation and often refusing even to deliver a caution to the abuser, they reinforce the abuser's power and control over the survivor⁴⁸. Yet police apathy is only one of many abuses that such women will face. Having been the victims of abuse, they are then likely to face similar abuse at the hands of the police authorities themselves⁴⁹. Women have claimed to have been 'beaten, kicked, and raped in the police stations to humiliate them, to intimidate them or to extract money'⁵⁰.

Within this context, the importance of female marital emancipation is acutely evident. An intellectual engagement with a secure right to divorce is extremely significant for women, as it can contribute to their overall empowerment.

Challenging existing hierarchies within families can become a springboard to secure greater rights within the public sphere⁵¹. A right to secure an exit from marriage is not merely an academic question, however, but an extremely pressing necessity for

⁴⁴ Ibid., 53.

⁴⁵ Ibid.

⁴⁶ Hina Jilani, *Human Rights and Democratic Development in Pakistan*, 143

⁴⁷ Ibid., 142.

⁴⁸ Karla Fischer, Neil Vidmar and Rene Ellis, "The Culture of Battering and the Role of Mediation in Domestic Violence Cases," *SMU Law Review* 46 (1993): 2159.

⁴⁹ *Women in Pakistan: Disadvantaged and Denied their Rights*, 7-18; Crime or Custom, 45-46.

⁵⁰ *Women in Pakistan: Disadvantaged and Denied their Rights*, 7-18.

⁵¹ Karin Carmit Yefet, "Lifting the Egyptian Veil: A Constitutional Road Map to Female Marital Emancipation in the Islamic World," *The Family in Law* 5, no. 87, (2011), 87.

Pakistani women. The freedom to divorce can amount to freedom from violence, abuse and humiliation; an escape from authoritarian rule that can be life-threatening. However, the majority of women in Pakistan are in a vulnerable position and thus access to justice is not an easy recourse. Courts are part of the public domain and traditionally women have less connection with the public sphere than their male counterparts: thus, the courts might be beyond their reach in their daily lives⁵². Law and legal language has a persona of unobtainability, an incomprehensible set of legal requirements that may be too complicated for them to fulfil. This research is therefore important, as it will not only assess the efficacy of statutory provisions in providing marital freedom but also analyse what motivates some Pakistani women to bypass strong cultural restraints and initiate a divorce and why many others remain silent. Dahl (1987) argues that women's life experiences and lived realities are integral in order to understand the relationship between women and the law⁵³. Through a process of "looking upwards from below to see both law, reality and morality from a women's point of view", one can develop new understandings of law and understand the impact of customary practices and public opinion⁵⁴. Cain (1992) argues that "legal scholarship is not feminist unless it is grounded in women's experience"⁵⁵. This study, then, will develop a critical consciousness of the context in which women are able to access the formal process of law.

⁵² See Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice* (Cambridge: Cambridge University Press, 2013).

⁵³ T. S. Dahl, *Women's Law: An Introduction to Feminist Jurisprudence* (Oslo: Norwegian University Press, 1987).

⁵⁴ *Ibid.*, 13.

⁵⁵ P. Cain, "Feminist Legal Scholarship," *Iowa Law Review* 77(1991-1992): 20.

1.2 Theoretical Basis of this Study

This study will adopt an interdisciplinary approach and draw upon a theoretical framework that is partly based on feminist legal scholarship, third world feminists and Islamic feminists. This research will take a wider view that law is a 'process' and a site for 'discursive struggle', enabling it to capture the possibilities and limitations of law⁵⁶. It questions whether formal state law situated within patriarchal and plural legal settings can provide justice for the suffering of women⁵⁷. Can women use formal laws as a strategy for social change and provide economic and physical security? Feminist legal theory works from the premise that even gender neutral laws discriminate between men and women, as the law invokes certain stereotypical images of women, such as mothers, wives, daughters and sisters, with which women must identify themselves. Law is viewed as 'male' and male values are reflected in legal rules and institutions. MacKinnon (1997) argues that male systems of justice create patriarchal powers, causing the oppression of all women⁵⁸. Kapur (2006) questions the ability of the law to bring about social change. He argues that although law has been important in the struggle for women's human rights, it cannot displace dominant discourses of class and socio-

⁵⁶ Ratna Kapur, "Subversive Sites: Feminists' Engagement with the Law in India" in *Writing the Women's Movement Reader*, ed. Malla Kullar (New Delhi: Zuban, 2005), 152.

⁵⁷ See F.B. Rothman et al, *Gender and Law: Theory, Doctrine* (New York: Aspen Law and Business, 1998).

⁵⁸ See C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1997).

economic positions⁵⁹. In post-colonial societies, formal legal strategies have not proven effective in providing satisfactory remedies to women, whilst the presence of local cultural practices has hindered women's ability to claim their legal rights to 'equality' and 'non-discrimination'⁶⁰. These areas will be explored in Chapter Six of this research, which reveals that the majority of the married women interviewed were not only sceptical of the *khul'* but also highly critical of women who pursued divorce in the court, contravening societal norms.

In her analysis of legal reforms under the Hindu Marriage Law in India, Basu (2001) observes that law alone cannot improve the status of women until the state succeeds in removing illiteracy and ignorance and creates an awareness of the need to change social attitudes⁶¹. In the same vein, Mukhopadhyay (1998) argues that while laws may be gender neutral, they do not take into consideration the actual lived experiences of women; nor do they take into account external norms that control many facets of women's lives in both the public and the private domain⁶². Thus, they are unable to provide substantive improvements in the conditions of women on the ground. Hence, laws passed in India aiming to protect women against domestic violence, rape or dowry-related violence have actually operated

⁵⁹ Ratna Kapur, "Revisioning the Role of Women's Human Rights Struggles," in *The Legalization of Human Rights: Multidisciplinary Human Rights and Human Rights Law*, eds. S. Meckled-Garcia and C. Basak (Abingdon: Routledge, 2006), 111.

⁶⁰ A. Stewart, "Should Women Give Up the State? The African Experience," in *Women and the State: International Perspectives*, eds. S. Rai and G. Lievesley (London: Taylor and Francis, 1996), 23-44.

⁶¹ M. Basu, *Hindu Women and Marriage: From Sacrament to Contract* (New Delhi, New York: Oxford University Press, 2001).

⁶² S. Mukhopadhyay, *In the Name of Justice: Women and Law in Society* (Delhi: Manohar, 1998), 9-14.

against the larger interests of women, since judicial decisions have been influenced by patriarchy, with legislation merely becoming a token gesture of the state's commitment to protect women⁶³. Within this vein, Chapter Four of this research will evaluate the efforts of the Pakistani judiciary in its interpretation of the statutory laws of divorce and the *khul'*. It will investigate what strategies, if any, have been employed by the courts to ensure that formal laws actually benefit women and where they have encountered problems to this effect.

Carol Smart (1996) argues that the 'uneven development' of law means that it must also be recognised that there are distinctions between law as legislation, the law in practice and the effects of that law in practice⁶⁴. Law should not be viewed as merely a tool for oppression or capitalism; rather, it can facilitate as well as be an obstacle to change⁶⁵. A discourse of law is not homogenous and affects citizens in different ways where gendered identities and positions are cultivated⁶⁶. It can be a strong power in creating and perpetuating gendered identities, but at the same time, ways can be found to use these discourses to challenge those constructions⁶⁷.

Chapter Seven, for example, will reveal the different experiences of the participants who applied for a *khul'* in the courts. For some, the judiciary was merely an

⁶³ F. Agnes, "Violence Against Women: A Review of Recent Enactments," in *In the Name of Justice: Women and Law in Society*, ed. S. Mukhopadhyay (Delhi: Manohar, 1998), 88.

⁶⁴ Carol Smart, "Feminism and Law: Some Problems of Analysis and Strategy," *International Journal of Sociology of Law* 14 (1996): 117.

⁶⁵ Ibid., 109.

⁶⁶ Carol Smart, "The Women of Legal Discourse," *Social and Legal Studies* 1 (1992): 33.

⁶⁷ Ratna Kapur, "Subversive Sites", 155.

extension of the patriarchal structures to which they had been subject within their marriages, whilst for others, the courts provided some marital relief. There are competing power structures that law on its own cannot challenge: thus, rather than focusing simply on law reform, we must look for 'other non-legal strategies and local struggles'⁶⁸.

1.3 Third World Feminism and 'Adaptive Preferences'.

Although this research draws inspiration from feminist legal perspectives, it is also important to consider Third World feminist perspectives, which take a 'women-centred' focus, as ignoring women's multiple identities and can be just as oppressive and essentialist as a male-dominated discourse⁶⁹. Chandra Mohanty (1991) is critical of the essentialist approach, as it assumes that women are a homogenous group even within differing cultural identities⁷⁰. She also argues that this pits 'First World women' against 'Third World women', with the former being categorised as white, middle class and heterosexual⁷¹. An essentialist approach perceives women as passive victims of religious extremism, oppressive cultural traditions and male oppression rather than considering women as a socio-economic group within

⁶⁸ Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989), 88, 165.

⁶⁹ The socio-political designation given to women of Asian, African and Latin American is often 'Third World women'. See Chandra Talpade Mohanty et al, *Third World Women and the Politics of Feminism*, (Indiana University Press, 1991) ix.

⁷⁰ Chandra Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses," in *Third World Women and the Politics of Feminism*, ed. C. Mohanty et al. (Indiana: Indiana University Press, 1991), 51-71. Mohanty uses a geographical basis to define the Third World and groups the nation states of South and South East Asia, Sub-Saharan Africa, South Africa and Latin America into this category.

⁷¹ Ibid., 60.

particular local contexts⁷² who respond to oppression in various ways. This is particularly important with respect to the results of this research, which found that the participants used different strategies to withstand male oppression. Some women chose to remain in abusive marriages; others preferred to use bargaining and manipulation tools within their marriages, whilst some women resorted to formal legal remedies to obtain marital freedom. Chapter Six of this research, for instance, displayed a vexing problem regarding the conflict between providing criticisms of the life choices made by women who appear to be “stultifying and dominating and in that way incompatible with autonomous agency”⁷³ and respecting the choices and preferences made by women who appear to accept, adapt to and even prefer oppressive circumstances. Therefore feminist theories of ‘adaptive preferences’ or ‘deformed desires’ and ‘patriarchal bargaining’ in relation to women’s autonomy are used to analyse participant responses⁷⁴. Many feminists consider adaptive preferences as harmful preferences, as they have been adopted as a response to unjust social conditions, such as those found in a patriarchal society

⁷² Ibid., 64.

⁷³ John Christman, “Coping or Oppression: Autonomy and Adaptation to Circumstance,” in *Autonomy, Oppression and Gender*, ed. Andrea Veltman and Mark Piper (Oxford: Oxford University Press, 2014), 202.

⁷⁴ See Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000), 111-166; Natalie Stoljar, “Autonomy and Adaptive Preference Formation” in Veltman and Piper, eds., *Autonomy, Oppression and Gender*, 227-252; Uma Narayan, “Minds of Their Own; Choices, Autonomy and Cultural Practices,” in *Minds of One’s Own: Feminist Essays on Reason and Objectivity*, eds. Louise Anthony and Charlotte Witt (Boulder, CO: Westview Press, 2002), 418-432; Deniz Kandiyoti, “Bargaining with Patriarchy,” *Gender & Society* September 2, no. 3 (1988): 274-290.

where men are deemed superior to women⁷⁵. Thus, Pakistani women who would rather remain in an abusive marriage than opt for a *khulʿ*, and who censure those who do take that route, could be considered to have ‘adaptive preferences’, since many of these women do not consider themselves as having rights that are being violated, but believe instead that it is their ‘lot in life’ to put up with such abuse. Feminists such as Martha Nussbaum (2000) describe adaptive preferences as ‘deformed desires’ and argue that they should be discarded, as they undermine a person’s ability to make independent decisions, and are thus impairments to autonomy⁷⁶. However, a competing interpretation is provided by Uma Narayan (2002). She does not believe that women within a patriarchal society always enjoy their subordinate status, and argues that they should not be considered ‘dupes’ of that system⁷⁷. The situation is thus more complex, as many women are aware of the cultural and religious constraints that curtail their actions but can still make informed and rational decisions that benefit them in the long term. So, for example, a Pakistani woman may choose to remain in an abusive marriage, as the alternative, divorce, will result in abject poverty and homelessness. She may not like her choices, but she has to ‘bargain with patriarchy’ in order to achieve the best result possible for her under the circumstances. Thus, part two of Chapter Six will use the narratives presented in part one to explore these themes and further understand the responses of the participants. It will be argued that the responses of the women

⁷⁵ Catriona MacKenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (New York: Oxford University Press, 1999), 13-19.

⁷⁶ Nussbaum, *Women and Human Development*, 111-166.

⁷⁷ Uma Narayan, “Minds of Their Own”, 420.

interviewed cannot be understood or explained by the general labels of autonomous or non-autonomous behaviour. Rather, the results illustrate multifarious approaches to marital conflict by the participants, who shape their lives in response to uncontrollable and sometimes unforeseen circumstances that do sometimes undercut autonomy, but which in other cases can be seen as rational choices that promote their self-governance.

1.4 Women as Agents of Change

Feminist legal theorists and Third World feminism emphasise the concept of 'woman's agency' as a useful tool to illustrate a realistic and dignified account of women's resistance to male oppression. 'Woman's agency' focuses on a woman's strength, her ability to resist, the strategies she adopts to improve her situation and her capacity to control and direct her life through individual action. The concept of agency allows meaning to be given to a set of traditional norms that may be marked by contradictions and might thus offer no clear and consistent principles for life⁷⁸. Agency becomes the 'story of oneself', allowing contradictory practices to become a coherent and consistent story and thus to become more bearable⁷⁹. Women's agency is struggling against gender discrimination and negotiating women's social and cultural relations and identities. Kapur (2005) argues that after recognising a woman's multiple identity, focus should shift to her instances of resistance, so that

⁷⁸ N. Naffine, "In Praise of Legal Feminism," *Legal Studies* 22, no. 1 (2002): 86.

⁷⁹ *Ibid.*, 86.

women are not always perceived as victims⁸⁰. An essentialist approach can sometimes ignore the strengths of women who engage in a continuous daily battle within their limited resources to provide as best as they can for their families and children. Women's diverse identities can be reflected in their survival strategies, ranging from new theological interpretations to an outright rejection of religion, from personal development to armed struggles⁸¹.

Taking this into consideration, Deniz Kandiyoti's (1988) concept of *patriarchal bargains* will be used as an analytical tool of analysis in this research, to understand the manner in which women strategise in the critical moment of divorce in the patriarchal and patrilineal context of Pakistan. Kandiyoti (1988) defines the concept of *patriarchal bargaining* as the manner in which women use various strategies within a set of "concrete constraints" that vary according to ethnicity, class, caste and geographical location⁸². In particular, she focuses on the manipulation and subordination of women in the areas of North Africa and the Middle East (including Pakistan, India and Iran) by which women maximise their security⁸³. Kandiyoti's (1988) description of *classical patriarchy* provides a benchmark of Pakistani women's position from which they negotiate their lives. Pakistan is a society whose social values and norms can be characterised as classically patriarchal, with its

⁸⁰ R. Kapur, "The Tragedy of Victimization Rhetoric: Resurrecting the Native Subject in International/Postcolonial Feminist Legal Politics," *Harvard Human Rights Journal* 15 (2002): 7.

⁸¹ See Farida Shaheed, "Constructing Identities: Culture, Women's Agency and the Muslim World," *International Journal of Social Science* 12, no. 51 (2002): 61-73.

⁸² Deniz Kandiyoti, "Bargaining With Patriarchy," *Gender & Society* 2, no. 3 (1988): 275.

⁸³ *Ibid.*, 278

salient features including female seclusion, subordination and segregation.

However, in the last thirty years, the advancement of technology and economic development has meant that a social transformation is taking place within the parameters of women's lives and has led to a relaxation of some of the patriarchal rules of the society: a transition emulating the transition from traditionalism to modernity. It is important to understand how women from both the lower working class and the urban middle class have responded to modernization and actively engage in *patriarchal bargaining*, the strategies they adopt to negotiate release from abusive marriages in the hope to achieve a better life. *Patriarchal bargaining* in my research is the rationalization by women regarding their prospects of marriage and divorce and other initiatives to obtain a better life.

For the purposes of this research, Kabeer's (2005) concept of empowerment is also an important analytical tool in examining Pakistani women's bargaining for and exercise of their agency⁸⁴. Kabeer (2005) defines *empowerment* as 'the process by which those who have been denied the ability to make choices acquire such an ability',⁸⁵ but in order to be empowered, one must have been disempowered in the first place⁸⁶. Empowerment, she argues, is a process of change and identifies certain

⁸⁴ Naila Kabeer, "Gender Equality and Women's Empowerment – A Critical Analysis of the Third Millennium Development Goal," *Gender and Development* 13, no. 1 (2005): 13-24.

⁸⁵ Ibid., 13.

⁸⁶ Naila Kabeer 1999a, "The Conditions and Consequences of Choice: Reflections on the Measurements of Women's Empowerment". UNRISD, 108, 1-58 2, accessed November 2015.

[http://www.unrisd.org/80256B3C005BCCF9/%28httpAuxPages%29/31EEF181BE C398A380256B67005B720A/\\$file/dp108.pdf](http://www.unrisd.org/80256B3C005BCCF9/%28httpAuxPages%29/31EEF181BE C398A380256B67005B720A/$file/dp108.pdf)

criteria as qualifiers of empowerment, such as choice, which implies the ‘possibility of alternatives’ or the ability to have chosen otherwise⁸⁷. Empowerment is further broken down into three categories: *resources*, which facilitate the expansion of *agency*, which will then bring about the possibility of *achievements*. Kabeer (199b) does not limit *resources* to economic factors alone, but also includes human and social resources, all of which can enhance the ability to make a choice⁸⁸. *Agency* is described as “the ability to define one’s goals and act upon them”⁸⁹. It does not refer to simply observable action but “also encompasses the meaning, motivation and purpose which individuals bring to their activity, their sense of agency, or the power within”⁹⁰. Kabeer (1999b) widens the scope of agency to also include bargaining and negotiation, subversion and resistance, as well as cognitive mechanisms of reflection and analysis that can be exercised by individuals and groups⁹¹.

Combining the two dimensions of empowerment, namely *resources* and *agency*, Kabeer (1999b) defines the third element of empowerment as *achievements/outcomes*, which is the “potential people have for living the lives they want”⁹². Kabeer (1999a) argues that economic gain is not the sole determinant in assessing achievement; rather, a woman’s sense of her own worth is also important:

⁸⁷ Naila Kabeer, “Gender Equality and Women’s Empowerment,” 14.

⁸⁸ Naila Kabeer, “Resources, Agency, Achievements: Reflections on the Measurements of Women’s Empowerment,” *Development and Change* 30 (1999b): 437.

⁸⁹ Ibid., 438.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

“What matters for women’s ability to bargain for a better deal within their households and families is their perceived rather than their actual economic contribution”⁹³.

The concept of empowerment is an important analytical tool in examining Pakistani women’s exercise and bargaining of their agency. Kabeer’s three interrelated aspects of empowerment – *agency*, *resources* and *achievement* – will help me to examine what motivates women to consider divorce and their experiences and expectations regarding it. Access to education (social resources), employment opportunities (economic resources) and family support and friends (human resources) are all resources that are available to women to various degrees. Since these are all elements of expanding agency, my research explores the extent to which women are able to exercise their power of decision-making and the negotiation strategies they use to improve their lives. During the critical moments of a marital breakdown, to what extent are Pakistani women able to use their agency and achieve their goals? To what extent do education, economic independence and family social status open up opportunities to negotiate in marital disputes, and conversely, how might these very factors impede and be a detriment to the actualization of agency? Kabeer’s concept of *effective agency* will also be used to examine whether those women who have managed to obtain a divorce have been able to realise a better life for themselves.

⁹³ Kabeer, “The Conditions and Consequences of Choice,” 35.

1.5 Islamic Feminist Perspective

The discussion above has highlighted feminist legal scholarship as the theoretical framework of this research. However, feminist writings within an Islamic political, socio-economic and cultural context are also important to this research,⁹⁴ as this study is focused on a Muslim country where the state's very foundations are based upon Islam⁹⁵. Within the last five decades, the constitutions adopted by Pakistan have created a legal hierarchy whereby Islam is the primary norm with which laws must be consistent. The Objectives Resolution, which had previously been part of the preamble of the constitution, was adopted as a substantive part of the existing constitution by General Zia in 1985 as Article 2A⁹⁶. It is important, then, to investigate the extent to which the Pakistani legal framework implements the

⁹⁴ Islamic feminism appeared in the 1990s within different geographical locations. Among the first scholars to use this term were Ziba Mir-Hosseini and Afsaneh Najmabadeh, whilst explaining its use by Iranian women in the Iranian women's journal *Zanam*. In 1996 the Saudi Arabian scholar Mai Yamani discussed Islamic feminism in her book *Feminism and Islam*, whilst Turkish scholar Nilofer Gole described new feminist paradigms emerging in Turkey in the 1990s; detailed by Margot Badran, *Feminism in Islam: Secular and Religious Convergences* (London: One World Publications, 2009), 43.

⁹⁵ Pakistan was one of the first nation states whose Grund Norms were based upon an Islamic ideology. In 1949, this ideology was formulated into the 'Objectives Resolution' of the first constitution passed by the Constituent Assembly of Pakistan, which reads as follows: 'Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which he has delegated to the state of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust; Wherein the Muslims shall be enabled to order their lives in the individual and collective sphere in accordance with the teachings and requirements of Islam as set out in the Holy Qur'ān and the Sunna.' See Martin Lau, *The Role of Islam in the Legal System* (Leiden: Martinus Nijhoff Publishers, 2009).

⁹⁶ Article 2-A of the Constitution of the Islamic Republic of Pakistan states: 'The principles and provisions set out in the *'Objectives Resolution'* reproduced in the Annex are hereby made a substantive part of the constitution'.

Islamic notions of marital freedom, equity and justice for women. Islamic feminism works from the premise that the status of Muslim women in the Muslim world cannot be determined merely on the basis of religion; rather, they should be seen as possessing multiple identities, since ethnicity, class and race all influence their status. Moreover, even the term 'Muslim women' is contested, as it implies a monolithic uniformity that in reality does not exist within the Muslim world, as women in Muslim communities differ according to their socio-economic positions as well as their race, class and ethnicity⁹⁷. For the purposes of this research, it is also important to discuss how Islamic feminists are calling for a reinterpretation of the Qur'ān and Shariah according to more egalitarian principles that do not discriminate on the basis of gender as well as the right to both enter freely and then leave a marriage if needed. Islamic feminism works from the premise that the interpretations of sacred texts are not the exclusive authority of the earlier religious scholars but that one must return to the original teachings of the Qur'ān in order to understand and appreciate its egalitarian principles. Badran (2009) classifies such feminists into three groups: those women scholars who focus exclusively on the Qur'ān (Fatima Naseef, Riffat Hassan); those who emphasise the need to reinterpret the Qur'ān in order to reformulate the Shariah (Pakistani Shaheen Sadar, Lebanese Aziza Al-Hibri), and a third group who focus on the need to re-examine the hadith (Turkish Hidayet Tuksal, Moroccan Fatima Mernissi)⁹⁸. Although they may encompass diverse views, a unifying factor among Islamic Feminists is that they do

⁹⁷ See L. Ahmad, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press, 1993); Deniz Kandiyoti (ed.), *Women, Islam and the State* (London: Macmillan, 1991).

⁹⁸ Badran, *Feminism in Islam: Secular and Religious Convergences*, 247.

not restrict themselves within an Islamic framework; rather, Islamic feminism is articulated within multifarious discourses, including human rights and democratic and nationalist discourses. Although there is a diversity of voices which contribute to the debate regarding human rights within an Islamic paradigm, a common thread is the empowerment of Muslim women within a rethinking of Islam⁹⁹. Islamic feminists argue that the socio-economic and political conditions in which Islam was revealed as well as an analysis of the historical and cultural context is necessary to reinterpret Qur'ānic texts and the formulation of Islamic principles. Feminism may have originated in the West but is a movement against the discriminatory practices against women that have existed in all cultures and countries and must lead to the empowerment of all women. Badran (2009) states that "a feminist discourse exists within the Islamic Paradigm, which derives its understanding and mandate from the Qur'ān and Sunna of the Prophet and seeks rights and justice for women and men"¹⁰⁰. Islamic feminists argue that Islam has always worked to the benefit of women and can continue to do so if we return to the original sources. The issues raised are not aimed directly at divine revelation, but rather are an objection to patriarchal interpretations of the Qur'ān and hadith by religious scholars¹⁰¹.

⁹⁹ See Mai Yamani (ed.), *Feminism in Islam: Legal Literacy Perspectives* (United Kingdom: Ithaca Press, 1996), 1-33.

¹⁰⁰ Margot Badran, *Feminism in Islam: Secular and Religious and Convergences*, 242.

¹⁰¹ F. Hussain, *Muslim Women* (Worcester: Croom Helm, 1984), 37.

This is particularly evident in the translation of verse 4:34 of the Qur’ān, which is used as a justification for men to physically chastise their wives¹⁰². During a marital conflict, this verse advises a husband to first talk to his wife about the marital discord. If this fails, then he is instructed to leave the marital bed, and failing that, to ‘*adriboo*’ his wife. The most commonly translated meaning of the word *adriboo* is ‘to beat’ and this translation is used in the majority of English translations consulted during this research. However, Qadri (2014) states that *adriboo* has several meanings in Arabic, such as ‘to forsake, to avoid and to leave’¹⁰³. Qadri (2014) argues that to attribute ‘to beat’ as its only meaning is a misinterpretation of this word, as the principles of *uṣūl al-Qur’ān* dictate that verses in the Qur’ān must be interpreted in relation to other Qur’ānic verses and authentic hadith¹⁰⁴. Thus, in his translation of this verse, he translates *adriboo* as “striking a temporary parting”¹⁰⁵.

A similar pattern can also be seen in the misogynist interpretation of the *khul’*.

Despite specific Qur’ānic injunctions to the contrary, women were denied the legal remedy of the *khul’* by colonial courts in British India as well as in post-

¹⁰² Al- Qur’ān: 4:34 “As to those women on whose part you see ill-conduct, admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly, if it is useful), but if they return to obedience, seek not against them means (of annoyance)”. Translation taken from Dr. Muhammad Taqi-ud-Din Al-Hilali and Dr. Muhammad Muhsin Khan, *The Noble Qur’ān: Translation of the Meanings of The Noble Qur’ān in the English Language*, (King Fahd Complex; no date) 113. See Chapter Seven, which highlights the views of members of the Pakistani legal profession, who argued that this was a key verse used by men to control ‘insubordinate’ wives.

¹⁰³ Interview Dr. Tahir-ul-Qadri, Canada June 2014.

¹⁰⁴ Interview Dr. Tahir-ul-Qadri, Canada June 2014.

¹⁰⁵ *The Glorious Qur’ān: English Translation*, Muhammad Tahir-ul-Qadri (London: Minhaj Publications, 2012), 56.

independence Pakistan¹⁰⁶. When women were finally allowed to utilise this divorce procedure, the right to a *khul'* was formulated with a mandatory payment of some compensation to the husband by the wife, as opposed to one dependent on the particular circumstances of each case. Chapter Two of this thesis will provide an analysis of the law of *khul'* and illustrate that not only has it been consistently misinterpreted by the '*ulamā*' but that positive classical Ḥanafī interpretations of this remedy were also ignored in favour of male supremacy.

The question arises as to why certain verses of the Qur'ān pertaining to women were interpreted to affect them negatively and are continuing to do so. Haddad and Esposito (1998) argue that classical divine revelation was interpreted and applied by early 9th century scholars in a socio-historical context who were influenced by their local cultural norms of a patriarchal society as well as their diverse geographical locations¹⁰⁷. The functions of the extended family and traditional roles of men and women evident in a patriarchal society were reflected in the Muslim family law of those times¹⁰⁸. Whilst underscoring the egalitarian basis of the Qur'ān, Engineer (2004) argues that "Shariah must be seen both in its cultural as well as normative and transcendental spirit"¹⁰⁹. Therefore a reformulation of Shariah should not be seen as a challenge to the judgments of past jurists, since their interpretations are a reflection of the social mores of their times; nor did they

¹⁰⁶ See Chapters Two and Three for a detailed analysis.

¹⁰⁷ Y. Haddad and J. Esposito, *Islam, Gender and Social Change* (New York: Oxford University Press, 1998).

¹⁰⁸ *Ibid.*, 8.

¹⁰⁹ A.A. Engineer, *The Rights of Women in Islam* (India: New Dawn Press, 2004), 17.

consider themselves completely infallible¹¹⁰. It is also important to note that the Arabic language is incredibly rich, with each word having multiple meanings and nuances, so that the Qur'ānic verses can be reinterpreted by not merely considering the literal meaning of the words but also through a look at the deeper spirit of the message of the Qur'ān itself¹¹¹. Ali (2003) argues that:

“What is not acknowledged by many Muslims today is that we have lapsed into an acceptance of status quo, a situation where social, economical and political disparity has taken over our capacity for independent thought. We feel that there is more security in treading familiar terrain rather than embarking on the challenging task of separating the egalitarian tradition of Islam from its cultural elitist manifestation.”¹¹²

The challenging task outlined by Ali (2003) can be achieved through numerous juristic methods to create a reformation within Islamic law. Many Muslim scholars and Islamic feminists advocate the implementation of the principles of independent thinking (*ijtihad*)¹¹³. *Takhayyur* (eclecticism) and *talfiq* (amalgamation) are other

¹¹⁰ Ibid.

¹¹¹ Rifat Hassan, “An Islamic Perspective,” in *Religion and Sexuality: Studies on the Impact of Religious Teachings on Women*, ed. J. Becher (Geneva: World Council of Churches Publications, 1990), 100-128.

¹¹² Shaheen Ali, “(Re)Claiming Our Histories: A Reflection on Women, Islam and Human Rights in Contemporary Muslim Communities,” Paper for Human Rights Day, 10th December, 2003, Islamabad.

¹¹³ *Ijtihad* literally means to struggle, to strive or to engage in strenuous physical or mental effort towards a particular activity. *Ijtihad* is a methodology that allows human endeavour and knowledge to develop, expand and provide reformation of law in a legal system based upon divine revelation. See Asaf A. A. Fyzee, *Outlines of Muhammadan Law* (New Delhi: Oxford University Press, 1964); N.J.A. Coulson, *History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964); Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964); W. A. Hallaq, *History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge: Cambridge University Press, 1997); B. Weiss, “Interpretation in Islamic Law: The Theory of *Ijtihad*,” *American Journal of Comparative Law* 26, no. 2 (1978):

important juristic techniques that have been employed by Muslim jurists and states to fulfil the needs of a developing society. The process of *takhayyur* allows a scholar to choose between the opinions of individual scholars within a single school or from amongst different schools, whilst *talfiq* allows the amalgamation of opinions within the schools of law¹¹⁴. Ali (2003) argues that there needs to be a revival of these Islamic juristic techniques to reflect the egalitarian and democratic nature of the Islamic tradition¹¹⁵. This will be discussed further in Chapters Three and Four.

1.6 Literature review

Although female-initiated divorces are on the increase in Pakistan, there is a paucity of literature regarding the practical implementation of the *khul'* in the courts and women's lived experiences when applying for a divorce in Pakistan. Research on the *khul'* has been limited to its judicial development by the courts through a textual analysis of case law (which will be discussed later), rather than its practical implementation. However, Pakistan has been subject to a few previous studies that expose the limits of legislation and argue that these legal endeavours have failed to deliver gender justice. These studies are important, as they place the impact of the *khul'* within a larger framework regarding the efficacy of law reform to improve the rights of women within a patriarchal society such as Pakistan. Jilani (1994), a

199-212; Muhammad Tahir-ul-Qadri, *Ijtihād; Meanings, Application and Scope* (London: Minhaj Publications, 2007).

¹¹⁴ Wael Hallaq, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009), 117.

¹¹⁵ Shaheen Ali, "(Re)Claiming Our Histories: A Reflection on Women, Islam and Human Rights in Contemporary Muslim Communities," Paper for Human Rights Day, 10th December 2003, Islamabad.

prominent human rights lawyer in Pakistan, argues that legislation has always been implemented through male-dominated institutions, including the legislature, police and judiciary¹¹⁶. These institutions protect patriarchal privilege, and the proper implementation of laws that would entail the curtailment of the rights of men in favour of women has not occurred. Even though recent years have seen a stark increase in the number of women elected into Parliament and local government, their voices remain silent and they are precluded from any major role in policymaking and legislation¹¹⁷. Jilani (1994) argues that unless social institutions are changed and local social values and traditions do not take precedence, legislation cannot become an effective tool to overcome injustice¹¹⁸. Zia (1995) highlights the pivotal role played by religious groups in the implementation of discriminatory practices, particularly against women, and questions whether formal laws can ever provide justice to women when laws are misinterpreted in the name of Islam to their detriment¹¹⁹. She argues that those who hold the power to control and implement the law either belong to the feudal landed aristocracy or come from military and bureaucratic backgrounds¹²⁰. Any attempt to provide justice for vulnerable groups or minorities is viewed as a threat to the ruling elite and their interests¹²¹. Shaheen Ali (2003) examines the efficacy of legal literacy courses run

¹¹⁶ Hina Jilani, "Law as an Instrument of Social Control," in *Locating the Self: Perspectives on Women and Multiple Identities*, eds. Khan, N. S et al. (Lahore: ASR Publications, 1994), 96-105.

¹¹⁷ Ibid., 102.

¹¹⁸ Ibid., 102.

¹¹⁹ Zia, "Women and the Law", 76.

¹²⁰ Ibid., 76.

¹²¹ Ibid., 76.

for women in Pakistan¹²². She argues that although these courses proved useful by raising awareness of existing legislation, women were still reluctant to engage with formal laws for empowerment. She found that the presence of religious and cultural norms proved to be a powerful deterrent within a plural legal society such as Pakistan¹²³.

In her work, Shaheed (1997) continues the theme of the impact of religion in Muslim societies to justify patriarchal structures¹²⁴. She argues that plural legal systems co-exist with formal laws, the former derived from religious scripture or other cultural norms. Unfortunately, when there is a choice to be made between the two, then those laws that are disadvantageous to women are predominantly chosen. She provides an analysis of a husband's right to orally divorce his wife in Pakistan. Although it has been made subject to notification provisions by the Muslim Family Law Ordinance 1961 (MFLO), since an oral divorce is permissible under classical Islamic law, the notification requirements are rarely enforced¹²⁵. Conversely, in the case of rape and adultery, formal laws that discriminated against women were

¹²² Shaheen Ali, "A Critical Review of Family Laws in Pakistan: A Woman's Perspective," in *Women's Law in Legal Education in Pakistan: North South Cooperation*, eds. Shaheed, F. and R. Mehdi (New Social Science Monographs, 1997), 198-223.

¹²³ Ibid., 209.

¹²⁴ Fareeda Shaheed, "Controlled or Autonomous: Identity and the Experience of the Network, Women Living Under Muslim Laws," *Signs*, 19, no. 4 (1994): 997-1019. See also Fareeda Shaheed, "The Interface of Culture, Customs and Law: Implications for Women and Activism," in *Women's Law in Legal Education and Practice in Pakistan: North and South Cooperation*, eds. Fareeda Shaheed and Rubya Mehdi (New Social Science Monographs, 1997).

¹²⁵ Fareeda Shaheed, "Controlled or Autonomous," 1000.

followed in Pakistan rather than classical Islamic texts¹²⁶. Jillani and Jehanghir (2003) examine the impact on women of the *Hudood* Ordinances, which criminalised adultery, and argue that they became a powerful weapon in the hands of men to oppress and control women¹²⁷. General Zia justified the passing of these laws exclusively upon an Islamic premise and rallied religious ‘*ulamā*’ in its support. However, these laws were used to facilitate sexual violence against women and impeded women’s right to obtain justice in cases of rape. More recently, Werlhof (2014) discusses the impact of the 2010 Acid Control and Acid Crime Prevention Act on women subject to violence in Pakistan. She argues that the Act has had very limited success in protecting women from violence. One reason, amongst many, is the failure by the state to provide support from other law enforcement agencies as well as assistance from other support networks. The police in particular are accused of not taking these crimes seriously by failing to pursue criminal sanctions against the perpetrators¹²⁸. This is reminiscent of the findings in this research, which found that police authorities failed to pursue various criminal sanctions issued by family court judges against ex-husbands. Police authorities were reluctant to pursue arrest warrants against husbands who had failed to pay child support or did not return property to their ex-wives. The studies above highlight the general failure of legal measures to provide any meaningful improvement to the daily lives of women.

¹²⁶ Ibid. See also Chapter Two of this thesis.

¹²⁷ Asma Jahanghir and Hina Jilani, *The Hudood Ordinances: A Divine Sanction?* (Lahore: Rohtas Books, 2003), 21.

¹²⁸ Emily Von Werlhof, “Scarred for Life: The Impact of the Acid Control and Acid Crime Prevention Act of 2010 on Addressing Violence Against Women in Pakistan,” *International Review of Law* 3 (2014): 8.

With respect to the *khul'* in particular, there has been limited research regarding the judicial development of the *khul'* and the attempts of the court to cultivate a no-fault *khul'* device. Carroll (1996) provides an extremely useful analysis of judicial decisions related to the *khul'*¹²⁹. In 1959, the High Court of Pakistan delivered a verdict in the ground-breaking case of Balquis Fatima, which created the judicial precedent of granting a *khul'* to women without the consent of the husband¹³⁰. Carroll (1996) puts forward an excellent account of the legal arguments submitted by counsel in this case and the reasoning behind the decisions of the judges. She dissects the judgment provided by all of the justices and explains the rationale behind their innovative judgment. However, in her treatment of the Supreme Court case of Khurshid Bibi¹³¹ (which reinforced the lower court's decision in the case of Balquis Fatima), she argues that the latter case "reiterated many of the same arguments and referred to much of the same material" as the Balquis Fatima case and does not provide a similar in-depth analysis¹³². This research will, however, seek to show that Carroll's (1996) assertions are inaccurate, as the Justices took a more nuanced approach to their legal reasoning regarding the *khul'* which had a major impact on subsequent case law. This, it will be argued, was a crucial factor in creating a legal device that was a more palatable remedy to be followed by other members of the judiciary. Carroll's (1996) work has also become a little dated, as it

¹²⁹ Lucy Carroll, "Qur'ān 2:229: 'A Charter Granted to the Wife?' Judicial *khul'* in Pakistan," *Islamic Law and Society* 3, no. 1 (1996): 91-126.

¹³⁰ Balquis Fatima v. Najm-ul- Ikram Qureshi, PLD 1959 W.P. Lahore 566.

¹³¹ Khurshid Bibi v. Mohammad Amin, PLD 1967 SC 97.

¹³² Lucy Carroll, "Qur'ān 2:229: A Charter Granted to the Wife?" 109.

does not include the judicial developments regarding what compensation, if any, a woman must provide at the dissolution of her marriage, nor the judicial response to the recent amendments to s. 10(4) of the Family Courts Act¹³³.

Yefet's (2011) work is also very useful to this study, as it provides an examination of the legal regulation of divorce in Pakistan, with a particular focus on the judicial development of the *khul'*. Although Yefet follows the model detailed by Carroll (1996), her work is more recent and takes into account the judicial decisions regarding the relaxation of rules of compensation. Yefet (2011) also places the *khul'* within the wider debate of readdressing gender imbalance of power through a stricter implementation of the rights ameliorated in the Pakistani Constitution. She argues that the right to marriage is a fundamental right protected by the constitution which necessarily entails the right to be free to marry, and that cultural, religious or judicial efforts that hinder female-initiated divorce rights prevent women from being free to marry and thus contravene the Pakistani constitution.

Masud (2012) provides a very detailed account of the Council of Islamic Ideology's recommendations for reform of the divorce laws in general and the *khul'* more

¹³³ The amendments now require courts to pass the *khul'* without a determination of fact regarding who was at fault. A wife is entitled to a *khul'* if there has been an irretrievable breakdown in the marriage and attempts at reconciliation have failed (S. 10 (5) Family Courts (Amendment) Act 2015 (XI of 2015)). Moreover, courts are now required to ensure that *khul'* cases are completed within four months of the original submission of the plaint of *khul'* with mandatory guidelines regarding the amount of *khul'* to be returned (S. 12 (A) Family Courts (Amendment) Act 2015 (XI of 2015)).

specifically in Pakistan¹³⁴. He argues that social concerns of the time created conflicting tensions regarding interpretation of women's right to divorce laws, not only in present day Pakistan but during the formative period of Islam, where jurists were influenced by the gender discrimination that existed in pre-Islamic Arabia¹³⁵. Indeed Masud (2012) is one of the few contemporary authors who argues that the Qur'ān does not make the return of the dower a compulsory element of the *khul'*, but rather it is left to the discretion of the wife. This thesis expands upon this argument more fully in Chapter Two and will show that the early Ḥanafī jurists did not construe compensation an automatic right of the husband during a *khul'*.

Munir's (2014) study is more recent and provides an interesting analysis of the law of *khul'* within the four schools of Islamic *fiqh* (the Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī schools)¹³⁶. Munir argues that the majority of the jurists (including Ḥanafī jurists) did not allow the granting of a *khul'* to a wife without the express consent of the husband, the exception being Mālikī jurists, who considered it appropriate for a woman apply to the *qāḍī* (Muslim judge) in the case of a dispute. With respect to Ḥanafī jurists, he states that both Al-Sarakhsī and Al-Kāsānī (eminent Ḥanafī jurists) emphasise the contractual nature of the *khul'*. The jurists state that a contract requires an offer of *khul'* with the *mahr* as compensation, and that a husband must

¹³⁴ Muhammad Khalid Masud, "Interpreting Divorce Laws in Pakistan: Debates on Shariah and Gender Equality in 2008," in Rubya Mehdi, Werner Menski and Jorgen S. Nielsen eds., *Interpreting Divorce Laws in Islam* (Copenhagen: DJOF Publishing, 2012), 43-61

¹³⁵ Ibid., 44, 51

¹³⁶ Muhammad Munir, "The Law of *Khul'* in Islamic Law and the Legal System of Pakistan: The Sunna of the Prophet or Judicial *Ijtihād*?" *Islamabad Law Review* 1 (2014): 7.

freely accept such an offer. Munir (2014) concludes from this that such an agreement can only occur if a husband gives his free consent to the *khul'*. This line of reasoning is adopted by many other authors, all of whom presume that Ḥanafī jurists did not allow a *khul'* without the express consent of the husband¹³⁷. Zantout (2006), for example, investigates past and present understandings of the *khul'* in light of Ḥanafī doctrines. She provides a comparative analysis of the application of marriage and divorce laws between modern Egypt and under the old Ottoman Empire¹³⁸. However, her underlying thesis is that Ḥanafī jurisprudence does not provide any remedy for women who wish to initiate a *khul'* without their husbands' consent. Whilst both Munir (2014) and Zantout (2006) provide a useful analysis of the different approaches of the jurists to the law of *khul'*, it will be argued in Chapter Two of this thesis that these views are based on a fundamental misunderstanding regarding the nature of the *khul'* in Ḥanafī jurisprudence. Specifically, it will be

¹³⁷ Fyzee, *Outlines of Muhammadan Law*, 155; Dinshaw Mulla, *Mahomedan Law* (Lahore: Kausar Brothers, 1981); Hammudah Abd al Ali, *The Family Structure in Islam* (Oak Brook, IL: American Trust Publications, 1977), 244; N.J. Coulson, *A History of Islamic Law* (Edinburgh University Press, 1991), 185; Abdur Rahman Doi, *Women in Shariah* (Kuala Lumpur: A.S. Noordeen, 1992), 96-97; John Esposito and Natana J. DeLong-Bas, *Women in Muslim Family Law* (2nd Edition; Syracuse: Syracuse University Press, 2001), 32, 79-80; Rubya Mehdi, Werner Menski and Jorgen S. Nielsen, eds., "Interpreting Women's Right of Divorce in Present Day Islamic Family Laws: Trans-National and Cross-Cultural Developments in the Law of Divorce," in *Interpreting Divorce Laws in Islam* (Copenhagen: DJOF Publishing, 2012), 19-39; Muhammad Khalid Masud, "Interpreting Divorce Laws in Pakistan; Debates on Shariah and Gender Equality," in *Interpreting Divorce Laws in Islam* (Copenhagen: DJOF Publishing, 2012), 43-61; Rashida Patel, *Gender Equality and Women's Empowerment in Pakistan* (Oxford: Oxford University Press, 2010), 189; Alamghir Muhammad Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia; A Study in Judicial Activism* (Oxford: Oxford University Press, 2011), 124; Mida R. Zantout, "Khul': Between Past and Present", *Islamic Law and the Law of the Muslim World* (New York Law School Research Paper Series, 8-14): 10.

¹³⁸ Mida R. Zantout, "Khul': Between Past and Present," *Islamic Law and the Law of the Muslim World* (New York Law School Research Paper Series, 8-14), 10.

shown that the consensual nature of the *khul'* was only emphasised in an extra-judicial *khul'* where a court was not involved in the negotiations between the husband and wife. However, it will be argued that in the event of a dispute, Ḥanafī jurists specifically permit the matter to be referred to the court irrespective of the husband's consent, which is contrary to previous understandings of Ḥanafī *fiqh*. Indeed, this is an extremely important distinction to be made, as '*ulamā*' in Pakistan continually justify their attempts at limiting reform of the *khul'*, basing their views on a misconception of Ḥanafī law on the matter.

Whilst the studies above provide a textual analysis of the *khul'*, as yet there have been no field studies regarding the practical implementation of this right in the courts. This research therefore hopes to fill this academic gap and provide a new insight into the inner workings of the family courts of Lahore and provide an analysis of the strengths and weaknesses of the legal implementation of the *khul'*. There have, however, been a number of field studies in Pakistan on women's experiences and problems within marriage and what remedies, if any have been used by women to deal with such situations. Whilst these studies do not delve directly into female-initiated divorce rights, they do provide a general context within which to situate the current research. Qadir et al (2005) investigated marital satisfaction in Pakistan (concentrating on the cities of Islamabad and Rawalpindi) and found that although most women expressed the need to achieve satisfaction within the marriage, the onus was on the wife to achieve this

satisfaction: she needed to be content with her destiny and circumstances¹³⁹. With respect to divorce, they found that all of the participants felt that it would be very difficult to survive in Pakistani society without the protection of a husband¹⁴⁰. All of the participants not only considered divorce to be a curse but even thought that to engage in one would be a selfish act that would be hurtful to parents¹⁴¹.

In Critelli's (2012) study, women's marriage experiences were examined in Pakistan, with a focus on women's ability to enter and extricate themselves from marriage through the tools available to them by law¹⁴². The narratives of these women illustrated a chasm between women's rights articulated by law and the law in practice¹⁴³. All of the participants had fled to a women's shelter in a major city of Pakistan. The majority of the participants were engaged in divorce proceedings as a result of either forced marriages by their parents or fleeing from abusive husbands. Critelli (2012) found that all of the participants were deemed to have transgressed social conventions by leaving abusive marriages and were subject to severe reprisals from their families, which included beatings¹⁴⁴. Whilst Critelli's (2012) research found that women in this study "were beginning to question traditional values and to voice greater expectations of choice about the terms of their

¹³⁹ Farah Qadir et al, "Marital Satisfaction in Pakistan: A Pilot Investigation," *Sexual and Relationship Therapy* 20, no. 2 (2005): 207.

¹⁴⁰ Ibid., 202.

¹⁴¹ Ibid., 202.

¹⁴² Filomena Critelli, "Between Law and Custom: Women, Family and Marriage in Pakistan," *Journal of Comparative Family Studies* 43, no. 5 (2012): 673-693.

¹⁴³ Ibid., 686.

¹⁴⁴ Ibid., 683.

marriages”¹⁴⁵, the current research explores this more deeply and illustrates that many women are actively engaged in making life choices through the utilization of legal remedies.

Tazeen Ali et al (2012) explored the perceptions of married women towards marital violence and coping strategies adopted by them among women living in Karachi, Pakistan. It was found that violence was directed more towards poorer women, uneducated women and those who did not bring a large dowry¹⁴⁶. Informants believed that educated women were more likely to stand up for their rights as compared with their poorer and uneducated counterparts. These particular results resonate with the findings of this research. Ali et al (2012) also found that women from higher socio-economic strata were more likely to stand up for themselves and seek divorce as a means of escape from violent marriages¹⁴⁷. This, however, is contrary to the findings of the current research, which found that it is women from lower socio-economic backgrounds who are more likely to seek a divorce than their wealthier counterparts. Ali et al (2012) draw their conclusions from the perceptions and views of the informants themselves rather than from an actual survey of divorce litigants. However, the current research aims to evaluate the accuracy of the participants’ perceptions, and thus a survey of female divorce

¹⁴⁵ Ibid., 687.

¹⁴⁶ Tazeen S. Ali et al, “Violence Permeating Daily Life: A Qualitative Study Investigating Perspectives on Violence Among Women in Karachi, Pakistan,” *International Journal of Women’s Health* 4 (2012): 580.

¹⁴⁷ Ibid., 583.

litigants was carried out to ascertain a more accurate picture of the backgrounds of the female litigants.

Rubeena Zakar et al (2012) documented the coping strategies adopted by female victims of spousal violence in Pakistan. They found that the majority of the participants used emotional-focused strategies such as placating their husbands, avoiding confrontations and an increase in religious activities¹⁴⁸. However, seeking help through formal strategies such as divorce litigation was found to be extremely rare¹⁴⁹. However, Zakar et al's (2012) study only involved participants from low middle class families and excluded women belonging to the lower working class. Zakar et al (2012) acknowledge that their sample was not representative, as it only represented urban middle class women¹⁵⁰. In contrast, this current research found that participants from the lower working classes were more likely to adopt formal legal remedies, but this particular demographic was excluded from Zakar et al's (2012) study.

Since there has been no specific research on the practice of *khul'* in Pakistani courts, it is apt to look at field studies in other Muslim countries to provide a template for the current research. Therefore, a brief overview will be provided of *khul'* studies in Egypt, Libya and Morocco before we return to the Pakistani domain. This will help

¹⁴⁸ Rubeen Zakar, Muhammad Zakar and Alexander Kramer, "Voices of Strength and Struggle; Women's Coping Strategies Against Spousal Violence in Pakistan," *Journal of Interpersonal Violence* 27, no. 16 (2012): 3279-3284.

¹⁴⁹ Ibid., 3286.

¹⁵⁰ Ibid., 3279.

situate this research within the context of the experiences of Muslim women elsewhere and provide an opportunity to compare and contrast the results. Egyptian women received the right to pursue a judicial *khul'* in 2000 for the first time in Egyptian history¹⁵¹, and there has been a plethora of studies on the effectiveness of this new law. Current work on the divorce laws of Egypt falls into two distinct categories. There are studies by prominent lawyers and judges who provide a textual analysis of the laws and court system, such as Al-Lamsawy (2006), Zuwein (2006), Sheta (2006), Mansour (2006) and Al-Bakri (2004). However, others have specifically addressed and critiqued the current system, concentrating on its drawbacks and effects on the lives of Egyptian women, including Singerman and Ibrahim (2003), Tadrus (2003), Fawzy (2004), Human Rights Watch (2004), Moussa (2005) and Sonneveld (2006, 2012): these studies are more relevant to the current research.

Tadrus (2003) and Sonneveld (2006) found that the new Egyptian law aroused intense debates in the media and judicial arenas, but these did not revolve around the need for the equality of the sexes, focusing rather on the fear that the stability and security of the family would be undermined. These discussions did not entail the promotion or violation of rights; nor was any discourse related to citizenship or constitutional rights¹⁵². Rather, the *khul'* was criticised for emulating westernised

¹⁵¹ See Nadia Sonneveld, *Khul' Divorce in Egypt: Public Debates, Judicial Practices, and Everyday Life* (Cairo: American University in Cairo Press, 2012).

¹⁵² Marlene Tadrus, "Qanun al-Khul fi al-Sahafa al-Misrya", in *Al-Sawi*, ed. al-Hisad (2003), 89-95.

modes of family life¹⁵³. Women were perceived as being more emotional than men, and it was anticipated that the new law would result in an increase in divorce rates and destabilisation of Egyptian families and would promote 'spinsterhood'. Katulis (2004) found that women suffered an onerous financial burden if they initiated divorce, while husbands would often freely bully their wives into asking for a *khul'*¹⁵⁴. Sharmani's (2008) ethnographic research on the litigation process highlighted that women applying for *khul'* receive little emotional or financial help from the extended family, whilst heavy financial obligations were stipulated by judges asking women to pay back the *shabka* (engagement gifts) and *qayma* (items and furniture that the wife brings to the marriage). Fawzy (2004) describes how many judges ordered the return of the *mahr* that was over and above the amount stipulated in the marriage contract¹⁵⁵. In contrast, the current research in Pakistan found that the return of the *mahr* proved to be of little significance when pursuing a *khul'*, whilst it was the female litigants who were forthright in demanding the return of marital gifts rather than their ex-husbands. However, this is not an indication of the higher generosity of Pakistani husbands in foregoing the return of the *mahr*.

¹⁵³ Nadia Sonneveld, "If only there was *Khul'* ...," *ISIM Review* Spring (2006), 50.

¹⁵⁴ Brian Katulis, *Women's Rights In Focus: Egypt* 24-25 (2004), accessed January 21st 2016, www.freedomhouse.org/uploads/special_report/21.pdf

¹⁵⁵ Essam Fawzy, "Muslim Personal Status Law in Egypt: The Current Situation and Possibilities of Reform Through Internal Initiatives," in *Women's Rights and Islamic Family Law: Perspectives on Reform*, ed. Lynn Welchmann (London: Zed Books, 2004), 15-21.

Rather, it reflects the nominal amounts of *mahr* given to Pakistani wives in marriage compared to the much higher amounts provided to Egyptian wives¹⁵⁶.

Human Rights Watch (2004) was highly critical of the Egyptian court procedures, finding a backlog of cases and inefficient courts that were unable to deal with the unprecedented number of cases¹⁵⁷. Singerman's (2005) research illustrated rampant bias and sexism towards female litigants¹⁵⁸. Judges often viewed wives as 'lewd' and 'immoral', assuming that their motivation was a desire for another man and thus sometimes refusing their petitions¹⁵⁹. Judges expressed their pity at children stigmatised for their mothers' *khul'* requests, but showed no sensitivity to the plight of trapped wives¹⁶⁰. Sonneveld (2010) observed that judges are predominantly from upper class backgrounds, whilst *khul'* litigants are from lower classes: thus, both carry different perceptions about marriage and divorce. This is reflected in judges who often see women as taking advantage of a husband's

¹⁵⁶ Dianne Singerman and B. Ibrahim, "The Costs of Marriage in Egypt: A Hidden Dimension in the New Arab Demography," in *The New Arab Family*, ed. N.S. Hopkins (Cairo: American University in Cairo Press, 2003), 80-116.

¹⁵⁷ Human Rights Watch, *Divorced From Justice: Women's Unequal Access To Divorce In Egypt* (2004), 24.

¹⁵⁸ Diane Singerman, "Rewriting Divorce in Egypt: Reclaiming Islam, Legal Activism, and Coalition Politics", in *Remaking Muslim Politics: Pluralism, Condensations, Democratization*, ed. Robert W. Hefner (Princeton, NJ: Princeton University Press, 2005), 163.

¹⁵⁹ Nadia Sonneveld, *Reinterpretation of Khul' in Egypt: Intellectual Disputes, the Practice of Courts and Everyday Life* (Leiden: Leiden University Press, 2007) chapters 4.5-4.7, 5.7, 6.4. See also Nadia Sonneveld, 'Khul' Divorce in Egypt: How Family Courts are providing a 'Dialogue' Between Husband and Wife," *Anthropology of the Middle East* 5, no. 2 (2010): 100-120.

¹⁶⁰ Mariz Tadros, *What Price Freedom?*, AL-Ahram, Mar.7-13, 2002, accessed January 21st 2016 <http://weekly.ahram.org.eg/2002/576/fe1.htm>;

financial investment in the marriage¹⁶¹. Bernard-Maugiron and Dupret (2008) noted how judges sometimes failed to implement the law of automatic right of divorce if a husband re-marries and in other cases added extra conditions to the *khul'* for women to fulfil¹⁶². The Egyptian legislature also gives judges an enormous discretionary power of interpretation: for example, to assess subjective notions like the harm inflicted on the wife or the existence of valid grounds for the husband's absence, which are again interpreted on very narrow grounds. This judicial conservatism was a constant observation throughout the Egyptian studies and is in contrast to some of the findings in this study. The current research suggests that similar biases exist within some members of the Pakistani judiciary that negatively affect female litigants when pursuing their divorce claims. Certain family court judges insisted on mandatory reconciliation attempts even when it was clearly apparent that the marriage had irretrievably broken down. This sometimes forced female litigants to face abusive husbands at close quarters in court. However, there were many other judges in Pakistan who also provided a more 'female friendly' approach to the *khul'*. An analysis of *khul'* case law and field work observations during this research illustrate the manner in which a judicial enterprise has been undertaken to create a no-fault *khul'* device to ensure that women find a much easier path to obtain a divorce. This also paved the way for a more flexible and lenient approach regarding the compensation to be paid by the wife to her husband as compared to her Egyptian counterparts.

¹⁶¹ Nadia Sonneveld, "*Khul'* Divorce in Egypt", 109.

¹⁶² Nathalie Bernard-Maugiron and Baudouin Dupret, *Breaking Up the Family: Divorce in Egyptian Law and Practice* (Hawwa: Brill Academic Publishers, 2008), 65.

Research into the implementation of the *khul'* has not been limited to Egypt but has also occurred in other Muslim countries. Hassani-Nezhad and Sjorgen (2014) traced the impact of *khul'* law reform on women's labour supply in Middle East and North African countries. In a survey of eighteen countries, they found that the *khul'* had a higher frequency in younger women (24-34) than in older women (35-55)¹⁶³. This is line with the current study, which found that almost all of the participants who pursued a *khul'* were less than thirty, with the majority being less than twenty-four. Hassani-Nezhad & Sjorgen (2014) also found a positive impact of the *khul'*, as it resulted in a 10 per cent increase in the labour force¹⁶⁴. The *khul'* was found to increase the bargaining power of women within marriage and thus enabled more women to enter the labour market¹⁶⁵. Women often threatened to walk out of their marriages if their husbands refused to grant them permission to work, and thus the threat of a *khul'* was used as an effective manipulation tool¹⁶⁶. This, however, was not reflected within the current research. Only a very small minority of the participants were able to use the *khul'* as a bargaining tool in their marriages, whilst the majority were forced to pursue the *khul'* and endure the breakdown of their marriage.

¹⁶³ Lena Hassani-Nezhad and Anna Sjorgen, "Unilateral Divorce for Women and Labor Supply in the Middle East," *Feminist Economics* 20, no. 4 (2014): 113.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid., 116.

¹⁶⁶ Ibid., 118.

Layish (1988) looked at the customary practices of the *khul'*, known as the *Sijill* in Libyan courts¹⁶⁷. He found that the customary *khul'* did not only include repaying the balance of the dower but also involved additional payments¹⁶⁸. Wives engaged in elaborate negotiations in court to obtain their *khul'*, with disputes surrounding the contents of the financial recompense to the husband. Layish (1988) delved through Libyan case law and analysed the manner in which both parties negotiate this contractual release. He also dealt with the tension between customary and religious law, whereby courts were quite happy to give preference to custom over religion even if the former was more detrimental to the wife. He argued that the courts were not concerned with these tensions and were more concerned that an amicable settlement could be reached¹⁶⁹. This again contrasts starkly with the Pakistani judiciary, which took great pains in ensuring that religious scriptures were followed in the formulation of the *khul'* device over the last fifty years. Indeed, the Pakistani judiciary entered into very nuanced debates about the importance of religious laws overriding local customary laws, which were detrimental to the well being of women¹⁷⁰.

Loukili and Michele Zirari-Devif (2004) concentrate on Morocco and argue that the model it uses surpasses any form of judicial *khul'* to date. Men and women are given the equal right to initiate a divorce under the law of *shiqaq* if there are irreconcilable

¹⁶⁷ Aharon Layish, "Customary *Khul'* as Reflected in the *Sijill* of the Libyan Sharia Courts," *Bulletin of the School of Oriental and African Studies*, 51 (1988): 428-439.

¹⁶⁸ Ibid., 429.

¹⁶⁹ Ibid., 438.

¹⁷⁰ See Chapter Four of this research for a detailed analysis of Pakistani Case law on the judicial development of the *khul'*.

differences between the husband and the wife. Both the husband and the wife have the right to initiate court proceedings and the court must make a decision within six months¹⁷¹. Zoglin (2009) notes that women initiate the majority of divorces and that uncontested divorces run quite smoothly¹⁷². Moreover, unlike the judicial *khul'*, a woman has greater prospects of being awarded interim financial rights until her divorce is finalised and has a much less onerous financial liability¹⁷³. These findings contrast with the current research, in which it was found that *khul'* cases could become protracted if a husband was a recalcitrant litigant and Pakistani women had no prospects of gaining any financial relief from their husbands despite court orders to the contrary. However, Bordat et al (2011) note that the Moroccan divorce law reforms have only served to assist women living in urban areas, whilst most women belonging to rural populations are unaware of their legal rights to divorce¹⁷⁴. They also found that local authorities posed obstacles to women seeking implementation of their rights, whilst many judges provided limited interpretations of the law based upon conservative readings of religious scriptures¹⁷⁵.

¹⁷¹ Rachel Newcomb, "Justice for Everyone? Implementation of Morocco's 2004 *Mudawana* Reforms," in *Interpreting Divorce Laws in Islam*, eds. Rubya Mehdi et al. (Copenhagen: DJOF Publishing, 2012), 109.

¹⁷² Katie Zoglin, "Morocco's Family Code: Improving Equality for Women," *Human Rights Quarterly* 31 (2009): 973.

¹⁷³ *Ibid.*, 980.

¹⁷⁴ Stephanie Willman Bordat et al, "Women as Agents of Grassroots Change: Illustrating Micro-Empowerment in Morocco," *Journal of Middle Eastern Studies* 7, no. 1 (2011): 95.

¹⁷⁵ *Ibid.*

1.7 Aims and Objectives of the Study

The literature review with respect to Pakistan reveals that there has been some work on the judicial development of the Pakistani *khul'* and its formulation into a no-fault divorce right for women. However, whilst these works provide invaluable information regarding the legal development of the *khul'*, they do not provide the rationales behind the court actions; nor do they delve into the legal methodologies adopted by the judiciary when they adopted this 'new' version of the *khul'*.

Moreover, all of the previous studies work from the (inaccurate) premise that the legal decisions adopted by the judiciary represent a move away from classical Ḥanafī jurisprudence, which did not allow a woman to be granted a *khul'* without her husband's consent. The literature review above also highlights the complete lack of information regarding the impact of the laws of *khul'* on the lives of women in Pakistan. There is a gap in the literature regarding the extent to which women are even aware of their right to initiate a divorce and whether formal legislation has been able to successfully provide an exit from unhappy marriages in Pakistan.

This research is therefore split into two parts. The first part of this thesis will examine the legal and historical development of the *khul'* and argue there has been a continual misconception regarding the true nature of the *khul'* under Ḥanafī jurisprudence, which is still prevalent today. Through an examination of primary and secondary Ḥanafī sources, it will be demonstrated that Ḥanafī jurisprudence is quite capable of providing female-initiated divorce rights without a husband's

consent and it does not necessarily financially penalise women for seeking a divorce. An investigation of the historical development of female initiated divorce rights will be presented, outlining the role of the 'ulamā' in providing legitimacy to reform efforts. It will be argued that by working within acceptable parameters of existing classical principles of Islamic law, reforms in divorce law have the potential to be more effective within pre-existing patriarchal structures that exist in a country such as Pakistan.

The second part of this research consists of an ethnographic study of one hundred women from different socio-economic and educational backgrounds living in Lahore. Structured and semi-structured interviews are used within a framework of grounded methodology to assess participant's knowledge of the *khul'* and their views regarding female initiated divorce rights. Moreover an additional thirty-two women are interviewed, who are either going through the process of the *khul'* or have obtained one and are pursuing post-divorce ancillary relief, in order to evaluate how the *khul'* is implemented on the ground. Through the use of unstructured interviews of female litigants, as well as structured interviews of lawyers and judges and observations of the workings of the Family Courts of Lahore, this part of the ethnographic study investigates which factors are at play that either limit or facilitate the seeking of redress from the courts. It seeks to reveal the role of the courts in this legal enterprise and the extent to which they have promoted or bypassed patriarchal legal structures in their interpretation of the law.

The rationale for splitting this research into two parts is to provide an effective legal methodology from part one of this study, and address problems in the current law of *khulʿ* found through the second part of this study. Part one of this thesis provides an analysis of the efforts of the ‘ulamā’ and the judiciary in their efforts for reform of female initiated divorce rights in the Indo-Pak subcontinent. This analysis provides the backdrop to suggest which legal methodologies and strategies can be used for the basis of reforms, to tackle the problems of the *khulʿ* process highlighted through part two of this thesis. This research for example, will illustrate how the principles of *takhayyur* and *talfiq* were extremely significant in developing a number of women-friendly codes of family laws in the Indo-Pak subcontinent¹⁷⁶. Mawlana Ashraf Ali Thanawi successfully used the principle of *takhayyur* in his support for the Dissolution of Marriages Act 1939, which gave Muslim women in India the statutory right to initiate a divorce for the first time in its colonial history. Thanawi’s engagement with *takhayyur* in the Indian sub-continent is contrasted with other juristic techniques employed by jurists in post-independence Pakistan to improve female divorce rights with varying degrees of success. This thesis highlights the need to explore more deeply the Islamic principles of *talfiq* and *takhayyur* when considering reforms to Muslim personal law. This will not only to help distinguish between the actual teachings of the Qur’ān and customary practices but also to give legitimacy to any new formulations that will be acceptable to the millions of

¹⁷⁶ Also see N.J Anderson, *Law Reform in the Muslim World* (London: Athlone Press, 1976); David Pearl and F. Menski, *Muslim Family Law* (London: Sweet and Maxwell, 1998).

Muslims who follow Islam, and their scholars to whom they look for advice on issues pertaining to Islamic law.

It is hoped that this research will answer the following research questions:

- 1) Does Ḥanafī jurisprudence permit women to initiate a *khulʿ* without the consent of their husbands and what are the rules regarding compensation?
- 2) What reform strategies can be learnt from the statutory development of female-initiated divorce rights?
- 3) What was the role of the judiciary in the development of the *khulʿ* as a no-fault legal device?
- 4) What are the perceptions of Pakistani married women towards female-initiated divorce?
- 5) How effective is the court system in implementing the *khulʿ* device?
- 6) How effective is the *khulʿ* in providing marital relief to women?

1.8 Structure of the Work

This research consists of eight chapters and is split into two parts; a legal and historical examination of the *khulʿ* (Chapters Two to Four) and an ethnographic study of the implementation of the *khulʿ* (Chapters Five to Seven). This introductory chapter is followed by Chapter Two, which provides the theological basis for the doctrine of *khulʿ* under Ḥanafī jurisprudence. It attempts to present a more accurate

representation of the *khul'* under Ḥanafī *fiqh* and provide a detailed analysis of the compensation rules as applied by the Ḥanafī jurists.

Chapter Three examines the historical development of female-initiated divorce rights in pre- and post-independence Pakistan. It traces the impetus for reform and the theological questions that were raised during the passing of the Dissolution of Muslim Marriages Act 1939 and the Muslim Family Law Ordinance 1964, which created statutory fault-based divorce rights for women. This chapter is important, as it provides a useful insight into the successful and unsuccessful methodologies used by reform activists of that time, which have consequences for present day law reform in Pakistan.

Chapter Four provides a critical examination of Pakistani case law and traces the implementation of the statutory laws of divorce as well as the development of a no-fault *khul'* device. This chapter illustrates that the courts deliberately adopted a high standard of proof for women relying on statutory provisions and encouraged them to rely upon the *khul'* instead. In this chapter, I argue that this was not always a judicial strategy adopted as a result of male chauvinistic attitudes to financially penalise women for divorcing men; rather, it was an attempt to provide desperately needed relief to women without raising the ire of the religious right and military dictators, who were themselves engaged in a process of rescinding the existing rights of women.

Chapter Five provides an outline of the grounded methodology used when designing the research project. It provides details on the scope and limitations of the project as well as details of the qualitative nature of the study. Details are provided of the interview techniques utilised as well as the sampling methodology used to choose the research site and the participants. The role of the researcher, ethical considerations and the obstacles faced during the research process are also discussed.

Chapter Six presents the first part of the findings from the fieldwork, which was conducted in the city of Lahore over a period of two years between 2013 and 2014. The chapter provides an overview of the responses of married women regarding their knowledge and perceptions of the *khulʿ*. Key themes and sub-themes that have emerged from the data collection are analysed and the chapter applies the theoretical discussion in the introduction to the participants' responses.

Chapter Seven presents the findings of the fieldwork that took place in the district courts of Lahore. It outlines the problems faced by many of the participants during their court proceedings and their primary reasons for obtaining a *khulʿ*. This chapter also includes a discussion on the *khulʿ* and women's agency in order to assess the extent to which the *khulʿ* is an effective device in providing relief to women in unhappy and abusive marriages.

The final chapter in this research provides an overall summary of the research and states the findings of the study. It also contains reform proposals to help facilitate the process of *khulʿ* during the court proceedings and suggests what other measures need to be adopted post-divorce to improve the lives of those women who use the *khulʿ* device. This chapter ends by recommending further areas of research.

CHAPTER TWO

THE INTERPRETATION OF THE *KHUL'* IN LIGHT OF THE QUR'ĀN , HADITH AND ḤANAFĪ JURISPRUDENCE

2.0 Introduction

This chapter will provide the theological basis for the legal remedy of *khul'* under Ḥanafī jurisprudence. Although all four schools of Sunni Islamic law recognise *khul'* as a female-initiated divorce right, this chapter will focus only on Ḥanafī jurisprudence, as this has been used as the basis for limiting female divorce rights in the Indo-Pak subcontinent and is the Islamic school of law practiced by the majority of Muslims in Pakistan¹⁷⁷. The literature review in Chapter One revealed that a common misconception exists in past and present scholarship that Ḥanafī jurisprudence only allows a *khul'* with the consent of the husband, and that a wife must necessarily return her *mahr* (dower) or provide some form of compensation to her husband in return for the divorce, irrespective of who is at fault in the marital breakdown¹⁷⁸. The idea that a husband's consent was obligatory in the Indo-Pak sub-continent meant that until 1959, courts refused to entertain *khul'* applications if the husband refused his wife this right. A primary reason for this can be traced back to the period of British colonial rule of the Indian sub-continent. Before the

¹⁷⁷ It has been estimated that 97% of the Pakistani population is Muslim, 77% of whom are Sunni Muslims and subscribe to the Ḥanafī school of law. See Sayyid Rami al Rifai, *Who is the Main Body of the Ummah: Muslim Demographics* (Sunna Muakada, 2013), 7

¹⁷⁸ Ibid., n.136

codification of Anglo-Muslim law, British judges in India referred to local clerics for clarification of legal points based on Islamic law¹⁷⁹. These local *maulvis* provided abstract answers to hypothetical questions posed by the judges: answers which were then applied in a formalised and rigid manner. Since the original Ḥanafī texts were in Arabic, in essence this third-hand information was being used by the judges to implement what they perceived as ‘Muhammadan Law’.¹⁸⁰ The judges were also wary regarding genuine differences that existed within Islamic jurisprudence and did not favour the diversity of Islamic law and the variances that occur in its application. In order to rectify the situation, and to replicate the British common law legal system, a limited number of Ḥanafī texts were translated into English to ensure some uniformity in the application of Muslim personal law¹⁸¹. Unfortunately, the decision to select just a few texts for translation, and then opt to follow them blindly, created a rigid system of law with little or no room for judicial discretion.

Al-Marghīnānī’s *al-Hidāya*¹⁸² was chosen as the principle text to be followed. After being translated into Persian¹⁸³, it was then translated from Persian into English by

¹⁷⁹ Michael Anderson, “Legal scholarship and the Politics of Islam in British India,” in Ravindra S. Khare, *Perspectives on Islamic Law, Justice and Society* (Lanham: Rowman & Littlefield Publishers, 2009), 73.

¹⁸⁰ Ibid., 73.

¹⁸¹ Muhammad Khalid Masud. “*Qāḍīs and their Courts: A Historical Survey*,” in *Dispensing Justice in Islam Qāḍīs and Their Judgments*, ed. Khalid Masud et al. (Leiden: Brill, 2003), 39.

¹⁸² *Al-Hidāya fī sharḥ Bidāya al-Mubtadī*, commonly known as the *al-Hidāya*, is a corpus of Ḥanafī *fiqh* compiled in the 12th Century by Burhān al-Dīn al-Farghānī al-Marghīnānī.

¹⁸³ Three *maulvis* were given the task of translating the work: Molla Taj-Addeen, Meer Mohammed Hossein and Molla Sharreet Oolla Cheema. See Shahbaz Ahmad

Charles Hamilton. Although errors were discovered in both the Persian and the English version, unfortunately only the Persian version was corrected in 1807¹⁸⁴. This text was followed by the publication of the *Principles and Precedents of Mohmmadan Law* by W.H. MacNaughten (1870), which purported to contain the basic principles of Islamic Ḥanafī law. However, this text primarily contained MacNaughten's own generalisations on legal principles, without any references¹⁸⁵, after which a number of precedent cases and answers were provided which "glossed over areas of problematic interpretation"¹⁸⁶. Later, the voluminous Fatāwa 'Ālamgīrī¹⁸⁷ was translated into an abridged one-volume text, which contained, according to its author, "the doctrines of the Haneefa sect on all the subjects to which the Moohummudan Law is usually applied by the British Courts of Justice in India"¹⁸⁸. Anderson (2009) notes that "those few texts that were translated came to be treated as authoritative codes rather than as discrete statements within a larger spectrum of scholarly debate"¹⁸⁹ and as a result they "minimised doctrinal

and Samee Uzair, "Genealogical Analysis of Islamic Law Books Relied on in the Courts of Pakistan", *Al-Adwa* (December 31, 2013), 3.

¹⁸⁴ Anderson, "Legal scholarship and the Politics of Islam in British India", 74.

¹⁸⁵ See W.H. MacNaughten, *Principles & Precedents of Moohummudan Law* (Reprint of the 1870 edition. Lahore: Pakistan Educational Press), 1-81.

¹⁸⁶ Anderson, "Legal scholarship and the Politics of Islam in British India", 74.

¹⁸⁷ A set of *fatwas*, legal edicts compiled during the 17th Century rule of Aurenzeb over the Indian subcontinent that consisted of over thirty volumes of Islamic legal principles based on the Ḥanafī *fiqh*. See M. Reza Pirbhai, *Reconsidering Islam in a South Asian Context* (Leiden: Brill Academic, 2009), 131-154.

¹⁸⁸ Neil Benjamin Edmonstone Baillie, *A Digest of Moohummudan Law; The Doctrines of the Imameea Code of Jurisprudence on the Most Important of the Same Subjects* (Waterloo Place: Smith, Elder & Co, 1870), i.

¹⁸⁹ Anderson, "Legal Scholarship and the Politics of Islam in British India", 73.

differences and presented Shariah as something it had never been: a fixed body of immutable rules beyond the realm of interpretation and judicial discretion”¹⁹⁰.

This is particularly evident in the law relating to the *khulʿ*. A study of the English translation of Marghīnānī’s *al-Hidāya* and the *Fatāwa ʿĀlamgīrī* reveals that the nineteenth-century British colonial rulers attempted to legally define the *khulʿ* in one or two sentences to facilitate judges’ understanding and application of it. The *Hidāya*, for example, is a concise text and states legal doctrines, but does not elaborate upon many of its principles through explanations and examples. The failure to translate similar but more substantial treatises negated the importance of many other works that have a significant role in classical Islamic literature because they expand, explain and then help jurists and the *fuqahāʾ* to apply legal doctrines in a more flexible and easily understandable manner. The work of Ibn al-Hammām¹⁹¹, for example, is a very well recognised *sharḥ* (explanation or commentary) of the *Hidāya* and provides legal examples for ease of understanding. This *sharḥ* (along with other Ḥanafī texts) is normally read by jurists concurrently with the *Hidāya* for a more comprehensive understanding of Ḥanafī jurisprudence¹⁹². However, only the *Hidāya* was translated during British colonial rule, without any accompanying texts to help explain and expand on the basic principles presented¹⁹³.

¹⁹⁰ Ibid., 75.

¹⁹¹ Ibn al-Hammām, *Sharḥ Faṭḥ al-Qadīr* (Beirut: Dār al-Kutub al-ʿIlmiyya, 2003).

¹⁹² See, for instance, Muhammad b. Aḥmad b. Abī Sahl Abū Bakr al-Sarakhsī, *Kitāb al-Mabsut*, vol. 3, part 6 (Beirut: Dār al-Kutub al-ʿIlmiyya, 2001), 199-231, which is an extremely authoritative work and a *sharḥ* of Muhammad al-Shaybānī’s *al-Aṣl*.

¹⁹³ Anderson, “Legal Scholarship and the Politics of Islam in British India”, 74.

In respect of the *khul'*, relying on a select few secondary sources has set a precedent of continual misinterpretation of Ḥanafī *fiqh* on this matter. The translation of al-Marghīnānī's *al-Hidāya* begins with the lexical meaning of the word *khul'*, after which the Qur'ānic verse 2:229 is paraphrased to explain its permissibility. Thereafter, the legal effect is explained, along with when and how much compensation needs to be paid, and a statement of the fact that "the sacred text goes to establish two points; one, the lawfulness of Khoola in a judicial view; and the other, its admissibility between the parties and God Almighty¹⁹⁴". Whilst al-Marghīnānī does clearly state that in a dispute he does provide an explanation of this judicial process and it is subsumed within other legal intricacies dealing with divorce. I believe that the failure to expand on this point may have led scholars to ignore or even bypass this important area when referring to his work. As will be seen in Chapter Four of this thesis, up until 1959, Pakistani judges believed that Ḥanafī jurisprudence did not allow courts to entertain *khul'* applications, despite these clear wordings of the *Hidāya*, and therefore denied women the right to exit clearly unhappy and often violent marriages. In contrast, in the *sharḥ* of the *Hidāya*, Ibn al-Hammām explains the permissibility of going to court in the second sentence of his chapter on the *khul'*. He goes into much greater detail about the linguistic translation of verse 2:229, explaining the fact that the courts are empowered to pass the *khul'*, thus negating any possibility of misunderstanding that a husband's permission is needed to effect a *khul'* in Ḥanafī jurisprudence¹⁹⁵.

¹⁹⁴ Ibid., 315.

¹⁹⁵ Ibn al-Hammām, Muhammad b. 'Abd al-Wahīd, *Sharḥ Faṭḥ al-Qadīr*, (Beirut: Dār al-Kutub 'Ilmiyya, 2003), 192-193. See below for further elaboration.

Similarly, in respect of compensation in return for the *mahr*, al-Marghīnānī begins his basic definition of the *khulʿ* as a divorce “in lieu of a compensation paid by the wife¹⁹⁶”, and then expands upon this much later in the text, stating that if the aversion “be on the part of the husband, it would be abominable for him (the husband) to take anything from her because of the sacred text.”¹⁹⁷ A scholar or judge reading just the beginning of the translation might therefore have assumed that *khulʿ* can only be affected with some form of recompense for the wife, if he/she does not delve deeper into the text to investigate the exceptions to this rule. In contrast, Ibn al-Hammām goes into much greater detail, discussing the nature of the “abomination” (as noted in the *Hidāya*), describing it not just as *al-makrūh*¹⁹⁸ but *al-makrūh al-taḥrīmī*¹⁹⁹. This constitutes a much severer prohibition than the *Hidāya*, leaving the reader in no doubt that compensation is not always payable by the wife.

Unfortunately, the lack of English translations of this and other classical Ḥanafī texts has meant that judges and other scholars have relied on the English version of the *Hidāya* and a few sparse texts for their juristic opinions. MacNaughten (1870), for example, describes the *khulʿ* as a “divorce purchased” in the margins of his text, and then only dedicates one sentence to the *khulʿ* in the entire book, stating; “A wife is at liberty, with her husband’s consent, to purchase from him her freedom from the

¹⁹⁶ Hamilton, *The Hidāya*, 314.

¹⁹⁷ Ibid., 315.

¹⁹⁸ An act that is considered abominable or highly disliked.

¹⁹⁹ An act that is so disliked that it almost nears the status of a forbidden (*ḥarām*) act. See Ibn al-Hammām, *Sharḥ Faṭḥ al-Qadīr*, 192.

bonds of marriage²⁰⁰". MacNaughten (1870) provides no further explanation of the procedure and thus leads the reader to assume that these are indeed the only parameters for a *khul'*. Baillie's (1870) translation of *Fatāwā Ālamgīrī* is also a very difficult text to follow. Rather than presenting basic principles of law and then providing examples to illustrate these principles, Baillie's translation delves directly into how a *khul'* is to be pronounced and what particular words are to be used²⁰¹. Thereafter, five pages are dedicated to hypothetical cases regarding different scenarios involving the payment or non-payment of the dower²⁰². The chapter concludes by providing eight basic laws relating to the *khul'*. At no point is there any discussion regarding the need for the husband's consent or the possibility of any recourse to the courts in the case of a dispute. In the absence of such debate, it would seem that subsequent scholars interpreted Baillie's work as not only necessitating the need for compensation in all cases but that a *khul'* must be effected only through some mutual agreement, contrary to the rulings of these classical

²⁰⁰ William MacNaughten, *Principles & Precedents of Moohummudan Law: A selection of Legal Opinions Involving Those Points, Delivered in The Several Courts of Judicature, Together With Illustrative and Explanatory Notes and Preliminary Remarks* (Lahore: Law Publishing Company, 1870), 60.

²⁰¹ Baillie, *A Digest of Moohummudan Law*, 129.

²⁰² Ibid., 129-134. This also includes the view that if a husband forces his wife to obtain a *khul'* she will not be liable to pay any recompense to him. Baillie states "If a man should compel his wife into an agreement for a ransom, he would do what is unlawful; and if he should repudiate her, the repudiation would be valid without any obligation on her part to deliver what she had agreed to give" (134). However, in a subsequent edition of the text where additions and amendments have been inserted, Baillie states that if a wife does give some recompense under these conditions, not only does she have no right to seek its return, but such an act by the husband is only considered a matter of conscience. See Neil Baillie, *A Digest of Moohummudan Law; The Doctrines of the Imameea Code of Jurisprudence on the Most Important of the Same Subjects, Revised With Some Additions of the Text and a Supplement on Sale and Loan and Mortgage* (Lahore: Premier Book House, 1957) 306.

Ḥanafī authorities. Another example is of Asaf Fyzee (1964), a notable legal authority in Pakistan and quoted by several Pakistani judges in their cases²⁰³. He claims to follow the “illustrious example of MacNaughten²⁰⁴”, and then cites the English translation of *Fatāwā Ālamgīrī* in support of his view that there are two essential conditions for a *khulʿ*: “common consent of the husband and wife, and as a rule, some ‘iwad (consideration) passing from the wife to the husband²⁰⁵”. As a result of reliance upon these secondary sources, Fyzee (1964) fails to provide any information regarding judicial intervention in the case of dispute or that a wife need not provide any compensation to her husband if he is responsible for the *nushūz* (marital discord)²⁰⁶.

This legal scholarship meant that women in Pakistan had no legal remedy to initiate a divorce unless they could prove specific fault-based events outlined in statutory divorce laws. However, these laws proved to be extremely difficult to apply, since wives were unable to provide reliable witnesses to prove they had suffered abuse within the confines of the marital home. The *khulʿ* thus became a defunct remedy amongst Muslims in the Indo-Pak sub-continent, as Ḥanafī *fiqh* appeared to provide no especial relief to women. The *khulʿ* was only resurrected in the late 1950s

²⁰³ See Chapter Four.

²⁰⁴ Fyzee, *Outlines of Muhammadan Law*, 155.

²⁰⁵ Ibid., 155.

²⁰⁶ Another notable text was Dinshaw Mulla’s *Mahomedan Law* (Lahore: Kausar Brothers, 1981), first published in 1905, which was also relied on greatly by courts in the Indian subcontinent and contained the same views. See Mathias Rohe, *Islamic Law in Past and Present* (Leiden: Koninklijke Brill, 2015), 370.

through judicial activism exhibited by a number of liberal-minded judges²⁰⁷. The remainder of this chapter will therefore investigate the application of the *khul'* by Ḥanafī jurists and attempt to dispel the perception that the *khul'* can only be affected through mutual consent and the necessary return of the *mahr* or some form of compensation. It will show that women were needlessly refused the legal right of *khul'* as a result of misunderstandings of the nature of a *khul'* in the Ḥanafī *madhhab*: misunderstandings that are still prevalent today.

2.1 Literal and Lexical Meaning of *Khul'*

Al-Khul' is originally derived from the root words of *kh-l-*. *Al-khal'* is the verbal noun of *al-khul'*, whose lexical meaning refers to 'extraction' or to 'remove'²⁰⁸.

Although the Qur'ān does not use the word *al-khul'* specifically for female-initiated divorce, it is used elsewhere in the context of removal or detachment: e.g. *khala'a thawbahū wa na'lahū*, "he removed his clothes and shoes"²⁰⁹. In the Qur'ān, Moses is asked to remove his shoes, and the words *f-akhla' na'layk* are used, where *f-akhla'* indicates that the shoes were removed from his body²¹⁰. The lexical meaning of extraction or separation is associated with *al-khal'* and *al-khul'*, since the marital

²⁰⁷ See Chapter Four of this thesis for a detailed analysis.

²⁰⁸ Al-Rāghib al-Aṣḥabī, *Mufradāt al-Qur'ān* (Beirut: Dār al-Kutub, 2004), 174; Badr al-Dīn al-ʿAynī, *Al-Bināya sharḥ al-Hidāya* (Beirut: Dār-ul-Kutub, 2000) 506. See also al-Firūzābādī, *al-Qāmūs al-Muḥīṭ*, vol. 2 (Beirut: al-Maktaba al-ʿAṣriyya, 2009).

²⁰⁹ Ḥusayn b. ʿAwda al-ʿAwāyisha, *al-Mawsūʿa al-Fiqhiyya al-Muyassara*, vol. 5 (Beirut: Dār Ibn Ḥazm, 2004) 334; al-Jawharī, *al-Ṣiḥāḥ*, vol. 3 (Beirut: Dār Iḥyā' al-Turāth al-ʿArabī, 1999), 1003.

²¹⁰ Al-Jawharī, quoted by al-ʿAynī, *al-Bināya sharḥ al-Hidāya*, 506.

relationship has been described as a *libās*, meaning a dress in Islamic teachings²¹¹. The term *al-khulʿ* is also derived from *khalʿ al-thawb*, the removal of the *thawb*, clothes²¹². According to the Qurʾān, the process of *nikāḥ* signifies the adornment of the marital dress by both spouses during the duration of the marriage²¹³. If a wife therefore wishes to exercise her right of separation through *al-khulʿ* she is viewed as metaphorically removing and depriving both parties of the marital dress, or extracting herself from it²¹⁴. Ibn al-Hammām describes this as *izāla milk al-nikāḥ*: the removal of the ownership of *nikāḥ*²¹⁵. The word *khalaʿa* is also used in the context of emerging from the obedience of Allah, and thus a *khulʿ* is equated with coming out of the bond of the marital conjugal relationship²¹⁶.

2.2 *Khulʿ* in the Qurʾān and Hadith

The primary Ḥanafī jurists dedicate a separate chapter to the *khulʿ*, denoting its significance in Islamic jurisprudence, and all agree that it is a type of divorce where a wife can secure her release from the marriage, and in some instances provide

²¹¹ Ibn al-Hammām, *Sharḥ Faṭḥ al-Qadīr*, 188.

²¹² Ibn al-Athīr, *al-Nihāya*, vol. 1 (Beirut: Dār al-Marʿifa, 2009), 520; Muhammad ʿĀbid al-Sindī al-Madanī, *al-Ḥanafī al-Mawāhib al-Laṭīfa Sharḥ Musnad al-Imam Abī Ḥanīfa* vol.5 (Damascus: Dār al-Nawādir, 2014) 104.

²¹³ Al-Qurʾān 2:187, “They are like clothes for you and you are like clothes for them”.

²¹⁴ Al-Azharī, *Tahdhīb al-Lughā* (Dār Iḥyāʾ al-Turāth al-ʿArabī; Beirut, 2001). Muhammad ʿĀbid al-Sindī al-Madanī, *al-Ḥanafī al-Mawāhib al-Laṭīfa Sharḥ Musnad al-Imam Abī Ḥanīfa*, 104.

²¹⁵ Ibn al-Hammām, *Sharḥ Faṭḥ al-Qadīr*, 188.

²¹⁶ Ibn al-Athīr, *al-Nihāya*, 520

some form of compensation to her husband²¹⁷. The opinion of the jurists is based on the Qur'ānic²¹⁸ verses 2:229²¹⁹, 4:19²²⁰, 4:20²²¹ and 4:35²²² and on several hadith.

Verse 2:229 is the principle verse of the Qur'ān which allows a woman to seek marital release if she or her husband fears that they will not be able to abide within

²¹⁷ Muhammad b. al-Ḥasan al-Shaybānī, *Kitāb al-Aṣl*, vol. 4 (Beirut: Dār Ibn Ḥazm, 2012), 549; Abū Bakr Aḥmad ibn 'Alī al-Rāzī al-Ḥanafī al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, Vol.1 (Lahore: Sohayl Academy, 1980), 390; Abū Muḥammad 'Alī ibn Aḥmad ibn Sa'īd Ibn Ḥazm, *al-Muḥallā*, vol. 9 (Beirut: Dār al-Kutub, 2010), 210; Burhān al-Dīn al-Farghānī al-Marghīnānī, *al-Hidāya*, trans. Imran Ahsan Khan Nyazee (Bristol: Amal Press, 2007), 29-47; Badr al-Dīn al-'Aynī, *al-Bināya Sharḥ al-Hidāya*, Vol. 5 (Beirut: Dār al-Kutub, 2000), 507; Zayn al-Dīn ibn Ibrāhīm ibn Muḥammad Ibn Nujaym, *al-Baḥr al-Rā'iq*, vol. 10 (Beirut: Dār al-Kitāb, no date), 322; Muhammad b. Aḥmad b. Abī Sahl Abū Bakr al-Sarakhsī, *Kitāb al-Mabsūṭ*, vol. 3 part 6 (Beirut: Dār al-Kutub al-'Ilmiyya, 2001), 199-231; Abū Bakr b. Mas'ūd al-Kāsānī, *Badā'i' al-Ṣanā'i'*, vol.4 (Beirut: Dār al-Kutub al-'Ilmiyya, 2010), 315; Muhammad Amīn b. 'Ābidīn, *Radd al-Muḥtār 'alā Durr al-Mukhtār* (Beirut: Dār al-Fikr, 2015), 487; Ibn Kamāl Bāshā al-Ḥanafī, *al-Īdāḥ*, vol. 1 (Beirut: Dār al-Kutub, 2007)

²¹⁸ All translations of the Qur'ān are taken from the following translation: Muhammad Tahir-ul-Qadri, *The Glorious Qur'ān; English Translation* (London: Minhaj-ul-Qur'ān Publications, 2012).

²¹⁹ Al- Qur'ān 2:229: "Divorce is (revocable) two times (only). Then either retain (the wife) with honour (in marital relationship) or release her with kindness. And it is not lawful for you to take back anything of that which you have given them, unless both fear that (now by maintaining marital ties) they may not be able to observe the limits set by Allah. If you fear that both will be unable to keep within Allah's limits, then (in that case) there shall be no sin upon either of them if the wife (herself) may give up something as recompense to free herself (from this distressing bond). These are the limits (set) by Allah. So, do not exceed them. And those who exceed the limits prescribed by Allah, it is they who are the wrongdoers".

²²⁰ Al-Qur'ān, 4:19: "O believers! It is not lawful for you to become heirs to women by force. And do not retain them by force in order to take (back) from them a portion of what you gave them, unless they commit open indecency. And treat them honourably. Then if you dislike them, it may be that you dislike a thing and Allah places in it abundant good".

²²¹ Al-Qur'ān, 4:20: "And if you seek to take a wife in place of another and you have (by now) given to her heaps of wealth, yet do not take back any part of it. Do you want to take that wealth (back) by means of unjust accusation and manifest sin?"

²²² Al-Qur'ān, 4:35: "And if you fear a breach between the two, then appoint one arbitrator from the husband's family and the other from the wife's family. If both (the arbitrators) resolve to bring about settlement, Allah will create harmony between them. Indeed, Allah is All-Knowing, All-Aware".

the limits of Allah whilst remaining within the marriage. Under these circumstances a wife can initiate a release, and in doing so may offer some recompense to her husband. The Qur’ān does not provide any details of what constitutes going beyond “the limits of Allah”, so one must refer to the hadith for further explanation. As to the nature of the recompense, the Qur’ān (4:19) is clear that husbands cannot force their wives to seek a *khul’* through coercion or misbehaviour. Even if they have given large amounts of *mahr* at the time of marriage, a husband who wishes to divorce his wife (and therefore necessarily relinquish that *mahr*) cannot force his wife to apply for a *khul’* in the hope of having the *mahr* returned as some form of compensation²²³. In cases of marital conflict, the Qur’ān also provides the option for the matter to be referred to a third party or arbitrators to solve such disputes²²⁴.

Whilst the Qur’ān provides very few details regarding *khul’* and the mechanisms to be employed, precedents from the *Sunna* (practices of the Prophet) are used to elaborate the matter further. The primary ahadith (sayings of the Prophet) on this subject describe the wife of Thābit b. Qays approaching the Prophet and requesting a release from her marriage²²⁵. There are several versions of the hadith that refer to Thābit’s wife as either Ḥabība or Jamīla²²⁶. Although most of the jurists consider this

²²³ Al-Qur’ān, 4:20.

²²⁴ Al-Qur’ān, 4:35.

²²⁵ Muhammad b. Ismā’īl al-Bukhārī, *al-Ṣaḥīḥ*, trans. Muhammad Muhsin Khan, vol. 7 (Dār al-Salām; 1997) Hadith 5273, 5274, 5275 (132-133); Abū Dāwūd Sulaymān ibn al-Ash’ath al-Azdi as-Sijistānī *al-Sunan*, trans. Nasīr al-Dīn al-Khaṭṭāb, vol. 3. (Maktaba Dār al-Salām, 2008) Hadith 2227, al-Nasā’ī, *al-Sunan*, trans. Nasīr al-Dīn al-Khaṭṭāb, vol. 4 (Maktaba Dār al-Salām) Hadith 3491-3492.

²²⁶ Ibn Ḥajar al-‘Asqalānī, *Faṭḥ al-Barī*, vol. 9 (Cairo: Dār al-Hadīth, 2004), 455

to be one event²²⁷, Ibn Ḥajar al-‘Asqalānī states that the *ṣaḥīḥ* (authenticity) of all the chains of the hadith indicate that Thābit was married more than once, and upon each occasion gave his garden as the *mahr*²²⁸. This would explain why Thābit’s wife is mentioned as Jamīla and Ḥabība in some hadith, as well as Maryam al-Maghāliyya and Zaynab bint ‘Abd Allāh b. Ubayy b. Salūl in other hadith²²⁹. Moreover, the reasons given by Thābit’s wife for initiating a divorce also vary, giving further credence to this theory. In the most common version of the hadith, Thābit’s wife requests the Prophet’s permission to separate from Thābit. She specifically states that she does not blame Thābit for any wrongdoing, but fears that she will fall into *kufr*, i.e. behave in an un-Islamic manner²³⁰. The Prophet asks her if she will return the garden belonging to Thābit, to which she agrees. The Prophet then orders Thābit to take the garden and divorce his wife²³¹. In Bukhārī’s version, Thābit’s wife absolves him of any wrongdoing, clearly indicating that she was not required to prove why she wanted the divorce. Moreover, the Prophet does not ask her to elaborate on the reasons for her request, merely asking her if she is willing to return her husband’s orchard.

However, other hadith indicate that she did have reasons for her aversion and request for a *khul‘*. Jamīla/Ḥabība is to have said several different things to the

²²⁷ Al-Zamakhsharī, quoted by al-‘Aynī, *al-Bināya sharḥ al-Hidāya*, 507.

²²⁸ Al-‘Asqalānī, *Fatḥ al-Barī*, 455.

²²⁹ Muhammad ‘Ābid al-Sindī al-Madanī Al-Ḥanafī, *al-Mawāhib al-Laṭīfa sharḥ Musnad al-Imam Abī Ḥanīfa*, vol. 5 (Damascus: Dār al-Nawādir, 2014), 101.

²³⁰ Al-Bukhārī, *al-Ṣaḥīḥ*, Hadith 7:5273.

²³¹ Al-Bukhārī, *al-Ṣaḥīḥ*, Hadith 7:5273 and 5274; Ibn Mājah, *Al-Sunan*, 3:2056.

Prophet: “I cannot endure or bear to be live with him”²³², or that she “did not like him”²³³, or that she found him ugly and wanted to spit in his face²³⁴. In other reports Thābit is considered to have caused his wife physical pain²³⁵ or even broken her arm²³⁶. Ibn Ḥajar al-‘Asqalānī also describes Thābit as “having displayed harsh behaviour”²³⁷. However, Thābit’s wife does not feel it necessary to mention this behaviour to the Prophet in the principal hadith narrated by Bukhārī, perhaps knowing that he is either already aware of the fact or will ask for clarification if needed. It has also been argued that if a wife merely fears that she will not be able to fulfil the commandments of Allah (by not being able to fulfil the rights of her husband) she will be entitled to a *khul*²³⁸. Since the Qur’ān clearly states *an yakhāfā*, “if you fear”, then actual harm or hatred need not be established; rather, the anticipation or fear that hatred or abhorrence will lead to marital dispute will be enough to request a *khul*²³⁹. What is clear from the hadith and the jurists’ reports is that the reasons for the request for *khul* were not considered important: merely that a request for a divorce was made and then granted upon the return of some compensation.

²³² Al-Bukhārī, *al-Ṣaḥīḥ*, Hadith 7:5275.

²³³ Ibn Ḥajar al-‘Asqalānī, *Fatḥ al-Barī*, 9:457.

²³⁴ Ibn Mājah, *al-Sunan*, 3:2057. In this particular hadith, Ḥabība bint Sahl informs the Prophet: “If it were not the fear of Allah when he enters me, I would spit in his (Thābit’s) face.” See also al-‘Asqalānī, *Fatḥ al-Barī*, 9:457, who quotes a hadith from Imam ‘Abd al-Razzāq, reporting from Ma‘mar that Jamīla, the wife of Thābit, said: “Oh Prophet, he is ugly and I am beautiful and I do not wish to live with him.”

²³⁵ Abū Dāwūd, *al-Sunan*, 3:2228.

²³⁶ Al-Nasā’ī, *al-Sunan al-Kubrā*.

²³⁷ Ibn Ḥajar al-‘Asqalānī, *Fatḥ al-Barī*, 9:457.

²³⁸ Ḥusayn b. ‘Awda al-‘Awāyisha, *al-Mawsū‘a al-Fiqhiyya al-Muyassara*, 336.

²³⁹ *Ibid.*, 336.

2.3 *Khul'* and the Husband's Consent

In past and present scholarship pertaining to the *khul'*, it has been posited by some scholars that Ḥanafī jurisprudence dictates that a husband's consent is needed before a *khul'* can be affected, clearly going against the textual readings of the hadith mentioned above. The perception that Ḥanafī *fiqh* requires the husband to give his consent was particularly prevalent in the Indo-Pak subcontinent during the late nineteenth and early twentieth centuries and negatively affected women as a result. As will be explained later in Chapter Three, Muslim personal law was used to govern issues relating to all family law cases in the Indo-Pak subcontinent. This erroneous conception of Ḥanafī *fiqh* meant that judges in pre- and post-partition Pakistan refused to allow women to exercise their right to *khul'* in the absence of their husbands' consent. It was only in 1959 that the Supreme Court of Pakistan decided to override so-called Ḥanafī jurisprudence and allow a newly formulated judicial right of *khul'* irrespective of the husband's wishes²⁴⁰. Unaware that Ḥanafī jurisprudence was being misinterpreted, the Supreme Court engaged in what it deemed as *ijtihād* and formulated what it perceived as a new version of the *khul'*. Unfortunately, since the judges did not base their judgment upon the classical Ḥanafī texts, for almost a decade the lower courts either refused to implement the decision entirely or prolonged existing cases, instituting extremely high evidentiary requirements for women to fulfil before a *khul'* was granted. Although the Pakistani courts have now radically changed their position and formulated a no-fault based

²⁴⁰ Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi, PLD 1959 (W.P) Lahore 566. See Chapter Four for a detailed analysis of this case.

khul', a careful review of the primary Ḥanafī texts below will illustrate that married women were unnecessarily restricted and forced to remain in unhappy and often violent marriages due to a misrepresentation of Ḥanafī jurisprudence in the case of *khul'*.

In his formative work on Ḥanafī jurisprudence, al-Shaybānī describes the *khul'* as *al-ikhtilā'* – the process of the wife detaching or extricating herself from the marriage – and states that this is a permissible separation²⁴¹. He makes no reference to the necessity of the husband's consent as a pre-requisite to the divorce, and instead engages in a discussion on the legal effect of the *khul'* and what compensation, if any, is required. Similarly, in *al-Jāmi' al-Ṣaghīr*²⁴², al-Shaybānī quotes a hadith direct from Abū Ḥanīfa, in which the wife of Thābit comes to the Holy Prophet and declares that she no longer wishes live with her husband, and is granted a *khul'* after she agrees to return Thābit's garden²⁴³. In this particular version of the hadith, there is no mention that Thābit was even present during the discussion, and is merely ordered to return his garden²⁴⁴. Thābit is assigned a completely passive role during the process of the *khul'*, and no mention is made regarding the necessity of his

²⁴¹ Muhammad b. al-Ḥasan al-Shaybānī, *Kitāb al-Aṣl*, vol. 4 (Beirut: Dār Ibn Ḥazm, 2012) 549.

²⁴² Muhammad b. al-Ḥasan al-Shaybānī, *al-Jāmi' al-Ṣaghīr* (Karachi: Idāra al-Qur'ān, 1990), 216.

²⁴³ See also Abū Ḥanīfa, *al-Musnad* in *al-Ḥanafī al-Mawāhib al-Laṭīfa sharḥ Musnad al-Imam Abī Ḥanīfa* Muhammad 'Ābid al-Sindī al-Madanī, vol. 5 (Damascus: Dār al-Nawādir, 2014), 99.

²⁴⁴ In the versions provided by al-Dāraqūṭnī in his *al-Sunan* and in al-Bayhaqī's *al-Sunan al-Kubrā*, the Prophet receives the garden from Thābit's wife and declares the divorce without any mention that Thābit was present. See Muhammad 'Ābid al-Sindī al-Madanī, *al-Ḥanafī al-Mawāhib*, 106.

consent. Al-Jaṣṣāṣ states that if either of the spouses fears that they will break the commandments of Allah by continuing with the marriage, then it is permissible for the wife to seek a *khul'*²⁴⁵. The consent of the husband is not made a pre-requisite for the *khul'*; rather, for al-Jaṣṣāṣ, the failure of either the husband or the wife to present “good behaviour” within the marriage will cause the “spirit of the nikāḥ” to be broken and lead the way towards a *khul'*²⁴⁶. The same position is taken by Ibn Ḥazm, who defines the *khul'* as *al-iftidā'*: a separation when a wife hates her husband²⁴⁷. If a wife fears that she will not be able to fulfil her marital obligations due to this hate, then she has the right to gain *fa-lahā*: freedom from the marriage²⁴⁸. It is not required that the husband reciprocates this hate or that he must necessarily consent to the *khul'*: instead, it is what the wife feels, and her worries about her marital obligations, that are of primary concern. If she cannot live amicably with her husband, then that is sufficient cause to be granted a *khul'*²⁴⁹. Indeed, it is the consent of the wife that is the primary condition of the granting of the *khul'*. It is the wife who must, without any coercion, either desire a *khul'* or freely consent to one if the husband initiates the demand²⁵⁰.

In his chapter on the *khul'* and through his commentary on al-Marghīnānī's *al-Hidāya*, al-ʿAynī provides four different views of the *fuqahā'* regarding the *khul'*

²⁴⁵ Al-Jaṣṣāṣ al-Ḥanafī, *Aḥkām al-Qurʾān*, 390.

²⁴⁶ Ibid., 391-392.

²⁴⁷ Ibn Ḥazm, *al-Muḥallā*, 210.

²⁴⁸ Ibid.

²⁴⁹ Ibn ʿĀbidīn, quoted by Muhammad al-ʿImrānī, *Fiqh al-Uṣra al-Muslilma fī al-Muhājar*, vol. 2 (Beirut: Dār al-Kutub, 2001), 187.

²⁵⁰ Ibn Nujaym, *al-Baḥr al-Rāʾiq*, 322.

before providing his own view on the matter. Al-‘Aynī states that the *ash‘ariyya*²⁵¹ requires the fulfilment of one of two conditions for a wife to be entitled to a *khul‘*: the wife does not like her husband, or, if she stays with him, she cannot fulfil his conjugal rights²⁵². The second view posited is that of Ibn Sīrīn, Sa‘īd b. Jubayr and Ḥasan al-Baṣrī, all of whom state that the *khul‘* cannot be granted without the intervention of the *qāḍī*²⁵³. Al-‘Aynī expresses the third view: that other *fuqahā’* have stated that a wife cannot be granted a *khul‘* unless she specifically informs her husband that she can no longer obey him and cannot perform the obligatory *ghusl*, implying that the wife no longer wishes to have sexual relations with her husband²⁵⁴. The fourth view is that there must be some argument between the two parties before a *khul‘* can be granted. After summarising the views of these *fuqahā’*, al-‘Aynī provides his own view on the matter. He bases his view on the Qur’ānic verse 2:229, stating that if there is a dispute between the spouses and they fear that by staying together as husband and wife they cannot fulfil the commandments of Allah, there is no harm if the wife frees herself from that relationship, and in doing so she may return some compensation and thus detach herself from her husband²⁵⁵. Neither al-‘Aynī nor al-Marghīnānī stipulates that the consent of the husband is a pre-requisite for the granting of the *khul‘*. Al-‘Aynī states that if the matter is not resolved between the two parties, the wife has the option to go to court and apply

²⁵¹ An early theological school of thought in Islam and the followers of Abū al-Ḥasan al-Ash‘arī.

²⁵² Badr al-Dīn al-‘Aynī, *al-Bināya sharḥ al-Hidāya*, 507.

²⁵³ Ibid., 507.

²⁵⁴ Ibid., 507.

²⁵⁵ Ibid.

for a *khul'*, as was implemented in the case Thābit's wife²⁵⁶. The fact that a wife has the right to refer the case to the court implies that this will be irrespective of the husband's wishes. Why else would a wife be allowed to refer her case to the court if a *qāḍī* does not have the power to dissolve the marriage without the consent of the husband? Such a right would be useless and of no value.

Al-Sarakhsī begins his chapter on the *khul'* by stating that it is permissible for a wife to apply for a *khul'* and that its legal effect will be similar to that of *ṭalāq-ul-bā'in*, an irrevocable divorce²⁵⁷. Again there is no mention of the need for the husband's consent. Rather, Al-Sarakhsī states that the *khul'* can be agreed upon mutually between both parties; or, if not, the case can be referred to any other third party or a *qāḍī*²⁵⁸. Indeed, al-Sarakhsī is of the view that even if the *khul'* is obtained through *al-ikrāh*, coercion of the husband, the *khul'* is still valid²⁵⁹. If a *khul'* is still considered valid when a husband is forced to give it, this clearly indicates that the husband's role in the granting of a *khul'* is a passive one. If a wife requests a *khul'*, either he can agree or the matter will be referred to a third party which has the power to override the husband's wishes. This also reflects the passive role given to Thābit in all of the hadith. Thābit is never asked by the Prophet about his opinion regarding his wife's demand, but is ordered to grant her a divorce and accept the garden in return.

²⁵⁶ Ibid.

²⁵⁷ Al-Sarakhsī, *Kitāb al-Mabsūṭ*, 199. Although its legal affect will be of a *ṭalāq-ul-bā'in* the *khul'*, it is still considered to be the right of the wife.

²⁵⁸ Al-Sarakhsī, *Kitāb al-Mabsūṭ*, 202.

²⁵⁹ Ibid., 207.

Al-Kāsānī's chapter on the *khul'* also contains nothing pertaining to the requirement of the consent of the husband²⁶⁰. Instead, his primary discussion revolves around the legal effect of the *khul'*, comparing the Ḥanafī juristic view that the *khul'* has the legal effect of being an irrevocable *ṭalāq* with the Ḥanablī view that the legal effect of a *khul'* is *al-naskh*. However, in both events the *nikāḥ* is totally repudiated by the *khul'*²⁶¹. Moreover, al-Kāsānī also states that whilst some *fuqahā'* require a *qāḍī* to affect a *khul'*, in his opinion the *khul'* can be obtained extra-judicially if mutually agreed between the parties, or through recourse to the *qāḍī* in the case of dispute²⁶². Similarly, al-Jaṣṣāṣ²⁶³ and Ibn Kamāl Bāshā al-Ḥanafī²⁶⁴ are all of the view that a wife has the right to initiate a *khul'*, and in the case of a dispute may refer the case to the courts for a settlement. Al-Jaṣṣāṣ mentions that Ḥasan al-Baṣrī and Ibn Sīrīn only allowed a *khul'* through recourse to a court because they feared that a wife's rights might be violated if the matter is left to the discretion of the spouses. However, al-Jaṣṣāṣ states that 'Umar b. al-Khaṭṭāb, 'Uthmān b. 'Affān, 'Alī b. Ṭālib, 'Umar b. 'Umar, Shurayḥ, Ṭāwūs and al-Ẓuhrī all allow a *khul'* to be settled through a court, or by mutual consent, or through the intervention of any third person²⁶⁵.

The exegetes have also interpreted the Qur'ānic verse 2:229 as providing courts with the authority to settle disputes during matrimonial conflict. Al-Qurṭubī states

²⁶⁰ Abū Bakr b. Mas'ūd al-Kāsānī, *Badā'i' al-Sanā'i'*, vol. 4 (Beirut: Dār al-Kutub al-'Ilmiyya, 2010), 315.

²⁶¹ Ibn al-Qaṭṭān al-Fāsī, *al-Iqnā' fī Masā'il al-Ijmā'*, 91.

²⁶² Al-Kāsānī, *Badā'i' al-Sanā'i'*, 319.

²⁶³ Al-Jaṣṣāṣ al-Ḥanafī, *Aḥkām al-Qur'ān*, 395.

²⁶⁴ Ibn Kamāl Bāshā al-Ḥanafīyya, *al-Īdāḥ*, vol. 1 (Beirut: Dār al-Kutub, 2007).

²⁶⁵ Al-Jaṣṣāṣ al-Ḥanafī, *Aḥkām al-Qur'ān*, 319.

that the words *an yakhāfā*, “if they both fear” (in the first part of the verse), refer to both the husband and wife, but the words *in khiftum*, “if you fear”, do not refer to the spouses but to a third party²⁶⁶, or to the sultan or those who work on his behalf²⁶⁷. Moreover, Ibn al-Hammām goes into great depth about the right of a woman to address the court in the case of a dispute regarding the *khul'*²⁶⁸. After presenting Bukhārī’s version of the hadith where the Prophet grants Thābit’s wife a *khul'*, he provides an explanation through Qur’ānic verse 2:229:

So if you fear that both will be unable to keep within Allah’s limits, then (in that case) there shall be no sin upon either of them if the wife (herself) may give up something as recompense to free herself (from this distressing bond).

Ibn al-Hammām states that the Arabic words *fa-in khiftum*, “so if you fear”, specifically refer to the *al-a’imma wa al-ḥukkām*: the learned people (judges) or the rulers²⁶⁹. Allah has made it a condition that if “you” – the rulers and judges – “fear that both”, namely the husband and wife, will transgress the limits set by God and are unable to resolve “your” marital dispute, then the matter should be raised before the court, presided over by the *a’imma* and *ḥukkām*. Ibn al-Hammām further states that Allah has given this authority to the courts and empowered them to provide a *khul'* to the wife. He uses the word *tamkīn* to signify that the courts have the

²⁶⁶ Abū ‘Abd Allāh al-Qurṭubī, *al-Jāmi‘ li-Aḥkām al-Qur’ān*, trans. Aisha Bewley (Dār al-Taqwā) vol. 1, 583.

²⁶⁷ Ibid., 584. Al-Qurṭubī also quotes the opinion of Sa‘īd b. Jubayr, Ḥasan al-Baṣrī and Ibn Sīrīn, all of whom state that a *khul'* can only be granted by a *qāḍī*.

²⁶⁸ Ibn al-Hammām al-Ḥanafī, *Fatḥ al-Qadīr sharḥ al-Hidāya*, 192-193.

²⁶⁹ Ibid., 192.

authority to affect a *khul'*²⁷⁰. Ibn al-Hammām's opinion that the courts have the right to grant a *khul'* again implies that this authority can be exercised irrespective of the wishes of the husband. Otherwise, recourse to the courts would be of no practical use to a wife.

It is therefore apparent from the discussion above that the perception that Ḥanafī *fiqh* only allows a wife to proceed with a *khul'* with her husband's consent is a misconception of Ḥanafī jurisprudence. Unfortunately, the situation has been confused with an inaccurate interpretation of the term *al-mubāra'a* and its connection to the *khul'*, which will be discussed below.

2.4 Al-Mubāra'a

Some contemporary commentators describe *al-mubāra'a* as *al-khul'* by mutual consent, whereby the terms of the *khul'* are agreed to by both the husband and wife²⁷¹. Others have termed it an extra-judicial *khul'* whereby no recourse is made to

²⁷⁰ Ibid., 193

²⁷¹ Abd al-Rahman Doi, *Women in Shariah*, 96-97; Hammudah Abd al-Ali, *The Family Structure in Islam* (Oak Brook, IL: American Trust Publications, 1977), 244; Joel Nichols ed., *Marriage and Divorce in a Multi-Cultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion* (Cambridge: Cambridge University Press, 2012), 40; Rakesh Kumar Singh, *Textbook on Muslim Law* (Delhi: Universal Law Publishing, 2011), 135; Asma Jahanghir and S. Abid, *Comprehensive & Exhaustive Commentary on Manual of Family Laws in Pakistan* (Lahore: Civil & Criminal Law Publications, 2004), 130

the court, since the husband has agreed to the *khul'* at the initiation of the wife²⁷². This definition, however, is also inaccurate with respect to Ḥanafī jurisprudence, which provides a much more detailed and technical analysis of this term. Whilst discussing the legal effects of the *khul'*, both al-Shaybānī and al-Marghīnānī note that *al-khul'* and *al-mubāra'a* are the same regarding their legal effects²⁷³. This fact, I believe, may have partly contributed to the misunderstanding regarding the interpretation of *al-mubāra'a* by some scholars. As noted above, the *khul'* has been wrongly interpreted as requiring the consent of the husband. If the *mubāra'a* has the same legal effect as the *khul'*, it appears that this was taken to mean that a *mubāra'a* must by definition also mean divorce by mutual consent.

In fact, a survey of the primary Ḥanafī texts reveals that the *mubāra'a* is not considered a *khul'* just because it has been effected through the mutual consent of both spouses. Rather, it requires the presence of two elements: the release of the husband from his financial obligation to support his wife and the presence of both spouses when any such agreement is made. Al-Sarakhsī states that if a wife agrees to give up her right to *al-nafaqa* (food and clothing) and *al-suknā* (housing) as compensation for the *khul'*, then the *khul'* will be termed a *mubāra'a*, since the husband will be absolved of his financial liability to provide food and shelter to his

²⁷² David Pearl and Werner Mensky, *Muslim Family Law* (Andover: Sweet & Maxwell, 1998), 284; Rashida Patel, *Gender Equality and Women's Empowerment in Pakistan* (Oxford: Oxford University Press, 2010), 189.

²⁷³ Muhammad al-Shaybānī's, *al-Aṣl* in *Kitāb al-Mabsūṭ*, al-Sarakhsī, 201; Al-Marghīnānī, *al-Hidāya*, 304.

wife²⁷⁴. Al-Shaybānī is of the view that even if the wife agrees to give up both these rights, the husband will still be liable to provide *al-suknā* to his wife during her *‘idda* period. He states that the wife cannot give up this financial liability, even voluntarily, and the husband will always be liable for *al-suknā* in the event of a divorce²⁷⁵.

However, being absolved of the liability to provide *al-nafaqa* will entail that the *khul‘* will be known as a *mubāra’a*. Thus the *khul‘* and *mubāra’a* have the same legal effect, for al-Shaybānī, only in terms of the release of the legal obligations upon the husband. In the event of the *khul‘*, if a wife has to pay some recompense to the husband, he in turn will be released from his financial liability to pay any outstanding deferred *mahr* payment, and thus will be absolved of any financial obligation to his wife. Thus the *khul‘* will have the same legal effect as the *mubāra’a*.

Al-Kāsānī states that the word *mubāra’a* is derived from *barā’at*, meaning to become free or to be released. When a husband is freed from his financial obligation and responsibilities or *ibrā’*, then the *khul‘* will be termed a *mubāra’a*²⁷⁶. Al-Marghīnānī adds to this definition and states that a *mubāra’a* is like a *khul‘* in its legal effect because through both of these acts, each of the spouses is released from their marital responsibilities²⁷⁷. It is important to note that the word *mubāra’a* is derived

²⁷⁴ Al-Sarakhsī, *Kitāb al-Mabsūṭ*, 207.

²⁷⁵ Al-Shaybānī, *Kitāb al-Asl*, 549-550

²⁷⁶ Al-Kāsānī, *Badā’i’ al-Sanā’i’*, 330. Ibn ‘Ābidīn also states that the word *mubāra’a* has been derived from *baraa’a*, meaning renunciation. He refers to the breach of the peace treaty of Ḥudaybiya, upon which a Qur’ānic verse was revealed stating that the treaty had been renounced. In the same way, a wife renounces her financial rights in the case of a *mubāra’a*. See Ibn ‘Ābidīn, *Radd al-Muḥtār*, 487.

²⁷⁷ Al-Marghīnānī, *al-Hidāya*, 323. See also al-Mullā ‘Alī al-Qārī, *Fatḥ Bāb al-‘Ināya*, vol. 2 (Beirut: Dār al-Kutūb, 2009), 287.

from *bara'ah*, and grammatically belongs to the chapter of *mufā'ala*, according to the principles of Arabic grammar (*al-ṣarf*). Any Arabic noun from the chapter of *mufā'ala* denotes the requirement of the involvement of two parties, and that is why, when the financial release of the husband is being negotiated, both of the spouses must be present when this occurs²⁷⁸. Al-Marghīnānī makes no allusion to the requirement of mutual consent of both parties in his definition of *mubāra'a*. However, this is, of course, implied, as both the husband and wife will have to agree to any release of financial obligations on either side.

Al-ʿAynī differs slightly from al-Marghīnānī regarding the application of *mufā'ala* in the definition of *mubāra'a*²⁷⁹. He states that this may refer to one party expressly (the wife) and to the other impliedly (the husband), or to both expressly, but in either case it refers to the release of the marital obligations owed by both parties to each other²⁸⁰. In a similar vein, Ibn Ḥammām provides the opinion of Abū Yūsuf, who states that *mubāra'a* is derived from *barā'a min al-jānibayn*: the release of two sides²⁸¹. In other words, the *barā'a* or release is of *jānibayn*, or both sides, from their financial obligations. Abū Yūsuf states that the *barā'a* should be of both sides and should involve the removal of the marital dress of responsibilities to the *nikāḥ*²⁸². Although the spouses terminate their mutual marital responsibilities, Imam al-Ṭaḥāwī agrees with al-Shaybānī that this is only in terms of the husband's

²⁷⁸ Al-Marghīnānī, *al-Hidāya*, 304.

²⁷⁹ Al-ʿAynī, *al-Bināya sharḥ al-Hidāya*, 526.

²⁸⁰ Ibid.

²⁸¹ Ibn al-Hammām, *Sharḥ Faṭḥ al-Qadīr*, 209.

²⁸² Ibid.

responsibility to pay *al-nafaqa*, and not with respect to his liability for providing *al-suknā* during the period of *‘idda*²⁸³.

What is clear from this analysis of Ḥanafī jurisprudence is that in both instances the wife has the right to initiate a divorce from her husband. If a *khul’* is affected through mutual consent, it will still not be considered a *mubāra’a* under Ḥanafī jurisprudence unless both parties are present and the wife also agrees to release her husband from his obligation to pay *al-nafaqa* during the *‘idda*. If the husband agrees to the *khul’* and accepts some form of financial compensation, then this *khul’* will also be known as a *mubāra’a*. This is because he has been absolved of any financial responsibility to pay any *al-mahr al-mu’ajjal*, or deferred dower, to his wife. However, if a husband agrees to the *khul’* (through mutual consent) but does not require his wife to repay the *mahr* (meaning that his liability to pay her any deferred *mahr* persists) and/or agrees to continue to support his wife during the *‘idda* period, the divorce will be termed a *khul’*. If the case is referred to the court and a judge orders the divorce at the behest of the wife, this too is termed a *khul’*, irrespective of whether or not the husband consents. It is the existence or absence of the financial liability of the husband that is crucial in creating a distinction between the two forms of divorce, rather than just the mutual consent of both parties.

²⁸³ Imam al-Ṭahāwī, *al-Yaneeb’* in *Sharḥ Faṭḥ al-Qadīr*, Ibn al-Hammām, 209

2.5 *Khul'* and Compensation

The *khul'* has often been criticised as a process where a wife must ransom herself in order to gain release from the marital bond²⁸⁴. In a society where a woman has a weaker socioeconomic position than that of her male counterparts (as is the case in Pakistan), this can create an onerous financial liability upon her. If the wife is unable to provide any financial recompense, this can leave her at the mercy of a cruel and malicious husband, who may or may not release her through a *ṭalāq*, or may make her life so unbearable within the marriage that she is forced to seek a *khul'* at her own legal expense. There is a general perception amongst many Muslims and contemporary scholars that the granting of the *khul'* is conditional upon the wife's return of the *mahr*. During the fieldwork in Pakistan, all the lawyers, judges and lecturers in family law interviewed expressed the view that this was the correct position under Ḥanafī *fiqh*. They argued that the return of the *mahr* by the wife is an indispensable element of the *khul'*, and that both Pakistani law and Ḥanafī jurisprudence endorse this fact. Although in many cases a judge may waive this right in favour of the wife, this was merely viewed as judicial discretion and, it was argued, did not reflect the actual position under the Pakistani statutory provisions or the Ḥanafī *madhhab*²⁸⁵. Moreover, the women interviewed for the purposes of this research also enunciated the same opinion. Even those women who had only a

²⁸⁴ Doreen Hinchcliffe, "Divorce in Pakistan: Judicial Reform", *Journal of Islamic and Comparative Law*, 2 (1968a), 25; Taslima Monsoor, *From Patriarchy to Gender Equity. Family Law and its Impact on Women in Bangladesh* (Dhaka: University Press Ltd, 1999), 190.

²⁸⁵ See Chapter Four of this thesis for examples of judicial dispensation of the requirement to repay any *mahr*.

very superficial knowledge of the *khul'* all stated that it is the right of a woman to gain a divorce only if she is able to return the *mahr*. This opinion was reiterated by family, friends and other Muslim and non-Muslim colleagues during informal discussions, all of whom were of no doubt that the granting of a *khul'* equates to the giving up of the *mahr*.

However, a closer look at the primary sources of Ḥanafī jurisprudence reveal that the return of the *mahr* is not always considered a binding and conditional element of the *khul'*. Rather, the Ḥanafī jurists have taken a much more nuanced approach in respect of this matter and with regard to what, if anything at all, needs to be returned by the wife. The central Qur'ānic verse that deals with the matter of the *khul'* is verse 2:229 where recompense in matters of divorce is mentioned twice in this verse. (Author's bold highlights).

*“Divorce is (revocable) two times (only). Then either retain (the wife) with honour (in marital relationship) or release her with kindness. **And it is not lawful for you to take back anything of that which you have given them**, unless both fear that (now by maintaining marital ties) they may not be able to observe the limits set by Allah. So if you fear that both will be unable to keep within Allah's limits, then (in that case) **there shall be no sin upon either of them if the wife (herself) may give up something as recompense to free herself (from this distressing bond)**. These are the limits (set) by Allah. So, do not exceed them. And those who exceed the limits prescribed by Allah, it is they who are the wrongdoers”.*

In the beginning of this Qur'ānic verse the addressee is the husband, and it has been made unlawful for him to take anything back from his wife which he had previously given to her. The exegetes have termed the 'taking back' of something in the

beginning of the verse as referring to the return of the *mahr*²⁸⁶. If, however, the spouses cannot maintain the marital ties, then the procedure for a wife to exit the marriage is given in the next part of the verse. This states that there is no sin if a wife *may* (author's italics) give some recompense to free herself from the marital bond, but the passage does not specify what that exact amount should be.

Zantout (2006) though takes a different approach. She argues that the beginning of this verse not only lays down the principle that some recompense must be given, but also limits the recompense to the return of the *mahr* and no more during a *khul'*²⁸⁷. The words *min-mā ātaytumūhunna* ("that which you have given them"), which precede the mention of the recompense given by the wife, have been taken to imply that the compensation cannot exceed the value of the *mahr*, which would be more "than which you have given them", as the Qur'ān stipulates. However, a closer look at this verse reveals that these words are in fact in reference to the procedure outlined for the husband if he wishes to pronounce a *ṭalāq*, and not a *khul'*. The Qur'ān firstly states that a "*divorce is (revocable) two times (only)*", thus setting the context for the verses that follow: "*then either retain (the wife) with honour (in marital relationship) or release her with kindness*". Here, reference is being made to the husband's right to *ṭalāq*, which is followed by placing a prohibition on the husband's taking back the *mahr*: "*And it is not lawful for you to take back anything of that which you have given them*". The husband is advised to treat his wife with

²⁸⁶ Al-Qurṭubī, *al-Jāmi' li-Aḥkām al-Qur'ān*, 582-583; Ibn Kathīr, *Tafsīr al-Qur'ān al-Aẓīm*, 1:273 (Beirut: Dār al-Fikr, 1980).

²⁸⁷ Mida Zantout, "*Khul'*: Between Past and Present", 12-13.

honour, but if he is unable to do so then he is ordered to release her with kindness; but return of the *mahr* is determined as unlawful for him²⁸⁸. Thus, *min-mā ātaytumūhunna* is clearly directed at the husband in the case of *ṭalāq*, and not in the case of a *khulʿ*.

Only when the matter of *ṭalāq* has been clarified does the Qurʾān address the issue of divorce at the initiation of the wife: “*So if you fear that both will be unable to keep within Allah’s limits, then (in that case) there shall be no sin upon either of them if the wife (herself) may give up something as recompense to free herself (from this distressing bond)*”²⁸⁹. The Qurʾān does not specify the nature of the recompense; nor does it place any minimum or maximum limit upon it. More importantly, the Qurʾānic verse does not state that the giving of some recompense by the wife is compulsory, but that there is no sin on her if she decides to give it and the husband accepts it. The Arabic word *junāḥ-un* is used to designate that the return of some recompense is permissible, but is not a mandatory order. Qadri (1979) asserts that *junāḥ-un* (“there is no sin”) is used twenty-four times within the Qurʾān in various places, and each time it is used in the context of allowing an act, but never does it constitute a direct *ḥukm* or commandment²⁹⁰. Verse 2:198, for example, states:

²⁸⁸ Al-Qurṭubī, *al-Jāmiʿ li-Aḥkām al-Qurʾān*, 582-583.

²⁸⁹ Al- Qurʾān: 2:229

²⁹⁰ Muhammad Tahir-ul-Qadri, *Islamic Principles of Family Law* (unpublished manuscript with the author). Qadri (1979) provides 24 verses of the Qurʾān where the word *junāḥ-un* has been used as pertaining to permissibility only 2:198, 2:229, 2:230, 2:233, 2:233, 2:234, 2:235, 2:236, 2:240, 2:282, 4:23, 4:24, 4:101, 4:102, 4:128, 5:93, 24:29, 24:58, 24:60, 24:61, 33:5, 33:51, 33:55, 33:60 33:10. Qadri states that there is only one *ayah* where *junāḥ-un* is used as mandatory, which relates to the *qaṣr* (shortened) prayer during travelling (4:101). The Ḥanafī jurists interpret

“And it is no sin on you if you (also) seek your Lord’s bounty (through trade during the Hajj days)”.

The word *junāḥ-un* is used to indicate that pilgrims may if they wish engage in trade during the hajj. This certainly does not mean that they *must* engage in such trade, merely that they are free to do so if they wish. Similarly, in verse 2: 30, the Qur’ān states:

“...But if he (the latter) also divorces her, in such a case there shall be no sin on both of them (the former husband and the wife) if they return (once more to the wedlock)”.

Again it is obvious from the context of the verse above that a divorced couple *may* remarry, but not that they *must* marry. Through exegetical analogy of the Qur’ān with these and other verses highlighted, it cannot be said that there is a Qur’ānic injunction that states that a *khul’* can only be effected through the return of the *mahr*, as many believe. Instead, the Qur’ān is explicit in stating *junāḥ-un*: that there is no sin upon the wife, who *may* provide some recompense to release herself from the marital bond, but not that she *must* do so, or that any such recompense *must* constitute part of her *mahr*. This is in contrast to the prohibition upon the husband in asking for the return of the *mahr* in the earlier part of the verse. Here the words

junāḥ as meaning *wājib*, in contrast to the Shāfi‘ī and Mālikī jurists, who state that the *qaṣr* prayer is permissible. Abū Ḥanīfa argues that Allah has made the shortening of prayer to ease the burden of *ṣalāt* on travellers, and as such, it is a blessing that should be accepted as mandatory and not as permissible. The rationale for Ḥanafī jurisprudence in this instance is to opt for the easiest option for a person to comply with.

used are *ḥill-un*, meaning unlawful, and this is a direct commandment towards the husband rather than a discretionary act, as in the case of the wife.

Al-Ṭabarī endorses this view in his commentary on the Qurʾān, and states that verse 2:229 does not mean that a wife must necessarily return the *mahr* if she requests a *khulʿ*²⁹¹. He states this is only required if it is proved that the *nushūz* is on the part of the wife, and quotes various *ṣaḥāba* and *tābiʿīn* to support his opinion²⁹². Senior *ṣaḥāba*²⁹³ ʿAbd Allāh b. ʿAbbās mentions verse 2:229, and in his opinion, if the wife has misbehaved in the marriage, only then is it *halal* for the husband to request some form of recompense to release her from the marriage²⁹⁴. According to ʿUrwa b. al-Zubayr, it is not lawful for a husband to receive any compensation unless it is proven that the *fasād* (conflict) appears to have come from the wife’s side. ʿUrwa b. al-Zubayr gives the example of a wife who claims that she cannot fulfil her husband’s sexual rights. In this instance, it is permissible for the husband to receive something in lieu of the marital breakdown²⁹⁵. Similarly, Jabr b. Zayd is of the opinion that if there is any *sharḥ* (mischief) on the part of the wife, then it is permissible for the husband to ask for the *mahr*, but he too emphasises that this is not a conditional element of the *khulʿ*²⁹⁶. In his explanation of verse 2:229, al-Rabīʿ

²⁹¹ Abū Jaʿfar Muhammad b. Jarīr al-Ṭabarī, *Tafsīr al-Ṭabarī* (Cairo: Dār Ibn al-Jawzī, 2008), 557.

²⁹² See also Ibn al-Qaṭṭān al-Fāsī, *al-Iqnāʿ fī Masāʾil al-Ijmāʿ*, 93, who states that there is *ijmāʿ* on the fact that if the husband has committed *ẓulm* upon the wife, he has no right to request the return of any compensation.

²⁹³ The title given to the companions of the Prophet.

²⁹⁴ Al-Ṭabarī, *Tafsīr al-Ṭabarī*, 557.

²⁹⁵ Al-Ṭabarī, *Tafsīr al-Ṭabarī*, 557.

²⁹⁶ Al-Ṭabarī, *Tafsīr al-Ṭabarī*, 558.

states that if a wife is obedient to her husband and she behaves nicely towards him, then the husband cannot force her to give him any compensation. Here it is clearly implied that a husband cannot force a wife to apply for a *khul'* in order to receive some recompense for the marital breakdown. Al-Rabī' goes on to state that if the husband has received anything from his wife (through such forceful separation), then whatever he has received from her is *ḥarām* upon him. Only if it is proven that the *nushūz* or *ẓulm* is from the wife's side is it permissible for the husband to get the recompense²⁹⁷. Al-Zuhrī is also of the opinion that a husband cannot force his wife to demand a *khul'* through coercion. He states that such an action is not *jā'iz* (permissible), and nor is the acceptance of any compensation in such an instance. A wife is only liable to compensate her husband in any manner if it is proven that she has acted in an inappropriate manner²⁹⁸. Al-Qurṭubī also states that even though the Qur'ānic verses 4:19-20²⁹⁹ were revealed to relate to a husband's right to a *ṭalāq*, through exegetical analogy of the Qur'ānic verses, they also provide the basic principles to be followed when dealing with the matter of compensation in respect

²⁹⁷ Ibid.

²⁹⁸ Al-Ṭabarī, *Tafsīr al-Ṭabarī*, 559. Ṭabarī also quotes 'Amr b. Shu'ayb, Ṭāwūs and 'Alī b. Ṭālib, all of whom say that a husband can never receive more than the *mahr* as compensation, under any circumstances, whilst Imam al-Sha'bī is quoted as saying that he should always receive less than what he had given. Sa'īd b. al-Musayyab tābi'ī also does not approve of the husband receiving everything he gave his wife and states that a husband should leave with his wife an amount of property that will be sufficient for her livelihood (Al-Ṭabarī, *Tafsīr al-Ṭabarī*, 574-575).

²⁹⁹ Al-Qur'ān, 4:19. "O believers! It is not lawful for you to become heirs to women by force. And do not retain them by force in order to take (back) from them a portion of what you gave them, unless they commit open indecency. And treat them honourably. Then if you dislike them, it may be that you dislike a thing and Allah places in it abundant good" Al-Qur'ān, 4:20. "And if you seek to take a wife in place of another and you have (by now) given to her heaps of wealth, yet do not take back any part of it. Do you want to take that wealth (back) by means of unjust accusation and manifest sin?"

of the *khul'* and verse 2:229³⁰⁰. Verses 4:19-20 admonish husbands who wish to remarry but forcibly retain their wives in the hope that the wives may seek separation themselves and thus relinquish their *mahr*. Al-Qurṭubī argues that these verses clearly state that a husband cannot cause harm to his wife in the hope that he will gain back from his wife what he had already given (namely the *mahr*). Thus, in the case of a *khul'*, if the *nushūz* or harm is from the husband, he has no right to ask for the return of the *mahr*³⁰¹.

It is clear from the discussion above that the Qur'ān does not equate the return of some recompense as a prerequisite of the grant of the *khul'*; rather, any such compensation is something that is permissible, but not mandatory. Moreover, the words of the hadith are also not specific regarding exactly what the recompense should be, and certainly do not mention that it must necessarily constitute a return of the *mahr*, as is commonly believed. In Bukhārī's version of the hadith, the Prophet asks Thābit's wife to return the garden given to her by her husband, but does not specify whether this was the *mahr*. Although al-Shaybānī states that the garden in this instance was the *mahr* that Thābit had given to his wife³⁰², senior Ḥanafī jurists all adopt the view proffered by al-Ṭabarī and al-Qurṭubī above³⁰³.

³⁰⁰ Al-Qurṭubī, *al-Jāmi' li-Aḥkām al-Qur'ān*, 836.

³⁰¹ Al-Qurṭubī, *al-Jāmi' li-Aḥkām al-Qur'ān*, 497.

³⁰² Al-Shaybānī, *Kitāb al-Aṣl*, 549.

³⁰³ See al-Zayla'ī, *Tabyīn al-Ḥaqā'iq*, vol. 7 (Cairo: al-Maṭba' al-Kubrā, 1912), 'Alā' al-Dīn al-Ḥaskafī, *Durr al-Mukhtar fī sharḥ Tanwīr al-Abṣār*, in *Ḥāshia Radd al-Muḥtār*, Ibn 'Abidīn, vol. 3 (Beirut: Dār al-Fikr, 2005) 489.

Both al-Jaṣṣāṣ and al-Marghīnānī adopt the same procedure as al-Qurṭubī and use verse 4:20 of the Qur’ān to establish the basic principles governing the return of any compensation in the event of a divorce: namely that if the *nushūz* is from the husband, then his acceptance of compensation is *makrūh* (disapproved of)³⁰⁴. Al-Jaṣṣāṣ states that it is morally wrong for a husband to force his wife to speak out, particularly when the husband has no intention of keeping his wife but plans to make her life so intolerable that she must opt for a divorce³⁰⁵. In such an event, it is *ḥarām* for the husband to receive any compensation for the wife³⁰⁶. Al-Jaṣṣāṣ also considers it unlawful for a wife to wilfully give up a *mahr* if the *nushūz* is from the husband. He argues that even though a wife may give up her claim to her dower during the marriage, this will not be the case in respect to a *khulʿ*, as she will be wilfully causing herself harm, which is not only morally unacceptable but also goes against the other verses of the Qur’ān and the text of the hadith³⁰⁷. Al-ʿAynī also alludes to verse 4:20, and categorically states that if the *nushūz* is from the husband, it is *makrūh* for him to receive any compensation from his wife, be it *qalīl* (a very small amount) or *kathīr* (a very large amount³⁰⁸). Al-ʿAynī reasons that a wife is suffering double harm, analogous to what takes place in verses 4:19-20: the emotional torture of her husband’s remarriage and then being penalised by having

³⁰⁴ Al-Marghīnānī, *Al-Hidāya*, 315; Al-Jaṣṣāṣ al-Ḥanafī, *Aḥkām al-Qur’ān*, 392. Interestingly, Charles Hamilton’s translation of *The Hidāya* clearly provides the same in English but the Pakistani courts or lawyers have never mentioned this particular ruling.

³⁰⁵ Al-Jaṣṣāṣ al-Ḥanafī, *Aḥkām al-Qur’ān*, 392.

³⁰⁶ *Ibid.*, 393.

³⁰⁷ Al-Jaṣṣāṣ refers to verse 4:20 and the text of the hadith provided in the *Ṣaḥīḥ* of al-Bukhārī. See al-Jaṣṣāṣ al-Ḥanafī, *Aḥkām al-Qur’ān*, 394.

³⁰⁸ Al-ʿAynī, *al-Bināya Sharḥ al-Hidāya*, 510. See also ʿAbd al-Ḥayy Lukhnawī, *Sharḥ al-Wiqāya maʿ Ḥāshiya ʿUmda al-Riʿāya*, vol. 3 (Al-Bāz al-Makkah, 2009), 392.

to provide recompense to her husband to release herself from such a marriage. The behaviour is described as *waḥshat* – coercive – on the part of the husband. Thus, if a husband has received any compensation under these circumstances, then he is under a mandatory liability to return such recompense to his ex-wife³⁰⁹. Ibn ‘Ābidīn goes further, and is of the opinion that those scholars who label the act of receiving unlawful compensation as *al-makrūh* or *al-makrūh al-taḥrīmī* is in fact such a strong prohibition, “there should be no doubt about that fact³¹⁰”.

Al-Sarakhsī states that if a husband is found to be at fault, then he forfeits his right to request the return of the *mahr*, terming it *al-makrūh al-taḥrīmī*³¹¹. He too bases his view on verse 4:20. Interestingly, al-Sarakhsī posits the example of a husband who demands 1000 dirhams in return for declaring three *ṭalāqs* to a wife. If, on such an occasion, a wife agrees to such a demand but her husband fails to pronounce the three *ṭalāqs* and only gives one *ṭalāq*, the wife will only be liable to pay 300 dirhams as compensation³¹². However, if the wife demands three *ṭalāqs* with an offer of 1000 dirhams, a husband who only pronounces one *ṭalāq* will not be able to recoup any amount of compensation due to his failure to comply with the agreement³¹³. Here, preferential treatment is given to the wife in respect to the enforcement of the agreement between the spouses. Al-Sarakhsī goes on to say that if the amount in question is disputed, then the opinion of Abū Ḥanīfa is that the burden of proof lies

³⁰⁹ Al-‘Aynī, *al-Bināya Sharḥ al-Hidāya*, 510.

³¹⁰ Ibn ‘Ābidīn *Radd al-Muḥtār ‘alā Durr al-Mukhtār*, 489.

³¹¹ Al-Sarakhsī, *Kitāb al-Mabsūṭ*, 215.

³¹² *Ibid.*, 213.

³¹³ *Ibid.*, 214.

with the husband to prove his claim. Since it is the wife who is required to pay, in the absence of any other witnesses the wife's view will be accepted over that of the husband³¹⁴. Both al-Kāsānī and al-Qudūrī also regard any *nushūz* on the part of the husband as a coercive tactic to force a *khul'* from the wife, and thus labels it not permissible³¹⁵. Ibn al-Hammām goes even further than his Ḥanafī counterparts and states that if the *nushūz* is not on the part of the wife, then not only is it *ḥarām* for a husband to receive any compensation from his wife, she cannot even voluntarily give up the *mahr* through mutual consent, as this would cause her *ḍarar* (harm), which he finds unacceptable³¹⁶.

These views of the Ḥanafī jurists are extremely important, as they acknowledge the fact that a wife should not be financially penalised if her husband is to blame for the marital breakdown. As will be illustrated later in the presentation of the fieldwork, some women stated that they had been forced to apply for a *khul'* due to their liability to repay the *mahr*. Husbands were accused of deliberately inflating the sums of the *mahr* and then making the lives of their wives intolerable so that they were forced to leave the matrimonial home. However, rather than pronounce a *ṭalāq*, husbands forced their wives to pursue a *khul'* to ensure that they returned the inflated *mahr*. Although many recent Pakistani judges have granted a *khul'* to the wife and absolved her of the need to pay any financial recompense to the husband

³¹⁴ Ibid.

³¹⁵ Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 329; Al-Qudūrī, *Mukhtaṣar al-Qudūrī fī Fiqh Ḥanafī*, in *al-Lubāb fī Sharḥ al-Kitāb*, 'Abd al-Ghanī al-Dimashqī al-Maydānī al-Ḥanafī (Beirut: Dār al-Kitāb al-'Arabī, 2004), Part 2, 188.

³¹⁶ Ibn al-Hammām al-Ḥanafī, *Fatḥ al-Qadīr sharḥ al-Hidāya*, 194.

due to his maltreatment, this has been viewed as judicial activism by the judiciary rather than the implementation of Muslim personal law³¹⁷. The distinction is important. If judges justify their actions on the basis of classical Ḥanafī texts rather than their own personal judicial discretion, then the likelihood of other judges following these precedents is much higher, as is the possibility of arguing for legislative changes in the law to penalise abusive husbands who force their wives to apply for a *khulʿ*. Currently, Pakistani law requires a woman to return part of the *mahr*, irrespective of the husband's role in the marital dispute³¹⁸. Even if it has been established that the husband has been extremely violent and abusive towards his wife, she is still liable to return part of the *mahr* to her husband. Unfortunately, despite the clear views of the Ḥanafī jurists above, there is still a dominant perception amongst scholars, lawyers and judges that the return of the *mahr* is a necessary condition of the granting of the *khulʿ*, and that any relaxation of this stipulation is merely an exception to the general rule.

Whilst it has been shown that there is no liability upon the wife to return any compensation to her husband if he is responsible for the *nushūz*, if the wife is responsible for the *nushūz*, the *fuqahāʾ* are unanimous that she must provide some form of compensation to her husband upon her request of the *khulʿ*. This can be mutually agreed between the two spouses, or, in case of dispute, the matter can be referred to a *qāḍī*, or to the court. There is, however, some disagreement amongst

³¹⁷ See Chapter Four of this thesis.

³¹⁸ S. 10 (5) Family Courts (Amendment) Act 2015 (XI of 2015). Prior to February 2015, the courts were required to order the wife to give surrender all of the *mahr* in full.

the jurists as to whether a husband can demand more than the *mahr* as compensation for the *khul'*. In his discussion of the *khul'*, the version proffered by al-Shaybānī relates to the situation where Thābit's wife is willing to return more than the garden but is refused by the Prophet. Al-Shaybānī notes that the Prophet disliked the return of more than the *mahr* as compensation for the *khul'* and did not find this morally acceptable³¹⁹. Al-Shaybānī, however, argues that this reading is only acceptable if it is proven that a wife has been *nushūz*: disobedient to her husband. In this instance, *ṭāba al-faḍl li'l-zawj*: "the husband may enjoy the excess"³²⁰. The rationale behind this viewpoint is that the *nikāḥ* is viewed as a contractual agreement between the husband and wife. When entering the agreement, just as a wife can request any amount of *mahr* from her husband as compensation for entering into the marital contract, even if it is more than *mahr al-mithl*³²¹, so, when she is breaking the marital covenant as a result of her own wrongdoing, she can offer more compensation to her husband in return for this breach. This is considered her own free choice in agreeing to give more than the *mahr*. In the case of a dispute, she is entitled to refer the case to the court. Al-Shaybānī also qualifies his statement by stating that if it is found that the husband is

³¹⁹ Muhammad b. al-Ḥasan al-Shaybānī, *al-Jāmi' al-Ṣaghīr*, 216.

³²⁰ Ibid.

³²¹ A *mahr al-mithl* refers to the dower which is given to the women who are related to the wife's father: for example, his aunts, sisters and cousins on the uncle's side. To give a proper dower to a female, her age, beauty, knowledge, intellect and character will be taken into consideration, as well as the lineage and property of her husband. See Al-Kāsānī, *Badā'i' al-Ṣanā'i'*, 2:287.

nushūz and initiates the argument, then he is not entitled to demand more than the *mahr*³²².

However, in his commentary on the *Hidāya*, Al-‘Aynī states that al-Marghīnānī rejected al-Shaybānī’s opinion, stating that this is not “part of our (Ḥanafī) view”³²³. Even if it is proven that a wife is *nushūz*, taking more than the original *mahr* as compensation is disapproved of, and he quotes the Prophet’s refusal of Thābit’s wife’s offer to provide more than the garden. Al-Jaṣṣāṣ offers his view from the opinions of Abū Ḥanīfa, Zufar and Abū Yūsuf, who clearly state that if the dispute comes from the wife’s side then it is only permissible for a husband to request what he had given to her (as the *mahr*) and nothing more³²⁴. Al-Jaṣṣāṣ, al-Kāsānī, al-Qudūrī and Ibn al-Hammām also regard the return of more than the *mahr*, in any circumstance, to be morally reprehensible, and legally term it *al-makrūh* (abhorrent)³²⁵. Although al-Kāsānī accepts that a wife can voluntarily offer more if she so wishes, he believes that this has the potential to cause the wife harm, and is thus an objectionable act³²⁶. Ibn al-Hammām quotes a student of ‘Abd Allāh b.

³²² Muhammad b. al-Ḥasan al-Shaybānī, *al-Jāmi‘ al-Ṣaghīr*, 216.

³²³ Al-‘Aynī, *al-Bināya sharḥ al-Hidāya*, 301.

³²⁴ Al-Qudūrī, *al-Mukhtaṣar*, 392.

³²⁵ Al-Qudūrī, *al-Mukhtaṣar*, 188; al-Kāsānī, *Badā’i‘ al-Ṣanā’i‘*, 329; Ibn al-Hammām al-Ḥanafī, *Fatḥ al-Qadīr sharḥ al-Hidāya*, 194. See also ‘Allāma Abd-ul-Hayy Lakhnawī, *Sharḥ al-Wiqāya ma‘ Ḥāshiya ‘Umda ‘al-Ri‘āya*, vol. 3 (Al-Bāz al-Makkah, 2009), 392, Al-Jassās, *Ahkām-ul-Qur’ān*, 394

³²⁶ Al-Kāsānī, *Badā’i‘ al-Ṣanā’i‘*, 328.

‘Abbās, ‘Aṭā’, who reports that the Prophet himself states that a husband cannot receive more than the sum that he originally gave to his wife³²⁷.

Ḥanafī jurists are also of the opinion that a wife is under no liability to recompense her husband if she made no indication that she would financially compensate him when she originally requested the *khulʿ* and he agreed to that request³²⁸. If, for instance, a wife requests a *khulʿ* from her husband and states that it will be in exchange for what she holds in her (empty) hand, then she will be able to have the *khulʿ* without compensating her husband³²⁹. Al-Marghīnānī states that if the wife’s hand is empty, then she has not alluded to any *māl*³³⁰ in return for the *khulʿ*, and will not be liable to return any *māl* at the time of the granting of the *khulʿ*³³¹. Al-Shaybānī also states that no recompense is required of the wife if the *badal*³³² demanded by the husband is not permissible in Islam³³³.

³²⁷ Ibn al-Hammām al-Ḥanafī, *Faṭḥ al-Qadīr sharḥ al-Hidāya*, 194. This hadith is reported by al-Dāraquṭnī and al-Bayhaqī. See also Ibn al-Qaṭṭān al-Fāsī, *al-Iqnāʿ fī Masāʾil al-Ijmāʿ*, 92, who states that there is *ijmāʿ* on the fact that a husband can request an equal or lesser amount of the dowry as compensation, but not more than he has given.

³²⁸ See al-ʿAynī, *al-Bināya sharḥ al-Hidāya*, 518.

³²⁹ Ibid.

³³⁰ Any monetary good or chattel of some value.

³³¹ Al-Marghīnānī, *al-Hidāya*, 318.

³³² The return of some recompense.

³³³ Muhammad b. al-Ḥasan al-Shaybānī *al-Jāmiʿ al-Ṣaḡhīr*, 218. Ḥanafī jurists give examples of such items as alcohol and pork. See also al-ʿAynī, *al-Bināya sharḥ al-Hidāya*, 5:515, Ibn ʿĀbidīn, *Radd al-Muḥtār*, 3:136, 444, al-Qudūrī, *al-Mukhtaṣar*, p. 386.

2.6 Conclusion

This chapter has provided an overview of classical Ḥanafī jurisprudence regarding the *khulʿ* in an attempt to dispel the perception that Ḥanafī *fiqh* has a very limited scope for women wishing to initiate a divorce. It has been found that the question of the husband's consent is irrelevant if a woman wishes to seek a *khulʿ*. If her husband agrees to her demand, the *khulʿ* will be an extra-judicial divorce, with the husband pronouncing a *ṭalāq*, and will be considered a *ṭalāq bā'in*³³⁴ in its effect. However, if he refuses her request, the wife has a right to seek redress from the court, and in doing so need not prove any particular ground for divorce under *khulʿ*, but merely that she no longer wishes to live with her husband. Moreover, in respect of compensation, this is also not a compulsory element of the *khulʿ*, but is dependent upon who is at fault within the marital breakdown. If the wife is proven to be at fault, then the husband has the right to receive some recompense from his wife, but this must not be more than any *mahr* that he has given to her upon the contract of the marriage. However, if the fault lies with the husband or if he has coerced his wife to seek a *khulʿ* through misbehaviour, then the wife is not liable to repay any compensation to her husband in return for the divorce. In the case of disputes regarding any of these issues, both the husband and the wife have the right to go to a court and have the matter resolved according to the principles highlighted above. During the negotiations of divorce, if both spouses agree to release the husband

³³⁴ This is known as an irrevocable divorce.

from his financial liabilities to support his wife, or to the return of any deferred dower, then the divorce will be known as a *mubāraʿa* rather than a *khulʿ*.

The importance of having an accurate depiction of Ḥanafī jurisprudence regarding the application of the *khulʿ* cannot be underestimated within the context of Pakistani society. If these principles had been allowed to flourish and develop in contemporary times, then women would not have had to face the difficulties that they did prior to the passing of the Dissolution of the Muslim Marriages Act 1939 and the Muslim Family Laws Ordinance 1960³³⁵. Although these laws provided some statutory relief, women faced difficult evidentiary hurdles in order to prove their cases either under the statutory provisions or under the *khulʿ*. Despite further reforms in 2002, the continued patriarchal nature of some court proceedings and the indignity of the social stigma of divorce continue to be massive deterrents to women seeking escape from abusive marriages³³⁶. Unfortunately, calls for further law reform in this area have been met with resistance from religious parties as well as from members of civil society, primarily because they are unaware of the correct Ḥanafī stand on the matter. This can be illustrated by the earlier attempts by the Council of Islamic Ideology of Pakistan to assist women further in female-initiated divorce rights.

The Council of Islamic Ideology was established in 1962 with the aim of examining Pakistani laws and ensuring that they are not repugnant to the tenets of the Qurʾān

³³⁵ See Chapter Three.

³³⁶ See results of field work in Chapter Seven.

and Sunna³³⁷. The Council has constitutional protection under Article 230 and reports to the Ministry of Religious Affairs, which may submit its proposals to the National Assembly. In 2008 the Council of Islamic Ideology took up a review of the Muslim Family Laws Ordinance 1961 and provided its recommendations to Asif Ali Zardari's government on 15th November 2008³³⁸. Although it provided recommendations on various aspects of the law, controversy surrounded its request to amend S. 7 of the MFLO to formally allow female-initiated divorce without recourse to the courts. The Council recommended that S.7 be amended to include the provision that if a woman demands, in writing, dissolution of her marriage, her husband must divorce his wife within ninety days of the request. Failure of the husband to do so will bring into effect the *khul'* after the ninety-day expiration. The husband will have no right to the return of his wife unless she withdraws her request³³⁹. The Council also recommended that a wife would not be automatically liable to repay her dower, and would have recourse to the courts to settle the return of any property or gifts to her husband in the case of a dispute³⁴⁰. Masud (2012) argues that the intention of the Council was to review the laws with respect to gender equality on the basis of the Qur'ān and the Sunna³⁴¹. If these recommendations had been implemented, then wives would no longer need to have

³³⁷ Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Leiden: Koninklijke Brill, 2006), 7-8.

³³⁸ Council of Islamic Ideology, *Annual Report, 2008-9* (Islamabad: Council of Islamic Ideology, 2009), 170.

³³⁹ Ibid.

³⁴⁰ Ibid.

³⁴¹ Muhammad Khalid Masud, "Interpreting Divorce Laws in Pakistan; Debates on Shariah and Gender Equality" in Rubya Mehdi, Werner Menski & Jorgen S. Nielsen, eds., *Interpreting Divorce Laws in Islam* (Copenhagen: DJOF Publishing, 2012), 44

recourse to the courts in order to initiate a divorce, and would be almost on a par with their husbands regarding divorce rights. Predictably, these recommendations were met with uproar from both members of the civil society and religious parties and organisations. They deemed the Council's proposals as being outside the tenets of the Qur'ān and Sunna, since they believed that only a man has the right to unilaterally divorce his wife³⁴². Others called for the Council to be dissolved and reconstituted³⁴³. Masud (2012) argues that the rejection of the Council's recommendations is as a result of the failure of religious parties, civil society and lawyers to recognise the difference between *fiqh* and Shariah³⁴⁴. Shariah is considered to be the divine laws revealed in the text of the Qur'ān and hadith, whilst *fiqh* are the legal principles and doctrines established from the Shariah by the four main schools of thought. However, there is a belief that both are divinely revealed and immutable, as the origins of *fiqh* doctrines are based on the Qur'ān and the Sunna, and thus one of the four schools of thought must be adhered to through the process of *taqlīd*. Masud (2012) states that these perceptions fail to take into account that the doctrines developed by the four schools of thought were created in a particular social and cultural context, and that therefore complete adherence is

³⁴² Daily Jang, Rawalpindi, Nov. 17, 2008 accessed May 21st 2015.

<http://columns.jang.com.pk/archive.asp>

³⁴³ Daily Jang, Rawalpindi, Nov. 20, 2008 accessed May 21st 2015.

<http://columns.jang.com.pk/archive.asp> The Minister for Parliamentary Affairs, Dr Babar Awan, and the Minister for Religious Affairs, Hamid Saeed Kazmi, also assured Parliament that the Council's proposals would not be accepted in their present form and the Council would be reconstituted as soon as possible. See *Daily Dawn*, Nov. 19th, 2008, accessed May 21st 2015 <http://dawn.epaper.pk/>

³⁴⁴ Masud, "Interpreting Divorce Laws in Pakistan", 47.

not necessary, as there is a tradition of diversity in juristic interpretations in the schools of law³⁴⁵.

Whilst this may be true, the fact remains that this is the culture and understanding of civil and religious society in Pakistan, which has been entrenched for hundreds of years. Unless calls for reform, particularly with regard to women's rights, are addressed within the principles and doctrines laid down by the Ḥanafī *fuqahā'*, proposals for reform are highly unlikely to be accepted in the current Pakistani diaspora. Indeed, this was a lost opportunity by the Council in failing to apply classical Ḥanafī jurisprudence to female-initiated divorce rights and defend their proposals for reform by applying the principles of the classical jurists highlighted in this chapter. Rather than dispel the misconception that Ḥanafī *fiqh* is a narrow and conservative *madhhab* with respect to female divorce rights, the Council perpetuated this belief by citing the sacred texts directly, with a total disregard for the classical Ḥanafī jurisprudence that exists, and which promotes rather than curtails the rights of women within the divorce arena. If the Council had used a more nuanced approach to their arguments, and created a pre-emptive defence of the likely and obvious attacks by the religious right in Pakistan, the report might not have received the negative response that it did, which led to its proposals being shelved for another few decades. As will be shown in the following chapter, when proposals for law reform are made within the realm of women's rights in Islam, adherence to the classical modes of juristic reasoning, be it within one school of

³⁴⁵ Ibid.

thought or through the process of *takhayyur*, means that the likelihood of acceptance and thus enforcement is much higher. This particular episode regarding the failure to reform the laws of *khul'* in Pakistan clearly illustrates the need for a new approach to the understanding of Ḥanafī jurisprudence in the area of female-initiated divorce rights. As will be illustrated later, in Chapter Four, and then in the results of the field study, although the Pakistani judiciary has now developed a fault-free *khul'* principle, women still face numerous obstacles when going to court in order to obtain a *khul'* and implement ancillary matters of post-divorce maintenance and child support claims; whilst conservative religious leaders continue their attacks on the legitimacy of the current law of *khul'*. If, however, the recommendations posited by the Council had been implemented, many women would have gained release from unhappy and violent marriages in a much more amicable and less contentious manner.

CHAPTER THREE

THE DEVELOPMENT OF WOMEN'S RIGHT TO DIVORCE IN PAKISTAN: A HISTORICAL AND THEOLOGICAL EXAMINATION

3.1 Introduction

Ḥanafī jurisprudence is the school of thought practiced by the majority of Muslims in India and Pakistan. The previous chapter illustrated that the *khul'* became a defunct legal remedy under Ḥanafī *fiqh*, as interpreted by both British colonial judges and the '*ulamā*'. In the absence of statutory female divorce rights, and with a defunct *khul'* remedy, women had no means to initiate divorces in the Indo-Pak subcontinent. In 1939, the Dissolution of Muslim Marriages Act (DMMA) was therefore passed by the colonial Indian legislature, giving Muslim women the statutory right to sue for divorce before Indian courts³⁴⁶, and is still applicable in Pakistan, India and Bangladesh³⁴⁷. Within the context of colonial India, this was a progressive piece of legislation, as Hindu women would only receive a similar right twenty years later in the form of the Hindu Marriage Act 1955³⁴⁸, and British women, although they had been given the right to divorce some years earlier, had less chance to sue, having to prove that they had two grounds in order to file a

³⁴⁶ Section 2, Dissolution of Muslim Marriages Act 1939, hereafter called DMMA.

³⁴⁷ M. Mannan, "The Development of the Islamic Law of Divorce in Pakistan," *Journal of Islamic and Comparative Law* 5 (1974): 91.

³⁴⁸ Law Commission of India Seventy-First Report on the Hindu Marriage Act 1955 (1978), accessed February 16th 2013, lawcommissionofindia.nic.in/51-100/Report71.pdf

divorce suit in a British court³⁴⁹. Through mapping the history of the DMMA, this chapter will focus not just on the law itself and how it came to pass, but also on the theological questions that were raised during its passing. What was the impetus for reform, how did it pass, and what strategies were adopted to implement these new laws? Such an investigation is important, as it can provide much-needed insights that can promote methodologies for law reform of the *khul'* in present-day Pakistan. These questions are also interlinked with the British colonial impact on Muslim law, which created a fixed and static set of rules to be followed by Muslims. Codification of Islamic law indirectly exacerbated tensions between those who saw the law as immutable, and thus were of the view that the 'gates of *ijtihād* had closed', and those who argued that the law was changeable and malleable according to modern needs. The controversy surrounding a woman's right to divorce in Islam exacerbated these tensions over the correct way to solve this problem, which are still prevalent today.

The first part of this chapter will begin by locating the DMMA within the larger history of colonial India, and will briefly discuss the British colonial impact on Muslim personal law. This chapter will then trace the impetus for reform and the passing of the DMMA. It will look at the role of the '*ulamā*', particularly Maulana Ashraf Ali Thanawi, in providing the theological basis for the legislation, as well as

³⁴⁹ Under the 1857 Matrimonial Causes Act, husbands were only required to prove the single ground of adultery, while wives had to prove an additional factor of desertion, cruelty, incest, bigamy or practising an 'unnatural vice'. This dual standard was abolished under the 1923 Matrimonial Causes Act, with further grounds for divorce introduced in 1937 which added cruelty, desertion and incurable insanity as additional grounds for divorce. See Ann Sumner Holmes, "The Double Standard in the English Divorce Laws, 1857-1923," *Law & Social Inquiry* 20 (2) (1995): 601.

the fragile coalition that was created to ensure its passing. Thirdly, the chapter will move forward to the post-partition era and the enactment of the Muslim Family Law Ordinance 1961 (MFLO) in Pakistan, which has been the last major piece of legislation regulating marriage and divorce.

3.2 British Colonial Impact on Muslim Law

The British occupation of India³⁵⁰ had profound effects upon the development of what is now termed 'Anglo-Muhammadan Law'³⁵¹, perpetuating the idea that Islam could be narrowed down to a few authoritative texts that are fixed and immutable. The British assumed that Islamic law could be reduced to a set of concrete rules and codes to be applied irrespective of the social conditions in which these texts had been written, or the social and cultural conditions in which they were now being applied. Previously, *qāḍīs* had interpreted and applied Islamic law through the scriptures, as well as by using *ijtihād* when taking into account local customs³⁵².

³⁵⁰ The British occupation of India can be traced to the East India Company, which was formed in 1600 to pursue trade with the East Indies but concentrated on trading in the Indian sub-continent. Through economic expansion and its own private armies, it began to rule large areas of India, securing control in 1757 after the Battle of Plassey. The company was later nationalised through the passing of the Government of India Act 1858, with the British Crown assuming direct control of India. See John F. Riddick, *The History of British India: A Chronology* (Westport: Praeger Publishers, 2006).

³⁵¹ Scott Kugle defines this term as "both the Orientalized limitation imposed on Islamic Law, and its gradual buttressing by Anglo legal concepts". See Scott Alan Kugle, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," *Modern Asian Studies* 35, no. 2 (2001): 266.

³⁵² Muhammad Khalid Masud, "Qadis and their Courts: A Historical Survey," in *Dispensing Justice in Islam Qadis and Their Judgments* ed. Khalid Masud et al. (Leiden: Brill, 2003), 13-4. See the challenges faced by the *qāḍīs* in Francis Robinson, "Crisis

These judges – heirs to the *mujtahids* (accepted authorities on Islam) of previous centuries – came from diverse Muslim communities, and thus their application of Islamic law was relatively fluid and varied. *Qāḍīs* and Muslim judges used a combination of textual sources (the Qur’ān and the Sunna), prior decisions (known as *ijmā’* if there was scholarly consensus), reasoning based upon analogy (*qiyās*), and their own independent reasoning³⁵³ when applying Islamic law. This led to diversity in application, reflecting the needs and challenges of a complex society, which was not a homogeneous entity composed entirely of Muslims but a mix of different cultures and communities.

When the British East India Company and its successor, the British Crown, began its administration of India, it claimed that it would maintain the Mughal tradition of implementing the personal law of the Muslims and Hindus according to their own religious laws³⁵⁴. In 1772, Warren Hastings was appointed governor of Fort William, and he introduced the 1772 Regulations³⁵⁵ (also known as the Warren Hastings Plan of 1772), which required colonial courts to apply the native law in respect of personal law. Charles Hamilton explains the rationale behind this plan in the preface to his translation of the Ḥanafī text *Al-Hidāya*:

“... nothing can so effectually contribute as preserving to the latter their ancient established practices, civil and religious, and protecting them in the exercise of their

of Authority: Crisis of Islam?” *Journal of the Royal Asiatic Society*, 19, no. 3 (2009): 339-354.

³⁵³ See Wael Hallaq, “Was the Gate of Ijtihād Closed?” *International Journal of Middle Eastern Studies* 16, no. 3 (1984): 3-41.

³⁵⁴ Asaf A. A. Fyzee, “Islamic Law in India,” *Comparative Studies in Society and History* 5, no. 4 (1963): 414.

³⁵⁵ Kugle, “Framed, Blamed and Renamed”, 262.

own institutes; for however defective and absurd these may in many instances appear, still they must be infinitely more acceptable than any which we could offer; since they are supported by the accumulated prejudice of ages, and, in the opinion of their followers, derive their origin from the Divinity itself”³⁵⁶.

However, Warren Hastings’ belief that he was continuing the practice of the Mughals was misguided³⁵⁷, since it was still the colonial courts which not only interpreted the native law of the Muslims, but also decided what represented that law, by translating only those texts that they deemed represented it. The introduction of colonial courts created fixed institutions that served to maintain “effective political control with minimal military involvement”³⁵⁸. Anderson (1990) describes how the codification of Islamic law took place for ease of application by the new colonial courts. He argues that the British government assumed that the Qur’ān and the Sunna were a rigid code of laws, without fully appreciating the context in which these laws were written or considering the social context in which they were being applied³⁵⁹. As was illustrated earlier, the Ḥanafī text of *al-Hidāya* was translated along with a sparse number of others, lending it definitive weight in the application

³⁵⁶ Charles Hamilton, trans. *The Hedaya Commentary on the Islamic Laws*, New Delhi, (1985), iv, as quoted by Sharafi Mitra, “The Semi-Autonomous Judge in Colonial India: Chivalric Imperialism meets Anglo-Islamic Dower and Divorce Law,” *Indian Economic and Social History Review* 46, no. 1 (2009): 62.

³⁵⁷ Rohit De, “Mumtaz Bibi’s Broken Heart: The Many Lives of the Dissolution of Muslim Marriages Act,” *The Indian Economic and Social History Review* 46, 1 (2009): 115.

³⁵⁸ Michael Anderson, “Islamic Law and the Colonial Encounter in British India”, in *Islamic Family Law*, eds. Chibli Mallat & Jane Connors (London: Graham and Trotman, 1990), 205-206.

³⁵⁹ Ibid., 212. For further analysis of the codification of Islamic law, see Michael Anderson, “Legal Scholarship and the Politics of Islam in British India”, in R.S Khare, ed., *Perspectives on Islamic Law, Justice and Society* (Lanham: Rowman and Littlefield, 1999), 65-91.

and interpretation of Islamic law³⁶⁰. Rather like canon law, the British tried to codify and thus contain the Shariah into a limited set of authoritative texts³⁶¹. This led to a fixed number of precepts to be considered as Muslim law, as well as creating a Shariah that was considered final and absolute³⁶², disregarding regional customs when it suited them³⁶³.

Unwittingly, however, the very mechanism employed to control and more easily administer political rule served to polarise political identities based upon religion. Differentiation through codification of Islamic laws and the establishment of separate courts segregated people into two distinct groups – Hindus and Muslims – and then set them collectively against British rule, leading to partition in 1947. Although British policies served to dis-unify the very community that they had hoped to control, they also created a significant divide between Muslims. As the newly formulated codes of law began to be assimilated by the Muslims and take effect, the debate widened into what exactly constituted Islamic Law. Conservative *‘ulamā’*³⁶⁴ viewed Shariah as fixed and immutable, based purely upon the divinely revealed texts, whilst modernist reformers³⁶⁵ advocated a more fluid and

³⁶⁰ Anderson, “Islamic Law and the Colonial Encounter,” 214.

³⁶¹ Gregory Kozlowski, *Muslim Endowments and Society in British India* (Cambridge: Cambridge University Press, 1995), 126.

³⁶² Gregory Kozlowski, “Muslim Personal Law and Political Identity in Independent India,” in Robert Baird, ed., *Religion and Law in Independent India* (New Delhi: Manohar, 2005), 103.

³⁶³ Anderson, “Islamic Law and Colonial Encounters”, 215.

³⁶⁴ Such *‘ulamā’* included those who belonged to the *Deoband* School, trained at the Dar-ul-Uloom, such as Maulana Rashid Ahmad Gangohi and Maulana Muhammad Qasim Nantovi.

³⁶⁵ Most notably Syed Ahmad Khan, Allama Muhammad Iqbal and Syed Ameer Ali.

changeable interpretation through *ijtihād*, just as the *qāḍīs* had been practicing earlier in history.

The situation was further compounded by the colonial impact on Muslim personal law. Although family laws were largely left untouched, with the use of binding case law precedents used in decision-making³⁶⁶, these precedents were not applied consistently. Where British colonial rule found certain areas of Islamic law to conflict with their British values, particularly in the area of women's rights, they adopted the modernist agenda of amending those areas that were offensive to them³⁶⁷. As early as 1872, the Indian Evidence Act was passed, contravening perceived Ḥanafī law, which only allowed a woman to be considered a widow if her husband had been absent for 90 years beginning from the time of the husband's birth³⁶⁸. The new law established (more in line with Mālikī law) that a seven-year absence would suffice in declaring putative widowhood³⁶⁹. Similarly, the British colonial rulers passed the 1929 Child Marriage Restraint Act, establishing a minimum age for marriage at 16 for girls and 18 for boys, despite the absence of

³⁶⁶ Mumtaz and Shaheed, *Women in Pakistan*, 37.

³⁶⁷ Commercial Laws relating to contracts and the transfer of property were also amended by laws of British origin to facilitate colonial economic benefit from the region, as were the criminal codes and law of evidence. See Rubya Mehdi, *The Islamization of Laws in Pakistan* (Richmond: Curzon Press, 1994), 158.

³⁶⁸ In fact, this prohibition refers to the right to *khiyār al-faskh*, nullification or revocation of the *nikāḥ*. Under *faskh*, a woman need not go to court but has the right to revoke her *nikāḥ* unilaterally. Under Ḥanafī jurisprudence, she does not have the right to an extra-judicial *faskh* if her husband has been absent, but this does not preclude her from applying to the court for a *khulʿ*.

³⁶⁹ John Esposito and Natana Delong-Bas, *Women in Muslim Family Law* (Syracuse: Syracuse University Press, 2001), 75.

limitation under Ḥanafī law. Penalties were outlined for those who broke the law, applying to both men and parents or guardians³⁷⁰.

In essence, the British employed a dual strategy in their legal interventions in order to preserve their colonial state, which was in a precarious position³⁷¹. They needed to legitimise their rule, ensuring that insurgency and revolts did not occur, by appearing to apply Islamic law to its Muslim subjects, but at the same time guarantee that the law was a set of codes that British-trained judges and magistrates could easily apply without having to refer to external local religious bodies. Thus the codification of certain Islamic civil laws into a static entity led to the term ‘Muhammadan law’³⁷² or ‘Anglo-Muhammadan law’³⁷³, laying the foundations of a fixed, unchanging legal system that served the interests of the conservatives. Indeed, Rohit De (2009) points out that “the colonial state, after having discovered the code, was reluctant to deviate from it”³⁷⁴. Such was the case with respect to the *khulʿ*. The legislature construed the *khulʿ* as only permissible through the husband’s consent, and, rather than delve further to assess the authenticity of this view, it was more than happy to rely on the limited translated texts available, and looked for other

³⁷⁰ S.4-6 Child Marriage Restraint Act 1929. This involved imprisonment for up to three months and the payment of a fine as well as giving courts the power to issue injunctions against a proven child marriage. See Esposito and DeLong-Bas, *Women in Muslim Family Law*, 75

³⁷¹ Kugle, “Framed, Blamed and Renamed”, 267.

³⁷² Fyzee, *Outlines of Muhammadan Law*, xxi.

³⁷³ Esposito and DeLong-Bas, *Women in Muslim Family Law*, 74.

³⁷⁴ De, “Mumtaz Bibi’s Broken Heart,” 116. In 1903, for example, Justice of the Privy Council, Ameer Ali presented arguments to the court that certain classes of trusts were permitted under Islam. Despite using his own knowledge of Arabic and hadiths, his judgment was overturned.

means to assist women. This also pacified the ‘*ulamā*’, who were content to accept this interpretation, as it reaffirmed the superior right of men over women and ensured that Muslim wives remained subservient to their husbands³⁷⁵. The British colonial rulers appeared to have no objection to these matters, since their own national laws failed to provide adequate relief to married women in Britain. However, wherever British moral sensibilities were offended, they did campaign for reforms. This move away from those areas of Ḥanafī *fiqh* that the British felt were too conventional, amending the laws to improve the rights of women, gave credence to the modernists’ approach that Islamic law could be more flexible in nature and be subject to moulding by human hands. Thus the stage was set for reform of the divorce law.

3.3 Apostasy and the Impetus for Legal Reform of the Divorce Law

As British colonial rule became entrenched, religious identities became more polarised. The growth of colonial state powers was matched by Muslim and Hindu identity politics and nationalism, jockeying for authority against each other as well as against the British Crown. During this tense period, Muslim personal law became the focal point for some of this resistance. In colonial India, Ḥanafī law had been

³⁷⁵ De, “Mumtaz Bibi’s Broken Heart,” 116. Rohit De provides a quote from Lord Justice Wilson illustrating the reluctance of the judiciary to engage in any form of creativity: “...(it is dangerous)... to rely upon the ancient texts of the Mohammadan law, and even the precepts of the Prophet himself...deciding from them new rules of law. The danger is equally great, whether reliance be placed on fresh texts newly brought to light, or upon logical inferences drawn from old and undisputed law” *Baker Ali Khan v. Anjum Ara Begum* (1903), 30 Indian Appeals, 94

interpreted as giving a Muslim man the unfettered right to divorce his wife with the pronouncement of the words *ṭalāq*, meaning ‘I divorce you’. In contrast, women had limited options. A husband could delegate his right of divorce to his wife, known as *ṭalāq al-tafwīḍ*. Certain conditions could be stipulated in the marriage contract which, if breached, meant that the wife would hold the right to divorce her husband³⁷⁶. Alternatively, the wife could apply to the *qāḍī* for a judicial *khulʿ*, requesting the husband to release her upon repayment of the *mahr*. However, both these options were rarely used due to a lack of knowledge of their existence, as well as the cooperation required from the husband to agree to the contractual stipulations in advance, or to agree to a *khulʿ* and to attend sessions called by the *qāḍī*.

Ḥanafī law also provides the possibility for a minor girl to request an annulment of her marriage. In 1907, Maulana Ashraf Ali Thanawi confirmed this entitlement to *faskh* (annulment) in his *Imdād al-Fatāwā*, holding that a pre-pubescent girl given in marriage could validly ask for an annulment³⁷⁷. However, this came with an important caveat: that the girl would have to make her request to a Muslim judge, who, after verifying her claim, would be able to grant her the annulment. This proved to be almost impossible, since there were very few or no Muslim judges working within the British Indian legal system. The narrow application of the *khulʿ*

³⁷⁶ Lucy Carroll, “*Talāq al-tafwīḍ* and Stipulations in the Marriage Contract: Important Means of Protecting the Position of a South Asian Muslim Wife,” *Modern Asian Studies* 16, no. 2 (1982): 277-309.

³⁷⁷ Ashraf Ali Thanawi, *Imdād al-Fatāwā*, 5 Volumes, ed. Muhammad Shafi (Karachi: Maktaba Dar al-Ulum, 1999), vol. 2, *Fask an-Nikāḥ*, 467-475.

meant that the law provided no other relief on the grounds of cruelty, desertion or ill treatment by the husband, or the husband's failure to maintain his wife. Thus, apostasy became the only legal way out of unhappy marriages for Muslim women. Ḥanafī law provides that apostasy on the part of a Muslim spouse dissolves a Muslim marriage³⁷⁸. Muslim women realised that a quick exit route from marriage existed if they were willing to leave the fold of Islam, even temporarily. As women turned to apostasy to rid themselves of intolerable marital ties, Urdu newspapers began to publicise these cases, causing considerable concern in the Muslim community³⁷⁹. The government was presented with petitions to overrule court rulings that accepted apostasy as a valid cause for the dissolution of marriage. Crucially, the courts found it irrelevant if the apostasy occurred as a *ḥīla*: a legal remedy cited in order to obtain a divorce. Apostasy itself was enough. In a series of cases in the 1920s and 1930s, the High Court ruled that an apostate's testimony was sufficient proof of apostasy. It was deemed not to be the court's place to ascertain the genuineness of a claim³⁸⁰, and it was considered immaterial if the conversion was a device employed merely to have the marriage dissolved³⁸¹. As long as the claimant had renounced Islam, there was no need to see if she was now following her new religion³⁸². In one particularly disturbing case, a woman's claim of apostasy was

³⁷⁸ See Burhān al-Dīn al-Farghānī Al-Marghīnānī, *Al-Hidāya*, vol. I (Delhi: Mujtaba, 1960) 328, which states: "When one of the spouses abandons Islam, separation occurs without divorce. That is the view of Abu Ḥanīfa and Abu Yusuf."

³⁷⁹ Lucy Carroll, "A Charter Granted to the Wife? Judicial *Khul'* in Pakistan," *Islamic Law and Society* 3, no. 1 (1996): 93.

³⁸⁰ *Mussamat Bakho v. Lal*, All India Law Reports (1924), Lahore, 397.

³⁸¹ *Mst Rehmate v. Nikka*, All India Law Report (1928), Lahore, 954.

³⁸² *Mst Sardaran v. Allah Baksh*, All India Law Report (1934), Lahore, 976.

challenged, and in order to prove her claim she was asked to eat pork³⁸³. When she refused, her claim was rejected and she was forced to appeal. Upon appeal to the High Court, a special bench was convened, at which it was held that not only was the marriage dissolved but that the declaration of apostasy itself was sufficient evidence, and that no further investigation was required to prove to the contrary³⁸⁴.

The policy of the courts to uphold women's assertions of apostasy and dissolve marriages caused consternation within the Muslim community. However, calls to overrule the courts' decisions were met by resistance from the government for two important reasons: a lack of alternative remedies available to women to dissolve their marriages, and a textual reading of Ḥanafī law in this matter, which was also supported by local *‘ulamā’*. In 1913, Mawlana Thanawi was faced with the question of the legality of a marriage after a woman had become *murtad* (an apostate). He was unequivocal in his stance – the marriage was 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”³⁸⁵.

In his fatwa, Thanawi stated that not only would a woman's marriage be dissolved, but also that she should be forced to convert and marry her former husband. In this fatwa, it appears that Thanawi was more concerned with the fact that women were

³⁸³ Not only is the consumption of pork strongly prohibited in Islam, but pork is seen as one of the most abhorrent food items.

³⁸⁴ Mst. Reshman v. Khuda Baksh, All India Law Report (1938), Lahore, 482-85.

³⁸⁵ Quoted in Khalid Masud, “Apostasy and Judicial Separation in British India”, *Islamic Legal Interpretation: Muftis and Their Fatwas*, eds. Muhammad Khalid Masud et al. (New York: Harvard University Press, 1996), 194.

so easily renouncing their faith than why women were leaving and turning to apostasy in such numbers. He made no reference to the fact that women had no other recourse to marital emancipation, but rather focused on the ‘terrible deed’ of apostasy itself.

As apostasy cases became more frequent, tensions were heightened not only between Muslims and Hindus within the context of competition for numbers, but also between Muslims and the British rule, due to Christian missionary activities in the early 1900s that supported these claims³⁸⁶. Apostasy was not a crime in British India, and evangelical Christians were actively engaging in missionary work³⁸⁷. Significantly, the number of cases where women petitioned the court rose dramatically between 1920 and 1925³⁸⁸. With the advent of the press media, particularly Urdu publications, these cases received heightened publicity, and calls for the reform of the divorce laws increased.

3.4 The Impact of Local Women’s Groups and their Calls for Divorce Law Reform

With the advent of the press media, the publicising of these events became more widespread and the plight of women trapped in difficult marriages received heightened publicity in the public sphere. Gail Minhault (1998) discusses important

³⁸⁶ Masud, “Apostasy and Judicial Separation in British India”, 195.

³⁸⁷ Carroll, Qur’ān 2:229, A Charter Granted to the Wife? 93.

³⁸⁸ Muhammad Khalid Masud, *Iqbal’s Reconstruction of Ijtihād* (Lahore: Iqbal Academy, 2003), 157.

reformers of the nineteenth century who had an impact on reform in colonial India. One reformer was Sayyid Mumtaz Hassan Ali, who was the founder of the weekly newspaper *Tahzib un Niswan*³⁸⁹, a newspaper/journal that was one of the first of its kind dedicated to a female readership in Urdu. Mumtaz Ali believed that the position of women within Islamic law was much higher than what was practiced. The major reason for this discrepancy was twofold. Firstly, he believed that the rituals and customs that were falsely attributed to Islam perpetuated gender stereotypes of women and were practiced by women themselves to their own detriment. Secondly, he believed that men also needed to understand that their perceived superiority over women involved distinctions that had been a result of social custom and culture rather than any Islamic legal practice³⁹⁰. As the impetus for reform heightened, women also entered the public sphere, embracing the new language of social reform. Forbes (1979) details the involvement of women in debates regarding reform legislation and describes their impact as being crucial to policy-making³⁹¹. An increasing number of Muslim women began to voice their opinions and objections to polygamy and unilateral rights to divorce for men, and criticised the virtually non-existent right for women to get out of problematic marriages. The All Indian Women's Conference (AIWC) passed a resolution against polygamy in 1918 during their annual meeting in Lahore, which caused "outrage in the Muslim

³⁸⁹ Gail Minhault, "Women's Magazines in Urdu as Sources for Muslim Social History" *Indian Journal of Gender Studies* 5, no. 2 (September 1998): 201-214.

³⁹⁰ See also Gail Minault, "Sayyid Mumtaz Ali and 'Huquq un-Niswan': An Advocate of Women's Rights in Islam in the Late Nineteenth Century Author(s)," *Modern Asian Studies* 24, no. 1 (February 1990), 147-172.

³⁹¹ Geraldine Forbes, "Women and Modernity: The Issue of Child Marriage in India", *Women's Studies International Quarterly* 2, no. 4 (1979), 407-19.

Press”³⁹². The AIWC also pressed for *ṭalāq al-tafwīd* to be included in marriage contracts that would allow women to initiate divorce proceedings if contractual stipulations in the marriage contract were breached³⁹³. In 1931, a leading member of the AIWC, after consultation with ‘*ulamā*’, enacted a code called ‘Protection of the Rights of Wives’, which allowed parties to gain relief from Mālikī law when such relief was unavailable under Ḥanafī Law³⁹⁴. Two years later, Begum Sharifa Hamid Ali, a former president of the AIWC, in conjunction with a Bombay Law firm, proposed a draft marriage contract that allowed stipulations within the marriage contract to be inserted providing the right for a woman to obtain a divorce³⁹⁵. The entry of women into the public sphere showed a subtle shift in the debate for reform. Now, women began to shape debates about their positions, rather than just being passive observers of male-framed debates.

3.5 Ashraf Ali Thanawi and Reform of the Divorce Law

As pressure mounted for change, the traditional approach advocated by Thanawi and other ‘*ulamā*’ no longer seemed tenable. In the early 1900s, the famed poet and

³⁹²Gail Minault, “Women, Legal Reform and Muslim Identity in South Asia”, *Jura Gentium: Journal of Philosophy of International Law and Global Politics*, accessed October 23rd 2012, <http://www.juragentium.org/topics/rol/en/minault.htm>. See also Gail Minault, “Sisterhood or Separatism? The All-India Muslim Ladies’ Conference and the Nationalist Movement,” in *The Extended Family: Women’s Political Participation in India and Pakistan*, ed. Gail Minault (Chanakya Publication: Delhi, 1981), 79-84.

³⁹³ Aparna Basu and Ray Bharati, *Women’s Struggle: A History of the All-India Women’s Conference, 1972-1990* (New Delhi: Manohar, 1990), 188. See also Janaki Nair, *Women and Law in Colonial India* (New Delhi: Khali, 1996), 79-84.

³⁹⁴ Fyzee, *Outlines of Muhammadan Law*, Appendix C 474.

³⁹⁵ Basu, *Women’s Struggle*, 188.

philosopher Muhammad Iqbal had begun to deal with the lack of women's rights in the Asian subcontinent. He attributed their plight not to Islam but to the Muslim jurists, whom he felt had derived these principles from the Qur'ān through their own reasoning, arguing that they were not necessarily components of the religion itself³⁹⁶. He was also critical of the methodology that the 'ulamā' had been applying. The Ḥanafī 'ulamā' of his time had been using precedents and *qiyās*, or legal analogies, in their judgements; they had also not referred directly to the Qur'ān or the Sunna to obtain their legal principles, but had worked within the ambit of existing Ḥanafī jurisprudence³⁹⁷. This, Iqbal noted, went against the spirit of the Ḥanafī school, causing Ḥanafī jurists to "eternalize(d) the interpretations of the founders and their immediate followers"³⁹⁸. Instead, Iqbal favoured the approach of the Mālikī jurist al-Shāṭibī, who developed the principle of *maṣlahah* (reason) and *maqāṣid* (purpose), which entailed that any legal reasoning must also look at the purpose of the Islamic law³⁹⁹. In 1930, Iqbal delivered a lecture on *ijtihād* in which he specifically addressed the issue of apostasy and urged the 'ulamā' to create new strategies to solve problems surrounding it: otherwise, he feared that the Islamic edifice would crumble in the face of major societal shifts and stagnancy in the law,

³⁹⁶ Muhammad Iqbal, "Qawmi Zindagi" compiled by Sayyid Abdul Wahid Mu 'in *Maqalat-i-Iqbal* (Lahore: Sheikh Ashraf, 1963), 55-56.

³⁹⁷ Masud, *Iqbal's Reconstruction of Ijtihad*, 162.

³⁹⁸ Ibid.

³⁹⁹ Khalid Masud, *Muslim Jurists' Quest for the Normative Basis of Sharia* (Leiden: ISM, 2001), 9, accessed February 15th 2013. globalwebpost.com/farooqm/study_res/islam/fiqh/masud_norm.pdf. See also Khalid Masud, *Islamic Legal Philosophy: A Study of Abu Ishaq al-Shaitibi's life and Works* (Islamabad: Islamic Research Institute, 1977).

resulting in its ultimate demise. In his lecture, Iqbal outlined al-Shāṭibī's doctrine whilst addressing the problems that women faced in marriage:

“In the Punjab, as everybody knows, 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 the aims of a missionary religion. The law of Islam, says the great Spanish jurist Imam Shāṭibī in his *Al-Muwafiqat*, aims at protecting five things: *Din, Nafs, ‘Aql, Mal* and *Nasl*. Applying this test 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? In view of the intense conservatism of the Muslims of India, Indian judges cannot but stick to what are called standard works. The result is that while the peoples are moving the law remains stationary”⁴⁰⁰.

Iqbal criticised the heavy reliance on just a few limited texts of Muslim personal law, and argued that any legal reasoning must never violate the ultimate purpose and spirit of the law, which entailed the protection of basic human rights. He urged the ‘*ulamā*’ to engage in *ijtihād* on the real problems that women were facing in the Indian subcontinent. One of al-Shāṭibī's objectives with regard to the law was the protection of religion. If judicial methodology created legal reasoning that contravened one of the basic purposes of the law, such as protection of the religion, then that reasoning should be reviewed. Within the context of British colonial India, applying strict Ḥanafī laws codified by British colonial rule, which restricted the avenues of divorce for women, was leading women away from the religion, as opposed to protecting the religion. Iqbal was not requesting new interpretations of the texts, but advocating that the purpose of Islamic law must be taken into account when adopting *qiyās*.

⁴⁰⁰ Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Aberdeen, WA: Silver Lake Publishing, 1995), 164-5.

As pressure mounted through public opinion, the next leading Islamic scholar to address this issue was again Maulana Ashraf Ali Thanawi. It is unclear to what extent he was influenced by Iqbal's work, but his U-turn from his early fatwa of 1913 suggests that he was now much more aware of the realities of society and the necessity for the law to match its growth and developing needs. As pressure mounted, he began corresponding with Mālikī scholars from the Hijaz in order to solve the judicial problems that had beset contemporary Ḥanafī scholars. A particular problem was the lack of Muslim judges to deal with common issues. The phasing out of the *qāḍī* system had left a vacuum in legal authority. Who had the authority to dissolve marriages if no Muslim judges were available in the courts? Even relatively simple matters, such as what constituted the waiting period in cases of divorce and widowhood, were not being resolved⁴⁰¹. In 1933, Thanawi published his long-awaited fatwa *al-Hīla al-Nājiza li'l-Halīlāt al-Ājiza* ('The Successful Device for Helpless Wives').

Thanawi's fatwa is important, as it shows the manner in which the '*ulamā*' dealt with the changing conditions in which they found themselves under British colonial rule. Their authority had come under attack with the phasing out of the *qāḍīs* and the instituting of non-Muslim judges in colonial courts to adjudicate on matters relating both to Muslim civil and personal law. Whilst dealing with competing voices from within their own ranks, it was important for the '*ulamā*' to reclaim their exclusive authority to define Islamic law and interpret the Islamic tradition. *Al-Hīla*

⁴⁰¹ Muhammad Qasim Zaman, *The Ulema in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press, 2002), 27.

al-Nājiza li'l-Halīlāt al-'Ājiza is a significant work, as it illustrates the balancing act performed by Thanawi to ensure that his fatwa received widespread support. Thanawi's use of *takhayyur* and *talfīq* was counterbalanced by his heavy reliance on *taqlīd* (following an existing *madhhab*) on other major issues, ensuring that his commitment to *taqlīd* was clearly evident so that he did not alienate the Ḥanafī 'ulamā'. Their support was essential, since he would not only be moving away from what they perceived as Ḥanafī *fiqh*, but would do so in support of enhancing a woman's right to divorce.

The first solution he posited to relieve the plight of women was *ṭalāq al-tafwīḍ* and the adoption of councils to replace courts that did not have Muslim judges. Although *ṭalāq al-tafwīḍ* existed in some form or other in all four major schools of law, Indian 'ulamā' were always reluctant to advocate this remedy, fearing abuse of this judicial device by women. However, Thanawi's inclusion of this in his fatwa is interesting, as it not only provided benefit to women, but also showed his commitment to following the Ḥanafī school. His allegiance to *ṭalāq al-tafwīḍ*, an established principle under Islamic law, albeit a controversial one, demonstrated his commitment to *taqlīd* and to the Ḥanafī *fiqh*, which was essential to ensure that he had support for his fatwa from other 'ulamā'. In an attempt to appease conservative 'ulamā', he devoted one of his 'important advices', called *zaroori mashwarah*, to the intellectual deficiency of women⁴⁰². He argued that women were intellectually deficient, which rendered it dangerous for them to be given a unilateral right to

⁴⁰² Ashraf Ali Thanawi, *Al-Hīla al-Nājiza li'l-Halīlāt al-'Ājiza* (Karachi: Dar-ul-Ashaat, 1987), 23.

divorce; hence, specific restrictions must be placed upon women to avoid such danger, and so there should be promotion of stipulations in the marriage contract⁴⁰³. The fact that he spent the first part of his fatwa advocating the importance of *ṭalāq al-tafwīḍ* but then by detailing his own concerns not only demonstrated to the ‘*ulamā*’ that he was in tune with their reservations, but also ensured that he could defend himself against any likely attacks on his credibility. In essence, he was laying the foundations of support for the more radical reform methodology that was to follow later in his fatwa.

It is unfortunate, however, that rather than focus on the apparent ‘deficiency of women’, Thanawi did not address the right of *khul’*, as he did with *ṭalāq al-tafwīḍ*, at this important historical juncture. If Thanawi had presented a more accurate position under Ḥanafī jurisprudence of the permissibility of the *khul’* without a husband’s consent, this might have provided a much easier marital exit route than the fault-based law reforms for which he campaigned. Nevertheless, an analysis of the manner in which the methodological principles of *takhayyur* and *talfīq* were used by Thanawi to ensure support for statutory divorce laws provides a useful insight into the securing of further reforms in the Pakistani law of *khul’* in the present day. Classical Muslim jurisprudence provides room for choosing either minority interpretations within an existing school (*takhayyur*) or expanding outwards into another school of law to resolve a particular problem (*talfīq*)⁴⁰⁴.

⁴⁰³ Thanawi, *al-Hīla al-Nājiza li’l-Halīlāt al-’Ājiza*, 23.

⁴⁰⁴ Ihsan Yilmaz, “Muslim Alternative Dispute Resolution and Neo-Ijtihad in England” *Alternatives: Turkish Journal of International Relations* 2, no. 1 (Spring

Thanawi believed in the permissibility of these doctrines, and held that the pronouncement of a fatwa under another school of law was allowed:

“It is likely that the Ḥanafī school may be questioned on the ground of adequacy. The answer to this criticism would be that this school does allow, with certain conditions, subscription to the views of other *mujtahids* in the event of some dire need”⁴⁰⁵.

After consultation with Mālikī scholars, Thanawi, with the assistance of Mufti Kifayatullah and Maulana Husayn Ahmad Madani, put these principles into practice, borrowing rulings from the Mālikī *fiqh* where he felt that the Ḥanafī school of thought provided no recourse. However, he did so in a very nuanced way, taking what he considered to be the most essential elements to provide women with marital relief. In the case of a husband’s insanity, the prevailing view of Ḥanafī *fiqh* at that time was that a woman could not petition for a divorce, whereas the Mālikī, Shāfi‘ī and Ḥanbalī schools of law all agreed that she could. In his fatwa, although Thanawi had the option of relying on the Mālikī school, he chose instead to rely on the opinion of Muhammad al-Shaybānī, one of the prominent students of Abū Ḥanīfa. This allowed him to manoeuvre very sensitively between the schools to ensure that he retained the allegiance of the Ḥanafī ‘*ulamā*’. Thanawi argued that al-Shaybānī accepted insanity, or *janoon*, as one of the three defects that warrant a *faskh*, i.e. the option to divorce⁴⁰⁶. However, this is limited to cases where the wife

2003), accessed October 24th 2012.

<http://www.alternativesjournal.net/volume2/number1/yilmaz.htm>

⁴⁰⁵ Furqan, Ahmad, “Contribution of Moulana Ashraf Ali Thanawi to the Protection and Development of Islamic Law in the Indian Subcontinent”, *Islamic and Comparative Law Quarterly* 6 (1986): 75.

⁴⁰⁶ *Ibid.*, 52.

discovers the insanity before the consummation of the marriage. Although Thanawi proceeded to rely on Shaybānī's rulings to prove his point, he returned to the Maliki school for cases of insanity discovered after consummation. As long as the wife does not initiate sexual relations after discovery of the insanity or expresses contentment at the marriage, she still has the right to seek a divorce⁴⁰⁷. In respect of the level of insanity required for a wife to initiate proceedings, Thanawi again moved away from Shaybānī's view, which requires that the husband must be completely unbearable to live with, and opted instead for the Mālikī opinion, which provides a more lenient approach. Thanawi argued that if the husband does not reach the high level of insanity required by Shaybānī, but the wife still cannot tolerate living with him, she may rely on the Mālikī ruling, on the basis that he is unable to provide for her, analogous to the case of a miserly husband.⁴⁰⁸

A similar approach is taken in the case of a missing husband, which is often cited as one of the most restrictive elements of the Ḥanafī school⁴⁰⁹. As stated earlier, the commonly held view is that a woman can only remarry when her missing husband reaches such an age that he must be presumed dead. This has ranged from 70 to 90 years of age. In his chapter on missing husbands, Thanawi explains that the Ḥanafī school has not always been as strict as this in implementing the rule, and gives examples of Ḥanafī scholars of the earlier centuries adopting the more lenient Mālikī

⁴⁰⁷ Thanawi, *Al-Hīla al-Nājiza li'l-Halīlāt al-'Ājiza*, 56.

⁴⁰⁸ Ibid., 57.

⁴⁰⁹ Ann Elizabeth Mayer, "The Reformulation of Islamic Thought on Gender Rights and Roles," in *Islam and Human Rights in Practice: Perspectives Across the Ummah*, ed. Shahram Akbarzadeh and Benjamin MacQueen (New York: Routledge, 2008), 32.

approach⁴¹⁰. In the case of the missing husband, the Mālikī school demands a four-year waiting period before a wife can request a divorce. Thanawi adopts this position, but in an addendum placed at the end of the chapter, he mentions a minority view within the Mālikī *fiqh* that allows a wife to apply for a divorce after her husband has been missing for a year if she can wait no longer.⁴¹¹ After mentioning several times that this decision should not be taken lightly, Thanawi ultimately concedes that this right is available to her if she fears the commitment of *zina* (adultery). In effect, Thanawi is stating that a wife can apply to the court for an immediate dissolution of her marriage after one year has lapsed. It is clear from Thanawi's reasoning and concerns that although *madhhab* allegiance is of primary importance, other social concerns need to be taken into account when making a ruling. Here, a woman's sexual fulfilment is seen as one such concern that needs to be taken seriously, so much so that Thanawi is prepared to go beyond his own school and follow the minority opinion of another school. However, he comes to this conclusion in a stepwise manner to ensure that the reader is completely aware of his allegiance and that he prioritises his own school of thought and moves away from it out of necessity rather than mere choice.

Thanawi also borrows heavily from the Mālikī school in the case where a husband fails to provide financially for his wife whilst refusing to divorce her. Ḥanafī *fiqh* does not specifically mention this as a ground for divorce (since it assumes that she would apply for a *khul'* from the courts), so Thanawi presents a series of rulings

⁴¹⁰ Ibid., 60.

⁴¹¹ Ibid., 71.

based on Mālikī teachings. If a woman does her best to obtain a divorce from her husband but is not successful, then she may apply to the court for a divorce if there is no other means of securing financial assistance for her, or if she can fulfil her financial needs herself but must leave her husband in order to do so, and in so doing fears that she might fall into sin⁴¹².

The final, and perhaps most controversial, aspect of Thanawi's fatwa concerns the effect of apostasy on marriage. Thanawi asked his student, Muhammad Shafi, to write this fatwa on his behalf, and it was signed and then attached to the original fatwa. Previously, Thanawi had ruled that the majority opinion under Ḥanafī *fiqh* was that apostasy necessarily dissolved a marriage, and so a woman would have to be forced to convert and then remarry her first husband. However, circumstance now dictated that this was no longer a feasible option, since no Muslim authority existed to force a conversion and remarriage. Muhammad Shafi outlines three opinions within the Ḥanafī school. The first opinion had already been posited by Thanawi and other '*ulamā*': that apostasy dissolves a marriage. The second opinion was a minority one held by the jurists of Balqh, Samarqand and Bukhara: that apostasy did not annul or dissolve a marriage. The third opinion within Ḥanafī law was that the apostasy of the wife resulted in her becoming a slave of the husband in *dar al-Islam* (the abode of Islam)⁴¹³. Shafi rejected the third opinion outright, as not only had slavery been banned in India, but this opinion was detrimental to women and thus defeated the purpose of the fatwa. In respect of the first opinion, Shafi

⁴¹² Ibid., 73.

⁴¹³ Ibid., 111-113.

stated that due to the societal conditions in India, “it is impossible to act upon the first opinion since after pronouncing the annulment of the marriage the Muslims have no power to assert a renewal of the marriage”⁴¹⁴. He thus opted for the minority opinion within the Ḥanafī school – that apostasy would no longer dissolve a marriage – which resulted in a major theological shift from rulings reaching back hundreds of years. This fatwa was signed not only by Thanawi but also by other Indian ‘*ulamā*’, paving the way for its insertion into the subsequent Dissolution of Muslim Marriages Act.

Thanawi’s work was of importance because it served to unify the ‘*ulamā*’ in demanding changes to the law that were now perceived as forming an ‘authentic’ version of Islam. By issuing *Al-Hīla al-Nājiza li’l-Halīlāt al-Ājiza*, his fatwa contained meticulous research and delicately formed legal arguments. It also enhanced the jurisdiction of the ‘*ulamā*’ by creating new loci of authority that had been slowly whittled away by the demise of the *qāḍīs*. For the British colonial rulers, it provided a strong legal base from which they could create new legal change. They had already been responsible for narrowing the scope of Islamic law through the codifying of ‘Muhammadan Law’. Thanawi’s fatwa provided them with the impetus to secure much-needed rights without alienating the Muslim community by legislating so directly in their personal sphere.

⁴¹⁴ Ibid., 113.

This strong theological support brought together an ideologically diverse set of Muslims to push forward divorce reform. Qazi Muhammad Kazmi, the author of the bill, was a prominent lawyer, and represented the orthodox *Jamat-ul-Mana*⁴¹⁵. He led a committee which was supported by *Jamia al-'ulema al-Hind*, a broad umbrella organisation of Indian '*ulamā*'⁴¹⁶, as well as the British-trained Bohri-Shia lawyer Asaf A.A. Fyzee⁴¹⁷, Muhammad Ali Jinnah, and Sir Zafrullah Khan, all prominent reformist lawyers. The committee put forward Thanawi's recommendations, with particular emphasis that a married Muslim woman's apostasy would not dissolve her marriage, and that Muslim judges should be appointed to handle divorce cases. However, the reformist lawyers took issue with the request for Muslim judges. The '*ulamā*' saw this as necessary in order for courts to have the power to dissolve the marital contract, but the lawyers saw it as a dangerous judicial precedent. After much debate, the Dissolution of Muslim Marriages Act 1939 (DMMA) was passed.

Eight years after the publication of *Al-Hīla al-Nājiza li'l-Halīlāt al-'Ājiza*, the DMMA expanded the number of situations where a woman would be entitled to divorce her husband, which went far beyond what Thanawi had ever recommended. Not only were women entitled to a divorce in the case of the husband's impotence, financial negligence or prolonged absence, but they were also allowed to petition for divorce in cases where the husband "habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-

⁴¹⁵ De, "Mumtaz Bibi's Broken Heart," 120.

⁴¹⁶ Zaman, *The Ulema in Contemporary Islam*, 32.

⁴¹⁷ Minault, "Women, Legal Reform and Muslim Identity in South Asia," 8.

treatment”;⁴¹⁸ where he “associates with women of evil repute or leads an infamous life”;⁴¹⁹ or in the case that “he has more wives than one, [he] does not treat her equitably in accordance with the injunctions of the Qur’an”⁴²⁰. All of these provisions could be justified under Māliki law, and they show how far Thanawī’s efforts to use Māliki rulings were taken, even at such an early date.

When the law was finally passed, however, it differed in three crucial elements from the original recommendations of the ‘*ulamā*’. Firstly, the right to *ṭalāq al-tafwīḍ* was not made part of the DMMA. Although it was recognised as a procedure under Islamic law and could be enforced in the courts as a valid contract, it was not given statutory protection. Secondly, the DMMA was to be applied to all Sunni Muslims, and to all Shia Muslims as well. Finally, the cases were not reserved to the jurisdiction of Muslim judges alone, as the ‘*ulamā*’ had wanted, but would be heard by all judges irrespective of faith. This last change caused the social consensus that had been behind the bill to collapse. The *Jamia-ul-ulema* and Thanawi were unhappy with the final form of the act, as it removed the exclusive jurisdiction of Muslim judges to hear suits for the dissolution of marriages. They argued that the DMMA gave powers to the court to dissolve a marriage contract, rather than just rescind it. They argued that this was an extension of the power to delegate a *ṭalāq*, which could only be given to a Muslim⁴²¹. They made several attempts to persuade Jinnah to amend the legislation, declaring it un-Islamic. If a non-Muslim could not conduct a

⁴¹⁸ 1939 Dissolution of Muslim Marriages Act (DMMA), s. 2(vii)(a).

⁴¹⁹ 1939 DMMA s. 2(vii)(b).

⁴²⁰ 1939 DMMA s. 2(vii)(f).

⁴²¹ De, “Mumtaz Bibi’s Broken Heart,” 125.

marriage ceremony, how was it possible that non-Muslims could then dissolve a marriage⁴²²? The insistence on restricting the DMMA to the purview of Muslim judges was also an attempt by the ‘*ulamā*’ to regain lost ground in the Indian subcontinent. The codification of Islamic law into limited English texts wrested authority away from the traditional ‘*ulamā*’ and put it into the hands of secular-trained judges and lawyers. The Quazi’s Act of 1880⁴²³ had already taken away the ‘*ulamā*’s’ judicial and administrative powers, and so the DMMA was seen as a way to regain this lost authority. However, the reform process that Thanawi had so diligently supported was not to be stopped, going far beyond what he had envisaged.

3.6 Post-Partition and Reform of the Divorce Laws in Pakistan

After partition and the creation of Pakistan as an independent state in 1947, the DMMA continued to retain its validity and applicability in the legislature. Although it had led to substantial reforms in the divorce laws, however, inequity still remained⁴²⁴. The DMMA did not recognise incompatibility of temperament as a hardship: thus, a woman could only sue for divorce if she could prove one of the fault-based grounds outlined. However, most women were unable to bypass the

⁴²² Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (London: Sage Publications, 1992), 154-155.

⁴²³ The Quazi’s Act of 1880, Act XII. The preamble of the Act limits the role of the qāḍīs to conducting marriage ceremonies and other religious rites whilst S4 (a) clearly states that no judicial or administrative powers are to be conferred upon them.

⁴²⁴ Esposito and DeLong-Bas, *Women in Muslim Family Law*, 79. See also Chapter Four of this thesis for a critical examination of the provisions of the DMMA.

high evidentiary rules set by the courts. Moreover, the *khul'* was still being interpreted as requiring a husband's consent, and was given no statutory importance. As a result, many women still faced the prospect of suffering hardship in a marriage, perhaps disliking their partners vehemently but having no recourse to the law, unlike their husbands, who still had the unilateral right to divorce. Importantly, if a husband took another wife without the consent of his first wife, the DMMA did not outline this as sufficient grounds for the first wife to seek a divorce. This issue came to the forefront when the third Prime Minister of Pakistan, Muhammad Ali Bogra, took a second wife⁴²⁵, permissible under the laws of polygamy, which proved to be a catalyst for further reform.

As the newly formed Pakistani state gained its footing, calls for reform of the family laws had already begun to circulate amongst the elite. Women's groups began to form in order to improve the rights of women. Rouse (1984) describes these groups as 'bourgeois'⁴²⁶ because the women belonged to either the ruling families or the judiciary, which meant that they were less able to challenge the state⁴²⁷. However, it was this very demographic that served their cause well. The first wife of Prime Minister Ali Bogra belonged to the All-Pakistan Women's Association (APWA), which was one of the largest women's groups advocating reform. It was led by Begum Liaquat Ali Khan, who was the widow of the first prime minister of Pakistan,

⁴²⁵ Asma Jahanghir, "The Origins of the MFLO", in *Shaping Women's Lives: Laws, Practices & Strategies in Pakistan*, ed. Fareeda Shaheed et al (Karachi: Shirkat Gah, 1998), 96.

⁴²⁶ Shahnaz Rouse, "Women's Movements in Contemporary Pakistan: Results and Prospects", Working Paper, *Women in International Development* 6 (1984), 74.

⁴²⁷ Nadya Haider, "Islamic Legal Reform: The Case of Pakistan and Family Law", *Yale Journal of Law & Feminism* 12 (2000): 301.

Liaquat Ali Khan⁴²⁸. Since members of the APWA all belonged to elite families, they felt that Bogra's actions set a dangerous precedent, and began protests against the Prime Minister's actions. Media attention was galvanised, and, as public opinion gathered against the Prime Minister, he commissioned a report to study the existing laws on marriage, divorce, maintenance and other matters to see what reforms were necessary.

In 1956 the government appointed a seven-member commission composed predominantly of modern reformists. It was led by Chief Justice Abdur Rashid (and was hence called the Rashid Commission), with one conservative scholar, Maulana Haq, who ultimately wrote the dissenting opinion⁴²⁹. The Rashid Commission addressed the methodology required for reform and proposed *ijtihad* as a mechanism to initiate such reform. It outlined its definition of *ijtihad* as the 'interpretative intelligence' of legislative enactments and judicial decisions within the broad framework of the Qur'ān and the Sunna⁴³⁰. This, it argued, was an essential jurisprudential tool needed due to changing societal circumstances. Justifying this reasoning, it drew on the famous philosopher Muhammad Iqbal and his critical method of relying solely on established schools of thought when addressing new problems that the Muslim community faced. Iqbal argued that the Qur'ān provided a "dynamic outlook on life", but that intellectual attitudes had

⁴²⁸ Haider, "Islamic Legal Reform," 301.

⁴²⁹ Mehdi, *The Islamization of Laws in Pakistan*, 157.

⁴³⁰ The Report of the Commission on Marriage and Family Laws (1956), reprinted in Khurshid Ahmad, *Studies in the Family Laws of Islam* (Karachi: Chiragh-e-Rah Publications, 1961), 39, hereinafter called The Report.

reduced Islamic law to a state of immobility⁴³¹. The Commission, citing Iqbal, condemned strict adherence to the letter of the law, stating that “undue reverence for the past” had led scholars to believe that the era of creative and adaptive legislation had passed⁴³². The Rashid Commission lamented Muslim unwillingness to cope with the rapidly advancing world: a world which required a modern approach to enable “radical re-modelling of the legal and judicial system”⁴³³. This approach differed fundamentally from that of Thanawi when advocating reform of the divorce law. Thanawi took great pains in asserting the importance of *taqlīd* and following the Ḥanafī school of thought. He embraced doctrinal precedents as fundamental postulates that underpinned the stability and certainty of Islamic injunctions. Although he endorsed *ijtihād* within his fatwa, he did so carefully and cautiously, appreciating the fact that ‘*ulamā*’ support for his radical reforms was necessary if these reforms were to be taken seriously by the colonial rulers.

The Rashid Commission was, however, not so subtle. On the one hand, it tried to pacify orthodox conservatives through its careful definition of *ijtihād* and the manner of its employment. *Ijtihād* was described as the methodology from which law was derived, rather than the law itself. Shariah was described as the fixed law of Islam that was binding and could never be subject to change. This was distinguished from *fiqh*, which was described as either having an interpretative function in relation to the law or as covering areas that were not envisaged by the Qur’ān and

⁴³¹ Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Aberdeen, WA: Silver Lake Publishing, 1995), 148-149.

⁴³² The Report, 42.

⁴³³ Ibid., 43.

the Sunna⁴³⁴. *Ijtihād* was to take place within the ambit of *fiqh* and not Shariah. The Commission also reiterated its claims that it had no intention of going beyond the fundamental principles of Islam, believing that if interpreted liberally, Qur'ānic injunctions were capable of providing absolute justice⁴³⁵. However, as to the question of who had the authority to engage in *ijtihad*, the Rashid Commission took a more cavalier attitude. Traditionally, Islamic jurisprudence had vested this authority in *mujtahids*. The Rashid Commission, however, rebutted this tradition and maintained that since Islam had no system of priesthood, and thus no intellectual hierarchy, no person could claim to have special authority or privileges when determining the law. The Rashid Commission had sent out hundreds of questionnaires to the public to ascertain their views on key areas of reform. It argued that the hundreds of Muslims who had answered the questionnaire were exercising their judgment within the parameters of *fiqh*, which they were free to do, and that "law is ultimately related to life experiences which are not the monopoly of the theologians only"⁴³⁶. The primary recommendations of the Rashid Commission were to discourage polygamy and abolish the 'triple *ṭalāq*' through regulation by the courts. It also recommended compulsory registration of marriages, a prohibition on child marriages, an increase in the minimum age of marriage, procedural regulation of the *khul'*, maintenance provisions for divorced women and inheritance rights for grandchildren.

⁴³⁴ Ibid., 48.

⁴³⁵ Ibid., 46.

⁴³⁶ Ibid., 49.

Predictably, orthodox Muslims reacted vehemently to the Rashid Commission's reform proposals. Maulana Haq gave a scathing dissenting opinion regarding the Rashid Commission's findings and refused to sign the report. One of his main criticisms centred on the legal jurisdiction of the Rashid Commission in proposing reforms. He described the members as laymen who had no right to formulate any new reform agenda. Their views were described as un-Islamic, and their definition of *ijtihād* as a methodological tool within *fiqh* was seen as a derivation from religion, based upon the personal whims of individuals whose definition of *fiqh* and *ijtihād* was merely a distortion of religion⁴³⁷.

This dissenting opinion reflected the tensions that existed not only within the Rashid Commission itself but among the views of orthodox Muslims who felt that the Rashid Commission was overstepping its legal authority within the Islamic sphere. Much of this antagonism came from '*ulamā*' who belonged to Jamaat-i-Islami, a political organisation formed by Maulana Maududi⁴³⁸. This opposition was part of a wider hostility that the '*ulamā*' felt towards the new military regime led by Field Marshal Ayub Khan⁴³⁹. They viewed the military coup as a ploy to dismantle the Islamic constitution and prevent Islamic parties from gaining victories in the forthcoming elections⁴⁴⁰. Ayub Khan was also treated with suspicion, since he and many of his contemporaries had been trained at Sandhurst and were "steeped in

⁴³⁷ Ahmad, *Studies in the Family Laws of Islam*, 201.

⁴³⁸ Seyyed Vali Reza Nasr, *The Vanguard of the Islamic Revolution; The Jama'at-i-Islami of Pakistan* (London: I.B. Taurus Publishers), 21.

⁴³⁹ In 1958, after a bloodless coup, Field Marshall Ayub Khan appointed himself President of Pakistan.

⁴⁴⁰ Nasr, *The Vanguard of the Islamic Revolution*, 29.

British Indian military tradition”⁴⁴¹. Ayub Khan appointed British-trained civil servants to his cabinet and shifted the focus of constitutional debates “away from why Pakistan was created to where Pakistan was heading, that is, from ideological to developmental concerns”⁴⁴². Part of this developmental process was the plan to implement the Rashid Commission’s findings, which had reported earlier in 1956. Maulana Maududi took issue with the Commission’s definition of *ijtihad* and who had the right to interpret law. He argued that if *ijtihad* was construed as an “independent judgment upon a legal question” then this was no different from the legal opinions of any modern legislator⁴⁴³. Conservative Muslims feared that if the ability to interpret law was made so easy, then reforms proposed by the Commission could be validated as Islamic and thus wrest further authority away from the ‘*ulamā*’. Maududi called into question the Commission’s claim that any learned person has the right to interpret the Qur’ān and the Sunna. Maududi believed this was the exclusive privilege of those who were well versed in the Qur’ān and the Sunna, and that the Commission had neither the qualifications to define *ijtihad* nor the right to practice it⁴⁴⁴.

Despite strong opposition from conservative Muslims, women’s groups continued to campaign for the proposals to be implemented. The newly burgeoning Pakistani state was going through social and cultural change. Field Marshal Ayub Khan in

⁴⁴¹ Mumtaz and Fareeda, *Women in Pakistan*, 57.

⁴⁴² Nasr, *The Vanguard of the Islamic Revolution*, 149.

⁴⁴³ Khurshid Ahmad, *Mawdudi: An Introduction to His Life and Thought* (Leicester: Islamic Foundation, 2007), 87, 115.

⁴⁴⁴ Haider, “Islamic Legal Reform,” 307.

particular had an aversion to extremist elements in society, whom he felt were responsible for holding back the masses. Coupled with higher education and employment for women, who were entering fields that had been impossible for them to penetrate prior to partition, groups now had the impetus they required to push for reform. The 'bourgeois' element of the APWA and the United Front for Women's Rights (UFWA), which had once held them back from pushing through serious reforms, now worked to these groups' advantage. Chief Justice Abdur Rashid also had female relatives in the Women's Action Forum⁴⁴⁵, and so, by combining their efforts, they pressurised the government to pass the Muslim Family Law Ordinances in 1960 (MFLO). The major reforms introduced by the MFLO included the compulsory registration of the *nikāḥ*⁴⁴⁶, the placing of restrictions on the practice of polygamy⁴⁴⁷ and the adding of notice requirements for the *ṭalāq*⁴⁴⁸.

Although it was hailed as a major success towards giving women greater rights in the field of family law⁴⁴⁹, the MFLO failed to implement many of the recommendations of the Rashid Commission. The Commission had, for instance, recommended complete abolition of the 'triple *ṭalāq*' and the requirement that courts be informed of a husband's intention to divorce so that they could adjudicate

⁴⁴⁵ Mumtaz and Shaheed, *Women in Pakistan*, 58.

⁴⁴⁶ S.5 MFLO 1961.

⁴⁴⁷ S. 6 MFLO 1961 requires a husband to seek permission from the Arbitration Council to contract another marriage.

⁴⁴⁸ S.7 MFLO 1961 requires a husband to notify the Arbitration Council and his wife of his pronouncement of divorce and to be subject to a reconciliation process affected by the Council.

⁴⁴⁹ See Muhammad Feroze, "The Reform in Family Laws in the Muslim World", *Islamic Studies* 1, no. 1 (1962): 126.

over the matter. However, the MFLO watered down these provisions by simply requiring a husband to notify the local union Arbitration Council of his pronouncement. The Commission had also recommended the introduction of supplementary legislation to make the *khul'* more certain and precise⁴⁵⁰, but this recommendation was ignored in the final draft. Divorced women were also not provided with any financial rights of maintenance, as suggested by the Commission. Unlike the DMMA, which went much further than the reform proposals put forward by Thanawi and his supporters, the MFLO was met with significant opposition from conservative Muslims, who felt that the Commission was usurping many of the male prerogatives of divorce and thus campaigned vehemently against it. The final form of the MFLO indicates that the conservative forces in Pakistan were quite successful in their campaign. It would seem that Thanawi's more nuanced and sophisticated arguments proved more digestible to the religious community than those of the Rashid Commission.

Thanawi praised *ijtihād* throughout his fatwa, but at the same time he continually emphasised the importance of *taqlīd* in most matters. He defined *ijtihād*, but limited it to areas where it was most needed. Moreover, when he needed to rely on even a minority opinion of a different *madhhab*, he continually stressed caution, emphasising that such interpretative legislation needed to be made carefully and cautiously. It is interesting to note that although Thanawi eventually supported the view that apostasy should not automatically dissolve a marriage, he did not write

⁴⁵⁰ The Report, 62.

this fatwa himself, but asked his senior student to do so on his behalf. Although he is often quoted as being its author, perhaps he wished to create a subtle distance from it, acknowledging that this was a major shift from Ḥanafī jurisprudence. The Rashid Commission, on the other hand, took a more open and obvious route. It made its intentions clear from the outset, and seemed to do little to pacify the conservative Muslims. Its language was couched in an almost arrogant way, claiming total authority in interpreting the Qur’ān and Sunna. Perhaps if it had employed the use of more classical authorities, and at least attempted to show some deference to the religious ‘ulamā’, the opposition might not have been so great –opposition which continues to this day.

3.7 Conclusion

Whilst looking at the history of divorce law in South Asia, two important debates emerge regarding Muslim personal law. Firstly, there is the importance of gender, focusing in particular on improving the rights of women in law reform; and secondly, there is the nature of Muslim law itself. If Islam is divinely ordained, is it immutable and unchanging, or is there scope for creativity and change according to the needs of an evolving society? These two debates are closely intertwined.

Historical accounts of Muslim women in South Asia are couched within the parameters of Islamic practices⁴⁵¹, and this has led to the belief that there is a

⁴⁵¹ Imtiaz Ahmed, *Caste and Social Stratification amongst Muslims in India* (New Delhi: Manohar, 1978).

consistent and uniform Muslim polity, as opposed to a highly differentiated and heterogeneous community⁴⁵². Moreover, there is also a consensus amongst some commentators that women's rights can only be achieved at the expense of Islamic doctrine. The right to practice religion is put at odds with the rights of women to gain equal access to the law and improve their situation⁴⁵³. However, throughout this chapter I have attempted to show that these are not mutually exclusive, and that the debates and impetus for reform in the 1930s regarding women's right to divorce were built upon the premise that equal access to Muslim law would naturally lead to the improvement of women's rights.

Moreover, previous accounts of the DMMA have either focused simply on the theological changes that it brought⁴⁵⁴ or analysed it within a wider context of galvanising national identities and the crisis that the '*ulamā*' were facing under colonial rule in India as they sought to control the sphere of women's roles in order to reassert their religious authority⁴⁵⁵. However, the above analysis has shown that,

⁴⁵² Zoya Hasan and Ritu Menon, *Unequal Citizens: The Status of Muslim Women in India* (New Delhi: Oxford University Press, 2004). Their survey found that post-colonial academic literature was dominated by debates that viewed Muslims and Muslim women as a monolithic category, perpetuating a reductive thesis of Islamic history, culture and politics.

⁴⁵³ Rajan Sundar, *The Scandal of the State: Women, Law and Citizenship in Postcolonial India* (Durham: Duke University Press, 2003). See also Shibany Roy, *Status of Women in North India* (New Delhi: B.R Publishers, 1979), who sees Muslim personal law as the oppressor and the reason for women's subordinate status.

⁴⁵⁴ Tahir Mehmood, *Statute Law Relating to Muslims in India: A Study of Islamic and Constitutional Perspectives* (New Delhi: Institute of Objective Studies, 1995); Fyzee, *Outlines of Muhammadan Law*.

⁴⁵⁵ Minhault, "Women, Legal Reform and Muslim Identity in South Asia"; Kumkum Sangari, "Gender Lines: Personal Laws, Uniform Laws, Conversions," *Social Scientist*

despite being flawed, the introduction of the DMMA illustrates how conservative ‘*ulamā*’, liberals, and women’s groups were able to create a consensus and pass a law that enhanced women’s rights, going even further than they had themselves envisaged⁴⁵⁶. By using the principles of *taqlīd*, *takhayyur* and *talfīq*, although this proved to be the last alliance between conservative ‘*ulamā*’ and modernist reformers, this strategy went against the fixed and static Muslim law that had been imagined by the colonial state.

Finally, this episode illustrates the importance of gaining the support of the ‘*ulamā*’ and other religious bodies when proposing reforms. Demands for change cannot occur within a vacuum if they are to be taken seriously. Religious bodies in Muslim countries cannot be ignored, particularly in Pakistan, where they hold great weight and can sway public opinion. However, women’s rights activists often pit themselves against the Shariah, or legislation that claims to be based on Shariah. This, however, ignores the flexibility of Islamic teachings, the evolving character of *fiqh*, and the important principles of justice and equality that exist within Islamic jurisprudence. Although the DMMA was not a perfect piece of legislation, and will be the subject of critique in the following chapter, it is the MFLO that is continually attacked as being ‘un-Islamic’, with continuous calls for it to be rescinded. Most recently, the Chairman of the Council of Islamic Ideology (CII), Maulana Mohammad Khan Sherani, declared S.6 of the MFLO to be un-Islamic, as it requires a husband to

27, no. 5/6 (1999): 17-61. See also Archana Parashawar, *Women and Family Law Reform in India* (New Delhi: Sage Publications, 1996), 155, who describes the efforts of the ‘*ulamā*’ to provide a limited right of divorce as illustrations of the use of the political process to confirm the hold of religion on the lives of people.

⁴⁵⁶ De, “Mumtaz Bibi’s Broken Heart”, 126.

notify his wife of an impending second marriage and to request permission from the local union councils⁴⁵⁷. However, during its inception, if a more nuanced approach had been taken by the Commission in its proposals for reform, and if emphasis had been placed upon its validity within the parameters of established Islamic principles and the Ḥanafī *madhhab*, the perpetual attacks upon the MFLO might have lessened.

⁴⁵⁷ Different clauses of the Muslim Family Law Ordinances are often attacked by the Pakistan Council of Islamic Ideology as being un-Islamic and out of the bounds of Islam. See Dunya News, accessed April 3rd 2016 <http://dunyaews.tv/en/Pakistan/214861-Wifes-permission-not-necessary-for-second-marriag>, Dawn News, accessed April 3rd 2016 <http://www.dawn.com/news/1107849>.

CHAPTER FOUR

A STUDY OF PAKISTANI CASE LAW: THE DISSOLUTION OF MUSLIM MARRIAGES ACT (DMMA) 1939 AND THE *KHUL'*

4.1 Introduction

Chapter Three traced the legal and theological endeavours of lawyers and the *'ulamā'* of the Indian subcontinent to improve women's right to seek a divorce. This culminated in the passing of the Dissolution of Muslim Marriages Act (DMMA) in 1939, which increased the grounds upon which a Muslim woman could seek judicial dissolution of her marriage. Based primarily on Mālikī *fiqh*, it radically enhanced women's right to divorce and was heralded by women's rights activists and academics as the legislature's answer to the unilateral power of a Muslim man's right to divorce his wife⁴⁵⁸. Yet, whilst the provisions of the DMMA provide a wide range of grounds for women to seek a divorce, the nature of court proceedings meant that women found it extremely difficult to prove their allegations. This chapter will therefore examine the obstacles that women faced whilst relying on the Act, as well as the courts' failure to successfully implement these reforms. Through a critical examination of Pakistani case law, this chapter will demonstrate that by deliberately requiring extremely high standards of proof, the courts appear to have made concerted efforts to discourage women from relying on the fault-based

⁴⁵⁸ Vinithia Johnson, "A Note on the Operation of the Dissolution of Muslim Marriages Act, 1939," *Journal of Divorce & Remarriage* 52 (2011): 95.

grounds of the DMMA, and instead have encouraged them to pursue divorce under the doctrine of *khul'*, which traditionally attracts a financial penalty.

Part two of this chapter will seek to show that this judicial strategy has not always been adopted as a result of male chauvinistic attitudes to penalise women for daring to initiate divorce, but has been applied by some judges to provide women with the relief they need whilst taking into consideration the social and cultural constraints that prevail within Pakistani society against female-initiated divorce. This part of the chapter will also delineate the theological obstacles faced by the courts in attempting to create a 'no-fault' *khul'* divorce law and the modifications they introduced to this traditional doctrine. It will examine case law and illustrate that despite early failings by the courts, rather than curtail women's rights to marital freedom, they have now made great strides in the area of divorce law reform.

4.2 Judicial Interpretation of the Dissolution of Muslim Marriages Act (DMMA) 1939

The DMMA was the final piece of family law legislation to be enacted before the partition of India and the creation of Pakistan as an independent state⁴⁵⁹. Although it was intended to consolidate Muslim personal law relating to the dissolution of marriages by women, its primary purpose was to relieve the 'unspeakable misery'

⁴⁵⁹ De Mumtaz, "Bibi's Broken Heart", 84.

faced by Muslim women trapped in unhappy marriages⁴⁶⁰. Section 2 of the DMMA set out the grounds upon which a Muslim woman could apply to the court for a divorce. This includes the husband's desertion for four years⁴⁶¹, the husband's neglect or failure to pay maintenance for two years⁴⁶², the husband's imprisonment for seven years or more⁴⁶³, his impotence⁴⁶⁴, insanity, or contraction of a virulent disease,⁴⁶⁵ and the option of puberty⁴⁶⁶. Cruelty by the husband is another ground, which is defined through six further elements: mental and psychological cruelty⁴⁶⁷, the husband's immoral conduct⁴⁶⁸, disposal of the wife's property⁴⁶⁹, obstructing her observance of her religion⁴⁷⁰ and inequitable treatment of wives in a polygamous marriage⁴⁷¹. The final ground that a woman may rely upon is contained in S. 2 (ix). This states that she may rely "on any other ground which is recognised as valid for the dissolution of marriages under Muslim Law"⁴⁷². Although the DMMA does not specifically state what this entails, under classical Islamic law other valid

⁴⁶⁰ Statement of Objects and Reasons, Dissolution Muslim Marriages Act 1939.

⁴⁶¹ S.2(i) Dissolution of Muslim Marriages Act 1939 (DMMA).

⁴⁶² S.2(ii)DMMA 1939.

⁴⁶³ S.2(iii) DMMA 1939.

⁴⁶⁴ S.2(v)DMMA 1939.

⁴⁶⁵ S2. (vi). See also Sohail Warraich and Cassandra Balchin, "Confusion Worse Confounded: A Critique of Divorce Law and Legal Practice in Pakistan," in *Shaping Women's Lives: Laws, Practices in Pakistan*, eds. Farida Shaheed et al (Karachi: Shirkat Gah, 1998), 196.

⁴⁶⁶ S. 2 (vii) DMMA. The option of puberty states that provided the marriage has not been consummated if a father or other guardian has given his/her daughter in marriage before she attained the age of sixteen years, and if the marriage was repudiated before attaining the age of eighteen years, she may rely on this ground.

⁴⁶⁷ S.2(viii) (a) DMMA 1939.

⁴⁶⁸ S.2(viii)(b) DMMA 1939.

⁴⁶⁹ S.2(viii)(d) DMMA 1939.

⁴⁷⁰ S.2(viii)(e) DMMA 1939.

⁴⁷¹ S.2(viii)(f) DMMA 1939.

⁴⁷² S2(ix) DMMA 1939.

grounds for divorce include the concept of *liʿān*, or false accusation of adultery against the wife by the husband⁴⁷³, *ṭalāq al-tafwīd*, and the *khulʿ*. In 1961, the Muslim Family Law Ordinance (MFLO) amended the DMMA and added another ground for divorce, namely if the husband has taken an additional wife without following the legal procedures set out in the MFLO⁴⁷⁴.

Despite the all-encompassing nature of S.2(ix) of the DMMA, the failure of the legislature to exactly specify what justifies a marital exit under Islamic law “turned the clause into a meaningless dead letter for decades”⁴⁷⁵. Between 1947, when Pakistan became an independent state, and 1959, the courts interpreted the *khulʿ* as an option to be granted only with the consent of the husband⁴⁷⁶. This meant that most petitions for divorce relied on the statutory grounds, particularly the wife’s allegations of cruelty by the husband or his failure to maintain his wife for two years. It was only in 1959, when the ground-breaking case of *Balqis Fatima v. Najmul-Ikram*⁴⁷⁷ was heard, that the courts granted a *khulʿ* irrespective of the husband’s wishes. This provided wives with the option of relying on the DMMA and alternatively applying for a *khulʿ* if they failed to prove one of the fault-based grounds. Under statutory provisions, the wife was entitled to a divorce without any

⁴⁷³ Johnson, “A Note on the Operation of the Dissolution of Muslim Marriages Act 1939,” 98.

⁴⁷⁴ S. 2(ii) (a) DMMA 1939. S.6 of the 1961 MFLO states that a husband must seek permission in writing from the Arbitration Council. S.6(3) allows a wife to nominate a representative to the Council and place any objections against a second marriage of her husband. If her husband fails to comply with these procedures, she has the right to apply for a divorce under the DMMA.

⁴⁷⁵ Karin Yefet, “The Constitution and Female Initiated Divorce in Pakistan,” 578.

⁴⁷⁶ See part two below for its judicial development.

⁴⁷⁷ 1959 PLD Lah. 566.

financial liability. However, if a wife was granted a *khul'* in the early years, she was required to re-pay her dower to her husband, placing an onerous financial burden upon her. Although the *khul'* provided an easier exit from an unhappy marriage, the financial liability proved to be a double-edged sword for women.

As the years have progressed, the courts have constructed a high threshold of proof, creating very few positive outcomes for women under these statutory provisions, with the courts preferring to grant divorces under the doctrine of *khul'*.

Disappointingly, the courts have applied a very narrow interpretation of what constitutes cruelty under the Act. Such is the difficulty in proving the matrimonial offences that Pakistani lawyers have been accused of forgetting what these fault-based grounds entail⁴⁷⁸. In practice, when women do decide to initiate a divorce, invariably they have been advised by their lawyers to rely both on the DMMA and alternatively on the ground of *khul'*⁴⁷⁹.

Unfortunately, a major problem in the implementation of the DMMA has been the complicated procedural rules of the Pakistani courts. They are the remnants of the colonial courts of India, which has meant that litigation is prolonged, with divorce cases taking more than six years to come to a conclusion in previous years⁴⁸⁰. Part

⁴⁷⁸ Nadia Sonnveld, *Khul, Divorce in Egypt: Public Debates, Judicial Practice and Everyday Life* (2009), PhD. Thesis, at 6.5, quoted in Karin Yefet, "The Constitution and Female Initiated Divorce in Pakistan," 611.

⁴⁷⁹ Sohail Warraich, "Confusion Worse Confounded," 199.

⁴⁸⁰ Lucy Carroll, "Qur'ān: 2:299: A Charter Granted to the Wife?" 95. However the recent amendments to the Family Courts Act (1964) has a much quicker turn-over of divorce cases than before. See Chapter Seven for further details.

of the delay was caused by the fault-based nature of the grounds, since a petitioning wife was required to substantiate one of the matrimonial offences upon which the suit was filed. This proved to be problematic, as most wives in Pakistan live within their husbands' extended families⁴⁸¹. Proof of matrimonial offences requires witnesses, who often belong to the husband's family and therefore are reluctant to come forward and testify against him⁴⁸². This amounted to an almost unsurpassable hurdle for women to overcome. In most instances women applied under s.2 (vii), citing the husband's neglect or failure to pay maintenance for two years, and s.2 (viii) of the DMMA, alleging cruelty by the husband. However, without external evidence, the courts were reluctant to rely on the contentions of the wife only⁴⁸³. If, as a result of the alleged cruelty, the wife fled the matrimonial home, failure to succeed under s.2 (viii), cruelty, meant that she was automatically disbarred from relying on s.2 (vii), failure to maintain⁴⁸⁴. The courts held that before a husband could be said to have neglected or failed to provide maintenance for his wife, it must be shown that he was under a legal duty to provide such maintenance⁴⁸⁵. Such a duty was not considered to exist where the wife, through her own conduct, had led the husband to stop the maintenance⁴⁸⁶. In an illustrative case of that time⁴⁸⁷, a wife

⁴⁸¹ See Indralal De Silva, "Demographic and Social Trends Affecting Families in the South and Central Asian Region," in *Major Trends Affecting Families: A Background Document, Report for United Nations* (Department of Economic and Social Affairs, Division for Social Policy and Development Program on the Family: May 2003), 4. Accessed September 16th 2003.

<http://www.un.org/esa/socdev/family/Publications/mtdesilva.pdf>.

⁴⁸² Carroll, "Qur'ān: 2:292: A Charter Granted to the Wife?" 95.

⁴⁸³ See Fazal Muhammad v. Mst. Umatul Rahim 1949 AIR Pesh. 7.

⁴⁸⁴ See Mst. Allah Jawai v. Farid 1952 PLD Lah. 31.

⁴⁸⁵ Zafar Hussain v. Mst. Akbari Begum 1944 Lah. 336,

⁴⁸⁶ Mst. Badrulnisa Bibi v. Syed Muhammad Yusuf 1944 AIR 1944 All. 23

alleged that she had been treated cruelly by her husband and falsely accused of adultery, and, having been turned out of her house for three years, her husband then neglected to provide maintenance for her during her absence from the matrimonial home. As in many of these cases⁴⁸⁸ the husband resisted the suit. Witnesses in support of the husband rebutted witnesses affirming the wife's claim. Since the wife was unable to provide external evidence of her plea, she was blamed for voluntarily leaving the matrimonial home, thus extinguishing any right to be legally maintained by her husband⁴⁸⁹.

Whilst adjudicating cases under S. 2 (viii), courts have often created a very narrow interpretation of what constitutes cruelty under the Act. An explicative case of this time is *Shahida Khan v. Abdul Rehim Khan*⁴⁹⁰, where the wife relied on several grounds under the DMMA. She claimed that her husband was a drunken womaniser, was physically and mentally cruel to her, and had misappropriated her property. During long, drawn-out litigation, both the District and Family Courts rejected the

⁴⁸⁷ *Mst. Jannat v. Rahim Baksh* 1952 PLD Baghdad-ul-Jadid 47

⁴⁸⁸ See also *Fazal Muhammad v. Mst. Umatul Rahim* 1949 AIR Pesh. 7, *Mst. Badrulnisa Bibi v. Syed Muhammad Yusuf* 1944 AIR 1944 All. 23,

⁴⁸⁹ Unfortunately there have only been a few instances where a wife was able to find corroboration for her assertions and was able to succeed under the DMMA. In *Begum Zohra v. Maj. General Muhammad Ishafaqul Majid* (1955 PLD Sind 378), the wife was able to produce letters written by her husband admitting to beating her and threatening to do so again. In *Goas Ali v. Firoza Khatoon* (1969 PLD Dacca 548), the court's own observation of the threatening demeanour of the husband convinced them that the wife was telling the truth. See also *Muhammad Salahuddin v. Mst. Rubshana Saeed and 2 others* 1987 CLC Kar 163, *Rahilan v. Sana Ullah* 1959 PLD 1959 (W. P.) Lah 470 and *Mst. Asghari Sultana v. Chaudhry Shamim Ahmad and 2 others* 2002 CLC Lah 123 for instances where the courts have granted a divorce under the DMMA. However, cases of this type have been rare.

⁴⁹⁰ *Shahida Khan v. Abdul Rehim Khan* 1984 PLD Lah. 365.

wife's claim for a divorce. On appeal to the Lahore High Court, even though the judge stated that he did not agree with the lower court's assessment that there was insufficient evidence to prove an offence under the DMMA⁴⁹¹, he still refused to grant a judicial divorce under the DMMA and awarded the wife a *khul'* instead⁴⁹². A common rationale for such judgments is the inaccurate definition that the courts have given to cruelty. Section 2(viii) of the DMMA states that if a husband 'habitually assaults' his wife, then she has grounds for divorce. Unfortunately, the courts extended the 'habitual' element to all types of ill treatment outlined under the DMMA, inadvertently creating a higher standard of proof. The DMMA defines cruelty as a situation where a husband "habitually assaults" his wife and then states separately "or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment"⁴⁹³. It is manifestly clear that the 'habitual' element of the Act refers only to assault, and not to the remaining section of that clause. Nevertheless, courts have still justified their conclusions by stating that a wife must be "subjected to habitual cruel treatment"⁴⁹⁴. This, it is submitted, goes far

⁴⁹¹ Shahida Khan v. Abdul Rehman Khan 1984 PLD Lah. 365, para 5.

⁴⁹² Similarly, in Bashiran Bibi v. Bashir Ahmad (1987 PLD 376), the wife provided documentary evidence, supported by police records, a copy of the arrest warrant and a criminal complaint, that her husband had beaten her, causing her to flee to her mother's house. She was then abducted, along with her family, and tortured until she signed over property that she had inherited. Her complaint was also supported by medical evidence and strong testimony by her family. However, the court found that this was not enough to warrant 'cruelty' under S. 2 (viii) and ordered a *khul'*-based divorce.

⁴⁹³ S.2 (viii) (a) DMMA.

⁴⁹⁴ 1975 PLD Lah. 766 para (4). Similarly, in Abdul Majid v. Razia Bibi (1987 PLD 376), the wife sued for divorce under the DMMA and *khul'* as an alternate remedy. Under the DMMA, she relied on the grounds of cruelty, ill repute and misappropriation of property. The judge dismissed her claim under the DMMA, finding that there "was not enough evidence to come to a conclusion beyond any

beyond what is legislatively required as constituting the standard of proof. The DMMA does not require that the husband be 'habitually' cruel, or that he 'habitually' appropriates the property of his wife. A single act of cruelty or misappropriation of property should suffice under the law.

It is unfortunate that courts have not been clear in defining and distinguishing between the importance of granting a divorce under the DMMA and the financial consequences of granting a woman a *khul'*. If a wife obtains a judicial divorce under the DMMA, she is not liable to repay her husband any financial compensation. However, if she is granted a *khul'*, she is under an obligation to repay the *mahr* that her husband might have given to her at the time of marriage. Yet the courts continue to construe the applicability of the DMMA very narrowly, even when finding positively on one ground of the DMMA but still insisting on granting a *khul'*⁴⁹⁵. Given that the courts give no reasons in their judgments for this policy of promoting the *khul'* instead of issuing a remedy under the DMMA, the question naturally arises as to why this phenomenon occurs. Pearl and Mensky (1998) argue that the judiciary merely enforces its own social attitudes and cultural beliefs. This is difficult to contest, since the highly patriarchal nature of Pakistani society and culture has

reasonable doubt that the petitioner was habitually cruel to the respondent". See 1987 PLD 376 para. 8

⁴⁹⁵ See Muhammad Sadiq v. Mst Aisha (1975 PLD Lah. 615), where a court found that the chopping off of a wife's nose could not be termed 'habitually cruel' but the subsequent physical scars and the resultant psychological 'knots and barriers' would create such deep hatred between the parties that this would suffice for the wife to claim a *khul'*. See also Bibi Anwar Khatoon v. Gulab Shah (1988 PLD Kar. 602), where an 11-year-old girl's marriage to her 78-year-old impotent and violent husband was seen as being cruel, but the courts still passed a *khul'* decree.

already been briefly discussed in this thesis and elsewhere⁴⁹⁶. However, part of the blame may also lie in the complex political history of Pakistan and the enormous pressures put on the judiciary through successive military dictatorships. Law, religion and politics have always been inextricably linked in Pakistan, with the curtailing of freedoms in one sphere negatively impacting the other. In order to better understand why the courts refused to provide women with remedies under the statutory regulations, it is important to situate the development of the DMMA and the *khul'* within the changing political scene of Pakistan, particularly during the first forty years after independence when the judicial precedent was set, providing a socio-political context for the judgements discussed further below.

4.3 Pakistani Politics, the DMMA and the *Khul'*

After Pakistan gained independence from British rule in 1947, the newly formed state experienced great economic and social upheaval through the migration of millions of Muslims from India⁴⁹⁷. At first, the success of the anti-colonial movement looked to continue through political activism post-independence. It was during this

⁴⁹⁶ Maliha Gull Tarar and Venkat Pulla, "Patriarchy, Gender Violence and Poverty amongst Pakistani Women: A Social Work Inquiry," *International Journal of Social Work and Human Services Practice* 1, no. 2 (2014): 56-63; Valentine M. Moghadam, "Pakistan and the Politics of Gender in Modernising Societies: Iran, Pakistan and Afghanistan," *International Sociology* 7, no. 1 (1992): 35-53; Rubina Kidwai, *Domestic Violence in Pakistan: The Role of Patriarchy, Gender Roles, Culture of Honor, and Objectification and Commodification of Women* (Ph.D. thesis, Alliant International University, California School of Professional Psychology, Los Angeles, 2002).

⁴⁹⁷ Gyanesh Kudaisya and Tan Tai Yong, *The Aftermath of Partition in South Asia*, (Abingdon: Routledge, 2000), 8, who estimated the number of refugees at over 18 million for both nations.

period that the Rashid Commission was formed to review the family laws of Pakistan, with the aim of providing greater remedies and protection for women within their marital lives. When it reported in 1956 and gave its suggestions for major reforms, however, it generated heated debates and harsh criticism from religious parties that called its proposals un-Islamic⁴⁹⁸. Although President Field Marshall Ayub Khan implemented some of the Commission's proposals through the Muslim Family Law Ordinances in 1961 (MFLO), his ten-year rule of martial law (1957-1968) derailed any further political activism⁴⁹⁹. The struggle for women's rights dispersed as socialist groups endeavoured to maintain their identities under the new military regime rather than fight against gender inequalities⁵⁰⁰. Matters deteriorated further during the military rule of General Zia-ul-Haq from 1977 to 1988. In his first televised speech, General Zia promised to uphold the sanctity of the '*chadder* and *chardiwari*' ('the veil and the four walls')⁵⁰¹. The military dictatorship began the task of Islamising most of the country's institutions, which began a systematic process of rescinding women's rights⁵⁰². The combination of military and religion within state power proved devastating. Laws were passed by the military

⁴⁹⁸ Rahat Imran, "Legal Injustices: The Zina Hudood Ordinance of Pakistan and Its Implication for Women," *Journal of International Women's Studies* 7, 2 (2005): 79.

⁴⁹⁹ Farida Shaheed, "The Women's Movement in Pakistan: Challenges and Achievements," in *Women's Movement in the Global Era; the Power of Local Feminism*, ed. A Basu (Boulder: Westview Press), 91.

⁵⁰⁰ Farida Shaheed, "The Women's Movement in Pakistan," 91.

⁵⁰¹ Nighat Said Khan, "Up Against the State: The Women's Movement in Pakistan – Implications for the Global Women's Movement," Dame Nita Barrow Lecture Series, *Ontario Institute for Studies in Education of the University of Toronto*, accessed September 12th 2013.

<http://www.oise.utoronto.ca/cwse/UserFiles/File/UpAgainstTheState.pdf>

⁵⁰² For further details see Khawar Mumtaz & Fareeda Shaheed, *Women in Pakistan: Two Steps Forward, One Step Back?* (London: Zed Books: 1987), 77-122.

government that effectively made women second-class citizens: laws which were then justified in the name of Islam⁵⁰³. The most infamous of these laws were the Hudood Ordinances of 1979, which criminalised rape, *zina* (adultery), drunkenness and bearing false witness. The Ordinances made *zina* a criminal offence against the state⁵⁰⁴, with a maximum punishment of stoning to death for married Muslims and 100 lashes for un-married Muslims and non-Muslims⁵⁰⁵. Problems occurred when women accused men of rape. In order to prove the crime of rape, the new laws of evidence⁵⁰⁶ stated that the equivalent of four Muslim male witnesses must verify a woman's claim to sexual penetration and rape⁵⁰⁷. However, if a woman was unable to convince the court of her allegation of rape, this was deemed to be a confession of *zina*, with the woman therefore implicating herself and rendering herself liable to criminal prosecution⁵⁰⁸.

The abrogation of women's rights through these turbulent political times is also reflected in the judicial reasoning of this era. Many applications for divorce that should have been granted under the fault-based legislation, making the husband

⁵⁰³ Anita Weiss, "The Slow Yet Steady Path to Women's Empowerment in Pakistan", in *Islam, Gender and Social Change*, ed. Yvone Yazbeck Haddad and John Esposito (New York: Oxford University Press, 1998), 133.

⁵⁰⁴ Asma Jahanghir and Hina Jillani, *The Hudood Ordinances – A Divine Sanction?* (Lahore: Rhotas Books, 1990), 100.

⁵⁰⁵ The Offence of Zina Ordinance, VII of 1979, Art. 5.2

⁵⁰⁶ The Law of Evidence Act 1984.

⁵⁰⁷ Rahat Imran, "Legal Injustices," 88.

⁵⁰⁸ Jahanghir and Jillani, *The Hudood Ordinances*, 14. The "Human Development in South Asia 2000" report notes that more than half of all female prisoners in Pakistan have been accused under the *Zina* Hudood Ordinances. See "From Victim to the Accused; The *Zina* Ordinance of Pakistan", Human Development in South-Asia Pakistan 2000; The Gender Question; report prepared by Mahbub-ul-Haq, *Human Development Centre, Pakistan* (Oxford: Oxford University Press, 2000), 99.

culpable, were instead granted under a *khulʿ*, relieving the husband of any blame. The courts, undoubtedly aware of the strict political regime, became extremely reluctant to enforce the rights of women that openly criticised male dominance and male power to abuse their wives. Providing women with a remedy under the doctrine of *khulʿ*, where a woman is financially penalised for making her claim, might have helped to assuage male outcries that women were now being granted divorces irrespective of their husbands' objections, while still providing the relief that was so desperately needed. I would argue that this was a legal endeavour by the judiciary to bypass the state agenda without subjecting themselves to any state repercussions. Rather than grant women divorces as a result of the fault of the husband, which would have brought them into direct opposition to Zia's social and political aims, they used the doctrine of *khulʿ* to provide a legal remedy to women that was palatable to those in power. The 1980s were marked with a plethora of cases that not only granted women the right to a *khulʿ* but also lowered the legal threshold required in order to be granted one⁵⁰⁹.

This judicial enterprise also occurred during a period of intense political activism by women's groups designed to resist the legal changes brought about by the Hudood Ordinances and Laws of Evidence, which made it almost impossible to prove allegations of rape whilst increasing the likelihood of women being convicted of adultery. In 1975, young professional women formed a group to create awareness

⁵⁰⁹ See section 4.5 below.

regarding women's rights and development, called *Shirkat Gah*⁵¹⁰ ('place of participation'). Spurred on by the negative impact of these new laws, they formed the Women's Action Forum (WAF), which became a lobby group to defend women's rights. WAF attracted both individual women and women's groups from a wide political spectrum, but was based upon a specific agenda of repealing the Hudood Ordinances⁵¹¹. General Zia's measures galvanised women into militant action in the defence and extension of their rights⁵¹². They organised protests, sits-ins and demonstrations. Other women's groups, such as the Democratic Women's Association and the Women's Front⁵¹³, joined this struggle, which saw an unprecedented mass mobilisation of women⁵¹⁴. Although most belonged to the urban middle classes, the women from the Sindh province formed the first rural-based organisation for women, called the Sindhi Women's Movement⁵¹⁵. During these turbulent times, the courts did not adopt an openly confrontational route, as the women's rights activists did, which would have surely brought the wrath of General Zia down on the judiciary. Instead, after a few years of inertia, they worked quietly but consistently, and slowly developed an enforceable female-initiated divorce right. In later years, with the fall of the Zia regime, subsequent governments have been more tolerant of women's rights, and this has been reflected in the

⁵¹⁰ Mumtaz and Shaheed, *Women of Pakistan*, 67. *Shirkat Gah* literally means "a place of participation" and was formed with the aim of empowering women by increasing their access to information, resources, skills and decision-making

⁵¹¹ Mumtaz and Shaheed, *Women of Pakistan*, 74.

⁵¹² Hamza Alvi, "Pakistan: Women in a Changing Society", *Economic and Political Weekly*, 23, no. 26 (1988): 1328.

⁵¹³ Hamza Alvi, "Pakistan," 1328.

⁵¹⁴ Rahat Imran, "Legal Injustices," 93.

⁵¹⁵ Mumtaz Khawar and Yameema Mitha, *Pakistan: An Oxfam Country Profile*, (Oxford: Oxfam Publishing, 2003), 46.

positive judicial development of the *khul'*. The next section, however, will first trace the initial inertia of the judiciary and its narrow interpretation of the *khul'* before detailing its more positive role. Between 1944 and 1959 the courts refused to grant a *khul'* without a husband's consent, which meant that women found little or no relief if they wished to exit an unhappy marriage. However, in 1959, they passed a landmark case allowing the granting of a *khul'* irrespective of the husband's consent, which has paved the way to a slow yet steady path to the empowerment of women through the development of a no-fault, female-initiated divorce law.

4.4 Judicial Implementation of the *Khul'*: Traditional View Upheld

(1944-1959)

Between 1944 and 1959 the courts took a restrictive view of the *khul'*, interpreting Ḥanafī law as necessitating the husband's consent in female-initiated divorce. In an important case in 1944, the Lahore High Court dealt with two appeals from women in a single judgement where both had applied for divorce under S.2(viii) of the DMMA, alleging cruelty⁵¹⁶. The Court was faced with two questions. Could a court provide relief to a wife through the legal remedy of *khul'* without the husband's consent, and was incompatibility of temperament a valid ground for divorce under Islamic law? The High Court answered both questions in the negative. Justice Abdur Rahman, presenting the main judgement of the High Court, observed that it was quite possible for a wife to be physically capable of bearing the child of a man she

⁵¹⁶ Mst Umar Bibi v. Mohammad Din 1944 All Indian Law Reports 25 Lah. 542.

detests and thus could not validate a divorce on such a ground⁵¹⁷. Justice Rahman seemed particularly concerned about what he viewed as the dangers of creating liberal divorce rights for women. In his judgement he described women as being “fickle minded and impressionable” and claimed that due to this “temperamental” nature, they might seek divorce as a “passing fancy”, reducing the institution of marriage to a farce⁵¹⁸.

This antiquated and highly gendered reasoning was followed almost a decade later in the case of Sayeeda Khanam v. Muhammad Sami⁵¹⁹. A full bench of the High Court was convened. Commenting on the famous hadith of Jamila and Thābit, it held that the Prophet had not granted Jamīla a divorce in his judicial capacity; rather, he had ordered Thābit to grant the divorce. As Jamīla had agreed to return the garden, the court held that Thābit’s willingness for the marriage to be dissolved for financial advantage enabled the release of Jamīla⁵²⁰. The consensual nature of *khulʿ* in the hadith was seen as being of paramount importance. Where there was mutual agreement on the *khulʿ* and agreement upon what compensation the wife should give, a divorce would be given by the husband extra-judicially, without the interference of a judge or court of law. The court further held that the Prophet had adjudicated the matter in his capacity of ‘law-giver’, rather than in his judicial capacity, and that the law that he had established was that of *khulʿ* by consent⁵²¹.

⁵¹⁷ 1944.

⁵¹⁸ 1944 All Indian Law Reports 25 Lah. 543.

⁵¹⁹ 1952 PLD Lah. 113.

⁵²⁰ 1952 PLD Lah. 113 Judge Cornelius at p.113, 123.

⁵²¹ Ibid.

The court did not rely on any classical Ḥanafī jurists in coming to this decision but based their reasoning upon their own logic.

Unfortunately, for over a decade it was extremely difficult for women to obtain a legal remedy to vacate an unhappy marriage. The high standard of proof desired by the court, as well as a narrow interpretation of the DMMA's grounds, forced wives to sue for the alternate remedy of *khul'*. Not only was this financially detrimental to them, but this judicial remedy could only be obtained with the consent of the husband. Pearl and Mensky (1998)⁵²² believe that the courts hid behind their own barely-concealed social views of the matter, rather than address the principles of Muslim law. They argue that, rather than apply the provisions of the DMMA, the judges were far more content to uphold traditional Ḥanafī law⁵²³. Ironically, it is not Ḥanafī law that the judges were implementing, but a pseudo version of it that had been adopted by their British colonial rulers, and then reinforced by the judiciary and the '*ulamā*' themselves. Nevertheless, despite prevailing negative social attitudes to female marital freedom, the judiciary finally took up the legislative gauntlet for which the architects of the DMMA had so determinedly fought.

⁵²² Pearl and Mensky, *Muslim Family Law*, 316.

⁵²³ Pearl and Mensky, *Muslim Family Law*, 316.

4.5 Judicial Development of the *Khul'* Irrespective of a Husband's

Consent

In the ground breaking case of Balqis Fatima⁵²⁴, the court finally held that a wife is entitled to a *khul'* irrespective of her husband's desires⁵²⁵. Judge Kaikaus wrote the final judgement on behalf of the bench, which provides an illuminating insight into his judicial reasoning. He began his reasoning by referring to verse 2:229 of the Qur'ān, which had not been considered in the previous cases. Judge Kaikaus interpreted this verse as permitting dissolution of the marriage by the wife if she returns her *mahr* to her husband irrespective of her husband's wishes. He reasoned that the words 'if you fear' in the verse refer to '*ūlī al-amr*', i.e. the state or a judge, since the spouses are referred to in the third person as 'they' in the latter part of the verse. This verse was to be read as "if you [the judges] fear" that they [the spouses] "will not keep within the limits of Allah" then the judges have the right to rule against the continuation of the marriage. Judge Kaikaus argued that it would be meaningless for a judge to have the right to determine whether spouses had transgressed the limits of Allah but then have no right to do anything about such a transgression without a husband's consent⁵²⁶. This would mean that an arbitrary restriction would be placed on a judge's power to adjudicate.

⁵²⁴ Balqis Fatima v. Najm-ul-Ikram 1959 PLD Lah. 566.

⁵²⁵ Fyzee (1965) argued that this bypassed centuries of classical Ḥanafī law and in his opinion the decision in Sayeeda Khanum represented the classical view of the Ḥanafī jurists as understood in South Asia. See Asaf. A. Fyzee, *Cases in the Muhammadan Law of India and Pakistan* (Oxford: Oxford University Press, 1965), 170.

⁵²⁶ 1959 PLD Lah. 566, 572-573.

Judge Kaikaus supported his arguments, quoting the hadith of Jamīla and Thābit and another hadith regarding Thābit's second wife, Ḥabība. Unlike the case of Sayeeda Khanum, where the courts held that the Prophet had acted in his capacity as lawgiver, Judge Kaikaus stated that the Prophet, after listening to both women, ordered Thābit to divorce his wives after the return of the *mahr*. He analysed different accounts of the second divorce regarding Ḥabība, noting that words such as *khale sabilaha'* and *farqha'* were used to mean 'divorce her'. In neither case did the Prophet blame Thābit or make any pronouncements of the reasonableness of the wives' attitude. The Prophet did not ask Thābit if he agreed with his wife, but was satisfied that husband and wife could no longer live together⁵²⁷. Judge Kaikaus accepted that some of his reasonings were taken from the Mālikī *fiqh*, but the main thrust of his argument came from his assertion that whilst dealing with interpretations of the Qur'ān, the judiciary were not bound by the opinion of any classical jurists. If they were clear on what God or the Prophet intended, then it was their duty to abide by it⁵²⁸. Although Judge Kaikaus relied on Maulana Maududi's moral and legal arguments regarding women's right to seek dissolution of their marriage, he was of the view that authorities on Islamic law, be they past or present, were only to be used to assist jurists in interpreting the Qur'ān, with the final say being reserved for the judges.

⁵²⁷ 1959 PLD Lah. 566, 573-574, 586.

⁵²⁸ 1959 PLD Lah. 566, 584. He also up held the view that the compensation would still need to be paid in return for the granting of the *khul'*.

Clearly, the full bench was asserting its right to decipher the Qur'ān independently. The courts, rather than just stating and interpreting the law, now proposed to become its architects. They determined that they were the competent authority to determine the basic postulates of Islam derived from the Qur'ān and the hadith according to contemporary needs. In one decisive stroke, the exclusivity of the 'ulamā' was taken away by this "revolutionary conclusion of potentially far-reaching import"⁵²⁹. This decision was all the more remarkable since there had been a general reluctance in Islamic jurisprudence to provide judges with a meaningful role in the development of the law⁵³⁰. Although Judge Kaikaus's judgement was an extraordinary example of judicial activism⁵³¹, particularly when examined in the light of the social and cultural constraints of the time, his high-handedness in dealing with the classical authorities did not sit well with subsequent cases. It is unfortunate that at this important juncture, the High Court bench did not refer to the primary sources of the Ḥanafī *fiqh* and provide more solid reasoning to justify this decision. Unlike Thanawi's more nuanced approach in his fatwa, Judge Kaikaus's failure to provide classical Ḥanafī authorities in support of his arguments meant that

⁵²⁹ Lucy Carroll, "Qur'an: 299: A Charter Granted to the Wife," 106.

⁵³⁰ Christopher Ford, "Siayar-ization and its Discontents: International Law and Islam's Constitutional Crisis," *Texas International Law Journal* 30 (1995): 528.

⁵³¹ He also disagreed with the court's assessment that granting women a right to divorce by rendering up their dowries would make the institution of marriage meaningless (as held in the Sayeeda Khanam case). Instead he stated that if a man could divorce his wife at will, even though she was not to blame, "why should there be such a disparity between the rights of spouses?" (p. 592). Mindful of the fact that his reasoning could be challenged, Judge Kaikaus put an important limitation upon the exercise of this right. The wife, he argued, could not demand a divorce upon any 'passing fancy' but it was up to the court to decide, looking at the facts of the case, whether the rift between the spouses was serious enough to warrant dissolution of the marriage (p.593).

many judges simply refused to follow this new precedent, describing it as having been “born of the new-fangled ideas of the equality of spouses”⁵³².

It took almost a decade before the Supreme Court finally affirmed the ruling on the Balqis Fatima case, endorsing the view of Judge Kaikaus that under Muslim law a wife is entitled to a *khul'*, as of right, if she satisfies the court's conscience that refusal will mean forcing her into a hateful union⁵³³. The leading judgement was delivered by Judge S.A Rahman on behalf of the full bench, and has been described as reiterating many of the same arguments and referring to much of the same material as Judge Kaikaus in the Balqis Fatima case⁵³⁴. However, a closer study of the judgement reveals that this is in fact not the case. Rather, a more subtle approach was adopted by Justice Rahman, who took great pains to cite as many classical authorities as possible to support his reasoning and ensure the legitimacy of his claim. Although the judgement begins from the premise that *taqlīd* is a doctrine that was invented by followers of the four orthodox imams, who themselves had never claimed the conclusiveness of their opinions⁵³⁵, Judge Rahman did go on to rely on classical authorities in Islam for his decision. Within the main body of the judgement, he followed the interpretation of the words ‘if you fear’, delivered by Judge Kaikaus, as referring to *ūlī al-amr* or *qāḍīs*, but cited ‘Abd Allāh

⁵³² Mst. Resham Bibi v. Muhammad Shafi 1967 PLD AJK 32, 46. See also Ghulam Sakina v. Umar Baksh 1964 PLD SC 456, where the court refused to follow precedent in the Balqis Fatima case.

⁵³³ Mst Khurshid Bibi v. Muhammad Amin 1967 PLD SC 97 para (c).

⁵³⁴ See Lucy Carroll, “Qur’ān 2:299: A Charter Granted to the Wife?”, 10, and Alamghir Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study in Judicial Activism* (Oxford: Oxford University Press, 2001), 125.

⁵³⁵ 1967 PLD SC 97 para (a).

al-Qurṭubī's⁵³⁶ commentary on the Qur'ān, *al-Jāmi' li-Aḥkām al-Qur'ān*, as his authority on this point, supported by the views of 'Abd Allāh b. 'Abbās⁵³⁷ and Mālik b. Anas⁵³⁸. He also cited the famous Ḥanafī jurist Shāh Walī Allāh al-Dihlawī⁵³⁹ and al-Miṣrī al-Shāmī⁵⁴⁰, who stated that a wife's dislike of her husband was sufficient grounds to warrant a *khul'*, even if there is no fault of the husband. Yet, most importantly, he argued that although it is the view of some Ḥanafī 'ulamā' that a wife is not entitled to a *khul'* in the face of her husband's opposition, from his own research into the matter, he had concluded that there had been no such express treatment of this matter in the treatises of the Ḥanafī jurists of the formative period⁵⁴¹. Judge Rahman acknowledged that classical Ḥanafī jurists contend that *ṭalāq* is the exclusive right of the husband, but that they make no such claim with respect to the *khul'*⁵⁴². Whilst he did not delve deeper into the Ḥanafī view, he provided this as a justification to look elsewhere for answers. In doing so, he differentiated between a *mubāra'a*, as an extra-judicial *khul'* which can only occur with mutual consent, and a judicial *khul'*, where a judge or *qāḍī*s has the right to dissolve the marriage. If a wife can prove that the parties can no longer live within the limits prescribed by God, then "any other interpretation of the Qur'ānic verse

⁵³⁶ A famous classical *mufasssīr* of the 13th Century from Cordoba, of Mālikī origin.

⁵³⁷ The paternal cousin of the Holy Prophet and revered by Muslims for his expertise on the exegesis of the Qur'ān.

⁵³⁸ The founder of the Mālikī school of *fiqh*.

⁵³⁹ Qutb-ud-Dīn Ahmad ibn 'Abdul Rahīm, commonly known as Shāh Walīullāh and known as one of the founders of modern Islamic thought from the Indian Subcontinent. Justice Rahman quotes him from *al-Musawwa-min-Ahadith-al-Muatta* vol. 11. P. 60 at 1967 PLD SC 97 para (c).

⁵⁴⁰ A Sunni Shafī scholar of the 10th century A.D. Justice Rahman quotes from his book *Al-Mizan-ul-Kubra* vol. 11 p. 117, quoted at 1967 PLD SC 97 para (c).

⁵⁴¹ 1967 PLD SC 97 para (c).

⁵⁴² Ibid.

regarding *khul'* would deprive it of all efficacy as a charter granted to the wife"⁵⁴³.

Moreover, in respect of the hadith regarding Thābit and Jamīla, Justice Rahman did not interpret it according to his own reasoning, as Judge Kaikaus had. Instead, in order to distinguish this case from that of Sayeeda Khanum, he cited 'Abd Allāh al-Ḥakīm al-Nisābūrī⁵⁴⁴, Ibn 'Abd al-Barr⁵⁴⁵, Muhammad al-Shawkānī⁵⁴⁶ and Ibn Ḥajar al-'Asqalānī⁵⁴⁷ as authorities who stated that the Prophet had ordered Thābit to divorce his wife, irrespective of Thābit's consent, thus strengthening his own decision that a judge has the power to do the same in a wife's divorce petition.

This painstaking approach to rely on renowned and accepted classical authorities of Islam was crucial for the social acceptance of this judgement, since the *khul'* severely curtailed the power that men had held over women for many years. The need for husbands' approval had been a powerful negotiating tool, enabling husbands to seek financial recompense from wives desperate for release from unhappy marriages. Justice Rahman must have been aware that the precedent laid down in Balqis Fatima had not been followed and that most courts preferred to rely on Sayeeda Khanum. Justice Rahman's reasonings (representing the full bench of the Supreme Court) illustrate not only their judicial awareness of their role as

⁵⁴³ Ibid.

⁵⁴⁴ See *Al-Mustadrak 'alā al-Sahīhayn al-Mustadrak*. Al-Nishaburi is also known as Imam Hakim, and was a leading classical Sunni scholar and *muhaddith* of the 10th Century A.D.

⁵⁴⁵ See *Al-Isti'ab fī ma'rifat al-ashab*. 'Abd al-Barr was a Sunni Scholar belonging to the Mālikī school of the 11th Century A.D.

⁵⁴⁶ See *Nayl al-Awṭār*. Muhammad al-Shawkānī was a Yemeni sunni *mujtahid* of the 19th Century A.D.

⁵⁴⁷ See *Fath al-Bārī*. Ibn Ḥajar al-'Asqalānī was an eminent *Shafi* scholar of the 12th Century A.D.

lawmakers, but also the social consequences of their judgements. They clearly understood that the doctrine of legal precedent would not be enough to warrant this new application of the *khul'*. In order to ensure compliance and resist further opposition, they had to justify their stance within the classical legal body of Islam. Unlike Justice Kaikaus, who utilised his own interpretations of the Qur'ān and the hadith, Justice Rahman paid due deference to the classical jurists of Islam, creating an estoppel for any future agitation against this case.

In 1968, Hinchcliffe (1968a) observed that although this decision now meant that a matrimonial offence no longer needed to be proven, and went a long way towards making the position of spouses equal, the fact that a wife still had to prove that life was impossible with her husband and be prepared to repay the benefits she had received from the marriage, despite her not being at fault, was still not a happy state of affairs⁵⁴⁸. She also predicted that without specific legislation, it was easy to visualise a situation where a husband would not wish to repudiate his wife, for fear of losing the *mahr*, but might still make life difficult for her without contravening the provisions of the DMMA. This would put him in a powerful position either to negotiate a *mubāra'a* in return for the relinquishment of the wife's dower, or to force his wife to seek a judicial *khul'* through the courts to her financial detriment⁵⁴⁹. Initially, it appeared that Hinchcliffe's (1968a) reservations about the judicial decision in the Khurshid Begum case would be borne out, as many lower courts

⁵⁴⁸ Hinchcliffe, "Divorce in Pakistan," 24.

⁵⁴⁹ Hinchcliffe, "Divorce in Pakistan," 25.

were still reluctant to grant a woman a *khul'*⁵⁵⁰. However, as more and more *khul'* cases were brought before the courts, the judiciary finally began to chastise the lower courts' failure to follow precedent and implement the *khul'*⁵⁵¹. The Supreme Court held that a wife need not prove her aversion to her husband, but must simply demonstrate that she was unable to live a life of peace and harmony in her marriage, to warrant granting her a *khul'*⁵⁵².

4.6 Judicial Development of a No-Fault *Khul'*

This judgement⁵⁵³ proved to be a catalyst, and paved the way for a judicial enterprise to make the *khul'* a practical avenue for women to take in order to escape an unhappy marriage. This judgement was passed during the height of the repressive regime of General Zia, and contrasted starkly with the cases decided under the fault-based grounds of the DMMA, where the courts consistently failed to provide remedies for women seeking divorce. Over the last thirty years, since the demise of the Zia regime, Pakistan has been oscillating between democracy and military rule. Successive governments have promised to improve the socio-economic and legal rights of women, and have passed limited measures to this

⁵⁵⁰ See Siddiq v. Sharfan 1968 PLD Lah. 411, where the court held that allowing a *khul'* based on the wife's admission to adultery would threaten the institution of marriage, which was a sacred tie in the eyes of God.

⁵⁵¹ See Hakimzadi v. Nawaz Ali 1972 PLD Kar. 540, Abdul Rahim v. Shahida Khan 1984 PLD S.C 329.

⁵⁵² Abdul Rahim v. Shahida Khan 1984 PLD S.C 329.

⁵⁵³ Ibid.

effect⁵⁵⁴. Although their effectiveness has not been profound, they have resulted in greater political awareness that an improvement in the rights of disenfranchised groups, particularly women, must be an element of any party's agenda if it wishes to enjoy the support of the masses. This consciousness also resonates in recent Pakistani divorce jurisprudence, which appreciates the need to adopt female-friendly interpretations of the law. Whilst adjudicating *khul'* decisions, court judgements now reflect sensitivity to human emotion and recognise that marital splits are very personal in nature and cannot be objectively defined. Courts have held that aversion or hatred between couples can develop at any time, and cannot be determined by any objective "measurement, scale or weight"⁵⁵⁵. Hatred, abomination or detestation between spouses "may arise from any incident of a single word"⁵⁵⁶. Moreover, it is not even necessary on the part of the wife to produce evidence of facts and circumstance to show her hatred⁵⁵⁷ – it is merely necessary that the court's conscience should be satisfied that to not dissolve the marriage would mean a hateful union⁵⁵⁸. The judiciary recognises that emotional dynamics within marriages cannot be subject to rational analysis and are "often at times incomprehensible"⁵⁵⁹.

⁵⁵⁴ Weiss, "The Slow Yet Steady Path to Women's Empowerment in Pakistan," 133.

⁵⁵⁵ M. Mahmood, *The Code of Muslim Family Law; Amendment and Case Law Up To Date* (Lahore: Pakistan Law Times Publications, 2006), 356.

⁵⁵⁶ See Akhtar Ali Kureshe, *Twenty Nine Years' Family Law Digest 1978-2006* (Lahore: National Law Book House, 2006), quoting case 2004 UC 739 at 397.

⁵⁵⁷ *Mst Ruqia Bibi v. Muhammad Munir* 1999 MLD 812.

⁵⁵⁸ The court in *Shakila Bibi v. Muhammad Farooq*, 1994 CLC 231, held that a wife does not need to justify the reasons why she has developed hatred for her husband, presumably meaning that she no longer needs to provide any evidence to that effect either.

⁵⁵⁹ *Naseem Akhtar v. Muhammad Rafique* 2005 PLD SC 293 para (5).

In the case of *Naseem Akthar v. Muhammad Rafique*⁵⁶⁰, for example, the wife had been refused a *khul'* by the family court on the basis that she had been unable to provide evidence in support of her *khul'* application. But when the case reached the Supreme Court, Justice Javed Iqbal observed that emotions of hatred and aversion could not be confined to a limited sphere. He argued that the courts had not created any mechanism to express 'hatred or aversion' in a definitive manner, but the fact that the wife had filed a petition for *khul'* was in itself demonstrative of the fact that she did not want to live with her husband and indicated a degree of hatred and aversion on her part⁵⁶¹. A primary reason for judicial facilitation of the *khul'* appears to be that courts are appreciative of the fact that Pakistani culture frowns upon divorce in general and *khul'* divorces in particular, and so the very fact that a woman is prepared to circumvent these social constraints is sufficient evidence of the seriousness of her claim. The courts are also mindful of the fact that it is often extremely difficult to prove matrimonial offences, as illustrated earlier in the failure of women to find remedies under the statutory provisions of the DMMA. Witnesses to the events invariably belong to the husband's extended family, as many women leave their homes to take up residence in this extended network.

The courts are notably more concerned with the emotional well-being of women than with producing an objective standard of hatred. If a wife fails to invoke words

⁵⁶⁰ Ibid.

⁵⁶¹ Ibid.

of hatred in her statement, this has not been held to be fatal to her plea⁵⁶². Even if the causes of the wife's aversion to her husband are not based on any substantial reasons, courts have held that it is their duty to look at the wife's state of mind rather than on the basis of this state⁵⁶³. Such has been the extent of the judicial enterprise to grant a *khul'* that a woman has merely to make a statement of repugnance that is sufficient to satisfy the courts that she no longer wishes to live with her husband. A wife's claim that she would be "rather shot with a bullet" than live with her husband⁵⁶⁴, or her desire to spit on her husband⁵⁶⁵, have been taken as ample proof to justify the granting of a *khul'*. Similarly, a wife's declaration that she would "prefer to die or drown in the river than to live in the house of her husband⁵⁶⁶" or would prefer to die than to live with her husband⁵⁶⁷ have all been accepted as sufficient evidence to warrant a dissolution.

Surprisingly, this sympathetic approach has also been taken in cases where a *khul'* is sought as a result of polygamous marriages, which are perfectly legitimate under Ḥanafī law. The institution of marriage has been described as being based on love and mutual respect, which will inevitably shatter upon a husband's revelation of a

⁵⁶² Ghulam Zohra v. Faiz Rasool 1988 MLD 1353.

⁵⁶³ 1988 MLD 1353 para (4).

⁵⁶⁴ Mst. Rashidan Bibi v. Bashir Ahmed, 1993 KLR CC 31, 32.

⁵⁶⁵ Mst. Shah Begum v. District Judge, Saikot, PLD 1995 Lah. 19, 26.

⁵⁶⁶ Kureshie, *Twenty Nine Years' Family Law Digest*, quoting case 2001 CLC 1759 at 344.

⁵⁶⁷ Kureshie, *Twenty Nine Years' Family Law Digest*, quoting case 2000 SD 560 at 343. In Mst. Nazir v. Additional District Judge Rhaim Yarkahan, 1995 CLC 296, 297–98, the court categorically stated that a statement by the wife that she hates her husband is all that it takes to affect a *khul'*.

second marriage⁵⁶⁸. In *Allah Ditta v. Judge Family Court*⁵⁶⁹ the husband had contracted a second marriage without the consent of his first wife. Justice Muhammad Naseem accepted that the wife's detestation of this act was "well imagined", and based his judgement on the wife's broken heart. "Such conduct of the husband towards the wife certainly breaks her heart if not her bones, and when the heart is broken it is simply immaterial if the bones are intact"⁵⁷⁰, he ruled. It is heartening to see this judicial attitude, where the courts appreciate the emotional damage that a second marriage may inflict on a woman.

The compassion in the judicial rhetoric that pervades the cases highlighted above suggests that a primary interest of the courts is to circumvent the patriarchal tendencies of Pakistani culture through the promotion of the doctrine of *khul'*. In the name of Islam, sensitivity is shown to the domestic happiness of women; their feelings are discussed and concern is paid to their emotional satisfaction. This seems to defy conservative Pakistani society, which is littered with male authority, particularly in matters of the husband's authority. Haider (2000) argues that this is part of the courts' agenda for supporting marital and domestic happiness "for love and perhaps even romance"⁵⁷¹. Certainly, love is seen as a key element in marital bliss by courts, which declare that if a wife does not love her husband, then she has

⁵⁶⁸ Jan Ali v. Mst. Gul Raja 1994 PLD 245 para (5).

⁵⁶⁹ 1995 MLD Lah. 1852.

⁵⁷⁰ 1995 MLD Lah. 1852 para (3). In this particular case, the *khul'* was granted unconditionally without any consideration to be paid by the wife, as the judge held that the husband had presented no cogent evidence to the contrary.

⁵⁷¹ Nadya Haider, "Islamic Legal Reform," 327.

no option but to leave him⁵⁷². A wife's inability to love her husband has been set as one of the standards of proof for a *khul'*⁵⁷³, as are a wife's inner feelings for her husband, which are considered to be of paramount importance when deciding *khul'* cases⁵⁷⁴.

Equality and justice also play a key role when determining whether a marriage should persist⁵⁷⁵. The courts have described marriages as 'unfair and cruel' wherever women have been forced to remain and husbands treat them "as if they were chattels which could be parted at will"⁵⁷⁶. A wife need not come out with the sort of logical, objective and sufficient reasons that would satisfy an ordinary court⁵⁷⁷ so long as the marital court is satisfied that there is no possibility of the parties living in harmony⁵⁷⁸. Courts are loath to allow unhappy marriages to continue, holding that "it is better to separate than to live in an atmosphere perpetually saturated with suspicion, mutual distrust, discord and hatred for each other. In an atmosphere of the type aforementioned, human life becomes a mere waste"⁵⁷⁹. Judges have painted an idealistic, romantic vision of marriage justified

⁵⁷² In the case of Saki Muhammad v. Taj Begum 1985 CLC 734, 737, the court stated: "when the spouses fail to maintain mutual respect, confidence and love there develops extreme hatred and separation is the only solution which the courts should order".

⁵⁷³ Jan Ali v. Jan Raja PLD 1994 Pesh. 245, 249.

⁵⁷⁴ Muhammad Arif Khan v. Shakoor Akhtar 1999 YLR 985.

⁵⁷⁵ Hafiza Bibi v. District Judge Narowal 1995 MLD Lah. 136 para (10).

⁵⁷⁶ Abdul Ghafoor v. Judge Family Court 1992 CLC Lah. 2201 para 6.

⁵⁷⁷ Mst. Balqis Fatima v. Najm-ul-Qureshi, PLD 1959 Lah. 566, 577.

⁵⁷⁸ Muhammad Yaqoob v. Shagufta Begum 1981 CLC 143 para (b). See also Saffiya Bibi v. Fazal Din 2000 YLR 2678, where the judge refused to force a reunion that would 'give birth to a hateful reunion'.

⁵⁷⁹ Muhammad Amin v. Judge Family Court 2001 MLD Lah. 52, para (3).

upon Islamic premise, reiterating on many occasions that “Islam does not thrust upon parties a marriage devoid of harmony and happiness”⁵⁸⁰. A happy and content marriage is held up as an Islamic precept and a sacred goal⁵⁸¹.

It is surprising to note that women are not condemned for seeking a *khul'* or made to feel responsible for breaking up a family, even where there are children involved. Indeed, on occasion courts have even criticised and condemned those women who are forced into 'hateful unions' but still do not want a *khul'* and are prepared to live even in “those disgusted and disappointed unions”⁵⁸². Courts feel duty bound to grant a *khul'* when spouses develop hatred and disrespect⁵⁸³, likening this to the saving of two living souls from the agony of a hateful union⁵⁸⁴.

⁵⁸⁰ Muhammad Rizwan v. Samina Khatoon PLJ 1989 Kar. 239, 240.

⁵⁸¹ Muhammad Rizwan v. Samina Khatoon PLJ 1989 Kar. 239, para (9).

⁵⁸² Kureshie, *Twenty Nine Years' Family Law Digest*, quoting case 2004 UC 739 at 397.

⁵⁸³ Kureshie, *Twenty Nine Years' Family Law Digest*, quoting case 1999 SD 736 at 353.

⁵⁸⁴ Inamul Haque v. Sharifa Bibi 1993 CLC 46 para (10). There have been instances where the wife has neither expressly requested a *khul'* nor even expressed her hatred of her husband, yet still the court has taken it upon itself, having considered the facts of the case, to invoke a *khul'* on behalf of the wife. See Mir Qualam Khan v. Shamin Bibi, 1995 CLC 731. In another case, although the wife did not make a plea of *khul'* in her plaint for dissolution of marriage, the court still granted the wife a *khul'*, as she had decided that she no longer wished to live with her husband and was firm in her stance. The court held that it merely had to satisfy its conscience to this effect. See Kureshie, *Twenty Nine Years' Family Law Digest*, quoting case 2000 UC 162 at p. 341.

4.7 Judicial Relaxation in the Implementation of Compensation

Despite this liberal approach to the implementation of *khulʿ*, a fundamental problem lies in the notion that women are essentially buying their freedom⁵⁸⁵, perpetuating the perception that women's divorce rights are inferior to those of men. As illustrated earlier, in Chapter Two, despite classical Ḥanafī jurisprudence to the contrary, contemporary interpretations of Ḥanafī law state that a woman who wishes to apply for a *khulʿ* must repay any benefit she may have received at the time of her marriage to her husband, normally constituting her *mahr*. This, however, can create an onerous duty upon the wife, who may not have the resources to readily repay her husband, whilst at the same time it may empower the husband to settle terms to his financial advantage. The gender disparities that exist in Pakistan are extremely wide. Financial independence for women in Pakistan is an uncommon phenomenon, with women comprising only 21.8 per cent of Pakistan's labour force⁵⁸⁶. This is exacerbated by low literacy rates, with a school dropout rate for girls before grade 5 of 77 per cent⁵⁸⁷. Lack of financial independence means that the repayment of the *mahr* can be an arduous liability for women, placing men in an extremely powerful position when seeking to dissolve a marriage. It is important to note that until 2002, there was no legal statute in Pakistan that dealt exclusively with the mechanism of the *khulʿ*; consequently, all problems pertaining to the interpretation of the *khulʿ*, including compensation, fell within the domain of the

⁵⁸⁵ Monsoor, *From Patriarchy to Gender Equity*, 190.

⁵⁸⁶ Pakistan One United Nations Program Report 2013 -2017 (2013) 10.

⁵⁸⁷ Ibid.

judiciary⁵⁸⁸. An overview of recent case law demonstrates that Pakistani courts have risen to this challenge, creating a ‘no-fault’ divorce law paralleled by a sensitive approach to financial relief. The cases presented below illustrate judicial awareness that the economic vulnerability of divorced women in the South Asian subcontinent is a major socio-legal challenge facing Muslims⁵⁸⁹. Rather than merely lowering the evidential requirements of granting a *khulʿ*, the courts have gone further and created ingenious mechanisms to bypass these financial liabilities.

The courts have begun from the premise that payment of consideration is not a punishment of the wife for daring to demand a *khulʿ*, or compensation for the husband for the usurping of his right to object. Instead, it stems from the financial inequality of male and female dissolution rights. The duty to return the *mahr* by the wife is equal in nature to the duty of a husband to forego his claim to the *mahr* if he pronounces a repudiation (*ṭalāq*)⁵⁹⁰. Upon pronouncement of a *ṭalāq*, a husband must always return the total amount of the *mahr* that was promised to his wife⁵⁹¹.

However, the Pakistani courts have been much more lenient in enforcing the compensation rule with respect to women, and have responded very scathingly towards men who prolong litigation in order to seek vengeance against ‘poor

⁵⁸⁸ In 2002 the Family Courts Amendment Ordinance was passed, amending the Family Courts Act 1964 (FCA). S.10 (4) of the FCA was empowered to formally regulate petitions regarding the *khulʿ* with the following proviso added: “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”.

⁵⁸⁹ Lucy Carroll, “Qurʾān 2.299: A Charter Granted to the Wife,” 126.

⁵⁹⁰ 2004 SD 894 quoted by Kureshie, *Twenty Nine Years Family Laws Digest*, 383.

⁵⁹¹ Esposito and De-Long, *Women in Muslim Family Law*, 23, 25.

women'⁵⁹². They have devised mechanisms to provide as much relief as possible to wives and to assist them in gaining a more financially viable divorce.

The courts have enforced an important principle that a woman is only liable to repay the exact amount of the *mahr* given to her at the time of the marriage, and nothing more⁵⁹³. This is significant, as a cultural aspect of marriage in Pakistan is the dowry. Often, women do not receive any *mahr* from their husbands, but instead bring many household items, jewellery and even money to the marriage as a sign of status and respect. In *Perveen Begum v. Muhammad Ali*⁵⁹⁴, the wife had not been paid any *mahr* by her husband, but had brought many household items to the marriage that together were termed her dowry. The Family Court granted her a *khul'*, but ordered that she allow her husband to retain this dowry as compensation. Upon appeal, the High Court held that the husband could not take back more than he had given to his wife, as this was a deviation from the established traditions of the Prophet. Judge Zaidi argued that although Mālikī and Shāfi'ī laws allow the husband to take back more than the *mahr* upon a *khul'*, this is highly disapproved of by Abu Ḥanīfa⁵⁹⁵. Judge Zaidi was also concerned about the husband's superior right to dissolve a marriage unilaterally whenever he likes, without providing a reason. Judge Zaidi acknowledged that it is the husband who controls the marital ties, and

⁵⁹² *Muhammad Khan v. Zarina Begum* 1975 P.L.D 27.

⁵⁹³ *Shamshad Begum v. Abdul Haque* 1977 PLD Kar. 855, 857, 858. The High Court was extremely critical of the lower court's decision in awarding an inflated dowry to the husband. Justice Channa found that the lower courts were more concerned with the husband's future financial prospects of securing another wife rather than with ascertaining the correct amount of *mahr* due, calling such an act "patently illegal".

⁵⁹⁴ 1981 PLD LAH 116.

⁵⁹⁵ 1981 PLD LAH 116 para (8). Judge Zaidi notes that although al-*Shaybānī* considers this a lawful act, it is still a loathsome act.

that this dominant position is open to abuse, as “there is always a likelihood of fleecing and robbing helpless and poor wives by some revengeful husbands”⁵⁹⁶.

Quoting the hadith of Thābit and Jamila, he observed that the Prophet only ordered the return of the garden, which was decided by the Prophet to strike a balance and eliminate any chance of exploitation and extortion “at the hands of merciless husbands”⁵⁹⁷.

In order to reduce the monetary burden on women and enable them to be in a stronger position to be able to afford a *khulʿ*, the courts have narrowed the definition of what constitutes the benefits they must return, excluding, for example, expenses incurred on a wife’s education⁵⁹⁸ or money paid to a wife’s grandfather⁵⁹⁹. In several cases, the courts have held that payments paid to the father or parents of the wife at the time of marriage are not recoverable, since the *mahr* must be paid *personally* to the wife⁶⁰⁰. Ahanger (1993) laments the injustice of these decisions⁶⁰¹, as it is common in Pakistan that the parents of the bride will receive the *mahr* on

⁵⁹⁶ 1981 PLD LAH 116 para (10).

⁵⁹⁷ 1981 PLD LAH 116 para (12). See also Abdul Sattar v. Mst. Kalsoom 2006 PLD KAR. 273 and Muhammad Zafar v. Judge Family Court 2005 CLC 1844.

⁵⁹⁸ Malik Sanaullah v. Mst. Rohella Hassan 1996 MLD 702, 703.

⁵⁹⁹ Muhammad Aslam v. Kuasar Perveen 1987 CLC 256, 259.

⁶⁰⁰ In Hashim v. Family Court Judge 2002 CLC 1409, although the marriage contract showed that the husband had paid 95,000 rupees to his wife’s father in return for her hand in marriage, the court held that the husband had failed to prove that his wife had received the monies personally. In Ghulam Sarwar v. Muniran 1984 CLC 1688, the court held that a sum of 10,000 rupees paid to the wife’s parents was not recoverable as benefits to be returned upon a *khulʿ*. See also Ghulam Muhammad v. Noor Bibi 1985 CLC 2540.

⁶⁰¹ Mohammad Ahanger, “Compensation in Khul: An Appraisal of Judicial Interpretation in Pakistan,” *Islamic and Comparative Law Quarterly* 13, no. 2 (1993): 125.

their daughter's behalf, and that they have the sole discretion to retain it for themselves or return it to their daughter. Most Pakistani parents pay for their daughters' weddings, and thus the *mahr* provides some recompense for that. Although this is a common local custom, such cultural attitudes actually contravene the purpose of the *mahr* in Islamic law, which is a financial gift that should be given directly to the wife for her to dispose of as she pleases. Technically, it is a benefit that she has the right to negotiate herself for her personal use, but in practical terms this is rarely the case and instead is relegated to the sidelines during the contractual stages of her marriage. In fact, the groom's family will often present gold or other valuables to the wife, but not include them as part of the *mahr* in the marriage contract in order to deprive the wife of full property rights⁶⁰². This is also done because the likelihood of a husband divorcing his wife is much higher than that of a wife demanding a *khul'*. In the case of the former, the husband must forfeit whatever *mahr* he has stipulated in the marriage contract. In order to avoid this future penalty, then, the *mahr* is sometimes kept to a bare minimum, with gifts given to the wife in the hope that they will be more easily retained in the event of a breakup of the marriage. Mindful of this fact, the courts have held that under no circumstances is the wife obligated to return bridal gifts given to her by her husband other than by way of the dower⁶⁰³.

⁶⁰² In the case of Shakeel Saood Dhon v. Rizwana Khanum and another (PLD 2012 Lahore 43), the court held that the word 'dower' had to be given its ordinary and plain meaning and could not be stretched to include bridal gifts or benefits other than the dower received by the wife. If gold was given but not specifically stipulated as the *mahr*, then this was not to be returned.

⁶⁰³ Abdul Sattar v. Mst Kalsoom 2006 PLD Kar. 272.

Even where a husband has proved payment of benefits to his wife personally, courts have further diminished such payments upon the basis of the reciprocal benefits that the wife may have received during the marriage⁶⁰⁴. This may include the spouses continuously living together⁶⁰⁵, a wife's housekeeping duties, and her looking after the children⁶⁰⁶. All of these duties are considered to be benefits received by a husband from his wife, and counteract a claim for the return of the *mahr*. The courts have also taken into account a wife's ability to repay the *mahr* when coming to their decisions, especially where a wife may face financial hardship⁶⁰⁷. In the case of *Auranzeb v. Gulnaz*⁶⁰⁸ the parties had been married for one-and-a-half years. The court held that this length of time could be treated as sufficient reciprocal benefit received by the husband for a dower of 42,000 rupees. The court also observed that, since the wife belonged to a poorer family, she was not in a position to repay the dower, and therefore ordered the *khul'* without any compensation to the husband⁶⁰⁹.

Whilst adjudicating what benefits must be returned, the courts are also reluctant to enforce *mahr* repayments when the husband is found to be at fault. In *Perveen Begum v. Muhammad Ali*⁶¹⁰ the court justified its position by following Muḥammad Shaybānī's who asserts that when cruelty comes from the husband's side, his

⁶⁰⁴ *Saqlain Zaheer v. Mst. Zaibun Nisa alias Zaibi* 1988 MLD 427.

⁶⁰⁵ *Mst. Balqis Fatima v. Najmul Ikram Qureshi* 1959 PLD Lah. 566.

⁶⁰⁶ *Saqlain Zaheer v. Mst. Zaibun Nisa alias Zaibi* 1988 MLD 427.

⁶⁰⁷ *Muhammad Khalil v. Shazia Iqbal* 2006 CLC 1033.

⁶⁰⁸ 2006 PLD Kar. 563.

⁶⁰⁹ 2006 PLD Kar. 563 para (9).

⁶¹⁰ 1981 PLD Lah. 116.

request for compensation for the *khul'* is unlawful⁶¹¹. This was reiterated by the courts after applying the law as laid down in the *al-Hidāya*⁶¹² and later clarified by the Peshawar High Court⁶¹³. In this case, the wife applied for a *khul'* on the basis of the cruelty of her husband and requested the return of 15 *tola*⁶¹⁴ of gold jewellery that constituted her *mahr*. The court formulated its question as follows: does the court have the power to refuse the return of the dower to the husband, or to release him from payment of a deferred dower, when a wife is compelled to resort to *khul'* due to her husband's cruelty?⁶¹⁵ The court considered the Qur'ānic verse 2:299 in the light of the hadith and the interpretations put forward by classical⁶¹⁶ and modern jurists⁶¹⁷. They found that although a husband is entitled to receive consideration from his wife in lieu of a *khul'*, this is not an absolute entitlement. The entitlement is affected by *nushūz*: cruelty. The court explained that Islam preaches love and mutual affection, and aggressively condemns cruelty in all its manifestations⁶¹⁸. If there is evidence to show that a husband's aggressiveness has compelled a wife to seek dissolution of her marriage, then the court has the power

⁶¹¹ 1981 PLD Lah. 116 para (9).

⁶¹² Anees Ahmad v. Uzma 1998 PLD Lah. 52.

⁶¹³ Karim Ullah v. Shabana 2003 PLD Pesh. 146.

⁶¹⁴ '*Tola*' is the common unit of weight used for gold, equivalent to 11.33 grams of gold.

⁶¹⁵ Karim Ullah v. Shabana 2003 PLD Pesh. 146.

⁶¹⁶ The courts relied on *Radd al-Muhtār 'alā Durr al-Mukhtār* by 18th century Islamic scholar Ibn 'Ābidīn; *Fatawa-e-Alamgiri*, a compilation of *Sunni* laws primarily based on Ḥanafī principles; *Fath al-Barī* a commentary on *Sahih Bukhari* by Ibn Ḥajar Al-'Asqalānī and *Kitab-ul-Fiqā Ala Mazaahib-e-Arbaa* by Abdur Rehman Aljazeera. See Karim Ullah v. Shabana 2003 PLD Pesh. 146 para (7).

⁶¹⁷ *Tafheem-ul-Qur'ān* by Maulana Abul Aala Maudoodi.

⁶¹⁸ 2003 PLD Pesh. 146 para (11).

to refuse the dower to the husband, or to refuse to release him from the liability to pay the dower⁶¹⁹.

On a more philosophical note, the court justified its conclusion on the premise that automatic payment of compensation on the request of a *khul'* would allow husbands to manipulate this provision. Their "cruelty would be purpose-orientated" to break the bonds of marriage at the financial expense of the wife⁶²⁰. One of the main criticisms levelled at the *khul'* is the fact that a wife has to purchase her freedom as opposed to having a right free from any financial consideration. Although this is the prevailing image of a *khul'*, it is not something the courts have taken for granted. They have determined that there is no automatic right to benefits in return for a *khul'*, which would be decided by the facts and circumstances of each case⁶²¹. The courts reiterated this view in the recent case of *Nasir v. Rubina*⁶²², where it was held that it is up to the Family Court to determine the quantity of benefits that a wife is liable to return to her husband. In this particular case, the court took into account the period of wedlock, the birth of the two children and the wife's detestation of her husband's polygamous marriage, which all resulted in the court granting the wife a *khul'* without the repayment of any dower⁶²³.

⁶¹⁹ Ibid., 13.

⁶²⁰ Ibid., 12.

⁶²¹ *Razia Begum v. Saqir Ahmad* 1988 CLC Que. 1586.

⁶²² 2012 M L D 1576 Peshawar, para (9).

⁶²³ In the case of *Abdul Aleem Khan v. Tabinda Nazeer Qazi* 2011P L D Kar. 196, the court observed that "if a husband contends that a *khul'* cannot be granted without restitution of the dower and other benefits are accepted, then a destitute wife, who is found otherwise entitled to *khul'*, will stand deprived of the right simply because

What is most interesting is that even if a wife is granted a *khul'* conditional upon payment of benefits to her husband, failure to fulfil this condition creates a civil liability only⁶²⁴. The courts have held that the return of benefits is not a condition precedent to the dissolution of marriage. Even if a *khul'* is decreed conditional upon the repayment of the dower, failure to repay the dower does not affect the validity of the *khul'*, which still operates to dissolve the marriage⁶²⁵. Non-payment of the *mahr* neither negates the granting of a *khul'* nor retroactively invalidates the decree. Courts have been categorical in their judgements that granting a *khul'* is not dependent upon the wife repaying the *mahr* first, meaning that failure to fulfil this condition does not render the *khul'* ineffective⁶²⁶. The Supreme Court of Pakistan has endorsed this position, holding that a husband has a right to pursue the matter in the civil courts but cannot contest the *khul'* itself. These cases illustrate that the courts are well aware of the economic disadvantages faced by women in Pakistani society. During the life of a marriage, wives are often completely financially dependent upon their husbands, so any financial liability incurred upon its dissolution is an onerous one to bear. It appears that the courts are seeking to redress the economic imbalance faced by women Pakistan by sending a clear message that women must be financially compensated when a marriage contract is

of her incapacity to return the benefits, which will be highly unfair and against the spirit of law and justice" (para 6).

⁶²⁴ Dr. Aghlaq Ahmed v. Kishwar Sultana 1983 PLD SC 169.

⁶²⁵ Saima Akbar v. Muhammad Zubair 1990 PLD Lah. 71.

⁶²⁶ See also Muhammad Shabbir v. Mst. Zahida and others 1991 CLC 1541 and Dilshad v. Judge, Family Court, Kharian and another 1991 CLC 1564, where the husband's right to recover the *mahr* was seen as a civil liability only.

negotiated, but that upon its dissolution, they will take a number of factors into account when deciding what must actually be repaid.

4.8 Conclusion

The development of female-initiated divorce law in Pakistan illustrates the dilemma that the courts have faced in providing legal remedies for women that are palatable to Pakistani Muslim men. Law is not practiced in a vacuum, and its interpretation and implementation are affected by the social, cultural and religious norms of the time. The restrictive implementation of the statutory provisions, where judges would have had to find men at fault whilst taking away from them their exclusive monopoly on divorce rights, proved too difficult a route for the courts, which are also products of the patriarchal social structure of Pakistani society, to pursue. Rather than ease evidential standards, the judiciary elevated the 'fault' threshold that a wife needed to prove a divorce, making the DMMA an impotent legislative endeavour.

As for the *khul'*, for a period of fifteen years the judiciary interpreted this according to the principles of contemporary Ḥanafī 'ulamā' as opposed to the classical jurists of the past. This, though, did not take into account the incompatibility of these rules with the changing social conditions of Pakistani society: a society that heavily favours men, where women are underprivileged, economically disadvantaged and generally considered as the weaker segment of society. Having failed to make the

DMMA into a potent remedy for women, the judiciary finally realised that, rather than faithfully follow these ‘ulamā’, they needed to take into consideration the economic, cultural and social changes that have taken place in the intervening years, and to adapt and adjust the law according to the pressing social needs of the time. They thus formulated an interpretation of the *khulʿ* that was in fact more in line with classical Ḥanafī jurists of the formative period of Islam.

The judicial activism exhibited by the courts is truly astonishing when compared to its earlier gendered reasoning under the statutory legislation. This lends credence to the belief that much of the negative rhetoric displayed in the earlier cases was a legislative strategy adopted by the courts to ensure that women gained a legal remedy but without alienating men en-masse. Failure to provide remedies under the DMMA meant that men were not overtly blamed for their marital breakdown. However, providing divorces under the *khulʿ* meant that women gained an easier exit from their marriages whilst the courts bypassed state scrutiny. It is important to remember that this judicial enterprise was developed during the rule of General Zia and his period of Islamisation, which sought to erode women’s freedoms. It is difficult to assess to what extent the judiciary was aware at that time of how its actions would resonate in governmental channels. However, it is safe to assume that if women had been given divorces relatively easily under the statutory provisions during the early years of Pakistan’s political history, the DMMA and the *khulʿ* would have received major public attention, particularly negative attention, from the religious authorities, as well as from General Zia himself. The judiciary must

therefore be commended for rising from its earlier stupor and navigating political and religious censure by adopting a more nuanced approach to divorce law reform, which has finally provided a remedy for women whilst appeasing traditional male prerogatives. The judicial commitment to improving women's divorce rights during these turbulent times up to the present day has shown that Muslim jurisprudence is fully capable of liberalising the rules of family law relating to divorce, by promoting social justice and equality for women whilst keeping within the underlying goals and spirit of Islam. The negation of a 'hate standard' for the doctrine of *khul'* and a relaxation of the rules regarding the return of the *mahr* are innovative efforts that have brought classical Ḥanafī law into legal practice.

This chapter also illustrates that activist courts can act as engines of progress and social change. Whilst interpreting the law, judges have taken into account the social and economic contexts in which these interpretations must take place, and have adapted and reconciled the law to its changing needs and requirements. Justice Krishna has argued that the law cannot remain static, but that a judge must mould the law so that it can serve the needs of the changing mores of society⁶²⁷. It must adopt an activist role in the process of social transformation and move with the changing concepts and values of society⁶²⁸. The Pakistani judiciary should be credited for leading the way in judicial creativity in the interpretation of Islamic principles, and for dispelling the myth that Muslim communities cannot keep pace with the social and cultural advancement of society. Indeed, their judicial activities

⁶²⁷ Fuzlunbi v. K. Khader Vali 1980 AIR SC 1730, 1732.

⁶²⁸ Serjuddin, *Muslim Family Law*, 2.

led to the Presidential Ordinance of 2002, requiring family law cases, particularly *khulʿ* cases, to be resolved within six months of the plaint being issued with the most recent amendment reducing the time to four months⁶²⁹ in order to further enhance the judicial process. The right to female marital dissolution may be a small stepping-stone in the overall scheme of ensuring an equal footing with men, but any improvement will surely promote overall progress in the Pakistani state.

⁶²⁹ S. 12 (A) Family Courts (Amendment) Act 2015 (XI of 2015). See Chapter Seven for a detailed review of the legal formalities of a *khulʿ*.

CHAPTER FIVE

RESEARCH METHODOLOGY FOR THE FIELD WORK

5.1 Introduction

The aim of this chapter is to provide an overview of the methodology used during the creation of the research design, data collection and analysis for this project. It aims to link up with the theoretical framework put forward in Chapter One and provide the foundations for carrying out the empirical research. This chapter outlines the qualitative methods used as a channel for compiling and analysing data through the use of structured, semi-structured and unstructured interviews and observations. It assesses the role of the researcher in the field and the ethical issues faced during the research process. In order to contextualise the study, the research sites and the sampling methodology used to recruit the participants are delineated, and the details of the participants interviewed are provided.

5.2 Research Theory

Grounded theory methodology, which was developed in the 1960s through the pivotal works of Glaser and Strauss (1967), will serve as the theoretical basis for the fieldwork in this study⁶³⁰. The aim of grounded theory is to 'generate or discover a

⁶³⁰ Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Chicago: Aldine, 1967); Barney Glaser and Anselm Strauss, *Awareness of Dying* (Chicago: Aldine, 1965). Whilst Glaser and Strauss were

theory', and it has been defined as "the discovery of theory from data systematically obtained from social research"⁶³¹. Grounded theory was chosen for this research because it focuses on discovering elemental social mechanisms and processes. Crooks (2001) argues that grounded theory is particularly useful where very little is known about the contextual factors that impact an individual's life, whilst Glaser (1978) stresses that grounded theory allows a researcher to delve beyond presumptions and understand the innate processes that dictate behaviour. During an initial exploration of this topic, it was noted that very little research has been conducted in Pakistan on women's perceptions of the *khul'* and their experience of recourse to legal remedies for female-initiated divorce. The grounded theory approach therefore proved extremely useful to probe the intrinsic behaviour of women and discover why some women remain in unhappy and often abusive marriages whilst others opt to enforce their legal rights to divorce. It allows a researcher to comprehend the meanings behind behaviour and construct a unique theory for the project rather than generalise from universal laws. In the past, the grounded theory methodology has also been used in research in Pakistan to investigate the bias in local customary laws that are not favourable to women and discriminate against them (Kamal 2003). The research found that women are seen

pioneers of this method, they later diverged to follow different paths, with Glaser criticising Strauss for concentrating less on theories and more on concepts.

⁶³¹ Glaser and Strauss, *The Discovery of Grounded Theory*, 2.

as distrusting alternative dispute resolutions such as *jirghas*⁶³², preferring formal court procedures to resolve their disputes and complaints⁶³³.

Research based on grounded theory demands that data be systematically analysed and then a theory be constructed that is grounded in the experiences and views of the respondents⁶³⁴. The theory can be inductively obtained from an inquiry of the phenomenon it embodies⁶³⁵. Glaser (1978) argues that the purpose of an inductive approach is to ensure that the researcher is not biased by preconceived ideas regarding the research matter, knowing that there is no definite theory to prove through the data, but that the collection of data from the field is the starting point for a grounded theory approach. However, it has also been argued that even if there is some knowledge about the research topic, a grounded theory approach can still be used if a new point of view is desired⁶³⁶. Before I began my research work, I was aware of some theoretical perspectives regarding the notion of women's autonomy and agency denoted by feminist legal theory and Islamic perspectives on marriage

⁶³² An informal dispute resolution process involving senior members and leaders of the local community.

⁶³³ S. Kamal, "*Effects of the Interplay of Formal and Customary Laws on Women in Tribal Cultures*", Paper for the 7th Interdisciplinary Congress on Women's Worlds 99 June 24th, 1999; WLUM (2003) "Knowing our Rights: Women, Family, Laws and Customs in the Muslim World." Accessed February 26th 2015 http://uit.no/utskrift?p_document_id=169282

⁶³⁴ Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (Thousand Oaks: Sage Publications, 1998), 12.

⁶³⁵ Glaser and Strauss, *The Discovery of Grounded Theory*, 3.

⁶³⁶ See Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (Newbury, USA: Sage, 1998); K. Smith and F. Biley, "Understanding Grounded Theory: Principles and Evaluation" *Nurse Researcher* 4 (1997): 17-30.

and divorce, as well as the knowledge that women in Pakistan are subject to both formal and local customary and religious laws. Although these provided an initial base for research, I needed to acquire a deeper understanding of the lived realities of married women and the efficacy of the law as a tool to empower women in marital disputes. Unlike other qualitative methods, which predominantly use one source of data, grounded theory research allows the use of multiple sources of data such as interviews, observations and life histories⁶³⁷. These multiple data sources allowed me to gain insights into the views of married women and their own perceptions of married life and how to deal with marital conflict, as well as to observe court processes and interview women who engage with the law and the state apparatus.

In order to ensure that an organised, systematic and methodical approach to obtaining information is formulated, it is important in grounded theory to adopt a methodology that will assist a researcher in understanding the data collected and the study itself in the broadest way⁶³⁸. Bryan (2002) states that the best position for qualitative researchers is to view phenomena through the eyes of the subjects of the research and interpret the 'social world' from the viewpoint of those being studied⁶³⁹. Thus, this research attempts to analyse the problems faced by women in

⁶³⁷ Christina Goulding, "Grounded Theory: Some Reflections on Paradigm, Procedures and Misconceptions," *Working Paper Series* (University of Wolverhampton, 1999): 8.

⁶³⁸ Louis Cohen et al, *Research Methods in Education* (London: Routledge Falmer, 2003), 45.

⁶³⁹ Alan Bryman, *Social Research Methods* (Oxford: Oxford University Press, 2007), 277.

initiating divorces, looking through the eyes of Muslim women living in Pakistan. Denzin and Lincoln (1998) argue that any qualitative study must take a 'naturalistic approach', observing subject matter in its natural setting and trying to interpret findings "in terms of the meanings people bring to them"⁶⁴⁰. Moreover, Loveland and Loveland (1995) argue that in order to acquire social knowledge, the researcher must "participate in the mind of another human being (in sociological terms, 'take the role of the other')", and the best way to achieve this is through face-to-face interaction⁶⁴¹. Cartledge (2003) provides a concise description of what a researcher's intent and purpose should be in adopting a qualitative approach to research:

"Qualitative research, wishing to focus on the world views of the subjects under study, tends to operate with an open and flexible research strategy rather than one which is overly prescriptive from the start. This means that research problems tend to be organized around more general and open questions rather than tightly defined and theory-driven questions. Qualitative researchers tend to favour a process that formulates and tests theories and concepts as they arise from within the data under collection⁶⁴²".

This research is also influenced by Bentzon et al 1998, who have used the grounded theory approach whilst investigating the predicaments faced by women when

⁶⁴⁰ Norman Denzin and Yvonna Lincoln, *Collecting and Interpreting Qualitative Materials* (Thousand Oaks, CA: Sage, 1998), 3.

⁶⁴¹ John Lofland and Lyn Lofland, *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis* (Belmont: Wadsworth, 1995), 16.

⁶⁴² Mark Cartledge, *Practical Theological-Charismatic and Empirical Perspectives* (Carlisle: Paternoster Press, 2003), 17.

coming into contact with alleged gender-neutral laws⁶⁴³. Whilst exploring the relationship between law and practice, women's and men's lived experience are used as a starting point. Bentzon et al (1998) note that:

“legal concepts and theories need to be critically analysed through the medium of women's and men's lived experiences. To do this, researchers need to have a first-hand knowledge of local practices and procedures in the area of researching⁶⁴⁴”.

Similarly, Hirsch (1998), in her study of Muslim Swahili women in Kenya, uses the grounded theory method to assess how these women adopt legal processes to challenge religious cultural norms that place them in subordinate positions in society. Muslim women in Kenya break through the cultural deterrent of *Heshima*, which requires them to keep silent over personal marital issues, and instead pursue their marital disputes in the courts, emulating their male counterparts⁶⁴⁵.

5.3 Research Design

A research design provides a framework to guide the researcher in the different stages of research⁶⁴⁶. Cresswell (2012) demarcates three categories

⁶⁴³ See A. W. Bentzon et al, *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law* (Oslo TANO Aschehoug; Harare, Zimbabwe: Mond Books 1998).

⁶⁴⁴ Bentzon et al, *Pursuing Grounded Theory in Law*, 25.

⁶⁴⁵ Susan Hirsch, *Pronouncing and Preserving: Gender and the Discourses of Disputing in an African Islamic Court* (Chicago: Chicago University Press, 1998).

⁶⁴⁶ Chava Frankfort-Nachmias and David Nachmias, “Research Methods in the Social Sciences”, in *A Handbook of Social Science Research: A Comprehensive and Practical*

of research: quantitative research, qualitative research and a combination of both⁶⁴⁷. Quantitative research involves the application of precise and definite questions to gather perceptible and observable data. Only particular variables are studied, dependent upon narrow research questions or hypotheses. Qualitative research applies to generic and expansive data collection used to seek the respondents' experiences⁶⁴⁸. The third type of research is a combination of both qualitative and quantitative research. For the purposes of this research, only a qualitative approach was used. One of the aims of this study is to ascertain what cultural and religious barriers women perceive exist that prevent them from seeking the dissolution of marriage, regardless of how unhappy that marriage may be. The sensitive nature of the topic required me to establish a rapport and trust between each of the participants and myself before I could ask personal questions of this type. Thus, adopting a quantitative research method, which requires a large number of participants, would not have been suitable for this project.

Quantitative data is primarily concerned with the collection of numerical data to explain a particular phenomenon to be analysed through mathematically orientated methods. It is concerned with measuring behaviour and coming to

Guide for Students, ed. B.R. Dixon et al. (Oxford: Oxford University Press, 1987), 32-33

⁶⁴⁷ John Cresswell, *Educational Research: Planning, Conducting and Evaluating Quantitative and Qualitative Research* (New Jersey: Pearson Education, 2012), 597.

⁶⁴⁸ *Ibid.*, 46.

statistical conclusions about a representative sample of a population⁶⁴⁹.

Quantitative research requires larger sample sizes to increase the reliability and validity of the phenomenon studied⁶⁵⁰. However, this research was concerned with understanding behaviour in its natural setting (Flick 2002), and in providing subjective explanations of women's behaviour. Rather than create generalisations about the behaviour of all married women in Pakistan, this research was more concerned about women's perceptions of the *khul'*, and why some women but not all chose to utilise it. The research required an in-depth inquiry into the motivations behind behavioural attitudes and the decision-making process, and delved into culturally sensitive notions of marriage and divorce. A qualitative approach was therefore deemed more appropriate for this study, as it allows a researcher to focus on a smaller sample for his or her study and thus allows time for the researcher to establish a rapport with the interviewee to elicit pertinent information that is relevant to the study. A central question of this thesis is the relevance of the *khul'* to married women and their perceptions regarding it. It seeks to explore whether Pakistani women are even aware of their legal rights to obtain a *khul'*, and if so, whether it is a viable legal remedy for them to entertain. It also seeks to explore how women fare in reality when they actually have recourse to the law; why women decide to break through religious and cultural deterrents to affect a divorce, and what their lived experiences are after achieving a

⁶⁴⁹ John Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Thousand Oaks: Sage, 2003), 153-178.

⁶⁵⁰ Ibid.

dissolution of marriage. Qualitative research methods provide an opportunity to elicit this rich source of data for analysis through the use of interviews and observational techniques by virtue of using a smaller sample.

5.4 Method and Execution of the Field Work

Moore (2002) describes research methods as the “tools of the researcher’s trade”; these methods have also been described as the main ingredients of research⁶⁵¹. Qualitative research includes a wide variety of techniques for gathering information, such as observations, interviews and focus groups. Data for this research were collected using structured, semi-structured and unstructured interviews and observations of the family court processes. These methods allowed a more nuanced understanding of the social world of women in marriage and during divorce processes through an examination of the interpretation of that world by women themselves. Bell (1998) argues that specifically interviewing women is of particular significance, as centuries of legal practice have ignored women or only allowed men to speak for them⁶⁵². This is certainly true of Pakistan, where women have been generally excluded from the law-making process, with very little representation in policy-making in terms of their needs and requirements⁶⁵³.

⁶⁵¹ Peter Clough and Cathy Nutbrown, *A Student's Guide to Methodology: Justifying Enquiry* (Thousand Oaks: Sage, 2002), 22.

⁶⁵² Susan Bell, “Becoming a Political Woman: The Reconstruction and Interpretation of Experiences through Stories” in *Gender Discourse: The Power of Talk*, ed. A Dundas Todd and S. Fisher (Norwood: Ablex, 1988), 97-123.

⁶⁵³ Khan, *Zina and Transnational Feminism*, 83.

The field work for this research took place over several periods of time: initial field work preparation in December 2012-January 2013⁶⁵⁴, actual field work in June, July and August 2013, April 2014, July and August 2014, and follow-up work in July and August 2015. The summer months proved to be particularly useful, as these coincided with the Islamic month of Ramadan. During Ramadan, a common practice in Pakistan is for Muslims to gather together in one place to collectively open the fast at sunset and attend *iftar* (the evening meal) parties, or to assemble together to listen to lectures and *tafsir* (explanation) of the Holy Qur'ān. In Pakistani society, it is rare for women to frequent the mosque, so many women attend these gatherings, which take place in the home of any one person, rotating between family and friends. Through friends and acquaintances, I became aware of such gatherings taking place in the selected sites⁶⁵⁵, and I would arrive before the other participants and introduce myself to the host of the party or gathering. Thereafter, I would explain the nature and scope of my research and request permission to distribute my covering letter explaining my research. Being Pakistani, and having lived in Pakistan for ten years of my life, I was unsurprised to see that each time I attended these gatherings, I received full assistance from the host. I used these gatherings to make initial contact with potential participants. Those women who indicated willingness to be interviewed were contacted later by phone, and an appointment was arranged for the interview to take place. In order to maintain the confidentiality

⁶⁵⁴ This included visiting the location of the district courts, acquiring geographical information about Lahore and visiting the proposed sites of study. No interviews were conducted at this stage, as ethical approval had not yet been granted by the University Ethics Committee.

⁶⁵⁵ See Section 5.7 below.

of the participants, none of the interviews were conducted during these public gatherings.

5.5 The Interviews

The data collected during this research was based upon fully transcribed interviews that were both tape-recorded and written down manually to ensure accuracy of the data. Three main types of interview technique are prevalent in qualitative research, depending upon the degree of flexibility required: structured, unstructured and semi-structured interviews⁶⁵⁶. Structured interviews require questions to be predetermined and formatted, whilst unstructured interviews allow complete freedom regarding the content and sequence of the discussion⁶⁵⁷. In semi-structured interviews, questions are more loosely worded, allowing for flexibility, with more open-ended questions⁶⁵⁸. For the purpose of this research, all three types of interview were conducted. Whilst interviewing lawyers and judges, a structured interview method was used, where specific questions were asked relating to the process of obtaining a *khulʿ* in the family courts⁶⁵⁹. However, a uniform interview technique was not used whilst interviewing married women about their views and perceptions of the *khulʿ*. Divorce and the possible breakdown of marriage is an extremely sensitive topic in Pakistan. From my pilot study, I realised that the majority of women were quite reticent about their views, and thus a very structured

⁶⁵⁶ Ranjit Kumar, *Research Methodology: A Step by Step Guide for Beginners* (Thousand Oaks: Sage, 2010), 123.

⁶⁵⁷ Ibid., 126.

⁶⁵⁸ Sharan B. Merriam, *Qualitative Research: A Guide to Design and Implementation* (New York: Jossey-Bass, 2009), 90.

⁶⁵⁹ See appendix III for all interview templates.

interview technique was needed to elicit as much information from the participants as possible. This accounted for sixty-nine of the participants. As each of the structured interviews progressed, many of the participants seemed to relax and become more forthcoming in their views, but this still resulted in far more concise answers. Other participants were very vociferous in expressing their views on the topic and had extensive lists of issues that they wanted to discuss. Some of these participants had suffered a great deal, and wanted to tell me of their experiences and views. However, this often meant digressing from the original research at hand, whilst some women vented their anger to me regarding the behaviour of their husbands and extended family. During the pilot study, I found myself spending over two hours interviewing some participants but was still unable to cover the required topics. Thus, in order to obtain uniform information for easy comparability, semi-structured interviews were used for thirty-one of the participants. I followed the same set of predetermined questions used in the structured interviews, but during the interviews, additional questions were asked to ensure that the interviews remained within the parameters of my research and more detailed responses were extracted where important topics were being discussed. These answers were kept open-ended to allow my interviewees to express their points of interest and expand upon the views they wished to share with me. With respect to women interviewed at the District Family Courts of Lahore, I used unstructured interviews. The women that I interviewed at court were either going through the process of obtaining a *khul'* or had already obtained one and were dealing with ancillary matters of guardianship and custody of children and maintenance suits. In order to be more

empathetic to these women and establish a rapport, I engaged in unstructured interviews to allow them to 'tell their stories'. Although this proved to be much more time-consuming, it resulted in in-depth information about the struggles that these women had endured in reaching the courts, and allowed for a better understanding of their motivation to break through religious and cultural barriers and opt for a *khul'*.

Most of the interviews were conducted after making an appointment with the interviewees. Interviews with district court judges and lawyers, all of whom deal with family law cases, were arranged by telephone through a family friend who was a prominent high court lawyer and had contacts in the District Courts of Lahore. All these interviews were conducted on-site in the courthouses and chambers. The individual interviews with married woman were also arranged by appointment and were carried out at each interviewee's home, normally during the day whilst their husbands and children were at work and school respectively. In respect of the women going through the process of obtaining their *khul'*, these in-depth interviews were initially conducted outside the courthouses in waiting areas, and some were then followed up by visiting the respondent's home for further clarification.

Before the commencement of each interview, a letter was shown to the interviewee introducing myself and the nature and purpose of my research⁶⁶⁰. In the case of interviews with married women and those applying for the *khul'*, I gave a copy of

⁶⁶⁰ See appendix III for a copy of the participant information sheet and consent form.

the letter to the interviewee and also read the contents of the letter to them, explaining why I was conducting the research and the type of cooperation that was required from them. Although the letter was translated into Urdu, I still read its contents aloud before commencing the interview. This is because, as outlined in Chapter One, illiteracy rates in Pakistan are high, particularly amongst those who belong to poorer families. Interviewees were also asked to sign the letter of introduction indicating their free consent to the interview and research. Whilst some of the participants had never been to school, they were all able to sign their names. All of the interviews were conducted primarily in Urdu. Urdu is my second language, and I am able to converse fluently in it. During some of the interviews, whilst I asked questions in Urdu, the replies consisted of a mixture of Punjabi and Urdu. Punjabi is a local, colloquial language spoken by many people in Lahore. Punjabi is very similar to Urdu and is a familiar language to me, as it is spoken by my parents. I was thus able to understand the replies quite easily, as well as rephrase my questions using some Punjabi words to ensure that the participants understood my questions in full.

The interviews were recorded using handwritten notes. However, to ensure the accuracy of the data collected, the interviews were also audio-recorded after the requisite permission was granted. The audio recordings were then transcribed either later that day or the next day at the latest and then compared to the handwritten notes to ensure accuracy.

5.6 Research Sites

Pakistan was chosen as the research site for this project. Pakistan is the sixth most populous country in the world, with a population of 182 million (World Development Indicators (WDI) 2014). It is divided into four provinces: Punjab, Sind, Khyber Pakhtoonkhwa (previously known as NWFP) and the Federally Administered Tribal Areas (FATA). Azad Jammu and Kashmir make up the last part of Pakistan and part of the disputed territories⁶⁶¹. The province of Punjab was chosen for several reasons. It is the largest province of Pakistan, with 55.6 per cent of the total population residing within it⁶⁶². Moreover, the primary languages spoken in the Punjab are Punjabi and Urdu. Since I am fluent in Urdu and can understand Punjabi, this helped to facilitate the research and collection of data without recourse to a translator. The city of Lahore was chosen, as it is the capital city of the Punjab and is also the second largest city in Pakistan, with an estimated population of 7.5 million people as of July 2014⁶⁶³. Lahore has a demographically diverse population who have settled from various parts of the Punjab and come from differing socioeconomic backgrounds and cultures⁶⁶⁴. It is also home to large urban and rural enclaves; thus, it was hoped that this diversity of population could

⁶⁶¹ See Figure 1 (Appendix II) for a geographical map of Pakistan showing the province of Punjab.

⁶⁶² Ian S. Livingston and Michael O'Hanlon, *Pakistan Index: Tracking Variables of Reconstruction & Security* (December 29, 2011), accessed April 3rd 2015 <http://www.brookings.edu/~media/Programs/foreign-policy/pakistan-index/index20111229.PDF>

⁶⁶³ Demographia World Urban Areas, 11th Edition, January 2015, accessed April 2nd 2015 <http://www.demographia.com/db-worldua.pdf>

⁶⁶⁴ See Figure 2 (Appendix II) for a city map of Lahore.

be included in the research project. The city of Lahore is also home to my family, and so I am familiar with the city, having lived there for the first ten years of my married life. Travelling to different parts of the city and to the courts was made easier through the use of the family car and driver, which facilitated my research.

5.7 Sampling Method, Population, Sampling, Background and Selection of Survey Sites

Whilst conducting qualitative research, it is extremely important to identify the sources of the information that is needed to answer the research questions, also called the units of analysis. For the purposes of this research there were several units of analysis due to the nature of the research questions. In order to ascertain whether women in Pakistan are aware of their legal rights to divorce, and to ascertain what obstacles exist if they wish to implement these rights, the unit of analysis was married Muslim women. In order to investigate the efficiency of the current legal system to obtain a *khul'* and the problems women encounter when seeking marital dissolution, two units of analysis were chosen: members of the legal profession and Muslim women who had already obtained a *khul'* from the courts or were currently in the process of getting one. The units of analysis were as follows:

- 1) Married Muslim women
- 2) Members of the legal profession –
 - i) District Court Judges
 - ii) Lawyers

- 3) Muslim women who had obtained a *khul'* or were going through the process of obtaining one

Once units have been identified, the second stage is to select who will represent these units. Creswell (2102) defines such representatives as holding some common characteristics that a researcher can study and identify⁶⁶⁵. Once they have been selected, the target population or sampling frame can be chosen, and from this sampling frame it is then possible to generalise the findings (Sowell, 2001).

Sampling is the process of taking a small selection (namely a sample) from a larger group (the sampling population) in order to predict the presence of unknown information from that larger group⁶⁶⁶. In order to obtain a sample, there are two approaches employed in qualitative research: probability sampling and non-probability sampling. Creswell (2012) defines probability sampling as the selection of individuals "from the population who are representative of that population", whilst in non-probability sampling, "the researcher selects individuals because they are available, convenient and represent some characteristic the investigator seeks to study"⁶⁶⁷.

During the research, both probability sampling (or random sampling) and non-probability sampling were used to select samples. In order to ensure that representative respondents were used, a stratified random-sampling technique was

⁶⁶⁵ Creswell, *Educational Research*, 142.

⁶⁶⁶ Kumar, *Research Methodology*, 164.

⁶⁶⁷ Creswell, *Educational Research*, 142, 145

also used. Stratification involves the researcher dividing the population based upon specific characteristics, particularly when a variety of sampling characteristics are to be studied. Creswell (2012) notes that the first step is to divide the population into groups, or strata, and then to proportionally sample within each group according to their representation in the total population⁶⁶⁸. This technique was used to ensure that the population within a stratum was consistent in respect to the characteristics in which they were stratified. If different groups of the population are adequately represented, then this increases the accuracy of the research. The population for the present study consisted of married Muslim women from Lahore. The city of Lahore is divided into nine administrative towns, which are then further divided into a number of union councils. Table 1 shows the city of Lahore divided into towns and Union Councils (UCs)

Table 1 – Towns and Union Councils (UCs) of Lahore District

Number	Name of Town	Number of Union Councils
1	Allama Iqbal Town	15
2	Aziz Bhatti Town	11
3	Data Ganj Baksh Town	18
4	Gulberg Town	15
5	Nisthar Town	19
6	Ravi Town	30
7	Samanabad Town	19
8	Shalimar Town	11
9	Wagah Town	12
Total		150

Source: Bureau of Statistics, Government of Punjab, Lahore (2010)

For the purposes of qualitative research, I intended to collect data from married women from different socio-economic backgrounds, so it was necessary to take

⁶⁶⁸ Ibid., 144.

representative samples from randomly selected towns of Lahore. Random sampling is where each and every member of the population has an equal chance of being chosen⁶⁶⁹. This sampling is considered quite precise, as its purpose is to ensure that individuals who are representative of the population are chosen⁶⁷⁰. Since it was not feasible for me to question or interview all married Muslim women from Lahore, two towns were randomly selected from the nine administrative towns. These were Gulberg Town and Nisthar Town. Thereafter, two union councils were selected from each randomly selected town using stratified random sampling. I wanted to ensure that women from different socio-economic groups were represented in the sample, and therefore the union councils chosen from each random administrative town were based upon the economic figures provided by the government statistics of Pakistan. The first union council of Gulberg Town is located in the affluent business community of Lahore, and families that belong to the middle and upper middle classes typically reside there. The second union council of Gulberg Town, however, is in an older part of the town, where clustered and cheaper housing is readily available. Poorer working class families, and those who engage in skilled or semi-skilled labour, populate this union council. In Nishtar Town, the first union council selected primarily houses affluent populations with families of professionals. Housing is expensive and local union council laws only allow large houses of one *canal*⁶⁷¹ and above to be built there. However, the second union council of Nisthar

⁶⁶⁹ Jack Fraenkel and Norman E. Wallen, *How to Design and Evaluate Research in Education* (Maidenhead: McGraw-Hill, 2009), 93.

⁶⁷⁰ Cresswell, *Educational Research*, 147.

⁶⁷¹ A Pakistani unit of measurement that is equal to 1/8th of an acre or approximately 500 square feet.

Town is located near a busy market with much cheaper housing. The affordability of the housing means that it is primarily inhabited by working class families.

In respect of the choosing the actual participants, I employed non-probability purposive sampling. Purposive sampling is a targeted strategy of deliberately selecting participants who are best able to answer the research questions. Within this strategy, homogenous sampling was employed in order to target participants who share similar characteristics⁶⁷². Thus, married women were selected from different socioeconomic groups to provide more in-depth knowledge about their views and perceptions on the *khul'*. These women were identified during the public gatherings, and were asked if they would be willing to be interviewed at a later date. This sampling technique also enabled me to interview different members of the legal profession, as well as to select women in the process of applying for a divorce, allowing me to explore women's experience of attending court and applying for a *khul'*.

5.8 The Participants

Structured and Semi-structured interviews were used to interview one hundred married women and ascertain the extent of their knowledge regarding the legal remedy of *khul'* and their perceptions regarding the efficacy of the *khul'* as an option for marital relief. Table 2 (Appendix IV) details their names in alphabetical order,

⁶⁷² Cresswell, *Educational Research*, 208.

along with their age, education, occupation and total household income. The names of all of the participants have been replaced by pseudonyms to protect their identities. Fifty women from Gulberg Town and fifty women from Nisthar Town were interviewed. Figure 3 presents a breakdown of the interviews, and Table 3 shows the breakdown of the age groups.

Figure 3 – Participants' Residential Location

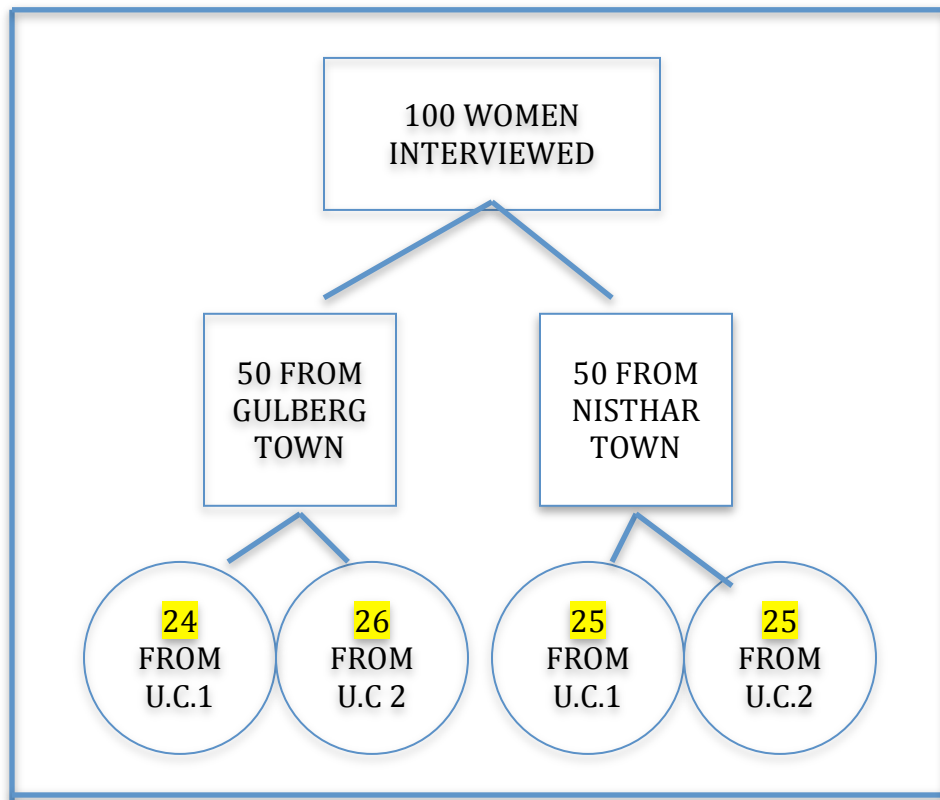


Table 3 – Breakdown of Participants' Age Groups

Number of Participants	Age Range in Years
12	18-25
20	26-35
60	36-45
8	46-55

A disproportionate number of women aged between 36 and 45 were interviewed. This was due to the fact that they were more willing to be interviewed. The younger demographic primarily lived with their extended family and did not feel comfortable discussing marriage and divorce, fearing that their husbands and mothers-in-law would not be happy with any such discussion. The slightly older demographic, however, were either living independently from their extended families, or if not, were firmly established within the marital home, having been married for a number of years. They were much more open and vocal in their views, and did not mention any particular repercussions from being interviewed. The oldest demographic were the most difficult to interview, and many refused point blank to be interviewed once they found out the nature of my inquiry. They took a more conservative approach to my study, and many of the participants' grounds for refusal concerned the inappropriateness of my research.

The first part of my interview involved asking about the age and education of the participants, how long they had been married, how they had met their partners, their own occupation and that of their husband, and their approximate total household income. After this, they were asked if they had children and who else occupied the marital home. All of the participants had arranged marriages, and eighty-five participants lived with their in-laws or other members of their husband's family, whilst only fifteen lived independently with their husbands and children. Fifty of the participants had an approximate income of between 10,000 and 20,000

rupees and belonged to working class or lower working class families. Table 4 illustrates their highest educational standard achieved.

Table 4 – Educational Standards of the Participants from Gulberg Town U.C.2 and Nisthar Town U.C 2

Number of Participants	Maximum Education Obtained
16	No Schooling
5	Gr. 1
12	Gr. 2
7	Gr. 3
9	Gr. 4
1	Gr. 6

The remaining fifty participants belonged to middle or upper middle class families, with an approximate total household income of between 30,000 rupees and 90,000 rupees. Table 5 illustrates their highest educational qualification achieved.

Table 5- Educational Standards of the Participants from Gulberg Town U.C.1 and Nisthar Town U.C 1

Number of Participants	Highest Education Obtained
2	Metric (Gr.10)
18	FA (college)
24	Bachelor's Degree
6	Master's Degree

These tables show that there was a large difference between the educational qualifications of the two groups of participants. Those participants from a lower socioeconomic group had attended very little school during their lifetime, with only one participant attending school up to grade 6 and the remainder having dropped out much earlier, or even not having attended school at all. In comparison, those

participants from more affluent backgrounds had at least attended college (with the exception of two), whilst twenty-four had obtained a graduate degree, and six of them had gone on to achieve their Masters' degrees.

In order to ascertain women's experience of going through the legal process and obtaining a *khul'*, unstructured interviews were used to interview thirty-one women in the District Courts of Lahore, Pakistan. Their names are also shown in alphabetical order in Table 6 (Appendix IV), which details their age, education, occupation and total household income. The names of all of the participants have again been anonymised to protect their identities. These women were chosen at random during visits to the district courthouse. All of the women interviewed were thirty years of age or younger, and they primarily belonged to lower working class backgrounds, with an average income of 7,000 to 15,000 rupees. Each participant was interviewed outside the family courtrooms, and the interviews took several hours to complete due to interruptions from lawyers and family members as each case progressed during the day. The first part of the interview was used to ascertain the name, age and occupation of the participant and her family background. Once these details were obtained, an unstructured format was used to allow the participants to give details of the reason for them being in court and literally to 'tell their stories'. During the interviews, some specific questions were also asked relating to the reasons for divorce, their overall court experience, and their feelings and expectations before, during and after applying for a *khul'*. Thirteen follow-up interviews were also conducted at the homes of the participants a few months after

the initial interview in the courts to ascertain in more depth details of the court experience and the repercussions of gaining a *khulʿ*.

During this stage of the fieldwork, legal professionals were also interviewed, using a structured format. This consisted of interviews with six family court judges, all of whom had been overseeing *khulʿ* cases for several years. The District Civil Judge of the Lahore District Courts gave permission to interview these judges, and to sit in the family courts to observe the proceedings. Moreover, seven lawyers were also interviewed who specialised in representing women in *khulʿ* cases and in all ancillary matters relating to post-divorce maintenance and dowry claims. All interviews with legal professionals were conducted at the district courts, either in judges' chambers or outside the family courts themselves.

5.9 Role of the Researcher

For the purposes of this research I considered myself an 'insider', a role which has been defined as "sharing the characteristic, role or experience under study with the participants"⁶⁷³, as opposed to an 'outsider', who shares no such commonality with the participants of the research. Being a Pakistani, married Muslim woman who has previously lived in Pakistan for over ten years, I share an identity of being Pakistani, and speak the national language of the country, Urdu. This membership can provide

⁶⁷³ Sonya Corbin and Jennifer Buckle, "The Space Between: On Being an Insider-Outsider in Qualitative Research," *International Journal of Qualitative Methods* 8, no. 1 (2009): 56.

legitimacy to a researcher⁶⁷⁴. Being an 'insider' allows a researcher to be more rapidly accepted by the participants, and this can lead to greater depth and breadth of the data collected and deeper understanding of the population⁶⁷⁵, since participants may be more open in their views. This shared status can be beneficial during the research, affording easier access and entry, and a common ground from which to begin the research⁶⁷⁶. However, Kanuha (2000) argues that questions can be raised regarding the objectivity and authenticity of a project, since a researcher may be too close or too similar to the participants being studied⁶⁷⁷. There is a possibility that participants in the research may make assumptions of similarity, and thus fail to explain their individual experiences more fully⁶⁷⁸. Moreover, a researcher's perceptions may be clouded by his or her own personal experiences, and thus he or she might run the risk of projecting their own views as opposed to those of the participants. During an interview, for instance, the focus and scope of the interview may be guided by the views of the researcher, as opposed to the participants.

In order to overcome these problems, Asselin (2003) suggests that it is important for a researcher to gather data with his or her 'eyes open', and approach the phenomena being studied with no assumptions. She argues that although the

⁶⁷⁴ Patricia Adler and Peter Adler, *Membership Roles in Field Research* (Newbury Park, CA: Sage, 1987).

⁶⁷⁵ Valli Kanuha, "'Being' Native Versus 'Going' Native: Conducting Social Work Research as an Insider", *Social Work* 45, no. 5 (2000): 444.

⁶⁷⁶ Corbin and Buckle, "The Space Between," 58

⁶⁷⁷ Kanuha, "'Being' Native Versus 'Going' Native," 444.

⁶⁷⁸ Corbin and Buckle, "The Space Between," 58.

researcher may have a shared culture with the participants, he or she may not understand the subcultures that exist within it⁶⁷⁹. Rose (1985) proposes that there can never be any possibility of neutrality in research, so “there is only greater or less awareness of one’s biases. And if you do not appreciate the force of what you’re leaving out, you are not fully in command of what you are doing”⁶⁸⁰. It is therefore important to appreciate that every researcher will have some form of bias and preconceived ideas with respect to the nature of their research. However, the benefits of being an ‘insider’ were significant for the purposes of this research. Pakistani society maintains a segregation of the sexes in most social settings, and thus my identity as a woman allowed me access to participants much more easily. Moreover, discussing divorce in any context is a highly controversial topic, and therefore being aware of cultural constraints in this matter enabled me to be sensitive to and empathetic with the female participants. Being married and having children also created a common bond, which allowed the participants to be more relaxed in my company. They would quite often ask if I was married and whether I had children, and then inquire about their ages and schooling. Sharing these common facts ‘broke the ice’ during an interview and allowed the respondents to be more relaxed, and thus more open and expressive in their views.

⁶⁷⁹ Marilyn Asselin, “Insider Research: Issues to Consider When Doing Qualitative Research in Your Own Setting,” *Journal for Nurses in Staff Development*, 19, no. 2 (2003): 99-103.

⁶⁸⁰ Phyllis Rose, *Writing on Women: Essays in Renaissance* (Middletown CT: Wesleyan University Press, 1985), 77.

Whilst being an 'insider' helped me with the participant interviews of married women and litigants in the family courts, I had a more varied response from the legal professionals that I interviewed. Most of the lawyers and judges were men, and regarded me with a degree of scepticism. Although I explained the purpose of my research before each interview, I sensed that many of the lawyers were hesitant to be interviewed, fearing disclosure of their views. After I had reassured each participant that they would remain anonymous, and that no references would be made at all to their identities, they became more relaxed and open with their views. In many of these interviews I informed them that I had trained as a lawyer in my early career, which created some common ground. I was often asked why I had not pursued this career and about the differences in the legal profession between Pakistan and England. After such discussions, the participants would become more candid in their views, viewing me as 'one of their own'.

5.10 Ethical Considerations

Whilst conducting the fieldwork, care was taken regarding a number of ethical issues. The first step was to obtain ethical approval from the Humanities and Social Sciences Ethical Review Committee of the University of Birmingham. Conditional approval was gained on the 21st of June, 2013 and full approval was obtained on 27th June, 2013. Other ethical issues included obtaining the consent of the participants, ensuring that no harm came to the participants and respecting their privacy. A primary issue was to acquire the consent of the participants to interview them, as

well as to ensure their willingness to use the data provided by them for this research thesis. Before any interviews or discussion took place, I informed the participants about the nature of the research topic, the purpose and objectives of the study, my enrolment at the University of Birmingham as a PhD student, and the types of question that they would be asked. I further informed them of the approximate length of the interviews and requested additional consent to make notes of their answers during their interview and audio-record their answers.

It was also important to ensure that no harm was caused to any of the participants. Divorce is an extremely contentious issue in Pakistan, and even discussing the topic can cause suspicion and mistrust from other family members. The participants were therefore informed that their answers and opinions would be used as part of my research project, but complete assurances were given regarding anonymity and the protection of their identities. This was done by not disclosing the real names and addresses of any of the participants; instead, pseudonyms were used to maintain the confidentiality of their identities. My handwritten notes were kept in a locked drawer at home, whilst the audio-recordings were downloaded onto my laptop and the recordings were subsequently erased after transcription. My laptop is password protected and only I have access to it.

Whilst interviewing women at court, in most cases I spoke firstly to their lawyers rather than approaching the clients directly. Having explained the nature and scope of my research, as I did with the other participants, I then asked the lawyers to

request permission from their clients to speak to them. However, if the lawyer had not arrived, I approached the participant directly. Once contact was made, I then went through the entire procedure of obtaining consent and requesting the participation of the women, as outlined above. Interviewing women during their court cases was also quite painful and sad at times. Some of the women were trying to obtain custody of their children, whilst others were desperate to enforce their maintenance orders and were suffering acute financial difficulties. Seeing their suffering and then hearing their stories invoked a feeling of helplessness, as I could not provide any kind of relief for them. Some of the women assumed that I would be able to help them with their cases, or put in a good word for them with the judge. It was therefore extremely important to adopt a completely transparent approach by explaining to the women that I was not a member of the judiciary or the government, or part of any charitable organisation. I also explained to them that the research was not being funded by any government or non-governmental agency, and that I was conducting research for the purposes of my thesis, to highlight the problems and issues faced by women obtaining a divorce, with the hope of suggesting areas of law reform. Once this was made clear, the participants readily spoke to me about their experiences.

5.11 Problems and Limitations of the Field Work

During the field work, I encountered some unexpected problems and limitations. The first problem I faced was that of the weather. The majority of my research work

took place during the summer months of June, July and August so that my children could accompany me to Pakistan during their summer holidays. Although I had lived in Pakistan for ten years (1996-2006), during this residential stay I rarely ventured out in the afternoon during the summer months due to the blistering heat. However, most of the women requested interviews during the early afternoon period, so I struggled with my physical fitness due to the hot climate. This was compounded by the fact that in the last ten years, Pakistan has suffered from power shortages, causing electricity to stop working in houses and shops for many hours at a time. This would result in complete darkness in homes, with no access to fans or air-conditioning to relieve the heat. Thus, many of the interviews took place in outside courtyards and gardens on makeshift chairs and tables. Arranging appointments in the evening also proved impossible due to power shortages, with the majority of the participants relying on candles and old-fashioned oil lamps. The high price of petrol has meant that very few people are able to arrange generators to supplement their electricity supply. I was fortunate that my family's home in Lahore has a generator, but twice, whilst transcribing my notes, I lost my work on my laptop due to fuses going, causing my laptop to shut down unexpectedly.

Another important limitation on the fieldwork is the law and security situation in Pakistan. Terrorist attacks and lawlessness have increased manifold in recent years. During my fieldwork in August 2014, the city of Lahore was in complete lockdown for two weeks due to political unrest and demonstrations against the Nawaz Sharif government. I was unable to visit the District Family Court of Lahore, as it was

surrounded by armed police, and I was forced to postpone the remainder of my visit until the following year.

This research is also limited by the fact that it only includes participants from the city of Lahore and does not delve into the experiences and views of women who live in the rural villages of Pakistan. It is envisaged that their experiences may differ significantly from their urban counterparts, particularly with respect to legal information and access to courthouses. Their exclusion was a deliberate policy, as it would have made the scope of the study too wide and made it too difficult to gather meaningful information from a larger and more diverse population. Moreover, since this is the first study of the application of the *khul'* in the Pakistani courts, the lack of any prior studies or information made it more expedient to concentrate upon a city setting, where it is easier to gather preliminary information and gain access to research participants. This is, however, an important area for future research, particularly with respect to women's access to legal remedies in rural Pakistan.

5.12 Data Analysis

Researchers use a variety of techniques to analyse data in grounded theory methodology. These include open coding, axial coding and selective coding⁶⁸¹. Some argue that there is no uniform or standard formula for analysing data, and that a researcher can develop his or her own data according to the requirements and

⁶⁸¹ Cresswell, *Educational Research*, 426.

objectives of the research, the nature of the data collected and insights gained from the field⁶⁸². For the purposes of this research, the discourse, narrative and experiences of the participants were used as the starting point for the data analysis. The first stage of the analysis during my research consisted of open coding, which meant carefully transcribing my notes and the audio recordings of the interviews using Microsoft Word. Thereafter, I analysed the text of the interviews line by line and attempted to identify key words and phrases, which enabled me to connect the responses of the participants with the research questions. Spiggle (1994) argues that “identifying a chunk or unit of data (a passage of text of any length) as belonging to, representing, or being an example of some more general phenomenon”⁶⁸³ is important at this stage of the research.

The second stage involved a process of organising and categorising the data. First of all, I separated the data according to the locality of the women interviewed. The data were then further categorised according to the economic and social backgrounds of the women. This was determined by analysing the educational level of the women interviewed, their individual incomes, the incomes of their husbands and the collective incomes of the household. The occupations of the husband, wife and parents, if relevant, were also taken into account when creating the categories. The participants were also asked for their own perceptions of what class they were in. A further sub-category was created regarding the age of each participant.

⁶⁸² Bentzon et al, *Pursuing Grounded Theory in Law*, 237.

⁶⁸³ Susan Spiggle, “Analysis and Interpretation of Qualitative Data in Consumer Research,” *Journal of Consumer Research* 21, no. 3 (1994): 493.

During the transcription stage, notes or memos were made in the margins to assist me later to identify concepts and themes, as well as to note down my own impressions and descriptions of events. These notes were written in red to ensure that they were kept separate from the contents of the interviews themselves. Once the data had been organised, the third stage consisted of axial coding: analysing the data for general themes and concepts that emerged from the raw data and their interrelationships with each other. Key themes and sub-themes were derived from the general concepts that began to emerge. Once each theme had been identified, it was then analysed again in order to create a comparison between the experiences of women according to their age, socioeconomic position and length of marriage, and explanations were developed to understand the behaviour under study.

5.13 Conclusion

This chapter has outlined the many steps involved in conducting and managing the fieldwork study. The socially and culturally sensitive nature of the research project meant that a qualitative approach to the fieldwork was deemed most appropriate. Discussing marital breakdown and rights to divorce for women is a highly contentious issue in Pakistani society. Stringent patriarchal norms dictate the place of women in Pakistani family life. Being passive and submissive are traits that are valued in a wife, and any action to the contrary is viewed with a critical eye, not only by the male members of a family but also by other senior members of the extended

family, including females. Thus, it was very important during the research to tread carefully when interviewing married women about their expectations of marriage and divorce, to ensure that they did not suffer any adverse reactions from their husbands and in-laws. The majority of the women insisted that they only be interviewed during the afternoon, when their husbands were away, and when most of the remaining womenfolk at home were sleeping during the afternoon siesta. Once these precautions had been taken, most of the women interviewed were very happy to have their views heard, and they were extremely animated during the interviews and discussions. The adoption of qualitative interview techniques for this research proved to be very useful, as it created a fairly free medium for women to speak to me and uncover their views, ideas and even their dreams for themselves and their future. Even though many of the participants had little or no formal education, they were very articulate in their ideas about the rights to divorce and when, if at all, women should exercise these rights.

The grounded theory methodology of listening to the voices of women and their lived experience has also been effective in addressing the main research question regarding the efficacy of the *khul'* as a tool to improve the situation of women in marriage and in the dissolution of marriage. This methodology was particularly useful for interviewing women in the courts who were going through immense stress and emotional turmoil during their protracted legal battles. Through the use of unstructured interviews, the litigants were able to relate their stories of hardship and the pain of divorce without interruption, and to present their stories at their

own pace and determination. The grounded theory methodology was useful in identifying concepts that emerged from the interviews, which were then broken down into key themes and sub-themes, the results of which will be discussed in the forthcoming chapters.

CHAPTER SIX

PERCEPTIONS OF THE *KHUL'*: A VIABLE ALTERNATE FOR PAKISTANI WOMEN?

6.1 Introduction

This chapter presents the findings of the fieldwork which was conducted in the city of Lahore over a period of three years, 2013, 2014 and 2015. It provides an analysis of the key themes and sub-themes that emerged from the data collection in the form of interviews with married women and their lived realities. This chapter examines the extent to which the liberal judicial interpretation of the *khul'*, as outlined in Chapter Four, has filtered down into society in practice, and to what degree Pakistani women believe that the *khul'* is a viable option for them to consider in the case of marital breakdown. The first part of this chapter provides an overview of the responses of the participants, who were asked a series of questions relating to their knowledge and awareness of the legal remedy of the *khul'*. They were also asked what obstacles, if any, existed if a woman wished to initiate a divorce, and to describe their perceptions of those women who had pursued such a course of action. During the course of the interviews conducted over the preceding years, it became quite apparent that although the vast majority of the participants were aware of their right to go to court and initiate a divorce (albeit not always known to them as the legal process of *khul'*), this was not a remedy that they considered appropriate for a woman to enforce. Rather, the majority of the participants felt that it was more

befitting to remain in an unhappy and even violent marriage as opposed to pursuing a legal remedy. The participants surveyed were also highly critical in their views regarding women who had initiated a *khul'*, describing them as selfish, impatient and rebellious towards their husbands and extended families. The second part of this chapter will analyse the views of the participants in light of feminist theories regarding 'adaptive preferences' and 'deformed desires' as outlined in Chapter One. It will discuss why some women choose to remain in unhappy and even abusive marriages and whether these decisions are compatible with autonomy.

6.2 Married Women's Perception and Understanding of the *Khul'*

This research is based upon structured and semi-structured interviews with one hundred married women who live in the city of Lahore, Pakistan. After gaining primary information from the women relating to age, education, employment, household income and family background, the primary part of the interview revolved around each participant's knowledge, views and perceptions regarding the *khul'*. The participants were first asked if they had heard of the term *khul'* and, if so, what they thought it meant. Eighty-three of the participants had heard of the term *khul'*. Thirty-two of these participants had not only heard of the term, but were able to describe it as the process of women attending court to obtain a divorce. Eighteen of these thirty-two participants mentioned that they knew of someone in their

family or *muhallah*⁶⁸⁴ who had gone to court to obtain a *khul'*, and so were familiar with its usage. See Figures 4 and 5 for a breakdown of these figures:

Figure 4 – Participants' Knowledge of the *Khul'*

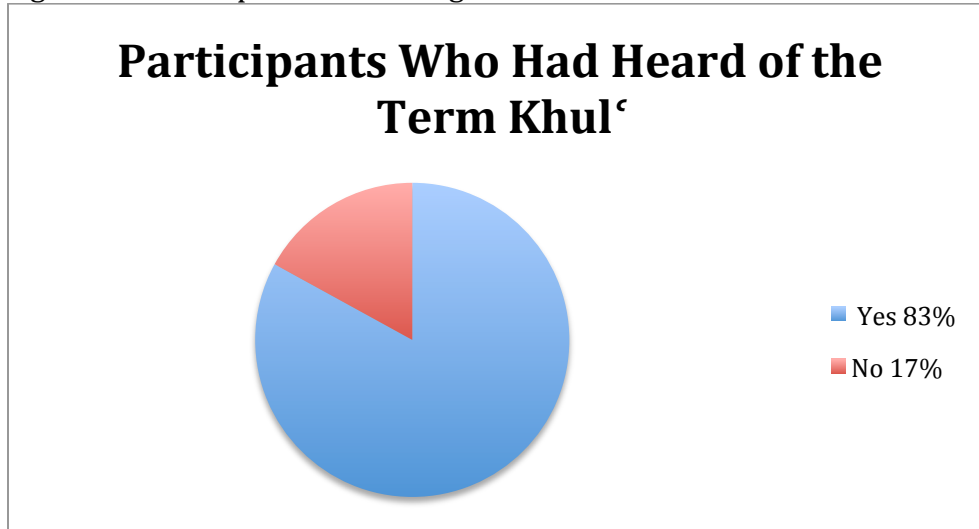
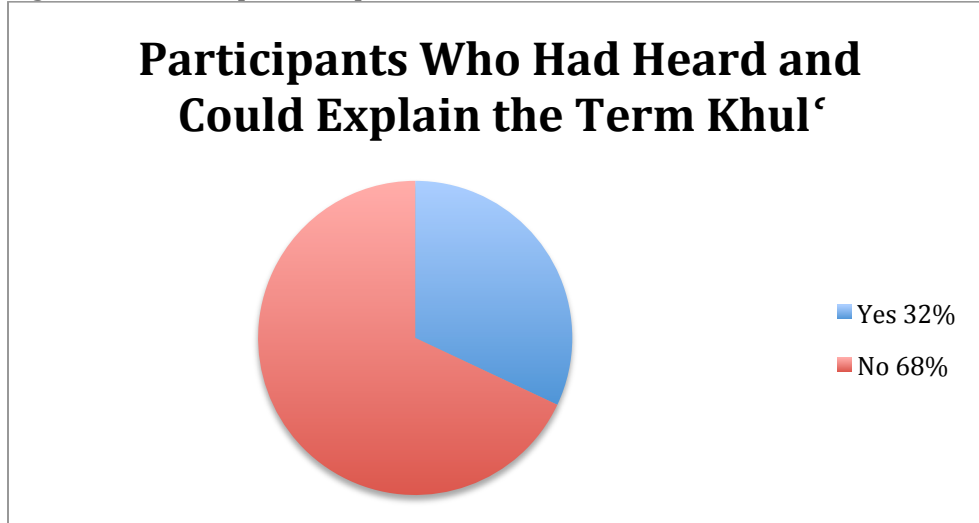


Figure 5 – Participants Explanation of the *Khul'*

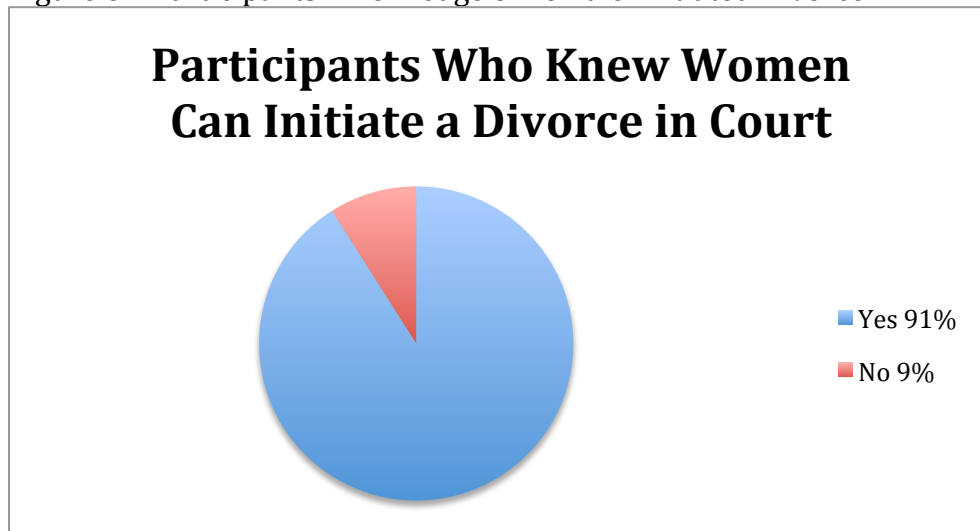


Fifty-one of the participants who had heard of the term *khul'* were unable to provide any definition of what it meant. All of the participants were asked if a woman could

⁶⁸⁴ Refers to the local community known by the participants.

dissolve her marriage if her husband refused to give her a *ṭalāq*. Ninety-one participants stated that a woman could go to court and ask the judge for a divorce. These participants were quite clear in their answers and unambiguously stated that a woman had an alternate court remedy if her husband refused to divorce her. Figure 6 provides a clearer picture of their responses.

Figure 6 – Participants' Knowledge of Female-Initiated Divorce



The research suggests that although many women have heard of the word *khulʿ*, most of them did not know what the word actually meant. Although the majority of the participants were aware that a woman has the right to go to court and seek a dissolution of her marriage, they did not know this to mean a *khulʿ*. Whilst this reflects the position of most of the participants, nine of the respondents expressed no knowledge on this matter and did not think a woman could initiate a divorce of any kind. Sobia, a 50-year-old woman from a lower working class background who had never been to school, stated:

*"I don't know. She cannot do anything. She will have to suffer with her in-laws or suffer at her parents' house"*⁶⁸⁵.

Khalida, who did not know her age, but who appeared to be in her late 50s and who was also illiterate, stated:

*"Once you are married you are married. The husband can divorce you if he wants to. She cannot get a divorce from him"*⁶⁸⁶.

When I asked her what a woman could do if her husband refused to give her a *ṭalāq*, she replied:

*"I have never found this to be the case. Most husbands are happy to get rid of their wives and get another one"*⁶⁸⁷.

Khalida did not entertain the thought that a woman could or should get a divorce. In her experience, a man was always ready to give his wife a divorce if she so desired. Majeeda, a forty-year-old maid who had attended school sporadically until grade four, reiterated these views:

*"What can a woman do? I don't know. Once you are married, unless your husband throws you out, you remain in his house. I know of many women who go to their parents' houses in anger or when they are upset. But in the end most return, or if they don't, the husband just divorces them"*⁶⁸⁸.

Bano, a fifty-one-year-old housewife from a lower working class family, also said:

*"She can do nothing. She will have to tolerate her lot. I don't know what she can do. Especially if she has children"*⁶⁸⁹.

⁶⁸⁵ Interview, Lahore, July 15th 2013.

⁶⁸⁶ Interview, Lahore, July 7th 2013.

⁶⁸⁷ Ibid.

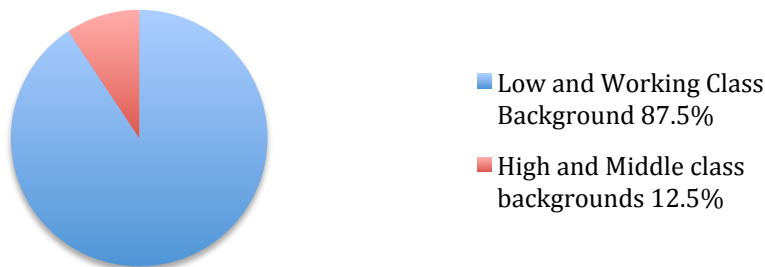
⁶⁸⁸ Interview, Lahore, July 22nd 2013.

⁶⁸⁹ Interview, Lahore, July 5th 2013.

Of the nine participants who were unaware of a woman's right to initiate a divorce, eight had never been to school and had received no formal education, whilst one participant had gone to school but only sporadically, and had not studied further than grade four. Moreover, all of the nine participants belonged to lower working class families with a total household income ranging between 7000 and 10,000 rupees. Although there was a strong correlation between low socio-economic standards and lack of knowledge regarding the *khul'*, the converse was also true. Of the thirty-two participants who had some knowledge about the *khul'*, the majority (87.5% n=28) also came from low socio-economic backgrounds. Over half (57% n=18) of them were able to describe the process of *khul'* in some depth: that it was not very costly, and that a woman was able to get a divorce within a year. Their knowledge came as a result of knowing someone in their own social circle or neighbourhood who had gone through this process successfully. Only four of the thirty-two participants came from higher socio-economic backgrounds. See Figure 7 below:

Figure 7 – Socio-Economic Background of Participants' Who Had Heard of and Could Explain the *Khul'*

Socio-Economic Background of Participants Who Had Heard of and Could Explain the *Khul'*



Whilst all of the women from lower middle class or middle class families knew a woman could go to court to obtain a divorce, only four of them were able to provide its technical legal name. Unlike their poorer counterparts, none of the women from higher socio-economic backgrounds had met anyone or knew of anyone who had gone to court to obtain a *khul'*. Moreover, these particular respondents all stated that they had absolutely no knowledge of the court process to obtain a *khul'*. Whilst it is difficult to make broad generalisations in this study (due to the small population sample), this research does suggest that women from lower socioeconomic backgrounds are just as aware of their legal rights to a *khul'* as their wealthier counterparts, and indeed are more likely to have met a woman or know of one who has obtained a *khul'*. Majid Iqbal, a senior lawyer who has represented many women in *khul'* cases over the last ten years, has stated that it is the poorer families who utilise the *khul'*, rather than those who belong to the middle or upper classes. He has stated that poorer women are already in a miserable condition and have a lot less to lose both emotionally and financially. Although the social stigma and

embarrassment relating to divorced women permeates Pakistani society, women from the poorer classes have less social standing to lose⁶⁹⁰.

Ali Shah, another family lawyer, reiterated these views⁶⁹¹. He stated that middle class families have a higher financial investment when girls are married. Money is spent on at least three functions: the *upton*⁶⁹², *mehndi*⁶⁹³ and *baraat*⁶⁹⁴. The girl's side of the family also provide numerous gifts to the boy's side, and will have already spent a great deal of money on pre-wedding dinners and functions⁶⁹⁵.

However, it is not only the financial consequences that are considered, but also the stigma attached to a divorce and the 'dishonour' that is brought to the family.

Pakistani middle class families are inherently conservative by nature, and have a social standing in the community based on respectability and propriety. A large amount of that propriety is linked to maintaining the honour and prestige of the women of the family. Divorce is one of many acts that reduce the honour of a woman, and by default reflect badly on her natal family. The parents will be blamed for not instilling good behavioural traits within their daughter, and thus they will pressurise her to remain in her marriage.

⁶⁹⁰ Interview, Lahore, April 30th 2014.

⁶⁹¹ Interview, Lahore, April 30th 2014.

⁶⁹² The bride's family applies local herbal cosmetics to the bride to mark the launch of her official wedding days, and traditionally from this day onwards she is not allowed to take part in any household chores or employment.

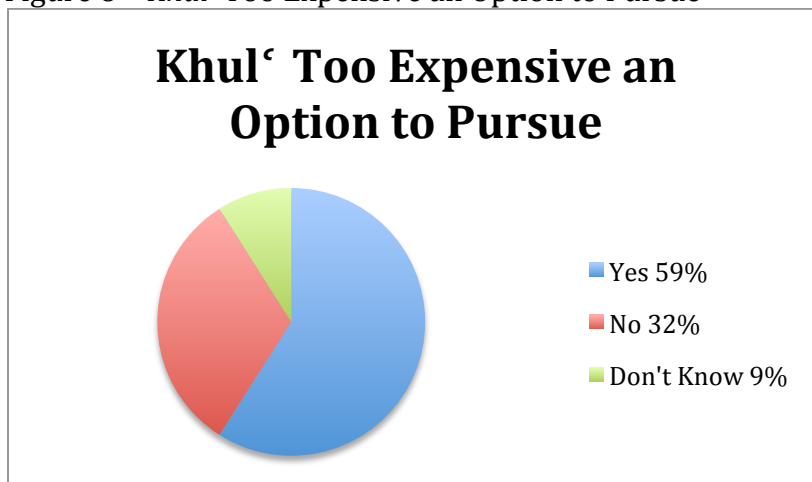
⁶⁹³ A henna party arranged by the bride's family where girls and the bride-to-be have intricate henna designs painted on their hands. The groom's family is invited to the event.

⁶⁹⁴ This is the first day of the wedding where the bride's family is the host and provides a special meal for all of the guests.

⁶⁹⁵ Interview, Lahore, April 30th 2014.

The participants were also asked what difficulties, if any, a woman faces if she wants to divorce her husband and obtain a *khul'* from the courts. A key factor outlined by the participants is financial constraints. Fifty-nine participants thought that litigation would be too expensive for anyone to afford. See Figure 8.

Figure 8 – *Khul'* Too Expensive an Option to Pursue



Twenty-one of these participants stated that the court cost would be at least 50,000 rupees, whilst the remaining thirty-eight participants stated that the cost would be at least 100,000 rupees. These views, however, do not reflect the actual expense of going to court. Most *khul'* cases cost the litigant between a minimum of 5000 and a maximum of 10,000 rupees, with only a few cases reaching 15,000 to 20,000 rupees

and in exceptional cases 50,000 rupees⁶⁹⁶. Whilst the majority of the women overall felt that it would be too expensive to obtain a *khul'*, there was a stark difference between the knowledge and perception of court costs between the different socio-economic groups. Figures 9 and 10 provide a clearer picture of the results.

Figure 9 – Socio-Economic Background of Participants: *Khul'* Too Expensive to Pursue

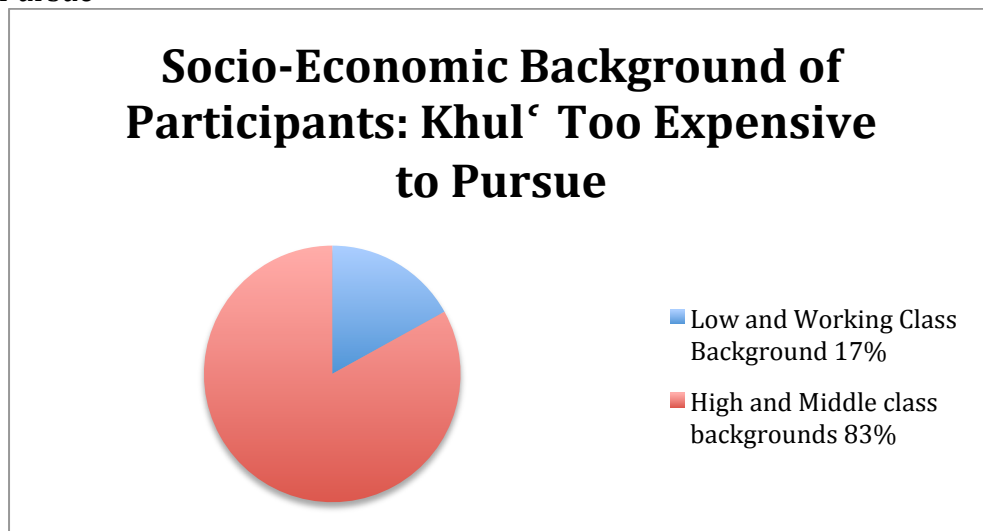
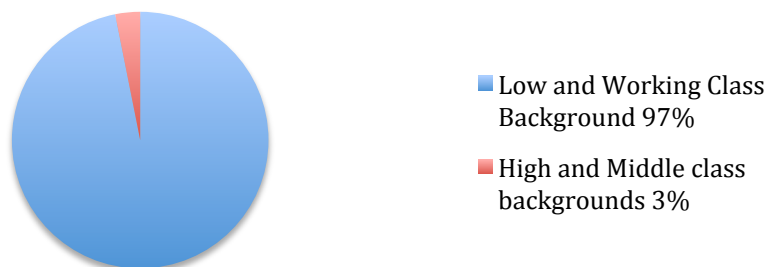


Figure 10

⁶⁹⁶ See Chapter Seven of this thesis.

Socio-Economic Background of Participants: *Khul'* Not Too Expensive to Pursue



As can be seen, of the fifty-nine participants who thought a *khul'* was too expensive to pursue, eighty-three per cent (n=50) came from affluent backgrounds. However, thirty-two participants thought that the costs of going to court were not too high, with eighteen of them being aware that not only was the court process relatively quick, but also that it was an affordable option. All but one of these participants belonged to lower working class families with little or no education. Rubya, a thirty-eight-year-old maid, stated:

*"A girl from my muhalla had a khul'. Her husband would beat her. She was quite poor like me but she still went to court. So it can't be that much money"*⁶⁹⁷.

A common feature of the participants who understood the court costs as being low was that they all knew of someone who had gone to court and successfully obtained a *khul'*. They were also very well versed in the life histories of those women,

⁶⁹⁷ Interview, Lahore 22nd July 2013.

indicating that the *khul'* had been a lively topic of conversation and debate for these participants in the past. Information regarding the *khul'* had filtered down to them through informal channels of communication and socialisation as opposed to the dissemination of formal education through literature, advertisements or workshops. Whilst this process of promulgation of knowledge was useful to these participants, only those women within such social circles – in this case, women from lower working class families – had access to such information. Those women who had never met or known anyone who had obtained a *khul'* were at a disadvantage. Nine women from working class families and all of the women from middle class families had inaccurate assumptions about the expense of a *khul'*, meaning that a deterrent existed in the minds of these participants that did not pertain to reality.

Whilst expense was outlined as a key obstacle for women who might wish to pursue a *khul'*, lack of family support was another issue raised by the participants. The overwhelming majority of the participants (91%: n=91) cited lack of family support as one of the primary reasons why it would be very difficult for a woman to have recourse to a legal remedy⁶⁹⁸. Courts were perceived as male-dominated forums, and it was viewed as inappropriate for a lone woman to attend court on her own. As a result, she would be reliant upon the male members of her natal family. However, parents, brothers and uncles were seen as unlikely to support a woman's decision to divorce, instead preferring that she compromise and have patience. The participants

⁶⁹⁸ The nine participants who did not mention this factor were those who had no knowledge of the *khul'*. They were very reticent in discussing the topic overall and belonged to very low socio-economic backgrounds.

outlined *sabr* (patience), *hikmah* (wisdom) and *kismet* (fate) as common phrases used by parents to encourage a girl to remain in the marriage. Sixty-seven of the participants quoted a phrase that girls often hear whilst growing up, and which is a concept instilled in them at an early age:

"Jaab bachee kee shadee huwthee hai thaw sirf oos ka janaza ghar seh jay gha":
"When a girl marries, she will only leave that house upon her funeral".

This phrase reflects the overall mentality of Pakistani parents, as described by the participants: that a woman must do her utmost to remain within the marital home through compromise and patience. Although parents will allow their daughter to return to the natal home during disputes, she will always be encouraged to return to her husband and his family after a few days' 'cooling-off period'. Lack of parental support was cited as a key reason why women remain in unhappy marriages.

Afifa, a thirty-six-year-old housewife from a lower working class family, stated:

*"Parents give no support at all. They are the ones who tell their daughters to be patient. This is against our izzat (honour), they will say. We will be dishonoured if you leave your husband, so stay for the sake of our respect and honour. Most women stay in unhappy marriages for the sake of the izzat of their families and parents. My husband has hit me. It did not change their (parents') mind"*⁶⁹⁹.

Lack of parental support was also linked directly to the loss of honour and shame if a woman seeks a divorce or is divorced by her husband. The honour of a 'daughter' reflects the prestige and honour of her own family. Blame and fault were also interlinked with dishonour. Seventy of the participants stated that a woman is always blamed in cases of divorce. Family members or members of the community

⁶⁹⁹ Interview, Lahore, July 11th 2013.

assume either that she was incapable of keeping her husband or that she must have provoked arguments. Insubordination by a wife is interpreted as bad parenting by her parents, who must have failed to *samjah* (advise and admonish) their daughter. Thus, parents encourage their daughters to remain in the marriage through all means possible rather than face the censure of their friends and family.

Raazia, a housewife from a middle class family, stated:

"The main problem is of izzat. They (parents) say you will live and die there. They say your funeral will come from there. Wives suffer in silence. What else can they do? They have nowhere to go. Their mekkah⁷⁰⁰ say go back. I see in our muhalla, in-laws trouble them. A girl had in-law problems. Her parents could not help her and did not help her. So she ate poison. I gave her the gusl⁷⁰¹. She has a daughter. He was a drug addict and her in-laws were bad too. No one helped her. The problem is all about finances. There are so many problems. You need money, pay fees, travel, and pay for the buses: I know you can't just go to the courts. Lawyers do nothing without fees"⁷⁰².

When asked how the local community reacts to a woman who has obtained a divorce or is divorced herself, Noorah, a thirty-nine-year-old teacher, stated:

"Very badly and very negatively. They normally think that she is to blame. She is expected to have been patient and to have compromised. This was her kismet and she has gone against that. Some parents may help but that is very few. It is her kismet and she must stick to that"⁷⁰³.

Whilst the social stigma of divorce combined with the lack of financial means and family support were seen as major deterrents in obtaining a *khul'*, eighty-one of the participants were also very adamant in their views that a woman should still compromise within her marriage and not voluntarily opt for a *khul'*. Despite exhibiting bitterness at communal censure as well as berating parents for their

⁷⁰⁰ Any member of the girl's natal family.

⁷⁰¹ Washing a dead body before burial according to Islamic burial rites.

⁷⁰² Interview, Lahore, August 15th 2013.

⁷⁰³ Interview, Lahore, August 11th, 2013.

failure to assist, the majority of the participants viewed the *khul'* as creating more problems than it solved, and it was not perceived as a realistic remedy to be pursued.

Kulsoom, a 44-year-old housewife from a very low working class family, stated:

*"She should stay put and stay safe in her marriage, especially if there are children. That is her duty and how she should work. Girls don't respect their husbands anymore so the men get angry. They should understand the man more. Compromise with him and don't talk back. Life will be easier ... fights with in-laws are excuses"*⁷⁰⁴.

Kulsoom went on to mention a local Pakistani idiom used by many of the other participants – *"talia dawnaw haat se bajtee hai"*, literally meaning, "it takes two hands to clap", which is similar in meaning to the phrase "it takes two to tango" – and commented that wives were equally to blame during marital disputes⁷⁰⁵.

Maria, a twenty-four-year-old housewife from a working class family, echoed similar views:

*"A woman will bring shame on her family. These days, women are not ready to compromise. As soon as it gets tough they want to leave. I have had a difficult marriage, with my husband losing work and problems with my in-laws. But I have remained married"*⁷⁰⁶.

Ambreen, a thirty-seven-year-old housewife from a lower working class background who had attended school up until grade 4, blamed the influx of Pakistani television dramas for 'corrupting' the minds of women:

⁷⁰⁴ Interview, Lahore, July 15th 2013.

⁷⁰⁵ Ibid.

⁷⁰⁶ Interview, Lahore, July 9th 2013.

“These dramas are corrupting the minds of girls. They watch these romantic things and think that is what they should have too. The dramas make it seem quite easy and that life will be fine. Divorce your husband and find another handsome one. Life is nothing like that. The girl should compromise and be patient. That will be better for her. Going to court will not help her”⁷⁰⁷.

Naheed, a 44-year-old housemaid, regarded women’s destiny as an important element in life:

“She should stay with the kids. It is sadaqah⁷⁰⁸ to stay with him. This is her kismath. Most are patient and must be patient. She needs to raise the children. I had problems in my marriage. I have patience. I never complain. The rest of my sisters-in-law do not have patience. They fight, but they cannot do anything about it”⁷⁰⁹.

The views expressed by Kulsoom, Ambreen, Maria and Naheed were a common theme amongst the majority of the participants, irrespective of their socio-economic position. The social stigma and shame resulting from divorce, the lack of family support and the inability to secure financial independence were the primary reasons why they felt that women should remain in a marriage no matter how intolerable it may be. Rather than face these obstacles, it was considered better to compromise and accept one’s fate. Women resorting to *khul’* were perceived as taking the easy way out and creating extra hardships for their parents. They were considered to be irresponsible regarding the fate of their children when choosing to live as single mothers. Some of the participants felt that those women who had obtained a *khul’* only served to create a false picture of happiness for divorcees. They set a bad example by indoctrinating other women in their families to be

⁷⁰⁷ Interview, Lahore, July 7th 2013.

⁷⁰⁸ Literally means ‘voluntary charity’ but in this context refers to blessings.

⁷⁰⁹ Interview, Lahore, July 15th 2013.

rebellious and insubordinate towards their husbands, to the detriment of their own welfare.

Somia, a 37-year-old college graduate, stated:

*"I do not believe in divorce. A wife should compromise. The children will suffer and that is not good. Girls these days are less patient and tolerant and just want an easy life"*⁷¹⁰.

Misbah, another college graduate, echoed these views:

*"A man will never look after another man's child. I think it is selfish of a woman to divorce. I have had problems. We all do. But she will be worse if she does get a divorce. These T.V. dramas are no good. They make it look romantic. It is the easy way out"*⁷¹¹.

Keisira, a 29-year-old factory worker, was very vehement in her views:

*"It is very, very tough for her. Her husband is already not helping her in the marriage, so how can she go to the courts to get a divorce when she has no assistance? Anyway, most women are patient. They suffer from unhappy marriage and even violence but they are patient and accept that this is normal and part of life. They think nothing of it and believe they are not worthy of getting divorced. In fact, divorce is really not an option for them. What can they do after that? They will be stigmatised by society. At least she has a roof over her head and has some food on the table"*⁷¹².

Whilst the majority of participants were of the opinion that women should not voluntarily seek a divorce in the form of a *khul'*, ten of the participants expressed the view that a woman should be entitled to divorce her husband if she is not happy in her marriage, and described the miserable conditions that some married women face: abusive husbands, interfering in-laws, and being forced to be party to polygamous marriages. In such instances, it was considered that a woman was justified in divorcing her husband and had the right to a dignified life. However, each of these participants qualified their views by mentioning the financial constraints

⁷¹⁰ Interview, Lahore, August 15th 2013.

⁷¹¹ Interview, Lahore, August 17th 2013

⁷¹² Interview, Lahore, July 9th 2013.

that women face in opting for such a choice. Only those women who could independently support themselves would and should avail themselves of such a right. Financial independence was viewed as a possible factor that could override or at least counteract the social stigma attached to divorced women. If a woman had an independent income through employment or inheritance, then she would not be reliant upon her family for support. Parents were not considered particularly helpful if a woman chose to divorce. Seven of these participants stated that it was very unlikely that parents would encourage or allow their daughters to obtain a divorce, and thus women's ability to support themselves was of crucial importance. Interestingly, the ten participants who stated that women should have the right to apply for a *khul'* all belonged to well-established middle class families. Six of these participants had Masters' degrees and the remaining four had Bachelors' degrees. Moreover, all of these participants were employed as teachers: two were lecturers in a local college and one was the principal of a prominent private girls' college. However, their views formed a minority opinion, not only amongst the sample as a whole but also amongst their own socio-economic group.

Yet, contrary to the majority view of the participants, many women are in fact opting to pursue the *khul'* (as discussed in the following chapter). Why, then, did the majority of these participants not only view such actions negatively but openly censure women who adopt such a route? Feminists have argued that patriarchal structures in society adversely affect women in their motivation, and lead to adaptive preferences or deformed desires. Should the views of these participants be

considered 'deformed' or 'repressive' as a result of their social conditioning, and thus not purely autonomous; or can these decisions be understood as calculated, rational and therefore autonomous choices made for their own long-term benefit? There is an important distinction to be made here, since these issues can influence state policies and future law making. Currently, women are able to obtain a *khul'* relatively easily, but, as will be discussed in Chapter Seven, there have been no reforms regarding ancillary matters of financial support and child maintenance. If the views of the majority of women are to be accepted at face value, then this will lessen the impetus for further state intervention in facilitating the *khul'*. If Pakistani women themselves do not think women should ever contemplate divorce, then it becomes more difficult to galvanise pressure groups and get people to lobby Parliament for further reforms. The views of the majority of the participants were also echoed by all of members of the legal profession interviewed, male and female. They all felt that the *khul'* had become an easy exit route for women to adopt, and that women were no longer trying hard to sustain their marriages, as they had done in the past. Many of the lawyers interviewed stated that women who opted for the *khul'* were not fully equipped to live life without the financial support of their husbands and extended families; nor did they realise the extent of the social ostracism that many would face in the future. However, rather than explore the need for further legislative reforms that could provide financial relief for women, all of the lawyers were more concerned with the social and cultural repercussions of the *khul'*. Thus, it is important to understand the context and underlying motivations behind the views presented above for future policy making, as well as

to gain a better insight into the decision-making processes, which are discussed below.

6.3 Adaptive Preferences, Deformed Desires and Autonomy

The results from this research indicate that while many women are aware of their rights to obtain a *khul'*, it is not a legal remedy that they consider appropriate for them to pursue. The decisions of the participants to remain within marriages which are abusive or detrimental to their physical or emotional well-being have consequences for their autonomy⁷¹³; that is, women should live lives of their own choosing and have a broad range of autonomy-enabling conditions⁷¹⁴. Such conditions include living their lives free of violence or the threat of violence, and free from paternalistic and patriarchal laws, and guaranteed access to choices and options. It has been argued that women suffering from oppression have *deformed desires* in that their desires have been adapted to the conditions of oppression and that their decisions are consequently not made autonomously⁷¹⁵. The oppression is internalised, so that agents who are oppressed come to believe in the oppressed ideology and thus develop preferences and desires in the light of that ideology. Ann Cudd (2006) describes these *deformed desires* in terms of which “the oppressed

⁷¹³ Natalie Stoljar, “Autonomy and Adaptive Preference Formation,” in Veltman and Piper, eds., *Autonomy, Oppression and Gender*, 227-252.

⁷¹⁴ Catriona MacKenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (New York: Oxford University Press, 1999), 13-19.

⁷¹⁵ Martha Nussbaum, *Sex and Social Justice* (New York: Oxford University Press, 1998), 30, 50.

come to desire that which is oppressive to them [and] one's desires turn away from goods and even needs that, absent those conditions, they would want"⁷¹⁶. Sandra Lee Bartky (1990) describes *deformed desires* as "repressive satisfactions" which "fasten us to the established order of domination, (to) the same system"⁷¹⁷. This domination then leads to the production of "false needs" and result in the "denial of autonomy"⁷¹⁸. This theory would explain why participants such as Noorah⁷¹⁹, Somia⁷²⁰ and Misbah⁷²¹ considered that leaving their marriages would be a failure on their part, rather than blame their abusive husbands or interfering in-laws. They did not question whether their husbands had a right to hit them, but accepted this violence as a result of their own perceived failure to keep their children quiet or cook a meal on time. Subordination to their husbands and mothers-in-law was considered a 'natural' and 'respectful' demeanour to adopt, whilst the *khul'* was viewed as harming the extended family, rather than providing any relief to a wife. Even though all three of these participants were able to financially support themselves and their children, they were not prepared even to consider the *khul'* as an option but considered a bad and even violent marriage better than no marriage at all. Indeed, both Somia and Misbah defended their husbands' violent attitude, blaming the financial strain of providing for their families as the root cause for their violence.

⁷¹⁶ Ann E. Cudd, *Analysing Oppression* (New York: Oxford University Press, 2006), 181.

⁷¹⁷ Sandra Lee Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression* (New York: Routledge, 1990), 39.

⁷¹⁸ Ibid.

⁷¹⁹ Interview, Lahore, August 11th 2013.

⁷²⁰ Interview, Lahore, August 15th 2013.

⁷²¹ Interview, Lahore, August 17th 2013.

Thus, these desires can be viewed as *adaptive preferences*, since they have been formed in response to the unjust conditions prevalent in a patriarchal society where men are deemed superior to women. Noorah stated that whilst she was growing up her father was often violent towards her mother and herself, and that she was now witnessing the same pattern in her marriage⁷²². Noorah explained that men have shorter tempers and less patience than women, so this was not an unexpected event, nor was it a justification for a woman to leave a marriage⁷²³. Throughout her life, Noorah had been taught to be subservient to male authority and not to question male actions in any form or manner. Noorah was also very shy in her demeanour and quite reticent whilst giving her views, indicating to me that she would accept punishments meted out to her by her husband without complaint.

According to Cudd's (2006) argument, a woman's desire not to leave an unhappy marriage or to remain in an abusive one can be mistaken "for legitimate expressions of individual differences", but in reality these are "formed by processes that are coercive: indoctrination, manipulation and adaptation to unfair social circumstances"⁷²⁴. As was discussed in Chapter One, many Pakistani girls are brought up in an atmosphere of son preference, and their own interests and rights are given up in favour of the male members of the family. This results in discrimination against girls in food distribution; lack of educational opportunities

⁷²² Interview, Lahore, August 11th 2013.

⁷²³ Ibid.

⁷²⁴ Cudd, *Analysing Oppression*, 183.

for girls; an increased burden of household work on women and the young; violence against wives; lack of inheritance or property rights for women; and male control over women's bodies and sexuality. When a woman is brought up in an oppressive atmosphere, her autonomy is undermined, and this precludes her from making decisions that can be *non-adaptive*. Liberal feminists argue that personal autonomy equates to personal freedom, i.e. living the life of one's own choosing. However, in order to exercise full personal autonomy, certain enabling conditions are required, as cited earlier. Procedural accounts of personal autonomy avoid judging the content of a woman's choices but instead focus on the conditions necessary for her to make autonomous decisions.

Ann Cudd (2006) argues that being free of violence or the threat of violence is one such enabling condition, since these factors violate women's dignity⁷²⁵. Violence or the threat of violence will force women to make choices that they do not want, or curtail their sphere of activity in their efforts to avoid harm. Brison (1997) argues that violence takes away women's self-respect and dignity, disempowering women and limiting their choices. In the case of Afifa⁷²⁶, Bilquis⁷²⁷ and Sultana⁷²⁸, all three admitted to have suffered some form of violence from their husbands during their marriage. Bilquis also said that her mother-in-law had slapped her several times for not preparing a meal on time⁷²⁹. However, none of these participants saw these as

⁷²⁵ Ibid., 85-18.

⁷²⁶ Interview, Lahore, July 11th 2013.

⁷²⁷ Interview, Lahore July 7th 2013.

⁷²⁸ Interview, Lahore July 15th 2013.

⁷²⁹ Interview, Lahore July 7th 2013.

out of the ordinary or unusual phenomena in marriage. When questioned about domestic violence within marriage, Halah, a 47-year-old nurse, just laughed and stated:

*"That is so common and most men hit their wives in anger most of the time. I see many women in my muhallah with a bruised eye or a split lip. That is so common and if we all went to the court for a divorce just because of that, then there would be no marriages left at all"*⁷³⁰.

This is similar to Martha Nussbaum's (2000) interpretation of why Vasanti, an Indian woman, stayed in an abusive marriage. Vasanti does not consider herself as having rights that are being violated, but has chosen a *deformed preference* to put up with abuse as natural and part of a woman's lot⁷³¹. Smith (2004) argues that freedom from patriarchal and paternalistic laws are also necessary enabling conditions for personal autonomy, since these laws restrict women's options on the basis that they are in the interests of the women themselves. Patriarchal laws steer women into a socially preferred way of life, but are unfair because they restrict women's choices – choices which should be guided by their own sense of self-worth and their own values rather than to the benefit of the oppressor. Walby (1986), for instance, describes the "patriarchal mode of production" in which women's labour in the house is appropriated by their husbands and the extended family who live there⁷³². The endless, backbreaking, repetitive household chores done by women are not considered work, and they receive no remuneration for them. Women are

⁷³⁰ Interview, Lahore, August 15th 2013.

⁷³¹ Martha Nussbaum, *Women and Human Development* (Cambridge: Cambridge University Press, 2001), 68-69.

⁷³² Sylvia Walby, *Patriarchy at Work* (Polity Press, Cambridge in association with Basil Blackwell, Oxford, 1986), 55.

still considered dependent upon their husbands, who retain control over most productive resources. The lack of economic independence and lack of recognition of their contribution to the household ensures a pattern of subordination and dependency, destroying women's self-respect, self-confidence and self-esteem, thus setting limits on their aspirations and goals. One participant, Khadija⁷³³, stated that she had been married for twenty years and helped her husband in the fields, doing the arduous job of gathering cotton with her fingers for hours at a time⁷³⁴. However, she received no payment for her duties, and neither did she expect to be paid, as she felt that she was helping her husband with his chores. She also said that a woman should not divorce, as there is more *izzat* (honour) in living in her husband's home than with her parents. In Khadija's mind, respectability and status within society were inextricably linked with her husband, and no form of detachment could be contemplated no matter how difficult the marriage became. Since Khadija never expected to receive any kind of remuneration for her labour-intensive work (which would have afforded her some form of financial independence), she could never imagine a life other than the one she was living. This was not a choice that she had ever contemplated, or a right she expected to have or should have, and so she stated: *"We are one family and we work hard together, and if I begin to ask my husband for money, this will only create disputes within the family"*⁷³⁵.

⁷³³ A forty-year-old housewife from a lower working class background with no formal education.

⁷³⁴ Interview, Lahore, July 14th 2013.

⁷³⁵ Interview, Lahore, July 14th 2013.

Having access to options is therefore seen as a necessary prerequisite and an enabling condition for making autonomous decisions. Cudd (2006) argues that women's access to options is frequently and unfairly curtailed due to economic deprivation or the "feminisation of poverty"⁷³⁶. In three of the participants' narratives highlighted above (Afifa, Bilquis and Sultana), none of them had ever worked, and they were solely reliant upon their husbands for every financial aspect of their lives. They had not received any substantial *mahr* at the time of their marriage, and their *jahez* (dowry) consisted primarily of household furniture and utensils, which had also been fully utilised for the duration of their marriage. None of them had attended school beyond grade 8, with three of them having dropped out after grade four, and their employment opportunities were severely curtailed as a result. In such conditions, it is difficult to imagine how a woman could contemplate leaving an abusive marriage, even where a legal remedy might be quite accessible, given that her options for an alternate life are so limited. Chambers (2008) argues that the ability to assess one's own preferences and imagine an alternative life is an essential enabling condition for personal autonomy. The absence of the meaningful options that are the basis for making choices does nothing other than to affirm the status quo. The absence of these internal psychological enabling conditions, as well as the presence of external conditions of violence or the threat of violence, gender stereotyping, sexual discrimination, economic deprivation and cultural constraints, can all have the effect of reducing reflection and possibilities of change⁷³⁷. Thus,

⁷³⁶ Cudd, *Analysing Oppression*, 119-154.

⁷³⁷ Clare Chambers, *Sex, Culture, and Justice: The Limits of Choice* (University Park: Pennsylvania State University Press, 2008), 263-264.

Misbah remained in an unhappy marriage, as this is what she had been trained to believe was best for her⁷³⁸. She considered it in her best interest to remain married and serve her husband or children rather than face social censure and the stigma of divorce. Afifa was very critical of women who had divorced, even if they had suffered physical abuse. She was incredulous as to why, if she was able to cope and had done so for so many years, others could not follow her lead and try as hard as her⁷³⁹. Cudd (1988) argues that this type of conformity to patriarchal standards perpetuates women's oppression by reaffirming stereotypes about them, which harms rather than benefits all women.

6.4 Non-Adaptive Desires and Autonomy

Whilst this theoretical model helps to analyse the choices made by women such as Kulsoom, Maria, Bilquis, Sultana, Afifa and Misbah, it does not take into account the complexity of the views of the other participants, who, faced with similar problems and making similar choices about their marriages, were aware of their limited opportunities, but who justified their choices based upon a rational assessment of their situation and what was best for their welfare. In their cases, it is difficult to reconcile the theoretical labelling of their decisions as *deformed desires* and pronounce their choices as non-autonomous. I would argue that the narratives of many of the participants exhibited various *degrees* of autonomy, and whilst they might have adapted their preferences, they were motivated to act in ways that did

⁷³⁸ Interview August 17th 2013.

⁷³⁹ Interview July 7th 2013.

not always contribute to their oppression. In the same vein, Uma Narayan (2002) acknowledges that women under patriarchy can have *non-deformed* desires, and believes that through *patriarchal bargaining*, women make rational (and therefore autonomous) decisions in response to circumstances where they have limited options⁷⁴⁰. In the narrative provided by Keisira⁷⁴¹, she did not believe that a woman should get a divorce. Although life had been difficult, she considered it positive that she had a roof over her head and financial support to look after her children:

*"My husband tries his best. Yes, he can be angry and we fight and he hits me. I feel embarrassed in front of the children when I have bruises. This is not good. But he also works hard in the factory. If I was to divorce, where would I go? Who would look after me? My children? My parents are poor and my brother is also not working. It is better for me and my children if I stay. At least we have food and water and a roof. We even built an extra room for the children. It is better for me and my children and my family that I stay"*⁷⁴².

Keisira has rationally engaged in a process of cost-benefit analysis. She has weighed up the options available to her, and after consideration, has decided to choose an option that is best for her on the basis of this analysis. Keisira was fully aware that she could go to court to obtain a *khul'*. She mentioned that a girl in her *muhallah* had done the same and was from a poor family⁷⁴³. Thus she knew that going to court to get a divorce was an option she could choose. Crucially, she also felt embarrassed about having bruises, and acknowledged that the violence was not good for her or her children. This contrasts with the views of Somia and Misbah, mentioned earlier,

⁷⁴⁰ Uma Narayan, "Minds of Their Own: Choices, Autonomy, Cultural Practices, and Other Women," in *A Mind of One's Own: Feminist Essays on Reason and Objectivity*, eds. Louise M. Antony and Charlotte E. Witt (Boulder, CO: Westview Press, 2nd edition, 2002) 418–432.

⁷⁴¹ A twenty-nine-year-old factory worker with no formal schooling.

⁷⁴² Interview, Lahore, July 9th 2013.

⁷⁴³ Interview, Lahore, July 9th 2013.

who defended their violent husbands' actions and blamed them on their own perceived shortcomings⁷⁴⁴. Keisira also envisaged a different life for her daughter, free of violence and abuse: something Noorah had never considered or anticipated.

Keisira stated:

*"Marriages are arranged. But when I arrange my daughter's marriage, I will make sure her husband is a soft man and not hard and nothing like her father"*⁷⁴⁵.

Keisira also recognised the benefits of staying at home and tolerating the abuse. Her husband provided her with food, clothing and the basic necessities of life. Thus Keisira chose to stay in an abusive marriage and not avail herself of the *khul'* through a process of *patriarchal bargaining*. Narayan (2002) argues that those who bargain with patriarchy should still be considered autonomous. Although their choices are constrained by patriarchy, they are still able to make authentic, reasoned choices within these constraints. Similarly, in the case of Saira⁷⁴⁶, the social stigma of divorce and being ostracised from the community were overriding factors in her decision to remain in her marriage. Saira said she would never contemplate applying for a *khul'* in such circumstances:

*"It is better to have a husband and a roof over your head. At least it is your own home, rather than being a beggar in your parents' home and at the mercy of your sister-in-law. He (husband) may hit me and I feel shame but that shame is in my home and not in the home of another. I pray to Allah that my daughters have a better life than me. That is why I work so I can give them education"*⁷⁴⁷.

⁷⁴⁴ Somia interview, Lahore, August 9th 2013; Misbah interview, Lahore August 16th 2013.

⁷⁴⁵ Second interview, Lahore, July 13th 2014.

⁷⁴⁶ A thirty-seven-year-old nurse with a graduate degree.

⁷⁴⁷ Interview, Lahore, August 24th 2013.

When pressed further, Saira admitted that a working woman with money, an independent life and her family's support could and should apply for a *khul'* if she was in an abusive marriage, but she felt that this was a dream and did not reflect the realities of Pakistani life⁷⁴⁸. For Rubya⁷⁴⁹, the welfare of her children was of paramount importance. She knew of a woman who had obtained a *khul'*. Although that woman had found relief from an unhappy marriage, Rubya regarded this new-found single status as unenviable.

*"She is the mother of three young children and cannot afford to send them to school. Her ex-husband does not give her any money and her parents refuse to pay too. They were not happy with her decision"*⁷⁵⁰.

Many of the participants accepted that *khul'* was a readily accessible legal remedy if they so chose. Shamma⁷⁵¹ related the story of her sister, who had gone to court and obtained a *khul'*. She had one child – a baby girl – and was now living with her parents. Shamma's sister had not suffered an abusive marriage; rather, her in-laws had created too many problems for her to stay. Having been married for three years and endured many disputes, she applied for a *khul'*. However, Shamma did not think her sister was now in a better position, and said she would never take that route:

*"She lives with my mother and my brother and sister-in-law. Although she stays with them, they do not respect her or provide any help. She has to sew to support herself. My bahbi (sister-in-law) makes her do all the chores of the house and is always taunting her – putting her down and complaining. It is better to suffer in your husband's house rather than at the hands of your bhabhi – at least your husband's house is yours and you belong there"*⁷⁵².

⁷⁴⁸ Ibid.

⁷⁴⁹ A thirty-two-year-old maid who attended school until grade 2.

⁷⁵⁰ Interview, Lahore, July 22nd 2013.

⁷⁵¹ A thirty-seven-year-old seamstress who attended school until grade 4.

⁷⁵² Interview, Lahore, July 7th 2013.

Harriet Barber (2007) takes a slightly different approach, arguing that *deformed desires* merely arise due to the second best option that is available under the circumstances. When the first and best option is not accessible, then it is rational to choose the second best option⁷⁵³. If a woman accepts oppressive conditions, this does not necessarily mean that she prefers what she chooses: “making the best of a raw deal when no other alternatives are available is not the same as preferring it”⁷⁵⁴. I would argue that in the case of Saira, she does not really prefer her husband hitting her and causing shame but that is a better option for her than the shame of living with her parents. She may not have clearly articulated that point, but her desire to achieve a ‘better life’ for her daughters does imply that she is not completely satisfied with the state of her own marriage and wishes better for her children⁷⁵⁵. According to Barber’s (2007) theory, Saira would jump at a better situation if it were accessible to her, and if its benefits outweighed the benefits of remaining in her marriage. However, remaining in a marriage and tolerating her husband’s abuse is a rational choice, albeit a second choice, because it is better than the reality of having no abuse but being homeless. This is also illustrated through the narrative of Mehvish⁷⁵⁶. She clearly agrees that women should have the right to divorce and go to court to obtain a *khulʿ*. However, lack of parental support, financial dependency and guardianship of children prevent women from exercising this preferred choice:

⁷⁵³ Harriet Barber, “Adaptive Preferences,” *Social Theory & Practice*, 33, no. 1 (2007): 105–126.

⁷⁵⁴ Barber, “Adaptive Preferences”, 114.

⁷⁵⁵ Second interview, Lahore, July 13th 2014.

⁷⁵⁶ A twenty-four-year-old maid who attended school until grade 2.

“Of course a woman would not remain in a marriage if they had money and family and education. The educated have it easier. They already have love marriages and so divorce is no big deal for them. But what can we do? Their parents will help them. Ours will not. We will be blamed for the breakdown and the children will be taken away”⁷⁵⁷.

Here, just like Saira before her, Mehvish articulates very well that if options were available and women could avail themselves of them, they would opt for a better life, as Baber (2007) suggests. Mehvish pinpoints family, education and money as pivotal elements that would enable a woman to choose a better life for herself. Indeed, Mehvish is quite adamant that no woman would choose to remain in an abusive marriage if she had the power and means to leave⁷⁵⁸. Unfortunately, the constraints of a patriarchal system prevent those ideal choices from being made, and thus one must settle for the next best option. During her interview, Mehvish was also quite dismissive of those women who opt for a *khulʿ*. However, she rationalised her opinions upon the basis that divorced women were still subject to constraints imposed onto them by family and the local community, and that they were no better off than when they were married.

“These women have jumped from one hell and entered into another hell. Now they have to beg for food and shelter from their parents, who cannot afford to feed themselves, let alone a divorced mother and her children”⁷⁵⁹.

Serene Khader (2011) also criticises the treatment of *adaptive preferences* as impairments to autonomy, which, she argues, can lead to coercive policies: “if

⁷⁵⁷ Interview, Lahore, July 22nd 2013.

⁷⁵⁸ Interview, Lahore, July 22nd 2013.

⁷⁵⁹ Interview, Lahore, July 22nd 2013.

people whose preferences do not manifest a value for their own independence are not autonomous, public institutions may reasonably coerce those people into changing their preferences”⁷⁶⁰. Overlooking the complexity of agents’ motivations for their choices can result in state policies that have an ‘ineffective focus’⁷⁶¹. Baber (2007) also finds it morally problematic to oversimplify the motivation of agents in deprived circumstances, since denying a woman’s adaptive preference as autonomous is, she argues, tantamount to denying her agency⁷⁶². In the case of Rabia⁷⁶³, she was happy that even though her husband had been mean and cruel to her in the past, particularly at the behest of his mother, she had now firmly established herself within the family home and all three of her children were now attending a local government school:

*“If I had taken the easy way and got a divorce, what would have become of my children? Who would have supported me? Where would I have lived? My parents turned a blind eye to my problems. My brothers had their own families and I did not want to be a burden. Now I have a house and my children are at school. My mother-in-law is aged and cannot do anything”*⁷⁶⁴.

Just like Keisira before her, for Rabia, a psychology of cost-benefit analysis was clearly in operation. From her narrative it is apparent that she accepted all of her marital problems with her husband as long as she received the benefits of his name, shelter and financial help in return. The cost of an unhappy and even violent

⁷⁶⁰ Serene Khader, *Adaptive Preferences and Women’s Empowerment* (Oxford: Oxford University Press, 2011), 98.

⁷⁶¹ Ibid., 100.

⁷⁶² Baber, “Adaptive Preferences”, 114, 126.

⁷⁶³ A thirty-seven-year-old housewife who had graduated from university.

⁷⁶⁴ Interview, Lahore, August 5th 2013.

marriage was overridden by the benefits that she felt she attained through the continuance of the marriage: benefits she would lose if she dissolved the marriage. Rabia felt that her perseverance and compromise during the marriage had yielded positive results for her in the long term. It is therefore important to appreciate the autonomy and agency of participants such as Keisira, Mehvish and Rabia, who have made difficult decisions under very harsh social conditions. They have decided to deny themselves legal remedies that could provide relief to them personally, choosing to sacrifice personal freedoms for the sake of their families or children. Whilst they may appear to perpetuate gender stereotypes of female submission in marriage, it is their very submissiveness that has proved invaluable in protecting them and providing some stability in their lives. Rather than placing casual responsibility of oppression inappropriately on the bearer, it is more appropriate to concentrate upon the unjust social conditions that permeate patriarchal society⁷⁶⁵.

6.5 Patriarchal Bargaining

The reluctance of women to engage with the *khul'* can also be understood within Deniz Kandiyoti's theoretical framework of *patriarchal bargains*⁷⁶⁶. Kandiyoti (1988) argues that patrilocal and patrilineal societies create complex controls that subordinate women living under *classical patriarchy*⁷⁶⁷. She defines *classical patriarchy* as the dominant patrilocal and patrilineal systems where girls are

⁷⁶⁵ Narayan, "Minds of their Own", 422.

⁷⁶⁶ Deniz Kandiyoti, "Bargaining with Patriarchy," *Gender & Society* 2, no. 3 (1988): 274-290.

⁷⁶⁷ Deniz Kandiyoti, "Bargaining with Patriarchy", 278.

married at a young age into an extended family: systems which in turn play a crucial role in shaping women's gender norms. Women deal with patriarchy through a variety of strategies in order to maximise their potential based on their limited resources. Women strategise to ensure the best financial security and life options, engaging in a difficult compromise between unrestrained agency and the restraints imposed on that agency, which occur "due to rules and scripts regulating gender relations"⁷⁶⁸. She describes this process of compromise as *patriarchal bargaining*. Some of the narratives provided by the participants highlight the nature of these rules and scripts that women are expected to follow, as well as the strategies they employ to manage these expectations as they "contest, negotiate, participate in and reproduce patriarchal relations"⁷⁶⁹. Jannah⁷⁷⁰ stated that although her parents were not happy at being involved in her marital affairs, she was still able to involve them in negotiating with her in-laws to provide a separate living area for her husband and herself, albeit next door⁷⁷¹. Her dowry was an important tool to manipulate the family into providing larger living quarters to accommodate her furniture, and her resistance to her sister-in-law by 'giving as good as she gets' meant that she was able to create a stronger position within the marital home. Jannah, however, did not believe that a *khul'* could provide a useful solution to marital unhappiness⁷⁷².

Although she had endured many arguments and violent conflicts with her husband and sister-in-law, negotiation, manipulation and resistance were all strategies she

⁷⁶⁸ Ibid.

⁷⁶⁹ I. Shankar and H.C. Northcott, "Through my Son: Immigrant Women Bargain with Patriarchy," *Women's Studies International Forum* 32, no. 6 (2009): 425.

⁷⁷⁰ A thirty-seven-year-old housewife who attended school until college.

⁷⁷¹ Interview, Lahore, August 15th 2013.

⁷⁷² Ibid.

had used to improve her marital status. Similarly, in the case of Fatima⁷⁷³ a *khul'* was not an option that could be considered.

*"My family would be devastated and I have a younger sister to think about. Any girl who gets a divorce is always blamed. They think it is her fault and not the man's. They think she should have compromised or that (she) made some mistakes. My sister's chance of a rishta (marriage offer) will lessen. My misfortune will affect her chances of marriage"*⁷⁷⁴.

Gerami and Lehnerer (2001) note that women sometimes accept patriarchal arrangements because they expect long-term benefits⁷⁷⁵. In the case of Fatima, her parents refused to help her against her violent husband, and instead advised her to remain patient. Whilst Fatima was able to support herself financially through her job as a college lecturer, leaving or divorcing her husband was not an option that she could contemplate. *"The shame would be too much and I have younger sisters to think about"*. Thus, rather than exercise her right to the legal remedy of *khul'*, Fatima preferred the long-term benefits of respectability that her marriage offered rather than the dishonour that a divorce would bring. Instead, Fatima stated:

*"I just keep quiet. I try not to go in front of my husband when he is in a bad mood. I put the children to bed early so he does not see them cry or fight and I serve his food on time"*⁷⁷⁶.

The strategy of keeping quiet and trying to be inconspicuous so that their husbands would not become frustrated with them was used by seventy-seven of the

⁷⁷³ A forty-five-year-old college lecturer with a Master's degree.

⁷⁷⁴ Interview, Lahore, August 15th 2013.

⁷⁷⁵ Shahin Gerami and Melodye Lehnerer, "Women's Agency and Household Diplomacy: Negotiating Fundamentalism," *Gender and Society* 15 (2001): 556-573.

⁷⁷⁶ Interview, Lahore, August 15th 2013.

participants. Moona⁷⁷⁷, Naheed⁷⁷⁸, Alia⁷⁷⁹ and Shazia⁷⁸⁰ all described their efforts to keep the peace between themselves and their husbands. They made repeated use of the words *sabr* (patience) and *hikmah* (wisdom). “I try not to answer back to him or commit *batameezi* (insubordination)”, “I just keep quiet and leave the room”, “I make sure his food is cooked on time” were all strategies employed by participants to ensure a smooth marital existence. In exchange for this tolerance, twenty-five of the participants said that these strategies worked. Moona stated that her arguments with her husband had lessened over the years and they now “understood each other”⁷⁸¹. She explained that as she had compromised with her husband by always trying to obey his orders, in return, after many years of marriage, he now even defended her against her “interfering mother-in-law” and had realised that she (Moona) was not cunning like other girls⁷⁸². Alia said that the first five years of her marriage were the worst, when her husband would insult her and become angry with her over trivial matters pertaining to household chores⁷⁸³. Alia rationalised this behaviour as a result of her husband’s difficult job and the long hours he experienced in his factory. Alia also worked as a maid, and so was unable to spend many hours at home to cook and clean. However, she had trained her three children to complete these chores, which not only relieved her burden at home but also provided relief in her marriage. Alia further explained that she had achieved success

⁷⁷⁷ A thirty-three-year-old housewife who attended school until college.

⁷⁷⁸ A forty-four-year-old maid who attended school until grade 2.

⁷⁷⁹ A thirty-year-old maid who attended school until grade 2.

⁷⁸⁰ A twenty-four-year-old factory worker who attended school until grade 2.

⁷⁸¹ Interview, Lahore, August 15th 2013.

⁷⁸² Interview, Lahore, August 15th 2013.

⁷⁸³ Interview, Lahore, July 2nd 2013.

in her marriage, since her husband was not so disagreeable and appreciated that she kept the house clean and was a *sughr*⁷⁸⁴ woman.

Kandiyoti (1988) also argues that many women in *classical patriarchy* insist that men should fulfil the role of provider and emphasise their husbands' obligation to live up to those responsibilities⁷⁸⁵. Women often prefer to secure the economic security provided by their husbands in exchange for submissiveness and propriety. Rabia expressed deep dissatisfaction regarding her husband's economic underachievement, which led to arguments, fights and physical violence towards her⁷⁸⁶. Nevertheless, she said, "*I just kept patient and tried to have sabr*"⁷⁸⁷. Rabia remained in the marriage in the hope that her husband's economic position would improve in the future. In her case, it did, and thus in the eyes of Rabia her patriarchal bargain had also been successful. Rabia's short-term tolerance of her husband's violence enabled her to have the long-term benefits of a steady income, children and a roof over her head. Rabia was also very much aware that she had paid a high price for her current position. She acknowledged that she could have left her husband in the early years of her marriage and found work as a teacher after having graduated from university. However, such a life did not appeal to her and she was adamant that it was her husband's duty to support her in return for her looking after the marital home and their children.

⁷⁸⁴ *Sughr* describes a woman who runs her house very efficiently, keeps it neat and tidy and is extremely house-proud.

⁷⁸⁵ Deniz Kandiyoti, "Bargaining with Patriarchy", 282-283.

⁷⁸⁶ Interview, Lahore, August 5th 2013.

⁷⁸⁷ Ibid.

Fifty-two of the seventy-seven participants who had used these strategies, however, said that their initial obedience and patience had not made much difference in their marital relationship. Instead, the arguments had grown and become worse over the years. In response, the participants used a variety of other strategies to resist their husbands within the confines of their marriages rather than resort to a *khulʿ*. All fifty-two participants said they “answered back” or “talked back” to their husbands. Phrases such as “when he argues I scream as hard back to him”, “I answer back to him”, “I also fight with him” and “we shout at each other” were illustrative of the strategies employed by these participants. Saira stated, “*My husband knows that if he shouts at me I will shout back and he is afraid the neighbours will hear him*”⁷⁸⁸. Keisira made similar comments: “*all our houses are joined, so when we fight, the whole muhallah can hear us. So my husband stops*”⁷⁸⁹. Raazia explained that she used a similar strategy and stated that her husband hated her screaming back at him. During the interview, Raazia related a common idiom and said that although it was a joke, it was based on reality:

*“In the first year of the marriage the husband shouts and the wife listens. In the second year of the marriage the wife shouts and the husband listens, and in the third year of the marriage, they both shout and the muhalla listens”*⁷⁹⁰.

It is interesting to note that the very neighbourhood that serves as a major deterrent to divorce for many women also provides a buffer for some wives against their

⁷⁸⁸ Interview, Lahore, August 24th 2013.

⁷⁸⁹ Interview, Lahore, July 9th 2013.

⁷⁹⁰ Interview, Lahore, August 15th 2013.

husbands' power. Social norms in Pakistan dictate that a wife must be obedient and passive towards her husband, being the "self-sacrificing wife, daughter-in-law and mother"⁷⁹¹. A woman's failure to encompass these roles is also a reflection upon her husband, who is viewed as not being able to 'keep his wife in check'. From the participants' responses, it was apparent that patriarchal community norms also serve as a pressure on husbands to stop marital bickering and fights because of the fear that they may be accused of being weak and 'unmanly'. The participants courageously exploited the social norms of the 'submissive wife' to their own advantage. By publically resisting their husbands and thus running the risk of alienating themselves from the local community, as well as tarnishing their reputations, they were able to force their husbands to acquiesce to some of their demands. Saira and Raazia both stated that their husbands were always fearful of the *muhallah's* response to their arguments and had become more agreeable as a result.

6.6 Conclusion

The results of the field work suggest that the majority of the Pakistani married women interviewed were quite aware of their right to attend court and obtain dissolution of marriage. However, rather than engage in the formal process of state law, women prefer to solve their disputes through informal mechanisms, which

⁷⁹¹ Margaret Abrahams, *Speaking the Unspeakable: Marital Violence Among South Asian Immigrants in the United States* (New Brunswick: Rutgers University Press, 2000), 120.

often means that they will remain in unhappy and even abusive relationships. This is partly a response to their precarious socioeconomic position, the lack of social support structures and the social stigma that divorce entails. Kandiyoti (1988) argues that even though classical patriarchy puts heavy obstacles in women's way, which far outweigh actual economic and emotional security, women still resist change, as any new transition in the social order still fails to provide any empowering alternatives⁷⁹². This is also evident from the views of the majority of the participants. The new laws regarding obtaining a *khul'* are a clear challenge to the traditional social order of Pakistani patriarchal society by circumventing male power in the marriage. The *khul'* has the potential to provide relief to women by enabling them to escape from an unhappy, abusive and violent marriage.

However, whilst a woman may find marital emancipation from her abusive husband, it is clear from the views of the informants that this benefit is still not enough of an alternative to persuade them to consider this route. Molyneux (1985) argues that this is not out of some "false consciousness" exhibited by women, although this might be one factor; rather, it is that changes that are implemented in piecemeal fashion can threaten the short-term interests of some women⁷⁹³. Thus, whilst the legal remedy of obtaining a *khul'* has become substantially easier through the intervention of the courts, and later through a Presidential Ordinance, subsidiary matters relating to maintenance and child support have not been improved, nor has

⁷⁹² Deniz Kandiyoti, "Bargaining with Patriarchy", 282.

⁷⁹³ M. Molyneux, "Mobilization Without Emancipation? Women's Interests, the State and Revolution in Nicaragua," cited in Deniz Kandiyoti, "Bargaining with Patriarchy," 282.

the actual experience of attending court, which will be outlined in the following chapter. Those participants who were aware that they could go to court and obtain a *khul'*, and who also knew that it was relatively quick and inexpensive, still did not feel that this was a viable option for any woman to take. Financial considerations, lack of parental support and the social stigma of divorce were too onerous deterrents to contemplate such a legal separation. Instead, many of the participants considered that it was their husbands' duty to feed and clothe them and provide a roof over their heads. If there were no alternative arrangements provided by the state or their families, then obtaining a divorce would not solve their problems.

The narratives of the women also illustrate that the participants cannot be considered a homogenous group with uniform views according to their social status. Instead, their lived realities are far more heterogeneous, exhibiting various impulses behind their opinions and life choices. Mohanty (1986) has argued that multiple factors must be considered, as well as how such factors affect women in complex ways. This is particularly true of the participants of this research. Whilst some of their views, particularly the censure towards female-initiated divorce, can be interpreted as *adaptive desires* that perpetuate the patriarchal structures of society, the narratives presented by other participants illustrate that the motivations behind such decisions are far more complex. Rather, the women are engaged in an unceasing balancing act between the gains and losses that they would incur within the context of their lived realities. They are not merely passive victims of oppressive patriarchal social structures, but make continuous efforts to improve their lives that

will enable them to achieve the best possible outcome for them in the circumstances that they have been given. Moreover, they take pride in having gone through tough times while still providing homes for their children and giving them educational opportunities to which they themselves did not have access.

CHAPTER SEVEN

***KHUL'* IN PRACTICE: IMPLEMENTATION OF THE *KHUL'* IN THE DISTRICT FAMILY COURTS OF LAHORE**

7.1 Introduction

This chapter presents the findings of the fieldwork that was conducted in the District Courts of Lahore over a period of several months (March, April 2014 and July, August 2015). A total of 31 women were interviewed, who were either going through the process of obtaining a *khul'* in the courts or who had already obtained one and were involved in obtaining post-divorce claims of maintenance, child support and restitution of their dowries. The chapter begins with an outline of the legal procedure for obtaining a *khul'*, followed by a summary of the problems that many of the participants faced during their court proceedings. Thereafter, the primary reasons for obtaining a *khul'* are investigated and the salient features of the litigants are discussed in order to ascertain why some women and not others pursue the legal remedy of the *khul'*. The chapter concludes with a discussion on the *khul'* and women's agency in order to assess to what extent women who pursue the *khul'* truly resist patriarchal structures in their society and to examine the emotional and physical costs of attempting to do so.

7.2 The Legal Procedure to Obtain a *Khul'*

The legal procedure of obtaining a *khul'* is governed primarily by the Family Courts Act 1964, which lays out the technical procedures to follow⁷⁹⁴. Once a *khul'* plaint is drafted⁷⁹⁵ and submitted, the court must set a date for the first hearing within thirty days, requiring the defendant's husband to appear⁷⁹⁶. If the husband fails to arrive, the court has discretion to hear the case *ex parte*, so long as it is proven that the defendant's husband has been properly served notice of the plaint⁷⁹⁷. If a husband does arrive during one of the court hearings, then the court will ascertain the exact nature of the dispute and shall "attempt to affect a compromise or reconciliation between the parties, if possible"⁷⁹⁸. If the reconciliation fails, then the court "shall immediately pass a decree of dissolution of marriage"⁷⁹⁹. This is important, as a wife need not prove any of her reasons for wanting a *khul'*. At this point, the court may

⁷⁹⁴ See S. 7 Family Courts Act 1964. Some procedural amendments were recently made by the Family Courts (Amendment) Act 2015 (XI of 2015) detailed below.

⁷⁹⁵ S. 8 Muslim Family Law Ordinance Act 1961 (MFLO) allows a wife to apply to the court to "dissolve the marriage otherwise than by a *talāq*" and is the legal basis for the submission of a *khul'* plaint.

⁷⁹⁶ S. 8 (a) Family Courts (Amendment) Act 2015 (XI of 2015). Prior to this latest amendment, the courts were required to set a date within 15 days of the submission of the plaint. However, the failure of most husbands to appear so quickly and the resultant cost to the wife has resulted in the first hearing date being set after thirty days.

⁷⁹⁷ S. 9 (5) (a) Family Courts (Amendment) Act 2015 (XI of 2015).

⁷⁹⁸ S. 10 (3) Family Courts (Amendment) Act 2015 (XI of 2015).

⁷⁹⁹ S. 10 (5) Family Courts (Amendment) Act 2015 (XI of 2015). When the wife is granted a *khul'*, the court must issue a certified copy of the decree of dissolution to the Chairman of the Arbitration Council within three days from the granting of the *khul'*. The Chairman of the Arbitration Council is then required to act as if he had received a notice of *ṭalāq* and apply the rules under the MFLO 1961. Under S. 7(4) MFLO, the Chairman is required to constitute an 'Arbitration Council' to affect a reconciliation between the two parties within thirty days of the receipt of the notice. However, if the parties fail to reconcile, the *khul'* will then be valid ninety days from the day on which the notice was received by the Chairman (S. 7 (3) MFLO 1961).

direct the wife to surrender her claim to up to 50% of any deferred *mahr* or up to 25% of her admitted prompt *mahr* to her husband⁸⁰⁰. If the plaintiff wife has also issued a suit for maintenance, the court has powers to issue an interim order for maintenance, and failure of the defendant husband to comply will mean that his defence will be struck off and the maintenance suit will be ruled in favour of the wife⁸⁰¹.

In 2002, a Presidential Ordinance was passed requiring family law cases, particularly *khul'* cases, to be resolved within six months of the plaint being issued. This was recently amended, in February 2015, to require courts to decide marriage dissolution cases within four months of the plaint being issued⁸⁰². This series of amendments to the Family Court Act 1964 has significantly speeded up the process compared to previous years. The new amendments now also require a *khul'* plaint to contain all claims relating to the return of the dowry and *mahr*, as well as maintenance and child custody claims, to be submitted in one summons, to reduce further delays⁸⁰³. Whilst the legal procedure is quite straightforward and the costs appear to be quite small⁸⁰⁴, in reality things do not always run as smoothly. From

⁸⁰⁰ S. 10 (5) Family Courts (Amendment) Act 2015 (XI of 2015). Prior to February 2015, the courts were required to order the wife to give surrender all of the *mahr* in full.

⁸⁰¹ S. 17 (a) Family Courts (Amendment) Act 2015 (XI of 2015).

⁸⁰² S. 12 (A) Family Courts (Amendment) Act 2015 (XI of 2015).

⁸⁰³ S. 7 (2) The Family Courts Act 1964 Family Courts (Amendment) Ordinance 2002 (LV of 2002).

⁸⁰⁴ From discussions with divorce lawyers regarding legal expenses, obtaining a *khul'* is relatively inexpensive compared to other court procedures. The expenses of the suit are normally in the range of 1000 rupees (approximately six pounds). A

my observations of the District Courthouse of Lahore and interviews with female litigants, it is in very rare cases that a wife will receive her *khul'* within four months of the original suit (as the law dictates): instead, it takes between six months and one year for a *khul'* to be granted. Moreover, costs and times escalate because of maintenance disputes and dowry claims, meaning that cases take much longer to be resolved. The section below therefore outlines the problems encountered by female litigants in their pursuit of their *khul'* claims.

7.3 *Khul'* and Notification Problems

In *khul'* proceedings, all the costs of the case are borne by the wife⁸⁰⁵. In the case of a husband who attends court on the first date and does not contest the divorce, the *khul'* should be granted immediately without lengthy court proceedings, reducing the costs. However, this rarely happens: twenty-nine of the participants stated that their husbands did not attend the first hearing. Although a judge can pass an *ex parte* decision in favour of the wife, she must prove that her husband was notified of the proceedings. Ali Shah⁸⁰⁶, a family court lawyer, stated that this is quite problematic in a country where there is an inefficient civil infrastructure and weak institutions. If a notice has been sent by registered post, any member of a family can sign for it, and thus a husband can deny being served if he did not sign the form.

further 600-1000 rupees are added if a newspaper advertisement is placed and the minimum fee of a cheap lawyer is about 2000 rupees.

⁸⁰⁵ S. 8 (5) Family Courts (Amendment) Act 2015 (XI of 2015).

⁸⁰⁶ All names of lawyers and judges have been replaced by pseudonyms in order to protect their identity at their own request.

Moreover, even if the postal service gets a receipt, this does not necessarily mean that the same receipt will be found in the court files. District courts have a massive backlog of cases, and district court judges have the jurisdiction to oversee criminal and civil as well as family law cases, and thus handle a multitude of cases at any one time⁸⁰⁷. Judge Shamsuddin Iqbal stated that they endure a severe lack of resources. Overworked court clerks deal with all administrative matters, including filing and keeping documents up to date, which means that many papers and receipts are simply not found on file⁸⁰⁸. Judge Ummayr Abbas stated that court files are not maintained in a systematic way, so it is rare to locate proof of notice of the summons even where a summons was served⁸⁰⁹. Consequently, Judge Ummayr stated that he always gives a husband at least three chances to turn up to court before giving an *ex parte* decision, to ensure that the case is not subject to an appeal at a later date. Unless there is concrete evidence that the husband has been notified, this occurs in the majority of cases. If on the third occasion the husband still fails to attend, the judge will then order an advertisement to be placed in a local newspaper at the wife's expense. Whilst the law states that this must be done simultaneously with the original issuance of the plaint, the wife is usually reluctant to incur this expense so early on in the proceedings, hoping that her husband will turn up to court on the required date.

⁸⁰⁷ Interview, Lahore, April 12th 2014.

⁸⁰⁸ Interview, Lahore Family Court House, April 4th 2014.

⁸⁰⁹ Interview, Lahore Family Court House, April 4th 2014.

In an *ex parte khul'* case, the judge also has the right to find in favour of the plaintiff wife's claim to maintenance for herself and her children, as well as to restitution of the dowry and waiver of the return of the *mahr*. However, through discussions with law professionals and female litigants, I discovered that this does not in fact happen. Four judges stated that rather than pass these judgements *ex parte* in favour of the wife, as the law requires, they invariably wait longer before making a ruling on matters ancillary to the *khul'*. Judge Ammar Arshad, for example, stated that in his experience, a husband will not turn up to court for the *khul'* hearings, but will inevitably challenge any claim to dowry or maintenance at a later date. In order to avoid having his judgement challenged at a later date, he felt it more expedient to wait a few months longer and serve more notices before dealing with ancillary matters⁸¹⁰. Thus, rather than apply the law strictly and find in favour of the wife, the common practice is to allow the husband extra time to challenge the wife's claim. Although this judicial policy is clearly detrimental to the wife, resulting in increased costs and court delays, all four judges defended their position on the premise that in property matters the husband must be given a chance to provide his side of the story. Judge Bilal Butt was of the view that many dowry claims were obviously inflated, and ridiculous amounts of child support demanded, and thus that it was not *just* to grant such requests⁸¹¹. However, the law is quite clear that in the absence of the husband, the judge must deal with the *khul'* and ancillary matters *ex parte*, even if the husband fails to attend court. Judge Ummayr also defended his decision to wait

⁸¹⁰ Interview, Lahore Family Court House, April 11th 2014.

⁸¹¹ Interview, Lahore Family Court House, April 18th 2014.

for a husband to attend court before passing judgement on dowry and maintenance claims for the following reasons:

“If we can get a husband to court, then he is more likely to comply with the order. We can threaten him with an arrest warrant and try to gain something out of him. If I make an order ex parte and the husband has never come to court, the likelihood of finding him and getting him to return the dowry or maintenance is much slimmer”⁸¹².

However, as will be discussed below, the issuance of arrest warrants and threats to imprison the husband do not materialise in reality. The family court judges were quite happy to pass *khulʿ* judgements to facilitate wives, but were less enthusiastic in their judicial handling of ancillary matters of maintenance and dowries.

7.4 *Khulʿ* and Maintenance

Post-divorce maintenance in Pakistan has very little statutory protection. S. 9 of the MFLO 1961 allows a woman to apply for maintenance during marriage, and courts have widened its scope to allow claims for any outstanding arrears due during divorce proceedings. To date, courts have interpreted this legal provision as only applying to maintenance during the wife’s *iddah* (mourning) period, or arrears of payment during marriage if a husband failed to maintain his wife, and nothing beyond that. Successive cases have outlined judicial policy on the matter, clearly stating that “maintenance beyond the period of *iddah* is illegal and without lawful

⁸¹² Interview, Lahore Family Court House, April 4th 2014.

authority”⁸¹³. Although the MFLO is silent on the limits of maintenance, judicial jurisprudence has been very conservative in the matter and has failed to provide post-divorce financial relief to wives, even when they have been parties to the marriage for several years. Similarly, in the case of children, there are also no explicit legal provisions under Pakistani family law requiring fathers to provide child support maintenance payments in divorce cases. Instead, the courts use the principles of Muslim personal law to guide their decisions. During observations of the family court and interviews with the participants, it became apparent that although courts do make orders of child support payments in favour of the wife, as well as some post-divorce maintenance payments, enforcement of these judicial decisions proves to be extremely difficult.

A common complaint made by the participants was that while they had been granted a *khul'* without much difficulty, enforcing the maintenance provisions was most problematic. Of the thirty-one participants interviewed, nineteen had already obtained their *khul'* and were in court to enforce their child maintenance payments and recover their dowry. Two of the participants had been coming for more than three years, while ten maintenance cases had exceeded two years, and the remaining nine participants were approaching a year since the granting of their *khul'* in pursuit of child support payments. Aadila, a twenty-three-year-old divorcee with two children, had been granted a *khul'* two years earlier, in 2012. At that time, the court had ordered her ex-husband to pay 1500 *rupees* a month for each of her

⁸¹³ Saadia Begum v. Jangez (2004) Vol. LVI, Pesh 213, at 215. See also Inamul Ahsan v. Hussein Bano PLD (1976) Lah. 1466.

children. However, her ex-husband had never been regular with his payments, and at no point had he ever paid the full amount in any one month. She stated:

*"I have to come here every month. Sometimes he gives just 1000 rupees. Sometimes he gives 2000 rupees and then sometimes he does not come for months and months...he has no interest in the children and is a miserly man"*⁸¹⁴.

Sajid Khan, a family lawyer working in the district courts, stated that husbands are quite adept at prolonging maintenance hearings. They will only consult a lawyer after several months have passed, and a newly appointed lawyer will naturally request time to consult his client and take appropriate instructions⁸¹⁵. At this point it is possible for the judge to make an interim order of maintenance to the wife. However, with no evidence in court detailing the husband's income, the judge is very unlikely to do this, and so the case is put forward to the next hearing, causing more delays. Even if the case is heard, it is also very difficult for a wife to prove her husband's income. Senior lawyer Majid Iqbal stated that very few people in Pakistan have bank accounts, instead living their lives based on a system of daily wages⁸¹⁶. Unless the husband is employed by a government agency, there are no legal requirements in Pakistan to provide formal pay slips that can prove his income. Judge Farkhanda stated that a husband will invariably attend court wearing old clothes, looking dishevelled, and claim that he is unemployed, or will declare a very low income. The onus of proving a husband's income lies with the wife. Unless she is able to provide sworn witness statements proving the husband's actual income, a

⁸¹⁴ Interview, Lahore Family Court House, April 23rd 2014.

⁸¹⁵ Interview, Lahore Family Court House, April 12th 2014.

⁸¹⁶ Interview, Lahore Family Court House, April 19th 2014.

judge can only make a nominal order of child maintenance⁸¹⁷. Duaa stated that her ex-husband was a tailor and earned a reasonable amount of money. However, when he came to court, he claimed that power shortages meant that he was earning less and less and could not pay anything to support his children. She said:

“He was lying. He has a manual machine that needs no motors and he can sew outside in the courtyard, which I know he does. I told the judge that, but my husband lied and said he didn’t have one. The judge still told him to pay 1000 rupees a month for my baby but he only paid this a few times. I hate coming to the court for this”⁸¹⁸.

If a maintenance suit is decided, then a separate order for its execution must be issued for non-compliance. This requires the filing of another plaint of execution and the relevant notices to be sent to the ex-husband. Once again, all costs of the execution of the new suit are borne by the ex-wife. She must re-instruct her lawyer, or get a new one and endure the expense of attending court and the subsequent non-appearance of her ex-husband. All nineteen participants who had arrived at court for their maintenance and dowry hearings stated that their lawyers had not informed them of these potential costs in advance. Farah⁸¹⁹, Bahirah⁸²⁰, Farheen⁸²¹

⁸¹⁷ Interview, Lahore Family Court House, April 25th 2014.

⁸¹⁸ Interview, Lahore Family Court House, April 8th 2014.

⁸¹⁹ A 23-year-old housewife from a low working class family and attended school until grade 3. Interview, Lahore Family Court House, April 7th 2014.

⁸²⁰ A 25-year-old housewife from a low working class family who attended school until grade 3. Interview, Lahore Family Court House, April 15th 2014.

⁸²¹ A 23-year-old house wife from a low working class family with no formal schooling. Interview, Lahore Family Court House, April 22nd 2014.

and Kauqab⁸²² all complained about the rising cost of their cases and were starting to question whether or not to pursue them any further. Farah stated:

“My lawyer keeps saying he will get an arrest warrant and force him (ex-husband) to pay. But nothing has happened yet”⁸²³.

Bahira stated:

“Our lawyer tells us nothing. Each time we come to court he asks for a hundred rupees for this paper, or fifty rupees for that paper. I am not sure how much we have paid him so far. But my father is finding this more difficult. Last time we wanted to stop coming but our lawyer said ‘just try one more time’. But he’s not the one paying the fees”⁸²⁴.

If, by some miraculous chance, a husband does pay, this is done at the court itself.

During one of my observations, Muneera’s ex-husband came to court to give 1500 rupees in child support. The courtroom was crowded, and in front of all the other lawyers and their clients, the husband paid the money to the judge. Muneera detested going in front of the judge to receive her money with her husband standing nearby. When we walked outside, Muneera’s ex-husband made some lewd comments and swore loudly at her. Muneera had been accompanied by a younger brother, who could only watch and stare along with all the other bystanders.

Muneera stated:

⁸²² A 19-year-old maid who attended school until grade 5. Interview, Lahore Family Court House, April 2nd 2014.

⁸²³ Interview, Lahore Family Court House, April 7th 2014.

⁸²⁴ Interview, Lahore Family Court House, April 15th 2014.

“This is humiliating. I feel ashamed in front of everyone and having to see him (ex-husband) laughing and insulting me. I cannot bear this shame”⁸²⁵.

Unfortunately, there is no way for direct bank deposits to be made, and the public spectacle of receiving paltry sums of money was described as “begging”, “shameful” and “dishonourable” by many of the participants. Fourteen of the participants complained of the emotional trauma of coming to court each time to receive the money, particularly when their ex-husbands would taunt them and even abuse them outside the courthouses. The two participants who had been coming to the courts for more than three years had finally decided not to pursue their cases any further due to the rising costs of their cases and the humiliation involved. The remaining seventeen had yet to decide what to do, due to the ancillary matters of the return of the dowry, which remained unresolved.

The court also has the power to issue an arrest warrant if the husband fails to pay consecutive maintenance payments, but courts are very reluctant to issue these. During four months of observations of the family courts, I witnessed the issuance of six arrest warrants for husbands who had failed to make child support payments. In each of these cases, the husband had failed to pay any child support for at least five consecutive months. During my interviews, only four of the participants stated that arrest warrants had been issued during their cases, whilst the remainder replied in the negative, despite continual defaults in payments. When I discussed the matter with practicing family lawyers, they stated that most husbands who appear in court

⁸²⁵ Interview, Lahore Family Court House, April 9th 2014.

are poor themselves. They are unable to pay for the upkeep of their wives and children during the marriage itself, and so the likelihood of being able to do so after the marriage is almost non-existent. However, many of the wives disagreed, stating that their husbands could pay, but that the judges did not bother to make them pay. The four male judges I interviewed claimed that they did issue arrest warrants in some cases, but I did not observe this. The only warrants I saw issued were by two female judges, Judge Farkhanda Ameen and Judge Alisha Zubair. Judge Farkhanda openly stated that in her opinion, male judges were much less inclined to issue an arrest warrant, and that they favoured husbands in maintenance and child-support payments. Further: although male judges verbally threatened recalcitrant husbands with such warrants, rarely did they issue them. She accepted that many husbands were unable to pay large amounts, but felt that they should still be held accountable for some payments⁸²⁶.

Judge Farkhanda stated that her practice was to first threaten the husband with an arrest warrant; then, if he continually failed to attend court and pay, she had no hesitation in issuing a warrant of enforcement. The four participants in my research who had had arrest warrants issued on their behalf all stated that their judges had been female, whilst the rest of the cases had been presided over by male judges. Although further research needs to be conducted on the frequency of enforcement procedures, Judge Farkahnda's and Judge Alisha's views⁸²⁷ indicate (as do my observations) that some male judges are not applying the law as strictly as they

⁸²⁶ Interview, Lahore Family Court House, April 25th 2014.

⁸²⁷ Interview, Lahore Family Court House, April 11th 2014.

should. The success in providing child support and maintenance is crucial to women if they are to have a chance of having any semblance of family life post-divorce. The lack of judicial implementation of the law and the absence of any policy initiatives means that on one level, women are gaining marital freedom, but at another they are still the subject of patriarchal structures enforced by men.

Even if warrants are issued, the police do not appear to take them very seriously, and the police are very likely to side with the husband. Mabrooka, a twenty-eight-year-old divorcee, stated that she had received her *khul'* in 2011 but had not received any child-support payments. After a year of non-payment, the judge issued an arrest warrant. She stated:

*"That did nothing. The police told him they were coming. He just went back to the village for a few days. He is my cousin, and my other cousins in the village told me the police told him to go, as they were coming to get him"*⁸²⁸.

Sabah⁸²⁹ and Rizwana⁸³⁰ related a similar story. They had both obtained a *khul'* and had been granted child support payments by the judge. After frequent defaults in child-support payments, the judge in each case issued an arrest warrant, but it was not executed. Each of them claimed that the police tipped off their husbands, who went underground for a few months.

⁸²⁸ Interview, Lahore Family Court House, April 8th 2014.

⁸²⁹ A 25-year-old seamstress from a working class family who attended school until grade 5. Interview, Lahore Family Court House, April 10th 2014.

⁸³⁰ A 27-year-old seamstress with no formal education. Interview, Lahore Family Court House, April 3rd 2014.

7.5 *Khul'* and Restitution of the Dower and Dowry

A major criticism of the *khul'* is that it is viewed as a legal mechanism where a wife is essentially purchasing her freedom through the return of the *mahr*⁸³¹. However, this criticism was not substantiated during this particular research, as most of the participants interviewed had received very nominal sums of *mahr* at the time of the marriage and had no financial liability to repay anything⁸³². Only one participant, Umayyrah, was forced to forego her deferred *mahr* during the *khul'* proceedings, as discussed further below. See Table 7 for a breakdown of the *mahr* payments.

Table 7 - Amounts of *Mahr* Given to the Participants

Number of Participants	Amount of Prompt <i>Mahr</i>	Amount of Deferred <i>Mahr</i>
14	None Given	None
11	32 <i>rupees</i>	None
1	200 <i>rupees</i>	None
2	500 <i>rupees</i>	None
2	1000 <i>rupees</i>	None
1	32 <i>rupees</i>	30,000

Whilst the return of the *mahr* posed no significant problem to these participants, it was the restitution of the *jahez* or dowry that was most problematic. During the filing of the original *khul'* plaint, the wife must provide a complete list of all items of her dowry that she took to her husband's house upon marriage, as well as other

⁸³¹ Doreen Hinchcliffe, "Divorce in Pakistan: Judicial Reform," *Journal of Islamic and Comparative Law*, 2 (1968a): 25; Monsoor, *From Patriarchy to Gender Equity*, 190.

⁸³² Thirty-two rupees is a common amount of *mahr* given at the time of marriage. Haider Abbass, a family court judge, explained that according to Ḥanafī *fiqh*, the minimum amount of *mahr* to be fixed for a marriage to be valid is 2g and 7.5 mcg of silver. During the colonial period in India, 'ulamā' had valued this amount of silver to constitute 32 rupees. Families unacquainted with the details of the ruling had assumed that the *mahr* represents 32 rupees and thus this tradition has continued unabated until the present day. Interview, Lahore Family Court House, April 10th 2014.

personal property. In cases where a husband fails to attend most hearings (which is quite common), the likelihood of having any items of the dowry returned is very low. The first problem faced by the wife is proving that she did indeed purchase these items and take them to her husband's house. Of the thirty-one participants interviewed, twenty-two had attached dowry lists as part of their original *khul'* complaints, but to date none had received the full amount stipulated. Nineteen of these participants had already obtained their *khul'* and were engaged in dowry disputes and maintenance claims. All nineteen participants stated that they were unable to provide any receipts of purchase for everything they had listed in their dowry claims.

Judges and lawyers shared their experiences in these matters during our discussions. Judge Bilal Butt stated that in some cases, it is fairly obvious when inflated dowry amounts have been listed⁸³³. If no receipts have been provided, and if the wife has no other external proof⁸³⁴, then it is up to the judge to decide the accuracy of the lists and what will be deemed an appropriate amount. If a husband fails to attend any of the court hearings, then the judge is empowered to order all items on the dowry list to be returned, with or without proof, as a result of the husband's failure to attend court and contest the lists⁸³⁵. He will be deemed to have accepted the list of contents, and thus required to return the dowry as specified in the list provided by the wife. However, although this may seem to be a judgement

⁸³³ Interview, Lahore Family Court House, April 18th 2014.

⁸³⁴ Sworn witness statements of the wife's parents or other family members were not considered adequate proof of the existence of the dowry by the judges.

⁸³⁵ S.9 (5A) Family Courts (Amendment) Act 2015 (XI of 2015).

that favours the wife, in reality a husband who has failed to attend the court even once is also one who is least likely to return any items of the dowry. Moreover, eight of the participants who had received an *ex parte khul'* stated that the judge had refused to make a decision regarding the dowry, but instead had put the case forward to another date in the hope that the husband would turn up. In cases where a *khul'* decision had been made *ex parte*, judges were quicker to entertain challenges from the husband. Aadila stated that she had obtained her *khul'* very quickly⁸³⁶. Her husband had not attended court during the proceedings, and she was awarded the return of her dowry, worth 1.5 *laks*⁸³⁷. However, once her husband found out, he came to court and claimed that he had not received the notice and contested the dowry list, prolonging the case for several months.

Once a court accepts a dowry complaint, the wife must then submit a new complaint to enforce the judgement, requiring that new notices be submitted to her ex-husband. She must then bear the expense and time-consuming effort of attending each court date in the hope that her ex-husband will appear at court and return some of her belongings. Yet, even if a wife is lucky enough to have an arrest warrant issued, enforcement by the police is rare. All the judges said that if a wife leaves the matrimonial home without her dowry items, it is highly unlikely that she will be able to recover them in their entirety through court proceedings. Majid Khan stated that in ten years of acting in *khul'* proceedings he had never seen a case where a wife had

⁸³⁶ Interview, Lahore Family Court House, April 23rd 2014.

⁸³⁷ 1 *lak* refers to 100,000 rupees.

been able to recover her entire dowry⁸³⁸, a point reiterated by three other lawyers. The participants cited common excuses used by their husbands to avoid the restitution: *“she (the wife) took everything with her and is lying”*, *“we both sold some of the things together to supplement the family income”*, *“the dishes, crockery and other items were bad quality and broke during the marriage”*. The two parties spend many months coming back and forth to court, contesting the dowry lists. Farhat⁸³⁹, Gohar⁸⁴⁰, Imaan⁸⁴¹, Farheen⁸⁴², Mansoor⁸⁴³ and Nasreen⁸⁴⁴ all stated that much of their court cases had revolved around disputes over their dowries.

The failure of the wife to have her dowry returned results in a massive financial hardship on her. Often, these items are a collection of goods, items and clothes built up over a period of many years. They can include substantial items such as a refrigerator, washing machine, dining table set, bedding and sofa set. It is extremely difficult for the wife or her parents to replace these items, and this will also reduce her chances of re-marriage. From my observations, the loss of the dowry was seen as one of the worst outcomes for the wife during the *khul'* process.

⁸³⁸ Interview, Lahore Family Court House, April 19th 2014.

⁸³⁹ A 25-year-old factory worker with no education. Interview, Lahore Family Court House, April 23rd 2014.

⁸⁴⁰ A 27-year-old housewife with no education. Interview, Lahore Family Court House, April 9th 2014.

⁸⁴¹ A 22-year-old factory worker who attended school until Grade 1. Interview, Lahore Family Court House, April 23rd 2014.

⁸⁴² A 23-year-old housewife with no education. Interview, Lahore Family Court House, April 22nd 2014.

⁸⁴³ A 28-year-old factory worker with no education. Interview, Lahore Family Court House, April 23rd 2014.

⁸⁴⁴ A 26-year-old housewife with no education. Interview, Lahore Family Court House, April 28th 2014.

7.6 *Khul'* and Court Delays

Although the new laws now state that *khul'* cases must be decided within four months of the initial plaint being filed⁸⁴⁵, the results of the survey suggest that this is rarely the case. Most *khul'* cases take between six months and a year to be granted, whilst ancillary matters relating to maintenance and dowry were on-going in my study. The tables below provide a breakdown of the results for the nineteen women who had already gained a *khul'* and were engaged in post-divorce matters.

Table 8 - Completion of *Khul'* Cases

Number of Participants	Time Taken for <i>Khul'</i>
2	4 months
5	6 months
9	7-9months
3	1 year

Table 9 - Length of Proceedings for Child Maintenance

Number of Participants	Maintenance Time
3	None claimed (no children)
4	One year on-going
10	Two years on-going
2	Three years on going

Table 10 - Length of Proceedings for Restitution of Dowry

Number of Participants	Time Taken to return Dowry
5	None (no dowry claimed)
4	One year on-going
8	Two years on-going
2	Three years on-going

The tables above illustrate that obtaining the *khul'* was the easiest and quickest part of the divorce process, whilst ancillary matters took much longer and were not

⁸⁴⁵ S. 12 (A) Family Courts (Amendment) Act 2015 (XI of 2015).

settled in any of the cases. With respect to the remaining twelve participants, all of them had yet to be granted their *khul'* and no decisions had been made on the matters ancillary to their cases. Yet all twelve participants had exceeded the four-month window stipulated by law, with nine participants being in the fifth month and three in the sixth month of their cases.

A common complaint made by the participants referred to the delaying tactics used by husbands to increase court expenses, as well as deliberate attempts at intimidation. Ten participants stated that their husbands had appeared in court once to demand reconciliation, but had then missed subsequent court dates in attempts to delay the case further. It is of course in the interest of lawyers on both sides to have longer court cases and delays, since the more paperwork generated and the more frequent appearances in court, the higher the fees that will accrue. This is not to say that all of the lawyers in *khul'* cases are corrupt or deliberately extend proceedings, but perceptions of the participants regarding their legal counsel were not very positive. They felt that their lawyers had no particular interest in their cases other than to obtain their fees, since many lawyers were representing several cases at a time and attended multiple hearings during one court session. A communication gap appeared to exist between many of the wives and their lawyers, with participants exhibiting a general mistrust of the legal system and all who represent it. When I asked if the participants were satisfied with the manner in which their case had been handled, all but one of the participants (Daanya) replied in the negative. Thirty participants offered similar comments about their lawyers:

“he (the lawyer) is just out to make money” or “he does not care for the case and what happens”. Farhat⁸⁴⁶, Kuasar⁸⁴⁷ and Mansoor⁸⁴⁸ were of the view that the lawyers were all *“in this together”*, meaning that the lawyers colluded with each other to put dates forward to ensure a longer case and thus extra fees.

During my own court observations, I noticed that although court proceedings officially begin at 9.30am, many of the participants were still waiting for their lawyers to connect with them at midday. Those who had arrived on time would immediately tell their clients that they had other cases in a different court and would be back shortly. This can be illustrated in the case of Farheen⁸⁴⁹, who had been instructed to meet her lawyer at 9.30 am. I began to interview Farheen at 9.45 am⁸⁵⁰. Although her lawyer had briefly met her at 10 am, he only returned at 2.30 pm to deal with her case, at which point the judge was winding down the day’s proceedings. The judge refused to listen to Farheen’s lawyer, and put the case forward for another month. Since Farheen’s husband had failed to attend for the third successive time, she had been expecting an *ex parte* decision in her favour, but her lawyer’s inefficiency meant that she had to wait another month for her *khul’* to be granted. Seven of the participants claimed that their lawyers had gone on holiday without informing them, so they incurred the cost of coming to court and their cases were again put forward. Eleven participants blamed the judges for taking too long in

⁸⁴⁶ A 25-year-old working class factory worker with no formal schooling.

⁸⁴⁷ A 20-year-old working class seamstress who attended school up until grade 3.

⁸⁴⁸ A 28-year-old working class factory worker with no formal schooling.

⁸⁴⁹ A 23-year-old housewife with no formal education.

⁸⁵⁰ Interview, Lahore Family Court House, April 22nd 2014.

their cases. Due to the multiple jurisdictions of the district court judges, sometimes judges were transferred to other cases, with no notice given to either the lawyer or the wife. Imaan complained that she had changed her lawyer twice, and was not happy at the judge's unexplained absences during her court proceedings:

*"No one tells anyone anything. Sometimes the judge does not come. Sometimes my lawyer does not come. Sometimes the lawyers are on strike. Then they have elections. And each time no one tells us and we come here and are left waiting and waiting"*⁸⁵¹.

Since there is no systematic way of calling cases, judges work at their own speed and inclination. Six of the participants who were waiting outside court had been there since 9 am, but the judge had been unable to hear their case by the end of the day. This was a common phenomenon during my court observations. At the end of the day's proceedings, if a case remained unheard, then a fresh date would be issued, and the entire process would begin again the following month.

7.7 *Khul'* and Reconciliation

S. 10(3) of the West Family Courts Act 1964 requires the judge to effect a reconciliation between the parties if possible⁸⁵². This normally occurs when both parties manage to attend court on the same day, during which counsel for the wife will outline the nature of the dispute. At this point, the judge will address the wife directly and ask if she really desires a divorce, and if so, what reasons she gives for this. Once she has provided her side of the story, the judge will then ask the husband

⁸⁵¹ Interview, Lahore Family Court House, April 23rd 2014.

⁸⁵² New sub-section (5) inserted by the Family Courts (Amendment) Act 2015 (XI of 2015)

for his side and ask if he wishes to be reconciled. For the purposes of reconciliation, a private room exists at the side of every courtroom, next to the judge's office. It is normally a very small room with no window or ventilation, with one small table and two chairs. If the presiding judge so chooses, he may order both the husband and wife to go into the room to discuss their marriage in private. During my observations and interviews, I observed a variety of responses. Ten of the participants stated that their husbands had no intention of continuing the marriage, but were using the reconciliation process as a ruse to mentally torture them. Somayya's⁸⁵³ story is illustrative of many of the participants' experiences. Whilst I was interviewing Somayya outside the courtroom, her husband arrived and began to taunt her, calling her names and insulting her family, shouting: "*I will never release you*". Somayya's lawyer had not yet arrived, and so there was no one to witness this other than her family and myself. When the case was finally called into court, the same husband declared his undying love for Somayya and tried to convince the judge of his sincere intentions to make the marriage a success. Although the husband had failed to attend three previous *khul'* hearings, meaning that Somayya should have been granted an *ex parte khul'* on the third hearing, Judge Ammar ordered both of them to step into the reconciliation room and discuss their situation privately. Ten minutes later, Somayya came out of the room crying and informed the judge that her husband had insulted her again, had called her shameless, and had been rude to her. Luckily for Somayya, Judge Ammar granted

⁸⁵³ A 26-year-old housewife who attended school until grade 2. Interview, Lahore Family Court House, April 2nd 2014.

her a *khul'* immediately, particularly since her husband had failed to attend three previous hearings, which had caused the case to be delayed for six months.

During my conversations with family court judges, I learnt that they had differing views with respect to reconciliation. Judge Ammar Arshad⁸⁵⁴ and Judge Ummayr Abbas⁸⁵⁵ stated that they always encouraged both parties to reconcile. During their tenure as judges, they viewed women as being too hasty regarding *khul'* cases. The virtual lack of evidential requirements to prove a *khul'*, they argued, meant that many women came to court seeking a divorce over trivial matters, such as fights with in-laws or problems with interfering parents who did not wish the parties to remain married. Both these judges felt that women were unaware of the post-divorce consequences of their actions and the immense difficulties they would face in the long term. Thus, they always encouraged both parties to attempt reconciliation, even if that meant delaying the case for a few months. Shugufta's⁸⁵⁶ case is an example of such a successful reconciliation and the judicial strategy adopted by Judge Ummayr. I had interviewed Shugufta earlier in the morning at court, and she had informed me that she had entered into a love marriage with her husband, whom she had met at her father's small shop⁸⁵⁷. Her parents had opposed the marriage, as they wanted her to marry her first cousin, and had asked her many times to leave her husband. Shugufta's husband's parents were also against the marriage, and she had had numerous fights with her in-laws and her own parents.

⁸⁵⁴ Interview, Lahore Family Court House, April 11th 2014.

⁸⁵⁵ Interview, Lahore Family Court House, April 4th 2014.

⁸⁵⁶ A 21-year-old seamstress who attended school until grade 3.

⁸⁵⁷ Interview, Lahore Family Court House, April 2nd 2014.

Although she was happy with her husband, her mother-in-law made it intolerable to live in the matrimonial home, so she returned to her parents, who encouraged her to apply for the *khul'*. Shugufta was twenty-one and did not appear very happy at the situation, but her mother was very aggressive. During the interview, Shugufta's mother interrupted us and began to berate Shugufta's husband as a useless man with a very poor future. This court appearance was the first for both parties. When the case was finally called, at 1 pm, her husband immediately stated that he did not want a divorce and asked his wife to return home, to the dismay of his parents and those of his wife. Judge Ummayr, assessing Shugufta's reluctance, ordered both parties to discuss their situation in the reconciliation room. As they were entering the room, Shugufta's mother shouted to her daughter not to be a fool and trust her "useless" husband. Judge Ummayr reprimanded the mother and threatened to throw her out of court. After twenty minutes, both spouses returned and informed the court that they wished to continue with the marriage. Judge Ummayr admonished the husband for his failure to protect his wife from his interfering mother, and also cautioned the wife's mother to leave both parties in peace. In this instance, Judge Ummayr's decision to allow both parties to reconcile proved useful.

However, this was not the case for Kausar⁸⁵⁸. She had married young, at seventeen, but her marriage began to deteriorate within months because of arguments over money with her in-laws and husband. Kausar's own parents asked her to compromise, particularly after the birth of her daughter, and made her return to the

⁸⁵⁸ A 20-year-old seamstress who attended school until grade 3. Interview, Lahore Family Court House, April 7th 2014.

matrimonial home several times when she left in anger. However, her continual refusal to remain in the marriage forced her parents to support her *khul'* application. When I met Kausar in court, this was her fifth appearance and her husband's fourth. Both parties' parents and other members of the extended family were also present. When the case was called in court, Judge Ummayr was very familiar with it and immediately accused Kausar of being stubborn in refusing to be reconciled. At this point her husband, standing with members of his family, shouted across the room, *"I have given everything to you! What more do you want from me?"* Judge Ummayr then proceeded to explain the virtues of married life to all parties, and again admonished Kausar for pursuing this case, particularly when she now had a little girl. The judge sent both parties to the reconciliation room to discuss their matter. During the reconciliation session, Kausar's mother came to me and complained about her son-in-law:

*"He treats her badly. He never gave her money when she left him, never gave her money for her ultrasound and never her gave money for her caesarean operation. We paid for everything...we know he is having an affair now. If she goes back to him and then has more children, who will take care of all of the expense? He won't pay for it and we cannot afford anything either"*⁸⁵⁹.

Kausar's mother expressed discontentment at the lengthy process of their case. Eight months had passed, and at each court date her son-in-law's lawyer would request a stay in proceedings, claiming that the husband wanted to be reconciled. The mother also talked of the shame and humiliation that the divorce would bring to her family:

⁸⁵⁹ Interview, Lahore Family Court House, April 7th 2014.

*"I have nothing to gain from this divorce. But they treat her so badly and she will just have more and more children if she stays with him with more and more mouths for us feed"*⁸⁶⁰.

After twenty minutes, the couple returned to the court, obviously un-reconciled, shouting at each other. Judge Ummayr calmed both parties, but again addressed Kausar directly:

*"What will you do about your daughter? She will be without a father, and your life will be very tough. He wants to take you back, so why not give him one more chance?"*⁸⁶¹

Kausar responded: *"He is nothing to me"*. Judge Ummayr asked Kausar: *"Why, then, are you demanding maintenance from him?"* Kausar responded: *"He owes me money and it is for my daughter"*. At this point the court clerk, sitting to the right of the judge, interjected and asked Kausar's mother to send her back one more time, saying: *"If he doesn't change, then get a khul"*. Judge Ummayr, clearly exasperated, asked the mother to send her daughter back to her husband one last time and set a hearing date for the next month.

This exchange illustrates the strategy adopted by Judge Ummayr (endorsed by Judge Ammar Arshad). He was clearly reluctant to grant a quick *khul'*, fearing that the plaintiff's wife would be in a worse position than if she remained within the marriage. Judge Ummayr took his duty to attempt reconciliations very seriously,

⁸⁶⁰ Interview, Lahore Family Court House, April 7th 2014.

⁸⁶¹ Observation, Lahore Family Court House, April 7th 2014.

irrespective of the wishes of the wife, and in this particular case despite the lengthening of the court process. He also offered no words of advice to the husband regarding his failings in the marriage, but directed all his efforts towards Kausar and her failings as a wife and mother.

However, three other judges whom I interviewed at the same district court, one male⁸⁶² and two female⁸⁶³, did not advocate this approach. All three of them were of the view that in most cases, when a woman comes to court, this is a last resort for her, and she has normally exhausted all other remedies to improve her marriage. They argued that the social stigma of divorce, hiring a lawyer, and thus bringing her private life out into the public sphere is so daunting that only when a woman has clearly made up her mind that she wants a *khul'* will she be prepared to incur the expense and humiliation of divorce proceedings. All three judges were of the opinion that unless it is glaringly obvious that the parties are not happy to pursue the *khul'*, they would ask both parties if they wish to be reconciled as a matter of routine, but if they do not, then they would never order the parties to attempt a reconciliation by sending them to a separate room.

Judge Farkhanda pointed out that many of the women have suffered physical violence from their husband and that it is completely unwise to allow both parties to be in a room on their own, even if the judge and family members are nearby. Judge Farkhanda related three different incidents during her tenure as a judge where a

⁸⁶² Judge Shamsuddin Iqbal.

⁸⁶³ Judge Farkhanda Ameen and Judge Alisha.

husband had come to court brandishing a gun and threatened to kill his wife during *khul'* proceedings⁸⁶⁴. Judge Alisha and Judge Shamsuddin reiterated these views, and agreed that in most cases reconciliation was futile and could even be dangerous. Judge Alisha related two similar incidents of husbands attending court and threatening their wives with guns⁸⁶⁵. Although she admitted that these types of case were rare, it is still true that where a wife has alleged physical violence, *"it is completely unrealistic to expect the wife to enter into a room on her own with an emotionally disturbed husband, and expect a sudden reconciliation in ten to twenty minutes"*⁸⁶⁶.

From the interviews with the participants, lawyers and judges, it became quite apparent that most wives arrived at the court after enduring emotional and physical abuse at the hands of their husbands and their extended families. Reconciliation was not a possibility in the majority of cases, and most just wanted the divorce process to be as quick and painless as possible. Of the thirty-two participants, only two reconciled with their husbands during the court hearing, whilst the remaining twenty-nine all proceeded with their *khul'* case. Judge Farkhanda also said that in her opinion, male judges were less sympathetic to wives than female judges. She

⁸⁶⁴ Interview, Lahore Family Court House, April 26th 2014.

⁸⁶⁵ Interview, Lahore Family Court House, April 11th 2014.

⁸⁶⁶ Whilst listening to these stories, it sounded incredible that such incidents could take place in a court of law. However, during one of my interview sessions at the Lahore District Courts, I heard a loud bang and screams. Everyone ran to the balcony to see what had happened, but nothing could be seen in the courtyard below with the normal throngs of lawyers, clerks and clients engaged in their activities. Later that afternoon I learned that a brother had shot his sister dead in the courthouse parking lot due to her refusal to divorce her husband, whom she had married through a love marriage.

claimed that male judges often insisted that the parties engage in some form of reconciliation and delayed the case for at least two to three months to allow both parties to come to some form of agreement. However, since it is only in a very small minority of cases that husband and wife will be reconciled, she felt that ordering a reconciliation attempt was not a suitable policy to enforce⁸⁶⁷. Moreover, the wife would also suffer a heavier financial burden in such cases. Judges who put cases forward rarely grant interim maintenance orders in favour of the wife. The longer a case takes, the higher the legal fees incurred by the wife, and the longer she will have to wait for her *khul'* and for the final maintenance and child support orders to be decreed by the court.

7.8 *Khul'* and the Courthouse

Perhaps one of the most daunting aspects of obtaining a *khul'* is the court premises: the location, style and setup of the courtrooms. The Lahore District Courts are called '*Aiwan-e-Adal*', meaning the 'House of Justice'. Inside the court building are around seventy courts, which are allocated for criminal, civil and family law cases.

According to the Family Courts Act 1964, any district court may be converted to a family court for the purpose of hearing family court cases⁸⁶⁸. Thus, the family courts are not situated in a separate family court building but are part of the matrix of the District Courthouse. They are merely courtrooms that have been allocated to be used by the family court judges where designated. A major disadvantage to this is

⁸⁶⁷ Interview, Lahore Family Court House, April 26th 2014.

⁸⁶⁸ S. 3 Family Courts Act 1964.

that the district courts are also where criminal cases are heard, as well as civil litigation proceedings. Upon entering the district court building, some of the courtrooms allocated for family cases are directly adjacent to the rooms that entertain criminal cases. Thus, whilst walking to court each day, I saw several prisoners, all men, chained from hand to feet with cuffs, shuffling to hear their cases. They were surrounded by the armed guards who bring a constant flow of prisoners to and from the courts. During these times, I was often leered at, laughed at and even shouted at. This was a common occurrence, with the guards acting as very little deterrent, merely yanking the prisoners back or laughing with them. It is extremely unfortunate that some of the criminal courts are adjacent to the family courts. In a society where it is socially unacceptable for women to be seen in court premises, having criminal cases and prisoners in such close proximity to family cases exacerbates these social tensions. Women are openly stared at, laughed at and humiliated by other male clients and their family members through jeering. Although there are female lawyers who practice law, they are a small minority. Moreover, the District Courthouse is also an unsuitable place for children. To reach the family courts, it is necessary to walk past many criminal courts, yet many of the family courtroom and verandas are crowded with women and their children, for whom they are unable to arrange alternate childcare arrangements.

The courtrooms themselves are also in a very dilapidated condition. They are normally medium-sized rooms with a few (broken) tables and chairs scattered around for clients and lawyers to use if they wish to consult each other. The judge

sits upon a slightly raised platform, and there are one or two clerks to the side. There is one place for a witness to stand to give evidence to the side of the judge. During my observations, I detected no systematic or methodical way for dealing with the family cases. A list is pinned to the front door detailing which cases are to be heard that morning. However, no times are given. Instead, whichever lawyer arrives first approaches the judge and puts his case forward. When a lawyer finally makes an appearance in court, he or she will be accompanied by the client and members of the client's family. This can just be the father or brother, or might consist of the entire extended family, who stand behind their lawyer. However, it is rare for one lawyer to present his or her case individually. Instead, during my observation of the family courts, I witnessed the courthouse as being akin to a market place, with lawyers fighting to get attention for their cases and having their matters resolved. Lawyers would speak at the same time; family members would be bickering with each other; and wives could be seen quietly weeping on the side, after hearing insults hurled at them by estranged husbands or in-laws. I found only one judge in the entire family court system who managed to maintain some degree of legal decorum, whilst the rest were inundated with demands and cross-talking. It was very difficult to follow the proceedings, with the judge giving orders to his clerks as the arguments progressed. In essence, most judges seemed to be tackling three or four cases at a time.

To compound matters, the electricity supply often fails, shutting off the fans and further slowing the business of the court. Rather than being a place that exhibits

some respect for the law or legal decorum, I found the family courts to be a completely farcical spectacle. During another observational day, two lawyers began to shout at each other and almost came to blows. The judge, clerks, litigants and other lawyers seemed to enjoy the entire performance as a form of entertainment, with the judge only intervening to order the lawyers to take their dispute outside. The chaos of the proceedings and the lack of privacy for the litigants made the entire court process a very stressful event. Many of the participants expressed shame and embarrassment when facing the judge, with their estranged husband and his family at such close proximity, whilst other litigants also listened to their tales of woe. Iqraa⁸⁶⁹ expressed her dismay and shame at having to inform the judge of her husband's homosexuality and the fact that he performed sexual acts with his boyfriend in front of her.

*"My father and brother came with me. I wish I could have died. I could hear the other people sniggering at me"*⁸⁷⁰.

Iqraa felt that she was in some kind of sordid drama, and felt humiliated by the public nature of the hearing. The courtroom doors are not closed and there are no private hearings. This is particularly awkward given that the criminal courts are in the same building, and in some cases next door. Many defendants are out on bail and are looking for a place to sit and wait for their hearings to begin. The lack of seating arrangements outside the courts means that throngs of people wait inside any

⁸⁶⁹ A 21-year-old seamstress with no education. Interview, Lahore Family Court House, April 2nd 2014.

⁸⁷⁰ Interview, Lahore Family Court House, April 2nd 2014.

courtroom for their lawyers to arrive or their cases to begin, and thus are privy to *khul'* proceedings. Thus the entire process of coming to court and facing these obstacles was viewed by the majority of the participants as adding to the stress and emotional strain of their divorce.

This section of the research has provided an overview of the legal processes of gaining a *khul'* and the problems encountered by the participants during the legal proceedings. However, this research also hopes to answer another important question: what are the primary reasons that lead women to seek formal court remedies? What are the salient factors and characteristics of these women who are willing to bypass the social stigma of divorce and enter into the complex legal arena to effect a *khul'*?

7.9 *Khul'* and the Reasons for Divorce

Several common factors were identified during the interviews that served as a reason for divorce. Dowry-related problems, extended family disputes, poverty and domestic violence were common denominators mentioned by the participants. Twenty-one of the participants stated that their failure to bring a large enough dowry to their matrimonial home had become a source of dispute. Twenty-eight stated that lack of money was a constant cause of marital strife. Eleven stated that their husbands had lost their jobs after the marriage and could not afford to pay for basic food and other necessities, while ten stated that although their husbands

worked, they were given no money directly by their husbands and were solely reliant upon them for their every need. Seven of the participants stated that their husbands were in and out of jobs during the entirety of their marriages. The lack of certainty in jobs and their low pay meant that husbands were always frustrated and angry and vented their anger on their wives and families. Four participants stated that their husbands had never worked due to drug and alcohol addiction. Twenty of the participants stated that there was never enough food in the house for everyone. However, the biggest and most decisive factor in seeking a divorce was domestic violence suffered by the wives. Twenty-seven of the thirty-one participants stated that they had suffered some form of physical abuse from their husbands and/or their in-laws during the course of their marriage. The level of violence described by the wives varied. Three participants spoke of occasional punches and slaps when arguments between them escalated. Four spoke of more severe violence, particularly when their husbands were under the influence of drugs, alcohol and other intoxicants. This included being hit with a stick, a cricket bat or an iron rod, and having items of furniture thrown at them. However, the majority of the participants (twenty-four) expressed the fact that they had suffered systematic abuse over the entire period of the marriage. Eighteen of the participants stated that slaps, punches and pulling of hair would occur over trivial matters, such as food not being cooked on time, the children making too much noise or the mother-in-law complaining about the wife's poor performance in doing the household chores. The domestic abuse was not only perpetrated by the husband but by other family members too. Thirteen of the participants stated that they had been slapped on the

face by their mothers-in-law on many occasions during the marriage. Three participants stated that their fathers-in-law had also slapped them during arguments, and one participant said she had been hit with a hot iron by her father-in-law.

It was apparent from the interviews that these participants were no longer prepared to suffer further hardship and abuse within their marriages, and thus opted for a *khulʿ*. However, this research has already illustrated that there are many women in Pakistan who suffer emotional and physical abuse in their marital lives, yet not all of them opt for a divorce. Indeed, many of those women were particularly opposed to the dissolution of their marriage and looked unfavourably upon those who had achieved one. The question therefore arises as to why these particular women and not others opt for a *khulʿ*. What are the salient attributes of these women, and why do they and not others initiate divorce? This research has found that age, duration of marriage and the socioeconomic position of the participant influence the likelihood of opting for a *khulʿ*.

7.10 *Khulʿ* Applicants, their Age, and the Duration of the Marriage

In total, thirty-one participants were interviewed who were either in the preliminary stages of applying for a *khulʿ* or had already obtained a *khulʿ* and were engaged in pursuing ancillary matters of post-divorce maintenance and child-support issues. The first notable thing was the age of all of the participants. All of

them were below the age of thirty. Fifteen participants were aged between twenty and twenty-five, and sixteen were aged between twenty-six and thirty. Table 11 provides a further breakdown of their ages.

Table 11 – Age of Participants Applying for a *Khul'*

Number of Participants	Age
5	19-21
11	22-25
6	26-27
9	28-30

The average age of the husbands was also young, with a slightly higher maximum age of thirty-five. Moreover, all of the participants had married quite young: between sixteen and twenty-four for women and twenty and twenty-seven for men. Table 12 provides a breakdown of participants' ages at the time of marriage.

Table 12 – Age of Participants at the Time of Marriage

Number of Participants	Age at Time of Marriage
15	16-18
7	20-22
9	23-24

Prior research has indicated that marriage at an early age is a strong predictor for divorce within the early years of the marriage⁸⁷¹. Booth and Edwards (1985) argue

⁸⁷¹ See Mohammad Taghi Sheykhi, "Development and Divorce in Iran: A Sociological Appraisal," *International Review of Modern Sociology*, 29, no. 2 (1999): 23-36; P. Glick and A. Norton, "Marrying, Divorcing and Living Together in the U.S. Today", *Population Bulletin* 32, no. 5 (1977): 142; D.M Fergusson, L.J. Horwood and F.T Shannon, "A Proportional Hazards Model of Family Breakdown", *Journal of Marriage and the Family*, 46 (1984): 539-549; Sosamma Pothan, *Divorce: Its Causes and Consequences in Hindu Society* (Madison, WI: Shakti Books, 1975); Nurul Alam et al, "Determinants of Divorce in a Traditional Muslim Community in Bangladesh,"

that couples who marry young might have limited life experience, and might thus be less prepared for the stresses that marriage can entail⁸⁷². In the present research, eighteen of the participants blamed their husbands' inability to stand up for them in the marriage. Iqraa⁸⁷³ stated that her husband was young and could not face his parents' wrath, and always sided with them against her, even when he knew they were wrong in their accusations. Iqraa's mother claimed that her daughter was too young and was not prepared to be as patient as she herself had been during her own marriage⁸⁷⁴. Booth and Edwards (1985) also state that couples may be less compatible with each other when young, and may find it difficult to come to an understanding. Amato and Rogers (1997) also found that factors which increase the risk of divorce, such as jealousy, infidelity, and drug and alcohol abuse, decline as age at first marriage increases⁸⁷⁵. Rao and Sekhar (2002), in their study of divorce practices in India, argue that age is an extremely important factor in determining divorce, with higher levels of divorce amongst those who marry young⁸⁷⁶. During my conversations with the lawyers and judges about their experience in court, they indicated that younger girls are less likely to tolerate abusive and unhappy marriages compared to their older counterparts. The advent of social media and television dramas, and the encroachment of modernity, have had some influence on

Demographic Research (2000) accessed March 4th 2016, www.demographic-research.org/Volumes/Vol3/4/.

⁸⁷² A. Booth & J. N. Edwards, "Age at Marriage and Marital Instability", *Journal of Marriage and the Family*, 47, no. 1 (1985): 67-75.

⁸⁷³ A twenty-one-year-old seamstress with no formal education.

⁸⁷⁴ Interview, Lahore Family Court House, April 2nd 2014.

⁸⁷⁵ Paul Amato and Stacey Rogers, "A Longitudinal Study of Marital Problems and Subsequent Divorce," *Journal of Marriage and the Family*, 59 (1997): 612-624.

⁸⁷⁶ A.B.S.V. Ranga Rao and K. Sekhar, "Divorce: Processes and Correlates: A Cross-Cultural Study," *Journal of Comparative Family Studies* 33, no. 4 (2002): 542-563.

younger minds. Judge Shamsuddin Iqbal stated that cable TV had reached most urban households: *“There may not be food on the table but there will be a T.V drama to watch”*. Many legal professionals commented that Pakistani T.V. dramas portray a romantic view of married life, and younger girls aspire to have this life rather than tolerate the injustices they experience in their marriage. This is also consonant with Levinger (1976), who argues that when the barriers to divorce are outweighed by the presence of alternate attractions, couples are more likely to divorce⁸⁷⁷. The lawyers, however, were sceptical about these new television shows that romanticise marital life, and which do not show the reality of life post-divorce. They argued that the younger generation is less patient, and is unwilling to compromise as their mothers had done before them, not realising the extent of the difficulties that they are likely to face post-divorce.

The research also showed that the duration of the marriages was quite short, with the longest marriage lasting five years whilst the remainder varied between one and three years. See Table 13 below:

Table 13 – Duration of the Participants’ Marriages

Number of Participants	Duration of Marriage
3	1 years
12	2 years
10	3 years
5	4 years
1	5 years

⁸⁷⁷ George Levinger, “A Social Psychological Perspective on Marital Dissolution,” *Journal of Social Sciences* 32 (1976): 21-42.

There have been many studies indicating a negative link between the length of marriage and the likelihood of divorce. Thornton and Rogers (1987) found that the risk of divorce is at its highest during the early years of marriage⁸⁷⁸. Choudhary (1988) found that women in India who married before the age of 21 were more likely to remain married for less than four years⁸⁷⁹. Becker (1991) argues that negative information about the spouse often arises early in the marriage, and so the shorter the marriage, the less likely it is that the two spouses will be compatible with each other⁸⁸⁰. White and Booth (1991) state that the longer a marriage persists, the greater the chance that material possessions will be amassed, thus increasing the risk of losing more in the case of divorce⁸⁸¹. A shorter marriage can therefore result in a lesser investment in the marriage in terms of number of children and emotional attachment to the spouse. In this research, only one participant had five children, and she had been married the longest: for five years. She also did not pursue her *khul'* case, as will be discussed later in the chapter. However, the rest of the participants either had no children or had a maximum of one or two children. The longer a marriage persists, the greater the likelihood of more children being born. This in turn increases the liability upon the wife and her family in terms of more mouths to feed, and places a heavier financial burden upon them to educate and look after the children. This was pointed out by Kausar's

⁸⁷⁸ Arland Thornton and Willard Rodgers, "The Influence of Individual and Historical Time in Marital Dissolution," *Demography* 24 (1987): 1-22.

⁸⁷⁹ Jagdish Choudhary, *Divorce in Indian Society* (Jaipur: Rupa Books, 1988).

⁸⁸⁰ Gary Becker, *A Treatise on the Family* (Cambridge, MA: Harvard University Press, 1991).

⁸⁸¹ Lynn White & Alan Booth, "Divorce and the Life Course," *Journal of Family Issues*, 12 (1991): 5-21.

mother, who was concerned about her daughter having more children if she remained married. She was unhappy about her daughter's decision to pursue the *khul'*, but considered it better to make a break now rather than later, when her liabilities were likely to increase.

Booth et al (1986) studied the relationship between marital instability, divorce, age and duration of marriage. They concluded that cementing a marriage is causally linked with the aging of the spouses and their marriage. An increase in age can lead to improvements in finances, family integration and community cohesion, as well as increased religiosity⁸⁸². This is certainly true in the case of Pakistan, where a wife is more likely to establish herself firmly within the family if she has children. As children grow older, they can act as a buffer between the mother and the extended family, as well as firmly cement her position in that family, particularly if she has a son. Thus, she is less likely to contemplate divorce than someone who has been married for a much shorter time. In Chapter Six, many of the participants spoke of their patience in making their marriages work and the different strategies they used to reach an understanding with their husbands and mothers-in-law. As the years go by, the likelihood of a new bride entering the family home can also alter family dynamics and power hierarchies. The *baree bahu*⁸⁸³ now has the opportunity to wield her own influence over the new bride. She will have had time to create support structures with other members of the extended family that will allow her to

⁸⁸² A. Booth et al, "Divorce and Marital Instability over the Life Course," *Journal of Family Issues* 7 (1986): 421-442.

⁸⁸³ The wife of the eldest son.

negotiate her own private space within the marriage. She is no longer at the bottom of the power hierarchy but instead has someone below her who not only becomes the new focus of attention of the 'interfering mother-in-law', but who also will allow the *baree bahu* to vent her frustration on someone who, as the new girl, will not be able to 'talk back'. Although such attitudes reinforce patriarchal structures within a family and are not beneficial to women in society as a whole, this may be the only chance of survival for a woman who has suffered years of abuse and emotional turmoil. Of course, this can only occur if a marriage persists. The participants applying for a *khul'* had all been married for a very short period of time. Whilst their marriages legally persist until a *khul'* is granted, many of them had already left the matrimonial home many months prior to applying for the *khul'*. Thus the actual breakdown of the marriage was much earlier than this in the majority of cases. The spouses had first physically separated, and then a decision was made to initiate divorce proceedings. Therefore, the likelihood of any of these participants improving their social position within the marriage in such a short period of time was more remote.

7.11 *Khul'* and the Education and Socioeconomic Position of Litigants

The results from this research also provided a surprise with respect to the education and socioeconomic levels of the women who actually applied for a *khul'*. In Chapter Six, some women who were highly educated and from affluent backgrounds indicated their approval of the right to a *khul'* compared to women

with lower education and from working class backgrounds. It was thus expected that this class of females would be more likely to opt for a *khul'* in marital conflicts. The views of the participants in Chapter Six also resonated with other studies on the causal link between education and divorce. Rao and Sekhar (2002) argue that education is strongly associated with divorce in India. They found that higher levels of education correspond with more divorces. The same has also been found to be true of women with a college education, who are more likely to divorce than those without one⁸⁸⁴. Carter and Glick (1976) found that women with a graduate degree are more likely to divorce than those with a college degree⁸⁸⁵. Anderson and Saunders (2003) also argue that women's socioeconomic position and education are among the most important indications of future marital breakdown. In a recent study by Kreager et al (2013) to assess the relationship between education and divorce in abusive marriages, educated women were found to be more likely to consider divorce in abusive marriages than in non-abusive marriages⁸⁸⁶. Women with a college degree were 10% more likely to divorce than those without a college degree⁸⁸⁷. The same was found for women who earned a higher proportion of the total family income⁸⁸⁸. The presence of resources creates more alternatives for a woman, who is thus less likely to endure abuse. Education also sensitises women to abuse, creating awareness that it negatively affects their dignity, self-esteem and

⁸⁸⁴ A.J. Kposowa, "The Impact of Race on Divorce in the United States," *Journal of Comparative Family Studies*, 29 (1998): 529-547.

⁸⁸⁵ Hugh Carter & Paul C. Glick, *Marriage and Divorce: A Social and Economic Study*, (Cambridge: Harvard University Press, 1976).

⁸⁸⁶ D. Kreager et al, "Women's Education, Marital Violence and Divorce: A Social Exchange Perspective," *Journal of Marriage and Family* 75 (2013): 577.

⁸⁸⁷ *Ibid.*, 578.

⁸⁸⁸ *Ibid.*

respect⁸⁸⁹. As stated earlier, these studies correspond with the views of the participants outlined in Chapter Six. During those interviews, women who had gained their Bachelors' and Masters' degrees and who belonged to more affluent backgrounds were the only ones who considered the possibility of divorce as an option for women. Some of them argued that a woman should have the right to dissolve her marriage if she is not happy, and some were quite adamant that the *khul'* is a necessary right that all women should be aware of. These views follow Gary Becker's (1981) economic theory of the family. He argues that higher levels of education increase the likelihood of women having significant economic resources and independence and thus decrease their marital gains⁸⁹⁰. Following this theory, conversely, those women from lower socioeconomic backgrounds and with little or no formal education should be less likely to divorce, because of their lower economic resources. This was borne out by the views of the participants in Chapter Six. Those women with little or no formal education felt that women should not consider divorce as an option, but should persevere and compromise in order to make the marriage work. They were concerned about the influence of the 'modern thinking' of the young, represented by Pakistani dramas, which were influencing girls to insist on 'new-fangled rights' that would be detrimental to them rather than bringing any benefit.

⁸⁸⁹ Ibid.

⁸⁹⁰ Gary Becker, *Economics of the Family: Marriage, Children, and Human Capital* (Chicago: Chicago University Press, 1974), 300.

However, despite these views and the studies outlined above, it appears that it is that very class of women – those who did not consider *khul'* as an option for themselves – who are entering the court process and making use of these new rights, rather than those with higher levels of education and resources. Of the thirty-one participants who were interviewed, twenty-eight belonged to lower working class families with an average income of between 10,000 and 20,000 *rupees*. Only three of the participants had attained any educational qualifications, whilst the remainder had either not been to school, or had only attended school up until grade six. Only three participants who were interviewed had higher levels of education, all of whom belonged to lower middle class families. None of these three participants worked, but their fathers had a good source of income.

The very small sample in this study is not conducive to making broad generalisations in this research. However, the random sample of participants does resonate with the views of all of the lawyers and judges interviewed, who stated that *khul'* applications are more often pursued by girls who belong to lower working class families, with low educational backgrounds, than by those from more affluent families. William Goode's (1993) theory on societal factors and the social composition of divorce may help to explain this phenomenon. Goode (1993) argues that in the early stages of modernisation, when the legal, social and economic barriers to divorce begin to fade, people from lower socioeconomic backgrounds are

able to access divorce, as they are under more marital strain⁸⁹¹. Hoem (1997)⁸⁹² and Oppenheimer (1997)⁸⁹³ also argue that poverty and lack of resources are all factors that increase marital strain and lead to a higher prevalence of divorce. Friedberg (1998)⁸⁹⁴ and Wolfers (2003)⁸⁹⁵ also suggest that libertarian divorce legislation increases divorce rates when first implemented. In the case of Pakistan, the liberalisation of the *khul'* laws has certainly played a significant role in the increase in divorce rates. Prior to 2002, a *khul'* divorce could take between five and ten years to achieve. After the 2002 Ordinance, the process became much quicker and cheaper, with an influx of *khul'* applications in the last ten years. Goode (1970) suggests that stricter divorce laws would mean that only those with higher resources would be able to have access to them, whilst more liberal laws would make them more accessible to lower class families⁸⁹⁶.

Moreover, even though the social stigma of divorce in Pakistan is still very high, an increase in divorce rates may not necessarily make it a more acceptable remedy and thus reduce the stigma surrounding it. Instead, increased social interaction with

⁸⁹¹ W.J. Goode, *World Changes in Divorce Patterns* (New Haven: Yale University Press, 1993), 20.

⁸⁹² J. Hoem, "Educational Gradients in Divorce Risks in Sweden in Recent Decades", *Population Studies*, 51 (1997) 19-27.

⁸⁹³ V.K. Oppenheimer, "Women's Employment and the Gain to Marriage", *Annual Review of Sociology*, 23 (1997) 431-453.

⁸⁹⁴ L. Friedberg, "Did Unilateral Divorce Raise Divorce Rates? Evidence From Panel Data, *American Economic Review*, 88 (1998) 608-627.

⁸⁹⁵ J. Wolfers, *Did Unilateral Divorce Raise Divorce Rates? A Reconciliation and New Results*. Working Paper No. 10014, Cambridge MA: National Bureau of Economic Research (2003).

⁸⁹⁶ W.J. Goode, *World Revolution and Family Patterns* (New York: The Free Press, 1970), 85-86.

those who have obtained a *khul'*, or hearing about such women through secondary sources, may mean that this behaviour can spread to a wider population (Chan and Halpin 2005)⁸⁹⁷. In Chapter Six, it was highlighted that it was only women from lower socioeconomic and educational backgrounds who had ever met a woman who had applied for a *khul'*. Those participants had more accurate knowledge regarding the costs of a *khul'* and the legal processes involved in gaining one. Those participants from affluent backgrounds assumed that the costs of the *khul'* would be very high and that the process would take a long time. Thus, whilst education may provide more economic resources for a woman and offer her better alternatives to remaining in an unhappy marriage, the frequency of divorce within a certain socioeconomic group may be a better indicator of the likelihood of divorce occurring. Twenty-three of the *khul'* litigants interviewed stated that they either personally knew of someone who had applied for a *khul'* or had heard of someone in their neighbourhood who had done so.

Although there has been a liberalisation of the divorce laws and a reduction in costs, the social stigma of divorce still remains. It was discussed in Chapter Six that women who belong to more affluent families have greater social standing in the community and thus have a lot more to lose regarding reputation and social censure. Family lawyer Ali Shah also stated that parents of middle class families are more involved in negotiations during family disputes. Since both sides of the family have a lot more to lose, parents are active in solving disputes and ensuring that some form of

⁸⁹⁷ T.W. Chan and B. Halpin, *The Instability of Divorce Risk Factors in the UK*. Working Paper No. 2005-06, Oxford Department of Sociology, University of Oxford, 2005.

compromise is reached. Judge Shamsuddin Iqbal stated that family and friends will try to actively arrange reconciliation between a husband and wife⁸⁹⁸. The social stigma of divorce is so great that a wife's natal family may even provide monetary incentives through increased dowry gifts, or might financially help their daughter through bad economic times. Such an option does not exist for women from poorer families. During the court research, most of the participants stated that their parents provided little or no support during their marital disputes. They were not allowed to return home for relief, but were merely advised to continue to be patient, and to compromise. Their parents were neither able to financially support their daughters nor to relieve their economic woes; nor were they able to provide any respite from the domestic abuse suffered by most of the participants. The failure of parents to provide any financial support for their daughters in the marriage, or to apply pressure on the husband and his extended family to be more accommodating towards the wife, appears to be a contributory factor for higher *khul'* divorces amongst low working class families in this survey.

Amato (1997) also argues that education and resources can lead to higher marital satisfaction. Amato and Rogers (1997) found that factors that lead to divorce, such as jealousy, alcoholism and drug abuse, were more likely to be prevalent in those with lower levels of education⁸⁹⁹. If women are in a happier marriage, they may be

⁸⁹⁸ Interview, Lahore Family Court House, April 4th 2014.

⁸⁹⁹ P.R. Amato and S.J. Rogers, "A Longitudinal Study of Marital Problems and Subsequent Divorce", *Journal of Marriage and the Family* 59 (1997): 612-624.

less likely to seek alternatives, even if they are available to them⁹⁰⁰. Poverty and domestic violence were two of the biggest factors cited by the participants that led them to seek a *khul'*. However, domestic violence, dowry-related problems and economic constraints were issues faced by all of the participants from middle class families, albeit not to the degree of their lower socioeconomic counterparts. Many of the divorce litigants spoke of a lack of food and basic necessities that persisted during their married life. When these concerns were raised by the wives, most of the husbands responded with either physical violence or abuse. Thus, overall, lower marital satisfaction resulted in the higher likelihood of pursuing alternate remedies, as Amato (1997) suggests.

7.12 *Khul'*, Agency and Empowerment

The discussion above has highlighted that most of the participants suffered emotional and physical abuse during their marriage, meaning that the right to initiate a *khul'* provided them with a way to escape their unhappy lives. The participants also encountered many difficulties in obtaining a *khul'*, as well as obstacles to negotiating post-divorce relief. On a peripheral level, it would appear that facing such obstacles is an example of women's agency in resisting patriarchal structures rather than engaging in *patriarchal bargains*, described earlier in Chapter Six of this research. Challenging their roles as 'subordinate and passive wives', the *khul'* provides a vehicle for women to counter the hegemony of their husbands and

⁹⁰⁰ P. Amato, "Explaining the Intergenerational Transmission of Divorce," *Journal of Marriage and Family* 58 (1996): 628-640.

extended family in marriage. However, Muhanna (2013) raises two important questions that need to be addressed when discussing women and the use of agency. Are women making these choices freely and autonomously or are they a result of other dynamics and processes, and do such voices always represent resistance to patriarchy⁹⁰¹? If these choices cannot be characterised as resistance to patriarchy, then how can they be explained⁹⁰²? Some feminists argue that, despite the oppressive nature of the social system around them, women can make decisions and choices that influence their lives⁹⁰³. Some studies have shown that women are active agents of change, and can achieve interests that result in a better quality of life⁹⁰⁴. These studies show that women can and are resisting patriarchy and male domination through asserting their agency. Others argue that women only bargain with patriarchy and compromise with its structures⁹⁰⁵. Johnson (2006) for instance states that Palestinian women engage in cousin marriages to ensure family stability

⁹⁰¹ Aitemad Muhanna, *Agency and Gender in Gaza: Masculinity, Femininity and Family During the Second Intifada* (Farnham: Ashgate Publishing Ltd, 2013), 31.

⁹⁰² Ibid., 31.

⁹⁰³ See Naila Kabeer, "Resources, Agency, Achievements: Reflections on the Measurement of Women's Empowerment", *Development and Change*, 30 (1999): 435-464; Naila Kabeer, "Gender Equality and Women's Empowerment – A Critical Analysis of the Third Millennium Development Goal." *Gender and Development* 13, no. 1 (2005): 13-24

⁹⁰⁴ See A.E Macleod, *Accommodating Protest: Working Women, the New Veiling, and Change in Cairo* (New York: Columbia University Press, 1991); Dianne Singerman and B. Ibrahim, "The Costs of Marriage in Egypt: A Hidden Dimension in the New Arab Demography," *The New Arab Family* ed. N.S. Hopkins, (Cairo: American University in Cairo Press, 2003) 80-116.

⁹⁰⁵ Deniz Kandiyoti, "Bargaining with Patriarchy." *Gender & Society* 2, no. 3 (1988), 274-290;

and protection in the face of colonial occupation⁹⁰⁶. Thus women do not challenge or resist the patriarchal system, but strategise within a constrained set of circumstances to achieve the best result possible for them. Examples of such strategies employed by women were demonstrated in Chapter Six of this research.

However, Muhanna (2013) argues that agency is not static and constant and cannot be reduced simply to just two indicators, i.e. resisting or accommodating patriarchy. Instead, agency is “always in motion” and can have ambiguous and unpredictable outcomes⁹⁰⁷. Similarly, Lyn Parker (2005) argues that agency is not a monolithic entity, and should not be employed uncritically where women are constrained in their choices due to their social situation⁹⁰⁸. Kabeer (1999) defines agency as a key dimension of empowerment, comprising “the ability to define one’s goals and act upon them”⁹⁰⁹. Kabeer (1999) argues that agency encompasses the purpose and motives behind an individual’s activity, characterised as the ‘power within’ as well as the perceptible nature of the action itself⁹¹⁰. Similarly to Lyn Parker (2005), Kabeer (1999) also does not view agency as a monolithic experience, but expands her definition into more variables. She outlines three broad concrete and perceptible methods of agency: deception and manipulation; bargaining and

⁹⁰⁶ Penny Johnson, “Living Together in a Nation of Fragments”, *Living Palestine: Family Survival, Resistance and Mobility Under Occupation*, ed. Lisa Taraki (New York: Syracuse Press, 2006), 53

⁹⁰⁷ Aitemad Muhanna, *Agency and Gender in Gaza*, 32.

⁹⁰⁸ Lynn Parker, “Introduction” in *The Agency of Women in Asia, Singapore*, ed. L. Parker (Singapore: Marshal Cavendish Academic, 2005), 1-25.

⁹⁰⁹ Nabila Kabeer, “Resources, Agency, Achievements: Reflections on the Measurement of Women’s Empowerment”, *Development and Change*, 30 (1999): 438.

⁹¹⁰ *Ibid.*, 438.

negotiation; and subversion and resistance⁹¹¹. She also includes more imperceptible methods of “cognitive processes of reflection and analysis, which can be exercised by individuals as well as be collectivised”⁹¹². Similarly, O’Shaughnessy (2009), in her study of divorce litigation in Indonesian courts, argues that agency can be both ambiguous and broad-ranging. She therefore distinguishes agency into three categories: “acquiescence, co-optation and resistance”⁹¹³. She defines ‘acquiescence’ as accepting the existing power hierarchies, which may be in the interest of a woman and thus still be agentive, due to the result of the inherent cultural norms of that society⁹¹⁴. Co-optation is used to define a strategy where women may use ‘hegemonic gender discourses’ to act in their own interests or in the interests of their families⁹¹⁵, whilst resistance is seen as a direct challenge to patriarchal structures of society⁹¹⁶.

The narratives of the participants in this research illustrate different levels of agency encapsulated by both Kabeer (1999) and O’Shaughnessy (2009) during their decisions to adopt the *khul’*. Some of the decisions to pursue a *khul’* can be characterised as being forced, rather than through a choice made freely and without constraint. In the cases of Afreen⁹¹⁷, Bahira⁹¹⁸ and Duaa⁹¹⁹, all three suffered marital

⁹¹¹ Ibid.

⁹¹² Ibid.

⁹¹³ Kate O’Shaughnessy, *Gender, State and Social Power in Contemporary Indonesia: Divorce and Marriage Law* (Abingdon: Routledge, 2009), 132.

⁹¹⁴ Ibid., 133-139.

⁹¹⁵ Ibid., 139-150.

⁹¹⁶ Ibid.

⁹¹⁷ Interview, Lahore Family Court House, April 3rd 2014.

⁹¹⁸ Interview, Lahore Family Court House, April 15th 2014.

breakdown and experienced acute forms of domestic violence and abuse. However, their parents' failure to assist them in any way meant that they continued to suffer abuse for several years. It was only when Afreen's cousin intervened after her arm was fractured, and when Bahira and Duaa were thrown out of their houses, that their parents finally reacted and provided them with safe places to stay. Whilst Afreen, Bahira and Duaa all pursued a *khul'* in the courts, this is more evidence of their husbands' power and control over their lives and their acquiescence to it than examples of their own agentive action. When I interviewed Bahira, she was unhappy with her current situation. She felt that she had lost everything, despite being free from domestic abuse and violence. She stated: *"I have nothing now. My parents hate me and I have nowhere to go"*⁹²⁰. Bahira did not view herself to be in a better situation, but was bitter at her husband for having forced her to come to the courts and suffer the humiliation and cost, and to endure a life of social stigma and blame⁹²¹. She had left her dowry in the matrimonial home, and was still pursuing its restoration a year after gaining her *khul'*. Duaa expressed similar discontentment at having to be forced to apply for a *khul'* and endure constant taunts from members of her own family⁹²².

⁹¹⁹ Interview, Lahore Family Court House, April 8th 2014.

⁹²⁰ Interview, Lahore Family Court House, April 15th 2014.

⁹²¹ Interview, Lahore Family Court House, April 15th 2014.

⁹²² Interview, Lahore Family Court House, April 8th 2014.

In the case of Ummayrah⁹²³, she came from a more affluent family and had not wished to pursue a *khulʿ*. Although her marriage had broken down, she had asked her husband to pronounce a *ṭalāq* rather than force her to attend court and obtain a *khulʿ*. However, her husband refused to do so, primarily because of the large amount of deferred *mahr* involved. He claimed that he was unable to pay this to her, and thus made her life so intolerable that she inevitably sought a *khulʿ*. In this instance, the passiveness exhibited by her husband in refusing to pronounce a *ṭalāq* adversely affected Ummayrah, who was forced to go to court to gain a divorce, with the loss of her *mahr*. The action taken by Ummayrah in reality indicated her acquiescence to her husband's passivity, and thus Ummayrah felt disempowered as a result.

Ummayrah stated that she was blamed for bringing shame on her family and bringing her personal business into the public courts⁹²⁴. She was also engaged in a long dispute for legal guardianship of property that belonged to her children, and was forced to incur further legal expenses. In these cases, it is apparent that the right to pursue a *khulʿ* is less about female agency and more about male power and prestige in marriage and society.

Kabeer (1999) also makes a distinction between 'passive forms of agency' and 'active agency'. Passive agency is defined as making a decision when there is no real alternative or little choice to do otherwise, whilst 'active agency' is a deliberate and

⁹²³ A 29-year-old housewife with a college education. Interview, Lahore Family Court House, April 7th 2014.

⁹²⁴ Interview, Lahore Family Court House, April 2nd 2014.

purposeful choice in order to maximise life choices⁹²⁵. These types of agency are also evident in the narratives of the participants. For example, Shagufta⁹²⁶ had not wanted to pursue a *khul'*, having entered into a love marriage with her husband. However, her parents and in-laws were not happy at the decision, and Shagufta's mother was particularly forceful in insisting that she apply for a *khul'*. Although Shagufta agreed to pursue the *khul'*, this was more as a result of family pressure than her own agentive force. She acquiesced to her family's demands, circumventing the desires of her husband, who had no wish to come to court and enter into divorce proceedings. Whilst Shagufta did not solely decide to begin *khul'* proceedings, acting on her mother's instructions proved fruitful for her. Threatening court proceedings, albeit through 'passive agency', spurred her husband to declare his love for her and promise to change. Thereafter, Shagufta engaged in 'active agency' by denying her mother's demands, and those of her in-laws, that she leave the marriage. Instead, she chose to reconcile with her husband and maintain her marriage. Here, both 'passive agency', through the threat of a *khul'*, and 'active agency', exercised by subsequently dropping the *khul'*, provided Shagufta with a vehicle to ensure that her marriage was maintained.

⁹²⁵ Nabila Kabeer, "Gender Equality and Women's Empowerment: A Critical Analysis of the Third Millennium Development Goal," *Gender and Development* 13, no. 1 (2005): 15.

⁹²⁶ A 21-year-old seamstress who attended college until grade 3. Interview, Lahore Family Court House, April 22nd 2014.

Kabeer (1999) argues that agency can also be exhibited through bargaining, negotiation and manipulation. This is illustrated through the case of Rania⁹²⁷. She initiated *khul'* proceedings solely as a way to force her husband to take her demands seriously. Rania had been married for five years and had been requesting a separate residence for her five children and herself. Her husband's refusal to arrange this resulted in frequent arguments and conflict between the couple, as well as with her mother-in-law⁹²⁸. Rania stated that she had left her husband many times and moved into her parents' home, but each time she had returned to the matrimonial home after her husband had failed to change⁹²⁹. So she instigated *khul'* proceedings in order to force her husband into action. Rania used the *khul'* as a tool to negotiate for a separate house. She also stated that her appearing in court also reflected badly on her husband, who would be accused of not being able to control his wife. Rania co-opted the social norms of the 'submissive and obedient wife' and accepted this role as a means to an end. She agreed to be less belligerent, and used the *khul'* as a manipulation tool to achieve her aims. Rania was successful in her strategy. Her husband turned up to court on the first court hearing and promised to accede to her demands if she promised not to return to court. In this case, the judge pushed the case forward for a month in order for the couple to effect a proper reconciliation.

Whilst the cases above illustrate various degrees of agency, some more agentic than others, the majority of the cases in the research reveal agency in the form of

⁹²⁷ A 50-year-old maid who attended college up until grade 4.

⁹²⁸ Interview, Lahore Family Court House, April 1st 2014.

⁹²⁹ Ibid.

resistance to patriarchal structures of society. The narratives of the participants demonstrate that they were well aware of their marital problems and their right to live lives free of abuse and violence. They possessed the ability to make choices in their decision to divorce, irrespective of the social consequences of their actions. For example, Gulnar⁹³⁰ had suffered physical abuse from her husband and in-laws for several years. However, she received no support from her family or friends, who disapproved of her decision to pursue a *khulʿ*. But Gulnar was able to ‘define her goals and act upon them’⁹³¹ despite their opposition. She was also able to reflect on her motivation and the reasons for her actions, which Kabeer refers to as “the power within”⁹³². Gulnar defended her position on the basis that a maid she knew had also obtained a *khulʿ* and was leading a better life than when she was married. Gulnar faced opposition from both her parents and her extended family in respect of the *khulʿ*, but still pursued it as a matter of exercising her freedom of choice.

The participants’ decision to adopt the difficult route of *khulʿ* at the expense of their dowry and maintenance suits also shows their ability to prioritise their needs and interests. These women pursued a *khulʿ* in the face of community censure and social stigma as a way to maximise the positive results secured from the situation they were in. Some of the participants were faced with patriarchal structures not only within the matrimonial home but also within the legal process itself. The insistence on reconciliation measures from some judges was resisted by many of the

⁹³⁰ A 27-year-old maid who attended school up until grade 6. Interview, Lahore Family Court House, April 15th 2014.

⁹³¹ Kabeer, “Resources, Agency, Achievements,” 438.

⁹³² Kabeer, “Resources, Agency, Achievements,” 438.

participants, who were adamant that they would prefer a life of blame and censure rather than endure more years of physical and mental abuse. Kausar's⁹³³ case is a prime example of this active agency. I met up with Kausar three months after the first interview at court. She had been granted her *khul'* two months after that last hearing, but was still waiting for her child maintenance claim. As of that date, the judge had made no interim order of maintenance and she had received no monies from her husband. I asked her how she considered her life now as compared to her previous married life. Kausar informed me that her parents were forced to support her, and most of her family viewed her in a bad way⁹³⁴. They blamed her for the divorce, and everyone would have preferred it if she had compromised and stayed with her husband. She stated: *"I'm lucky. My aunt said, 'He never hit you a lot. You should have stayed'"*⁹³⁵. Kausar was concerned about the financial burden of raising her daughter alone and did not envisage ever re-marrying, commenting, *"Who would want me and my daughter?"*⁹³⁶ In order to support herself, Kausar had begun to sew clothes for local ladies and was using the money to purchase extra goods that her parents could not afford. Kausar accepted that she was not in an ideal situation, but the fact that she could sew and keep her money rather than have it taken away from her by her husband and mother-in-law were very hard-won victories. Kabeer (2005) argues that agency combined with resources results in 'empowerment', the process by which one acquires the ability to make choices previously denied to

⁹³³ A 20-year-old seamstress who attended school up until grade 3.

⁹³⁴ Second interview, Lahore Family Court House, July 2nd 2014.

⁹³⁵ Ibid.

⁹³⁶ Ibid.

one⁹³⁷, and represents “the potential that people have for living the lives they want”⁹³⁸. For Kausar, the use of agency in divorce and utilising her skill as a seamstress provided the resources for her empowerment.

Kabeer (2005) also argues that empowerment is not merely a reflection of material resources, but also of the capacity of a woman to have a sense of her own worth and achievements⁹³⁹. Several of the participants were relieved and happy to have left their marriages, and felt more confident at having negotiated the court process and achieved some gains regarding obtaining their *khulʿ* and some of their dowry.

Muneera stated that she had no regrets in pursuing her *khulʿ*⁹⁴⁰. During her marriage, she was living in acute poverty and received no support from her husband or her own parents. Despite the opposition she faced, Muneera stated: “*At least I can breathe now, I can eat now, I can sleep whenever I want*”⁹⁴¹. Although she had lost most of her dowry and was subject to constant criticism from her *bhabhi*, Muneera was satisfied with her choices.

However, many of the narratives post-divorce also reflect the constraints on the life choices that have been made. Resisting patriarchal structures of Pakistani society was considered to have resulted in a heavy cost for the participants. Their search for

⁹³⁷ Kabeer, “Gender Equality and Women’s Empowerment,” 13.

⁹³⁸ Kabeer, “Resources, Agency, Achievements,” 438.

⁹³⁹ Nabila Kabeer, “Gender Equality and Women’s Empowerment: A Critical Analysis of the Third Millennium Development Goal,” *Gender and Development* 13, no. 1 (2005): 15.

⁹⁴⁰ Second Interview, Lahore July 5th 2014.

⁹⁴¹ Ibid.

an improved life through a *khulʿ* exposed them to serious social consequences. Many of the participants stated that they had lost the emotional support of their families and were shunned from family gatherings. Their divorced status had become a topic of gossip amongst neighbours, who were constantly reminding them of this fact. Others, such as Imaan, felt that their morals and piety were questioned, and that they had been labelled as non-virtuous and tarnished ladies⁹⁴². The psychological and emotional trauma was not limited to the participants but extended to the wider family. Zulaykah said that her father had suffered a heart attack shortly after her *khulʿ* had become public knowledge amongst the family⁹⁴³, whilst Ummayrah and Rifaat spoke of the shame and humiliation their families felt at them being at home, particularly when guests visited⁹⁴⁴. None of the participants envisaged that they would ever remarry, expecting instead to live the remainder of their lives with the label of 'divorcee'. Some stated that they now preferred to remain in the house and avoided social gatherings during Eid or weddings.

Thus, whilst many of these women had bravely circumvented patriarchal structures of male hegemony in marriage and in court, some had now acceded to the social and cultural norms of subordination within their family homes. Some of the participants, who had willingly opted for a *khulʿ* through 'active agency' rather than passive agency, did not regret their decision to adopt the *khulʿ*, and were grateful for its existence. However, the social costs were very high, particularly in terms of their

⁹⁴² Interview, Lahore Family Court House, April 23rd 2014.

⁹⁴³ Interview, Lahore Family Court House, April 23rd 2014.

⁹⁴⁴ Interview, Lahore Family Court House, April 8th 2014.

failure to enforce post-divorce maintenance and retrieve their dowries. These two issues were cited as being among their biggest regrets. Nineteen of the participants stated that if they had known of the difficulties they would encounter in court, they would have planned matters more effectively. Rifaat stated that she would have tried to take parts of her dowry slowly, over a period of time, before formally separating⁹⁴⁵. Zulaykah stated that she would have taken her clothes and small items of jewellery⁹⁴⁶. The loss of the dowry and failure to enforce child-support payments were viewed just as negatively as the social censure that they received as a result of their divorces.

Kabeer (2005) also distinguishes between ‘effective’ and ‘transformative’ agency. Effective agency “implies a greater efficiency in carrying out one’s given roles and responsibilities”⁹⁴⁷. This research illustrates that on one level the participants’ engagement in effective agency through the *khul‘* enabled them to leave abusive marriages and empower themselves personally. They were able to escape marital oppression and achieve significant change in their lives by improving their overall safety and that of their children. However, they were unable to implement ‘transformative agency’, which Kabeer (2005) defines as the “ability to act on the restrictive aspects of these roles and responsibilities in order to challenge them”⁹⁴⁸. The participants’ inability to combat and thwart community censure or secure their economic rights indicates that they were unable to achieve empowerment on a

⁹⁴⁵ Interview, Lahore Family Court House, April 3rd 2014.

⁹⁴⁶ Interview, Lahore Family Court House, April 8th 2014.

⁹⁴⁷ Kabeer, “Gender Equality and Women's Empowerment,” 19.

⁹⁴⁸ Ibid.

'transformative' level, as indicated by Kabeer (2005). Whilst the *khul'* increased their individual agency, their exclusion from community life meant that this was at the expense of their social existence. The *khul'* provides physical and emotional safety as well as freedom to work and engage in gainful employment, but at the same time it serves to disempower women within society as a whole, and perpetuates serotypes of the disobedient and immoral divorcee/wife.

7.13 Conclusion

This chapter has highlighted the manifold problems that women have to overcome in order to secure a *khul'* from the courts and obtain marital freedom. Although the legal framework has created a relatively simple procedure for the implementation of the *khul'*, administrative matters during the court proceedings result in delays and increased costs. Lack of information and knowledge of court proceedings lead to longer cases than necessary. Moreover, the failure of lawyers to consult adequately with their clients by providing relevant information about the legal proceedings not only creates further delays, but also fosters a sense of mistrust between the participants and their lawyers, as well as with the judges. The chaotic proceedings in court and the lack of any systematic mechanism for the hearing of cases add to the strain and stress of court appearances for the participants.

It was also found that, although women are able to successfully apply for the *khul'*, there is little or no success in gaining relief in post-divorce matters of personal

maintenance, child support and restoration of the dowry. This is partly a result of the failure of wives to prove the existence of their husbands' income, or to prove ownership of their dowries. However, the failure of some judges to implement the law with sufficient rigour compounds the situation. Rather than enforce the strict letter of the law, which would be at the expense of the husband, some courts reproduce gendered cultural norms of a husband's right to property and penalise women for obtaining the *khul'*. The leniency displayed by some judges towards husbands who fail to make child maintenance payments means that male power within marriage and society as a whole is not challenged. Judicial discretion and policy mean that courts consistently fail to penalise husbands for their failure to support their children and return dowries. Moreover, rather than chastise husbands for their abominable behaviour during marriage, many wives are exhorted to return and 'try harder', and are encouraged to remain submissive and passive in their relationships.

This chapter also illustrated that several factors are responsible for the breakdown of marital life. Dowry disputes, financial constraints and interference from extended family members were all cited as reasons for instigating the *khul'*. However, domestic violence and abuse was indicated as the pivotal and decisive reason for divorce. In almost all of the cases, the participants suffered from physical and emotional abuse at the hands of their husbands, and in some cases from their mothers and fathers-in-law. Unfortunately, very few of the participants found any relief from friends or family, and suffered the abuse alone and in silence. It was also

found that those women who chose to break free from these unhappy marriages primarily belonged to lower working class families or were from poorer backgrounds. Most had little or no formal schooling, and were either employed in low-paid jobs or did not work. The participants were also very young, both at the age of marriage and also at the time of applying for the dissolution of marriage. Moreover, the marriages that ended in divorce were also relatively short, with the longest marriage having lasted for just five years.

This chapter has also shown that, despite the legal difficulties encountered during court proceedings, the *khul'* is an important legal remedy for women who wish to leave an unhappy marriage. The use of the *khul'* is also an expression of resistance to patriarchal structures in Pakistani society, and an illustration of women's agency to overcome the hegemonic gendered roles of family life. The perseverance of many of the participants in overcoming family pressure and community censure are clear examples that Pakistani women are not merely passive victims of male oppression in the family, but can be active agents of control and power in their own lives.

Recourse to the law demonstrates that the *khul'* can be a tool for female empowerment in marriage. However, the cost of this agency and self-empowerment is also very high. Whilst the women were able to achieve 'effective' agency on a personal level, they were unable to achieve transformative change at any public or social level. That is not to say that this will not happen. But from the narratives of these participants, it is clear that they have had to pay a very high price for negotiating this resistance thus far.

CHAPTER EIGHT

CONCLUSION

8.1 Findings of the Research

This research has been a socio-legal study of the Islamic remedy of the *khul'*, and has investigated the extent to which this legal device has been able to empower women through female-initiated divorce rights. After providing a theological and historical context to this study, the research has delved into the responses of women from the cloistered shelter of their homes to the public stage of the courts. This research has provided a window onto the private and often hidden lives of women to inquire about their marital lives, and see what factors allow them to break free of their unhappy marriages or prevent them from doing so. By listening to their voices and thus-far untold stories, it is hoped that a more realistic account has been given of the extent to which divorce law reform has affected married women in Pakistan, as well as suggesting areas for law reform.

This thesis argues that classical Ḥanafī jurisprudence is quite capable of providing effective female-initiated divorce rights in the form of the *khul'*, and that it is unfortunate that for many years these classical Ḥanafī scriptures have been misinterpreted and misapplied by religious scholars, judicial officers and academicians in the past and present-day Pakistan. Most importantly, it highlights that the founders of the Ḥanafī *madhhab* provided the right to a *khul'* to women

irrespective of their husbands' wishes and without the need to prove a particular ground for divorce. Moreover, they never envisaged that women should be needlessly penalised for seeking a *khul'* through the return of the *mahr*. Rather, this was made dependent upon the *nushūz* of either party, a fact that has been neglected by scholars for many years. This research is extremely important for Pakistani women, as calls for further divorce-law reform have been met with resistance from religious parties as well as members of civil society who believe that the current *khul'* divorce laws are a deviation away from Ḥanafī *fiqh*. Most recently, the Islamic Council of Ideology stated that the granting of a *khul'* by the Pakistani courts without the consent of the husband is a violation of the Qur'ān and the Sunna, and called for its abolition in its current form⁹⁴⁹. Unfortunately, these conservative religious forces play an extremely active role in the political landscape of Pakistan, and cannot be ignored when proposals for reform are put forward. They gain moral high ground by claiming to legitimate their views through an adherence to the Ḥanafī *madhhab*, and shoot down any attempts to deviate from it, particularly if they perceive proposals to be through some form of *ijtihād*. Therefore, in order to improve the rights of women within Muslim personal law in general, and through divorce law reform in Pakistan more specifically, it is extremely important not only to engage with the primary sources of Islam, but at the same time also to have due deference

⁹⁴⁹ "Khul' Without Husband's Consent is Un-Islamic: CII," The Express Tribune, February 18th 2016, accessed May 9th 2016 <http://tribune.com.pk/story/1049717/khula-without-husbands-consent-is-un-islamic-rules-cii/>; "Why Aren't any Religious Scholars Denouncing Council of Islamic Ideology's Blatant War on Women?" The Nation, February 27th 2016, accessed May 9th 2016 <http://nation.com.pk/blogs/27-Feb-2016/why-aren-t-any-religious-scholars-denouncing-council-of-islamic-ideology-s-blatant-war-on-women>

to existing juristic principles of Islamic law and to the Ḥanafī *madhhab*, as I have attempted to do in this research.

In the same vein, this research has highlighted that when proposals for reform are made through an adoption of the classical techniques of *takhayyur* or *talfīq*, the likelihood of acceptance and thus enforcement is much higher. The efforts of Maulana Ashraf Ali Thanawi, for example, were much more successful than those of the Rashid Commission of 1955 purely because of the former's adherence to accepted juristic principles within the four *madhhabs* when advocating reform. Moreover, by creating a coalition of the leading '*ulamā*' of his time, Thanawi was able to confer 'Islamic' legitimacy to his proposals. This strategy was also successful in the judicial development of the *khul'*. The landmark case of Balquis Fatima was not widely followed precisely because the ruling in it attempted to understand the Qur'ān and Sunna directly, without recourse to the learned authorities of Islam. Judicial precedent was only strictly followed a decade later, after Justice Rahman's painstaking approach to providing arguments based upon classical Islamic legal texts⁹⁵⁰. Although he endorsed the views of Justice Kaikus in the Balquis Fatima case, his more nuanced approach, and his deference to established jurists of the past, proved more palatable for the courts to follow. This research has illustrated that whilst *ijtihād* is an extremely important legal device within Islamic jurisprudence, reform of Muslim personal law in Pakistan has a much greater

⁹⁵⁰ Mst Khurshid Bibi v. Muhammad Amin 1967 PLD SC 97

chance of success if traditional legal devices are exhausted before other avenues are implemented.

This study has also revealed that law does not operate within a vacuum, and that despite the judicial endeavours and legislative reforms in Pakistan, the failure to provide a broader framework of legal, social and economic reform has limited the scope of its achievements. This research has shown that, whilst many women are aware of their legal rights to initiate a divorce, they do not necessarily perceive this as a positive initiative. Indeed, the overwhelming majority of women interviewed exhibited dismay at any talk of divorce – particularly one initiated by a woman – and were clearly of the view that divorce was not a right but a liability. They looked unfavourably upon women who might take this exit route out of marriage, and preferred that women tolerate an unhappy marriage for the sake of their children. Crucially, many of the participants felt that the *khulʿ* could only provide short-term relief and would not alleviate the poverty and social stigma that they would face as a result of divorce. The failure of the State to provide a broader framework of reforms that could provide financial security to women meant that for many, the *khulʿ* would create more problems than it solved. Instead, these women preferred to engage in ‘patriarchal bargains’ with their husbands and extended families by submitting to their demands in return for some measure of long-term marital security. The experiences and voices of these women have also illustrated that despite low socioeconomic standards and even illiteracy, their lived realities do not mean that they are passive victims: rather, they are struggling hard for themselves and for the

sake of their children. They are continually engaged in a balancing act to protect their interests and those of their children. For these women, informal solutions within marriage provide them with a higher degree of stability than formal recourse to the law in the shape of the *khulʿ*.

The primary findings of the fieldwork also revealed that those women who chose to resort to the *khulʿ* faced a number of obstacles in court. Many of the litigants were faced with absent husbands who deliberately forced the lengthening of divorce proceedings, inducing unnecessary court delays and expense. The general apathy of the Pakistani legal system was compounded by the failure of many judges to enforce legal measures designed to speed up the divorce process. This is partly attributed to the fact that there are no specialised family law judges who are trained specifically to deal with family law cases; instead, judges are chosen at random, depending upon their availability at the time when a case is assigned⁹⁵¹. This lack of expertise and wide disparity in the handling of the *khulʿ* cases was clearly evident, with some judges being more concerned than others with ensuring that reconciliation occurred between the husband and wife, irrespective of the latter's wishes. During the *khulʿ* proceedings, many of the judges also failed to pass an *ex parte* judgement in favour of the wife, even though she was legally entitled to one, and there was also a wide disparity in the issuing of arrest warrants when defendant husbands failed to make child-support payments.

⁹⁵¹ S. 4 of the Family Courts Act 1964 states that any district judge can be appointed as a judge of the family courts. The provincial government therefore has no need to appoint specialised family court judges.

There was also a paucity of public information regarding the *khul'* proceedings, which resulted in frustration and mistrust between the participants and their legal representatives. This research has revealed that many of the female *khul'* litigants were overwhelmed by the legal proceedings and had not been fully briefed by their counsel. Many also felt that they had been overcharged by their lawyers, and were unaware of the legal costs of the writ and ancillary matters. The female litigants also felt very vulnerable and exposed in the male-dominated courthouse, and were often subject to ridicule and abuse from complete strangers as well as their former husbands and their extended families. Although the State is obliged to establish one or more family courts in each district of Pakistan⁹⁵², rather than create independent family courthouses, any courtroom is simply declared a family court by the local government, irrespective of its suitability for hearing sensitive family law cases⁹⁵³. This has meant that serious criminal cases involving murder or sexually motivated crimes are often held next door to family court hearings involving vulnerable women and children. Such close proximity of these conflicting jurisdictions places unnecessary strain on female divorce litigants.

Whilst most participants managed to obtain a *khul'* from the courts and exhibited many forms of 'effective' agency, many of them felt that this was an empty victory due to their failure to secure ancillary financial relief for themselves and their

⁹⁵² S. 3 Family Court Act 1964.

⁹⁵³ S. 6 of the FCA states "Subject to any general or special orders of Government in this behalf, a Family Court shall hold its sitting at such place or places within the District or areas for which it is established as may be specified by the District Judge"

children. Their inability to secure the return of their dowries or claim adequate child-support maintenance meant that many of them escaped the servitude of their marriages only to then become completely dependent upon their natal families for food and shelter. Their struggles for marital freedom impeded their efforts to exercise 'transformative' agency within their social environment. The manifold problems that women encounter when attending court, as well as the social and cultural norms present in Pakistani society, suggest that a broader framework of reforms needs to be implemented to truly empower women within the marital arena. The Pakistani Constitution provides constitutional commitments to achieve gender equality through the elimination of gender discrimination⁹⁵⁴ and outlines that all citizens are equal before the law⁹⁵⁵. However, it also empowers the State to make special provisions for the protection of women and children⁹⁵⁶ and obligates the State to protect marriage, the family, the mother and the child⁹⁵⁷ and to ensure the availability of inexpensive and expeditious justice⁹⁵⁸. These constitutional provisions provide a clear framework for the state to amend family laws in favour of women and children, and thus the following recommendations are made based upon this research work.

⁹⁵⁴ Aysha Shahid, "Post-Divorce Maintenance For Muslim Women in Pakistan and Bangladesh: A Comparative Perspective", *International Journal of Law, Policy and the Family* 27, no. 2 (2013), 197-215, 200.

⁹⁵⁵ Article 25 (1).

⁹⁵⁶ Article 25 (2).

⁹⁵⁷ Article 35.

⁹⁵⁸ Article 37 (d). The State has been defined to include 'judicial officers' by the Supreme Court. See *Mst Fazal Jan v. Roshan Din* PLD 1990 SC 661 665.

8.2 Recommendations for Reform

* It is recommended that the family courts be located in a completely separate building, away from other judicial jurisdictions. Moreover, separate waiting rooms should be created where female litigants and children can wait until their cases are called, protecting them from the likelihood of abuse and ridicule from angry husbands and their relatives. This will also provide privacy for women to nurse their children. Such waiting rooms should also be equipped with television screens broadcasting the court proceedings to the waiting litigants, to protect them from harassment from members of their husbands' families, which often occurs in open court⁹⁵⁹. This is particularly important after *khul'* proceedings are finished and female litigants have to return to court on a monthly basis to receive their child-support monies. It is recommended that husbands should provide such monies to the judge or clerk without the presence of the ex-wife, who can watch from the waiting room and be called if deemed necessary by the judge.

* It is recommended that specialised family law judges be appointed to deal solely with family law cases. If a judge is able to concentrate on one field of law, then he or she will be fully acquainted with all of the procedural rules and regulations of that branch of the law and will thus be able to dispose of cases more effectively. Daily dealing with and exposure to family law cases will allow a judge to understand the emotional, social and cultural complexities of family law cases in Pakistan, which

⁹⁵⁹ The courts would also have the power to turn off the screens if they wish to hold a private hearing.

will assist in providing 'better remedies', as outlined by the Supreme Court of Pakistan⁹⁶⁰.

* It is recommended that it be made mandatory for every civil judge appointed as a family law judge to attend intensive training in Muslim personal law and Pakistani family law. Courses specialising in *khul'* litigation, child support maintenance and guardianship cases should be specially formulated, taking into account the cultural norms of Pakistani society and considering how best to provide effective remedies to litigants. Currently there are only two judicial academies in the whole of Pakistan – the Federal Judicial Academy, established by the federal government, and the Sindh Judicial Academy, established by the Sindh provincial government – and wider use should be made of their services⁹⁶¹.

* It is recommended that the remaining three provinces (Punjab, Baluchistan and the North-West Frontier) also set up similar training academies to ensure that judges from all areas of Pakistan have suitable access to training academies. If uniform professional instructions can be given to all family law judges, then this will allow more consistency in court decisions, as well as ensure that the judges are fully

⁹⁶⁰ In *Adnan Afzal v. Capt. Sher Afzal* PLD 1969 SC 187, 193, the Supreme Court interpreted the Preamble of the Family Courts Act 1964 to provide 'better remedies' to women and children

⁹⁶¹ A visit of the Federal Judicial Academy (www.fja.gov.pk) reveals that there are no specialist training courses available for civil judges working in the field of family law. Indeed, there is only one course available, which provides general instruction in family law procedures and is specifically reserved for female judges only. See http://www.fja.gov.pk/uploaded_files/calendar_2015-2016.pdf, last accessed 4.01.2016

aware of their powers, particularly when dealing with recalcitrant husbands and the enforcement of judicial orders. The very nature of family court cases means that judges have the daunting task of ensuring that procedural rules are followed and that they remain neutral whilst navigating a minefield of moral and ethical issues relating to marriage and divorce. From the field work, it was apparent that there was tension between judges who based their decisions on following the law strictly or following legal precedent and those who based their decisions on what they perceived would benefit the family as a whole. Therefore, training courses will equip judges not only with knowledge of how to implement the law more successfully and consistently, but also with the skills to deal with vulnerable women and children within the court system.

* It is recommended that family judges be provided with refresher courses on the powers available to them to award *ex parte khul'* applications and the need to provide expedited justice, as the Family Courts Act 1964 amendments clearly dictate. Judges need to be reminded about the detriments to all parties of unnecessary delays that take place in family court cases and the need to maintain judicial decorum and control of their courtrooms.

* It is recommended that refresher courses should also include details about judicial powers of arrest warrants that must be issued if a husband continually fails to comply with court orders.

* It is recommended that judicial powers to punish violent husbands⁹⁶² be included in these refresher courses. It is recommended that judges be provided with judicial directives during these training courses, and be advised to use these powers as a bargaining tool on behalf of wives to ensure that child support and dowry claims are enforced, as well as to combat domestic violence in marriages.

* It is recommended that the Family Courts Act 1964 be amended so that a separate application for enforcing maintenance decrees by the plaintiff wife should not have to be made. This only serves to increase court expenses and delays in receiving monies owed to the plaintiff wife and children. Instead, once a maintenance order is passed after the *khul'*, then the mode of execution of that order should also be stated by the judge, so that the defendant husband is ordered to make immediate payments and warned of criminal sanctions in the event of failure to pay.

* It is recommended that the proviso to s. 10(4) of the Family Courts Act, which requires the compulsory return of the *mahr* in consideration of the *khul'*, should be abolished. This will ensure that there is complete clarity in the law, and will send a strong message to women that they will not be automatically financially penalised for seeking a divorce. Instead, policy directives should be provided to judges when deciding if and how much *mahr* should be returned to the husband. It was illustrated in Chapter Four that family court judges have already set judicial precedents regarding the circumstances in which the *mahr* should be returned. It

⁹⁶² S. 5(2) FCA as amended in 2002

has also been held that the contribution of the wife during the marriage should also be taken into account when deciding matters relating to the return of the *mahr*, as well as the behaviour of the husband. Therefore, training should be provided to family court judges regarding the correct Ḥanafī opinion on this matter, as well as written policy directives and outlines of legal precedent.

* It is recommended that large posters be put up on the walls of the courts detailing the costs and process of the *khulʿ* and other family law cases. Currently, the walls outside the courtrooms are filled with old, torn campaign posters belonging to lawyers contesting positions in numerous bar elections. Such posters should be taken down and replaced with ones providing important details to potential litigants. These can include a step-by-step guide to how a *khulʿ* and other such cases should proceed, and should include information such as what documents are required and how many copies. Other posters can include how to initiate a plaint and the costs involved in typing the plaint, how to issue a writ, how to send one to three consecutive summons, how to advertise the summons in a newspaper and the cost of photocopying documents. All of these steps are taken by the lawyers outside the court building and are relatively inexpensive. However, the female litigants mentioned that exorbitant amounts had been charged for these legal duties. By outlining the basic costs of the case, the litigants will then be able to judge how much each lawyer is actually spending upon each attendance. These posters should also contain details of how to overcome the possibility of missing documents (such

as birth certificates and copies of the marriage contract), the process of sworn affidavits, and addresses and phone numbers of the local union offices.

* It is recommended that the government initiate a free legal aid scheme aimed particularly at women to ensure that they are given free, easily accessible advice pertaining to marriage and divorce. In particular, they should be provided with workshops on the importance of the *nikāḥ-nāmah* and the clauses that are contained within it that have been specifically inserted to protect them in marriage and divorce. This would include the function of the *mahr*, and should emphasise the importance of documenting dowries.

* It is recommended that marriage and divorce rights in Islam be taught as a separate topic in schools. Islamic studies (*Islamiyyat*) is already a compulsory part of the school curriculum in all private and public educational sectors. A separate section on women's Islamic legal rights in marriage, divorce and inheritance should be introduced within the *Islamiyyat* syllabi in schools, along with an explanation of the statutory provisions available to women to enforce these rights. During such classes, it is necessary that the importance of the *nikāḥ-nāmah*, the *mahr*, dowry lists, and the possibility of inserting marriage stipulations within the marriage contract be discussed in schools to ensure that as many members of society as possible are aware of their rights within Islam. In particular, these documents should be made physically available for all students to study so that they can

familiarise themselves with them and be properly informed when making decisions regarding their marriages in the future.

* It is recommended that the *nikāḥ-nāmah* be amended with a clause inserted detailing what dowry, if any, a wife has brought to the marriage. Just as the amount of the *mahr* must be inserted, in the same way a clause should allow a list to be inserted detailing all the dowry items brought to the marriage by the wife and their value. The amended *nikāḥ-nāmah* should also make it clear that the details entered into the marriage contract will be treated as a matter of fact in the case of dispute, and thus it should be an accurate reflection of what gifts were exchanged at the time of the marriage.

* It is recommended that the government create a pamphlet that explains in detail the importance of the *nikāḥ-nāmah* as a legal document to be kept safe, and highlight the reasons for the different clauses and their ability to protect women during a dispute.

* It is recommended that an addendum to S.5 (5) (i) be added to the MFLO to make it mandatory for the *nikāḥ* registrar to read the contents of the pamphlet to both parties *individually* before the solemnisation of the marriage. Under S.5 (2) of the MFLO, the *nikāḥ-nāmah* is issued by an official called the *nikāḥ* registrar, and it is his

duty to provide all marriage documents to the marriage parties⁹⁶³. Once provided, both parties should attest that they have understood the contents and then sign the pamphlet. Only after the pamphlet has been signed should the *nikāḥ-nāmah* be completed. This will hopefully give the prospective wife and her family some opportunity to reflect on the *nikāḥ-nāmah* and complete the marriage contract accordingly.

8.3 Areas for Further Research

A particular area that I have not addressed in my recommendations is that of the problems surrounding *khulʿ* and post-divorce maintenance in Pakistan. Chapter Seven revealed that one of the fundamental problems facing women pursuing a *khulʿ* is their loss of financial support from their husbands after the dissolution of their marriage. Under current statutory and common law provisions, divorced wives are only liable to be maintained by their husbands, known as the *mataʿa*, for up to three months after the divorce is finalised, which is described as the period of *ʿidda*. Regardless of how long a woman may have been in a marriage, and the extent to which she may have financially contributed to her husband's overall wealth, current judicial practice has refused to consider the possibility of extending the period of maintenance any further than the period of *ʿidda*⁹⁶⁴. This is, of course, extremely

⁹⁶³ S. 5(5) MFLO 1961. Once the marriage contract is completed it must be registered at the local union council office (S.5 (5) MFLO 1961).

⁹⁶⁴ The MFLO is silent on post-divorce maintenance and the judiciary have categorically stated that maintenance beyond the period of Iddah is "illegal and without lawful authority". See Saadia Begum v. Jangreez (2004) vol. LVI, Pesh 213

detrimental to a divorced wife, and is a primary reason why many women choose to remain in abusive marriages, as outlined in Chapter Six. Pakistan does not have a welfare state, so a divorced woman has no source of income other than receiving handouts from her own natal family or friends. There are, however, Qur’ānic injunctions that clearly state that divorced women should be maintained by their ex-husbands for a reasonable period⁹⁶⁵. In particular, the Qur’ān states that, “...divorced women must also be provided with maintenance according to what is fair. This is compulsory for the pious”⁹⁶⁶. There are no provisos for this verse, only that the maintenance should be ‘reasonable’. However, it has been posited by most scholars that classical Ḥanafī jurisprudence does not allow the *mata’a* to be extended beyond the *‘idda* period, and thus it has been used as a justification for decades by religious scholars and the judiciary for preventing the extension of maintenance rights post-marriage⁹⁶⁷. I would therefore suggest that this particular area needs further research, with a closer look at the original Ḥanafī texts regarding their position on this matter. In particular, is it accurate to state that Ḥanafī jurisprudence does not allow post-divorce maintenance after the *‘idda* period has elapsed under any circumstances, and, if so, what is the rationale behind these views? Shahid (2013) states that Shāfi‘ī *fiqh* does contemplate a post-divorce

⁹⁶⁵ Al-Qura’n 2: 236, Al-Quran 2: 241, Al-Qura’n 65:6-7.

⁹⁶⁶ Al-Quran 2: 241.

⁹⁶⁷ See Ayesha Shahid, “Post-Divorce Maintenance for Muslim Women in Pakistan and Bangladesh: A Comparative Perspective,” *International Journal of Law, Policy and the Family*, 27, no. 2 (2013): 197-215, 204-210 who details the Pakistan Law and Justice Commissions unsuccessful attempts to amend S.9 of the MFLO to include provisions of post-divorce maintenance (Report No. 77: 10-3) in 1999 and 2009. Shahid (2013) argues that these reform proposals were rejected by the Islamic Ideology Council as being un-Islamic and not based on Ḥanafī jurisprudence.

maintenance period beyond the *'idda*⁹⁶⁸, and so it is suggested that the principles of *talfiq*, so elegantly applied by Thanawi in the reform of the female-initiated divorce laws outlined in Chapter Three, be used as a basis for further research in this area. It is also of note that *mata'a* has been included in family law reforms in other Muslim countries, including Qatar, Egypt, Morocco, Malaysia and Iran⁹⁶⁹.

Further research is also needed regarding the socio-demographic characteristics of *khul'* litigants. During the course of this research, all of the thirty-one participants who had obtained or were going through the process of obtaining a *khul'* belonged to low socioeconomic backgrounds. However, the small number of participants involved is not enough to make the broad generalisation that it is in fact only women from poorer backgrounds who are utilising the *khul'* process. I would recommend that quantitative-based research be carried out in the district courts of Lahore, using questionnaires to find out which demographic group of women are in fact making use of these new laws, and what different experiences, if any, they have had in their court experience.

It would also be ideal to follow up this research by conducting further qualitative interviews with these particular thirty-one participants, as well as with other *khul'* litigants, at least a year or two after they have obtained their *khul'* decrees. It would be extremely important to find out how these women have fared after the

⁹⁶⁸ Ayesha Shahid, "Post-Divorce Maintenance for Muslim Women in Pakistan and Bangladesh," 200.

⁹⁶⁹ Ibid.

dissolution of their marriages, and what successes or failures they perceived that they had achieved in their post-divorce lives. Were they able to successfully integrate back into their pre-marital lives? And what problems have they faced from family, friends and potential employers as newly divorced women? Such research is important because if it can highlight the particular hurdles and obstacles that these women face post-divorce, then discussion can begin on bringing about reforms and legislative changes to improve the lives of these women in the future

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APPENDIX

I

GLOSSARY OF ARABIC WORDS

Ash‘ariyya	The followers of Abu-al-Hassan Ash‘ariyyi, an early theological school of law
Iftidā’,	A separation
Ikhtilā	The process of detachment or extraction
Badal	Some form of recompense
Barā’at	To become free
Bara’ah	To release
Darar	Hurt
Fa-lahā	Freedom
Faqīh, pl. Fuqahā’	Islamic jurist
Fasād	To create mischief or conflict
Faskh	Annulment or Dissolution of marriage
Fiqh	Islamic jurisprudence
Ghusl	Ablution of the full body
Hadith, pl. AHadith	Reports that describe the words, action and habits of the Holy Prophet Muhammad (s.a.w)
Ḥanafī	One of the four schools of Sunni jurisprudence, named after its founder, Abū Ḥanīfa an-Nu'man ibn Thābit
Ḥanbalī	One of the four schools of Sunni jurisprudence, named after its founder, Ahmad ibn Hanbal
Harām	Prohibited or unlawful in Islam
Hukm	A commandment derived from religious scripture
‘Idda	Mandatory waiting period for a woman after divorce
Ijmā‘	Consensus of opinion by Muslim scholars
Ijtihād	Independent reasoning
Ikrāh	Coercion or compulsion
‘Iwad	Some form of compensation
Jā‘iz	Permissible
Janoon	Insanity
Kathīr	Abundance
Kufr	Disbelief
Libas	Clothing or dress
Māl	Wealth

Madhhab	A doctrine or school of thought in Islamic jurisprudence
Mahr	Obligatory dowry given by the husband to the wife upon marriage
Mahr al-mithl	Dowry which is given to women of similar standing
Mahr-al-Muajaal	Dowry paid to the wife promptly upon marriage
Makrūh	An act that is disliked or detested
Makrūh-al-Taḥrīmī	An act that is strongly disliked or strongly detested
Mālikī	One of the four schools of Sunni jurisprudence, named after its founder, Mālik ibn Anas
Maqāṣid	Aim or purpose
Maslaha	In the public interest or common good
Maulvis	Urdu word to describe a religious teacher
Mubāra'a	A divorce through mutual consent with the release of financial obligations of a husband towards his wife
Mufa'ala	Arabic grammatical term denoting the involvement of two persons
Mujtahid	A person who has an extensive knowledge of Islam and is qualified to engage in ijtihād.
Murtad	One who rejects faith or an apostate
Nafaqa	Husband's liability to provide food and clothing to his wife
Nikāḥ	Contract of marriage
Nushūz	Marital discord/harm
Qāḍī	Muslim judge
Qalīl	Little or less
Qiyās	Analogy
Sahih	Authentic
Ṣaḥāba	The companions of the Prophet Muhammad (s.a.w) who embraced Islam in his lifetime
Sarf	Arabic grammatical device explaining the change and patterns of Arabic words
Shāfi'ī	One of the four schools of Sunni jurisprudence, named after its founder, Abū 'Abdullāh Muhammad ibn Idrīs al-Shāfi'ī
Sharah	Explanation or commentary
Shariah	Islamic laws derived from the Qur'ān and hadith
Suknā	Husband's liability to provide housing to his wife
Sunna	Recommended practices of the Prophet
Tābi'īn	Second generation followers of the Prophet Muhammad (s.a.w) who were the contemporaries of the ṣaḥāba
Talāq	Divorce
Talāq-ul-Bain	An irrevocable divorce
Talāq-ul-Tafwīḍ	Where a husband delegates his right of divorce to his wife
Talfiq	Combining opinions from different schools of Islamic jurisprudence

Takhayyur	Adopting different opinions from within one or more schools of Islamic jurisprudence
Tamkīn	To enable or consolidate
Taqlīd	Adherence to one school of Islamic jurisprudence
Thawb	An ankle-length garment
‘Ulamā’	A group of Muslim scholars
Wahshat	Hideous or terrible
Wājib	Obligatory
Zina	Unlawful sexual relations outside marriage
Zulm	Cruelty or injustice

APPENDIX

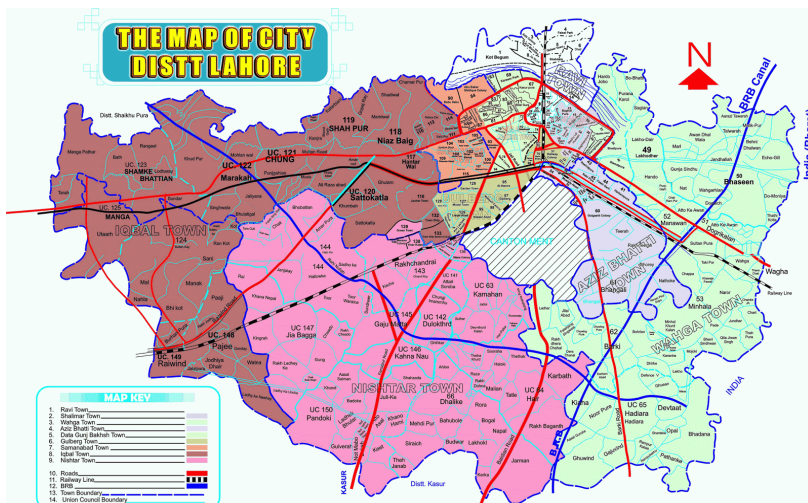
II

Figure 1 Map of Pakistan



Source: Graphatlas.com

Figure 2 Map of Lahore



Source: Urban Pakistan (2010)

APPENDIX

III

Participant Information Sheet

Purpose of the study

My name is Ghazala Hassan Qadri. I am a PhD student enrolled at the University of Birmingham. I am conducting research on women's right to divorce in Pakistan. I will be talking to a number of women about their knowledge of the divorce laws of Pakistan and within Islam. I will be asking them their opinions about the importance of having easier access to divorce and what problems they think exist within Pakistani culture and society for women who want a divorce.

Your Participation

If you agree to take part, I will ask you to sign a consent form. I will then ask you to answer some questions in an interview. There aren't any right or wrong answers – I just want to hear about your opinions. The interview should not take more than an hour at the longest. You do not have to answer all the questions. Please note that some of the questions will relate to your personal life experiences. You can pass on any question that makes you feel uncomfortable. You can pull out of the interview at any time.

Do you have to take part?

No, **taking part is voluntary**. If you do not want to take part, you do not have to give a reason and no pressure will be put on you to try and change your mind. Please note: if you choose not to participate, or pull out during the interview, this will **not** negatively affect you in any way

Confidentiality

Hand written notes will be made of the interview. It will also be audio recorded. However, your name will not be audio taped. If you feel uncomfortable with the audio recording, you can request that it be turned off at any time during the interview. Insights given by you and other participants will be used in writing up my thesis for my PhD. Although direct quotes from you may be used in the paper, your name or any identifying information will not be associated with any part of the written thesis. My supervisor, a second marker and an external examiner will see the thesis. Future students on the course may read the thesis and this study may be published in a research journal.

What will happen to the information you give?

The data will be kept confidential for the duration of the study. On completion of the thesis, they will be retained for a further six months and then destroyed.

What are the possible disadvantages of taking part?

I don't envisage any negative consequences for you in taking part. However, if you feel that your family or friends will object to this interview, you may wish to withdraw from this interview at any time.

Any further queries?

If you need any further information, you can contact me: Ghazala Hassan Qadri.

If you agree to take part in the study, please sign the consent form overleaf

Consent Form

I.....agree to participate in Ghazala Hassan Qadri's research study.

The purpose and nature of the study has been explained to me orally and in writing.

I am participating voluntarily.

I do/do not give permission for my interview to be noted down in writing

I do/do not give permission for my interview to be audio recorded

I understand that I can withdraw from the study, without repercussions, at any time, whether before it starts or while I am participating.

I understand that I can withdraw permission to use the data, in which case the material will be deleted.

I understand that anonymity will be ensured in the write-up by disguising my identity.

I understand that disguised extracts from my interview may be quoted in the thesis and any subsequent publications if I give permission below:

I agree/do not agree to quotation/publication of extracts from my interview

Signed.....

Date.....

Urdu Translated Participant Information Sheet

PhD مقالہ کے تقاضوں کی جزوی تکمیل کے لیے

انٹرویو میں حصہ لینے والوں کے لیے معلومات

آغراض و مقاصد

میرانام غزالہ حسن قادری ہے۔ میں یونیورسٹی آف برمنگھم میں پی ایچ ڈی اسکالر ہوں۔ میں پاکستان میں خواتین کے حق طلاق پر تحقیق کر رہی ہوں۔ اپنے تحقیقی مقالہ کے لیے مختلف خواتین سے پاکستان میں اسلامی تناظر میں طلاق کے قوانین سے آگہی کے بارے میں معلومات درکار ہیں۔ میں خواتین سے یہ معلوم کرنا چاہوں گی کہ انتہائی ناگزیر حالات میں طلاق حاصل کرنے کے لیے آسان راستہ اختیار کرنے کے سلسلے میں ان کی کیا آراء ہیں اور ان کے خیال میں پاکستانی کلچر اور سوسائٹی میں ایک عورت کو طلاق حاصل کرنے کی راہ میں کیا مسائل درپیش ہیں۔

شرکت کا ضابطہ

اگر آپ مذکورہ بالا موضوع سے متعلقہ انٹرویو میں حصہ لینا چاہتی ہیں تو سب سے پہلے متعلقہ فارم پر دستخط کر کے اپنی رضامندی کا اظہار کریں۔ پھر میں آپ سے ایک انٹرویو کے ذریعے چند سوالات پوچھوں گی لیکن وہ سوالات 'ہاں' یا 'نہیں' کی شکل میں نہیں ہوں گے بلکہ میں زیر بحث موضوع سے متعلق آپ کی رائے جاننا چاہوں گی۔ یہ انٹرویو زیادہ سے زیادہ ایک گھنٹہ دورانیہ کا ہوگا لیکن آپ تمام تمام سوالات کے جوابات دینے کی پابند نہیں ہوں گی۔ ممکن ہے بعض سوالات آپ کے ذاتی تجربات سے متعلق ہوں۔ لہذا آپ ایسے سوالات کے جواب دینے سے انکار بھی کر سکتی ہے جنہیں آپ اپنے لیے نامناسب خیال کریں۔

آپ اس مذاکرہ میں حصہ لینے میں کلی طور پر خود مختار ہیں۔ اپنا نقطہ نظر تبدیل کرنے کے لیے آپ پر کوئی دباؤ نہیں ڈالا جائے گا۔ دورانِ انٹرویو اگر آپ محسوس کریں کہ اس میں حصہ لینا آپ کے لیے نامناسب ہے تو آپ اس انٹرویو سے دستبردار ہو سکتی ہیں۔ آپ انٹرویو کے آغاز میں یا درمیان میں کسی بھی وقت انٹرویو میں حصہ لینے سے انکار کر سکتی ہیں۔ آپ کا یہ طرز عمل قطعی طور پر عار تصور نہیں کیا جائے گا۔

صیغہ رازداری

انٹرویو ریکارڈ کرنے کے ساتھ ساتھ اس کے نوٹس بھی تیار کئے جائیں گے۔ اگر آپ آڈیو ریکارڈنگ نہیں چاہتیں تو دورانِ انٹرویو ریکارڈنگ سے منع بھی کر سکتی ہیں تاکہ ریکارڈنگ بند کر دی جائے۔ اس انٹرویو میں آپ اور دیگر خواتین سے حاصل ہونے والی بصیرت افروز معلومات میرے **PhD** مقالہ میں شامل کی

جائیں گی۔ اگرچہ انٹرویو میں آپ سے براہ راست سوالات پوچھے جاسکتے ہیں لیکن آپ کانام یا کوئی اور شناخت کسی بھی صورت مقالے میں شامل نہیں کی جائے گی۔ اس مقالہ کو دیگر محققین اور ممتحن بھی دیکھیں گے اور اسی طرح مستقبل کے طلباء و طالبات بھی اسے پڑھ سکتے ہیں۔ نیز یہ مقالہ تحقیقی جرائد میں بھی شائع ہوگا۔ بایں ہمہ یہ طے شدہ امر ہے کہ انٹرویو کے ذریعے حاصل کئی گئی تمام معلومات مکمل طور پر صیغہ راز میں رکھی جائیں گی۔ یہ معلومات اس مقالہ کے مکمل ہونے کے بعد چھ ماہ تک محفوظ رہیں گی اور اس کے بعد انہیں تلف کر دیا جائے گا۔

کیا انٹرویو میں شرکت سے نقصانات ہوسکتے ہیں؟

اس انٹرویو میں حصہ لینے سے آپ پر کوئی منفی اثرات نہیں ہوں گے کیونکہ اس انٹرویو کا مقصد علمی ہے۔ تاہم پھر بھی آپ کی فیملی یا دوست آپ کے اس انٹرویو پر معترض ہوں تو آپ اس انٹرویو میں شامل ہونے سے کسی وقت بھی انکار کرسکتی ہیں۔

نوٹ:

اس سلسلہ میں اگر آپ کو کوئی معلومات درکار ہوں تو مجھ سے رابطہ کر سکتی ہیں۔

اگر آپ اس مطالعاتی انٹرویو میں حصہ لینے پر رضامند ہیں تو براہ مہربانی لف شدہ فارم پر دستخط فرما دیں۔

Urdu Translated Consent Form

رضامندی فارم برائے انٹرویو

- ۱۔ میں ----- غزالہ حسن۔ قلدری۔ کے ریسرچ ورک میں حصہ لینے پر رضامند ہوں۔
- ۲۔ مجھے اس ریسرچ کے مقصد اور نوعیت سے زبانی اور تحریری طور پر بالتفصیل آگاہ کر دیا گیا ہے۔
- ۳۔ میں اس میں رضاکارانہ طور پر بلا جبر و اکراہ حصہ لے رہی ہوں۔
- ۴۔ میں اس بات کی اجازت دیتی ہوں / نہیں دیتی کہ میرا انٹرویو تحریری شکل میں لایا جائے۔
- ۵۔ میں اس بات کی اجازت دیتی ہوں / نہیں دیتی کہ میرا انٹرویو ریکارڈ کیا جائے۔

- ۶۔ مجھے اس امر کا بخوبی علم ہے کہ بغیر کسی دباؤ کے میں اس مطالعاتی انٹرویو کے آغاز یا درمیان میں کسی بھی وقت حصہ لینے سے انکار کر سکتی ہوں۔
- ۷۔ مجھے اس امر کا بخوبی علم ہے کہ میں جب چاہوں حاصل شدہ مواد کو استعمال کرنے کا اجازت نامہ واپس لے لوں۔ اس صورت میں وہ مواد میرے انٹرویو سے حذف کر دیا جائے گا۔
- ۸۔ مجھے اس امر کا بخوبی علم ہے کہ میرا نام خفیہ رکھنے اور انٹرویو کو تحریری شکل میں لاتے وقت میری شناخت پوشیدہ رکھنے کا عمل یقینی بنایا جائے گا۔
- ۹۔ مجھے اس امر کا بخوبی علم ہے کہ میری شناخت کو چھپا کر میرے انٹرویو کا حصہ مقالے میں شامل کیا جا سکتا ہے۔
- ۱۰۔ میں اس بات پر راضی ہوں / نہیں ہوں کہ مجھ سے لیے گئے انٹرویو کے اقتباسات شایع کر دیے جائیں۔

دست خط:

تاریخ:

Interview Template for Lawyers, Judges and Legal Academicians

1. Assalam u alaykum. Can you give me some details about your legal background, what type of law you have been practicing and for how long?
2. How do women seeking a divorce normally find out about your legal services?
3. What are the main methods women use to contact you when seeking a divorce?
4. How many women file for a divorce on average in any given year in Pakistan?
5. How many women file for a divorce on average in any given year in Lahore?
6. What is the average number of women divorce petitioners that you deal with in any given year?
7. Are court records kept of divorces and how could I gain access to them?
8. What is the exact procedure for a woman applying for a divorce – the legal process?
9. How long does it take for a case to get to court and then for a judgment to be passed?
10. What is the cost of an average case?
11. In your experience, what are women's main reasons for seeking a divorce?
12. What social class of women normally seek a divorce through the courts?
13. What percentage of women pursue their cases fully through the courts?
14. How many women do not pursue a case further?
15. In your opinion, how efficient are the family courts during *khul'* proceedings?

16. Do you think judges are sympathetic to female petitioners?
17. How sympathetic are the court staff and clerks to women seeking a divorce?
18. What problems do women most often encounter when seeking a divorce?
19. How effective are arrest warrants in forcing litigants' husbands to comply with court orders?
20. In your experience, how often are warrants issued and under what circumstances?
21. What are your views on the reconciliation process?
22. What are your views and opinions regarding women who pursue a *khul'*?
23. What reforms would you suggest to make the process much easier for women?
24. How aware are women of their divorce rights before they seek your advice?
25. How much support do you feel family gives to a litigant wife?
26. What are the financial consequences of applying for a *khul'*?
27. What other obstacles do women face when seeking a divorce?

Interview Template For Married Women

Notes for Interview Process:

After general meet and greet, present an introduction to the purpose of the interview and provide the information sheet and consent form. Read out aloud the contents of both forms and explain the contents in Urdu. Present the form for signature and ask permission again specifically to record the interviews. Remind the participants that their information will be kept confidential and their identities will remain anonymous.

1. Can I please ask some personal questions relating to you and your family?
2. Can you please tell me your name?
3. Can you tell me how old you are and your date of birth?
4. Can you tell me your education background?
5. Are you married?
6. How long have you been married?
7. Do you have any children?
8. How did you find your marriage partner?
9. How old is your husband?
10. What is his educational background?
11. Is he related to you?
12. Do you or your husband work and if so where?
13. How much do you and your husband earn?
14. What is your average monthly income?
15. Where do you normally live?
16. Who else lives with you in the house?
17. When you married, did you see the Nikāḥ Nāmāh before you signed it?
18. Where did your Nikka take place: at time of rukhsati? At engagement? At mehndi?
19. Did you read your Nikāḥ Nāmāh?

20. Did anyone explain the Nikāḥ Nāmāh to you?
21. Do you know what the Haq Mahr is?
22. What was your mahr?
23. Is this a traditional amount where you live?
24. Did you have a jahez?
25. How important is the jahez for a woman in marriage?
26. Have you heard of the term talāq-ul-tafwīd, and if so, can you explain what it means?
27. Have you heard of the term *khul'*? If not, go to question> 35
28. If yes, can you explain what it means?
29. Does a woman need permission from her husband to get a *khul'*?
30. How does a woman get a *khul'*?
31. Is this a difficult thing?
32. Is this a costly thing?
33. Would you ever consider seeking a *khul'* if your marriage broke down?
34. How likely are other women to seek a *khul'* if their marriage breaks down?
35. Do you know of other ways a woman can obtain a divorce? If yes, please explain.
36. Would you be prepared to go to court to obtain a divorce?
37. In your opinion, would other women be prepared to go to court to obtain a divorce?
38. Would your family support you if you wanted to initiate a divorce?
39. In your opinion, would families support a woman if she wanted to initiate a divorce?
40. Do you know where your local courts are located?
41. If you had to hire an advocate, do you know how to do this?
42. How does your local society treat women who seek a divorce?
43. How do you feel about women who ask for a divorce/*khul'*?
44. In your opinion, what are the main problems that women face when they have to get a divorce?
45. What do you think are the main causes for women to ask for a divorce?
46. What do you think would make obtaining a divorce easier for women?
47. What reforms or changes would you suggest?

Interview Template for Women in the District Courts of Lahore

Notes for Interview Process:

After general meet and greet, present an introduction to the purpose of the interview and provide the information sheet and consent form. Read out aloud the contents of both forms and explain the contents in Urdu. Present the form for signature and ask permission again specifically to record the interviews. Remind the participants that their information will be kept confidential and their identities will remain anonymous

1. Can you please explain to me why you are in court today?

Possible questions to ask during the interview to elicit additional information if not covered by the participants' responses.

1. Can I ask for your name and age?
2. What is your educational background?
3. Are you married? If yes, how long have you been married?
4. Do you have any children, and if so, how many?
5. Can you give me some general background about your family and your husband?
6. Are you or your husband working? If so, can you provide some details about the work?
7. How did you find and marry your husband?
8. Do you have a marriage certificate (Nikāḥ Nāmah)? If yes, who filled it in?
9. Did you see the Nikāḥ Nāmah before you signed it?
10. Do you know what a *khul'* is? If yes, can you explain briefly what it is?
11. What is the reason for the breakdown of your marriage?
12. How did you find out about a *khul'*?
13. Did you know of anyone else who had obtained a *khul'*?
14. How did you find out about getting a lawyer?
15. Who helped you in getting a *khul'*?
16. Did you get any help from family and friends?
17. How much has it cost you so far?
18. How easy or difficult was it to get the *khul'*?
19. How cooperative has your husband been in coming to court?
20. What was it like going to court? Can you share your experiences?
21. Did you go through any reconciliation process?
22. How helpful did you find your lawyers?
23. What was your experience with the judges?
24. Who brought you here to court?
25. Did you find it a friendly place?
26. What has happened about your mahr?
27. What has happened about your dowry?
28. Who has custody of the children?
29. Did you get any interim maintenance relief?
30. Overall, how do you rate your experience in getting a *khul'*?
31. What are the financial problems of obtaining a divorce?
32. Is there a stigma attached to women seeking a divorce?
33. Did your family support your divorce petition?
34. In your opinion, how important is it for women to have easy access to divorce?
35. What measures do you think would make obtaining a divorce easier for women?
36. In your opinion, would other women be prepared to go to court to obtain a divorce?
37. What reforms or changes would you suggest to improve your experience of going to court?

APPENDIX

IV

Table 2 – Details of Married Women Participants Interviewed in Lahore

Number Of Participants	NAME	AGE	EDUCATION	PROFESSION	TOTAL HOUSEHOLD INCOME
1	Abida	25	Gr. 2	Maid	11,000
2	Afifa	36	Gr. 4	Housewife	10,000
3	Aliya	30	Gr. 2	Maid	12,000
4	Ambreen	37	Gr. 4	Housewife	12,000
5	Amina	27	BA	Teacher	50,000
6	Ayesha	41	Gr. 3	Seamstress	16,000
7	Badr	33	None	Maid	13,000
8	Bano	51	None	Housewife	12,000
9	Basima	44	FA	Housewife	40,000
10	Bashirah	40	FA	Housewife	45,000
11	Batool	20	Gr.4	Maid	12,000
12	Bilquis	40	Gr.2	Housewife	10,000
13	Bushra	32	BA	Housewife	44,000
14	Duha	37	Gr. 2	Housewife	11,000
15	Durah	50	FA	Housewife	55,000
16	Erum	27	BA	Teacher	50,000
17	Elisha	29	FA	Housewife	45,000
18	Eman	19	Gr.4	Maid	15,000
19	Faiza	39	Metric	Housewife	45,000
20	Fareeha	38	BA	Teacher	55,000
21	Farkhanda	25	None	Housewife	11,000
22	Farwah	23	Gr.3	Maid	15,000
23	Farzana	23	BA	Housewife	40,000
24	Fatima	45	MA	Lecturer	50,000
25	Fizzah	24	BA	Housewife	55,000
26	Fouzia	34	Gr.3	Seamstress	14,000
27	Gohar	30	Gr. 2	Housewife	12,000
28	Gulnar	42	BA	Teacher	55,000
20	Gulshan	55	None	Maid	19,000
30	Gulzar	57	Gr.3	Housewife	15,000
31	Halla	47	BA	Nurse	42,000
32	Haleema	25	BA	Housewife	55,000
33	Habiba	30	Gr. 1	Housewife	12,000

34	Hala	29	Gr.2	Maid	14,000
35	Hajira	35	None	Housewife	10,000
36	Hassana	35	FA	Housewife	45,000
37	Hasina	55	BA	Teacher	60,000
38	Hawwah	32	FA	Office work	39,000
39	Imaan	33	Gr. 1	Housewife	14,000
40	Imtiaaz	36	FA	Housewife	49,000
41	Inayat	30	None	Housewife	15,000
42	Iqra	36	BA	Housewife	45,000
43	Jameela	44	MA	Principal	90,000
44	Jannah	37	FA	Housewife	50,000
45	Jariyah	45	Gr. 1	Maid	15,000
46	Jasmine	43	BA	Tutor	55,000
47	Javeria	37	FA	Housewife	50,000
48	Kainaat	44	None	Housewife	15,000
49	Keisira	29	None	Factory Work	15,000
50	Khadija	40	None	Housewife	10,000
51	Khalida	50 plus	None	Housewife	12,000
52	Kulsoom	44	None	Housewife	8,000
53	Layla	40	BA	Teacher	60,000
54	Linah	37	Gr.1	Maid	15,000
55	Lubna	37	FA	Housewife	45,000
56	Maha	37	Gr. 6	Factory work	15,000
57	Majeeda	40	Gr. 4	Maid	16,000
58	Malka	44	BA	Housewife	50,000
59	Maria	24	Gr. 3	Housewife	12,000
60	Mehvish	24	Gr. 2	Maid	15,000
61	Misbah	37	FA	Housewife	37,000
62	Mobeen	42	MA	Housewife	50,000
63	Moona	33	FA	Housewife	50,000
64	Nadia	19	BA	Teacher	55,000
65	Najaf	37	None	Housewife	15,000
66	Najma	45	Gr. 4	Seamstress	15,000
67	Naheed	44	Gr. 2	Maid	12,000
68	Nazia	41	MA	VicePrincipal	60,000
69	Nighat	30	Gr. 3	Housewife	12,000
70	Noora	39	BA	Teacher	35,000
71	Nyla	20	BA	Teacher	38,000
72	Perveen	40	FA	Housewife	40,000
73	Rabia	37	BA	Housewife	52,000
74	Raadiya	39	Gr. 2	Housewife	12,000
75	Radwa	44	None	Maid	15,000

76	Rashida	27	BA	Teacher	40,000
77	Raazia	39	Metric	Housewife	45,000
78	Robina	32	Gr. 2	Ayah	15,000
79	Rubya	38	Gr. 2	Maid	16,000
80	Sabine	37	FA	Housewife	45,000
81	Saima	42	BA	Housewife	50,000
82	Saira	37	BA	Nurse	50,000
83	Saja	36	None	Housewife	11,000
84	Sajida	22	Gr. 4	Seamstress	18,000
85	Salma	35	None	Maid	10,000
86	Shahida	37	Gr. 4	Maid	15,000
87	Shaista	24	Gr. 2	Factory Work	18,000
88	Shamma	37	Gr. 4	Seamstress	15,000
89	Siama	42	BA	Nurse	40,000
90	Sobia	50	None	Housewife	10,000
91	Somia	37	FA	Housewife	50,000
92	Sultana	45	None	Housewife	12,000
93	Sumaira	42	Gr.1	Housewife	15,000
94	Sumayya	36	Gr. 3	Maid	12,000
95	Tanzeela	42	FA	Housewife	40,000
96	Tanzeem	37	FA		
97	Tasleema	44	BA		
98	Tasmin	38	MA		
99	Tasmia	45	BA	Principal	70,000
100	Yasmin	44	MA	Lecturer	60,000

Table 6 –Details of Participants Interviewed in the District Courts of Lahore

Number of Participants	Name	Age	Education	Profession	Total Household Income
1	Aadila	23	None	Seamstress	12,000
2	Afreen	23	None	Maid	10,000
3	Bahira	25	Gr. 3	Housewife	11,000
4	Daanya	25	None	Housewife	12,000
5	Duaa	22	Gr.2	Housewife	7000
6	Farhah	22	Gr.3	Housewife	10,000
7	Farhat	25	None	Factory Worker	15,000
8	Farheen	23	None	Housewife	12,000
9	Gohar	27	None	Housewife	10,000
10	Gulnar	27	Gr.6	Maid	12,000
11	Hafsa	30	Gr.1	Maid	14,000
12	Imaan	22	Gr.1	Factory Worker	13,000
13	Iqrah	21	None	Seamstress	12,000
14	Ishraat	29	None	Housewife	10,000
15	Karimah	28	None	Seamstress	14,000
16	Kaukab	19	Gr.5	Maid	12,000
17	Kausar	20	Gr.3	Seamstress	12,000
18	Mabrooka	28	Gr.2	Housewife	14,000
19	Mansoorah	28	None	Factory Worker	10,000
20	Muneera	20	None	Housewife	15,000
21	Nasreen	26	None	Housewife	13,000
22	Raheela	26	None	Housewife	14,000
23	Rania	5	Gr. 4	Maid	12,000
24	Raifaat	29	BA	Housewife	45,000
25	Rizwana	27	None	Seamstress	14,000
26	Sabah	25	Gr.5	Seamstress	15,000
27	Shaguftah	21	Gr.3	Seamstress	15,000
28	Somayya	26	Gr.2	Housewife	9000
29	Ummayrah	29	FA	Housewife	55,000
30	Zulaykah	28	BA	Housewife	50,000
31	Hala	25	Gr.3	Housewife	12,000