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Development of Women's Right to No-fault Judicial Divorce (*Khul'*) in Pakistan: Judges and *'Ulamā'* as Catalysts for Legal Reform

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Abstract

*Pakistan is the first Muslim country, which recognized women's unilateral right to no-fault judicial divorce (*khul'*) under Islamic family law in 1959. In contemporary Pakistan, Muslim women have the unilateral right to dissolve their marriages through summary court procedure. This has been made possible because of the gradual changes in case law and procedural law stretching over more than half a century. Despite questioning the validity of state-enforced Islamic divorce law on the basis that it is not in line with classical Islamic law (*sharī'ah/fiqh*), traditional* 'ulamā' *(religious scholars) accept the validity of court decrees of the dissolution of marriage based on* khul'*. As a result, the validity of judicial* khul' *under Islamic law is well established in Pakistan. This shows that the judges of the superior courts act as final arbiters by determining the binding interpretation of the Qur'ān and* sunnah *and the same has been approved by the* 'ulamā'*.*

Keywords

no-fault judicial divorce (*khul'*), traditional *'ulamā'*, judges of superior courts, final arbiters.

Introduction

During the second half of the twentieth century, Islamic divorce law in Pakistan transformed from fault-based divorce (*faskh*), where divorce is only granted after proving grounds permissible in Islamic law, to no-

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fault-based divorce (*khul'*) where there is no such requirement. The judges of the superior courts primarily led this transformation from *faskh* to *khul'*,[1] with the legislature playing a secondary role by amending the procedural laws to accommodate legal reform led by the judges. Several scholars have explored the legal development of women's unilateral right to no-fault judicial divorce (*khul'*) in Pakistan,[2] but the views of *'ulamā'* (religious scholars) regarding this development have remained relatively unexplored. Given the traditional authority that *'ulamā'* have in Muslim societies as "custodians of sharia,"[3] their opinions matter in granting socio-religious legitimacy to state-enforced legal norms. Therefore, the views of *'ulamā'* need to be engaged with for a meaningful dialogue about the development of Islamic family law in Pakistan. For this purpose, I have based my analysis not only on case law and statutes but also on *fatāwā* (legal opinions) of *'ulamā'* regarding judicial *khul'*.[4] Through this analysis, we hope to lay bare the conflict between the normative positions of the state and *'ulamā'* about women's right to *khul'*.

[1] Pakistan is the first Muslim country, which acknowledged women's unilateral right to no-fault judicial divorce (*khul'*) under Islamic law (*sharī'ah*/*fiqh*). Karin C. Yefet, "The Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb," *Harvard Journal of Law & Gender* 34 (2011): 553, 588.

[2] Doreen Hinchcliffe, "Divorce in Pakistan: Judicial Reform," *Journal of Islamic and Comparative Law* 2 (1968): 3-25; J. N. D. Anderson, "Reforms in the Law of Divorce in the Muslim World," *Studia Islamica* 31 (1970): 41-52; John L. Esposito, "Perspectives on Islamic Law Reform: The Case of Pakistan," *NYU Journal of International Law & Politics* 13 (1980): 217; Lucy Carroll, "Qur'an 2:229: 'A Charter Granted to the Wife?' Judicial *Khul'* in Pakistan," *Islamic Law and Society* 3 (1996): 91-126; Nadya Haider, "Islamic Legal Reform: The Case of Pakistan and Family Law," *Yale Journal of Law & Feminism* 12 (2000): 287; Muhammad Munir, "The Law of Khul' in Islamic Law and the Legal System of Pakistan," *LUMS Law Journal* 2 (2015): 33; Nausheen Ahmed, "Family Law in Pakistan: Using the Secular to Influence the Religious," in *Adjudicating Family Law in Muslim Courts*, ed. Elisa Giunchi (New York: Routledge, 2014), 85-105; Ihsan Yilmaz, "Pakistan Federal Shariat Court's Collective Ijtihād on Gender Equality, Women's Rights and the Right to Family Life," *Islam and Christian–Muslim Relations* 25 (2014): 181-92; Muhammad Munir, "One Step Forward, Two Steps Back: The Unending Twist and Turn Regarding the Law of Khul' and Its Exposition by the Superior Courts in Pakistan," *Manchester Journal of Transnational Islamic Law and Practice* 17, no. 3 (2021): 133-49.

[3] Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press 2002), 10-11.

[4] The focus of qualitative analysis is primarily on the judgements of the Lahore High Court (LHC). Wherever appropriate, references have been made to the judgements of the Sindh High Court (SHC), the Peshawar High Court (PHC), the Balochistan High Court (BHC), the Federal Shariat Court (FSC), and the Supreme Court of Pakistan (SC).

Structurally, I have divided this article into three parts. Part I explores how the judiciary gradually transformed Islamic divorce law by developing women's right to judicial *khul'* and how the legislature complemented this process by developing ancillary legal rules of procedure regarding the standard of evidence for judicial *khul'* and its financial consequences. Part II engages with the views of *'ulamā'* regarding the validity of judicial *khul'* under classical Islamic law, and their reservations on its development. It is observed that a majority of *'ulamā'* accept the validity of the decrees of dissolution of marriage based on *khul'* despite the adherence of many of them to the classical view of the Ḥanafī school which requires the consent of a husband for *khul'*. Part III presents the results of a public perception survey regarding the reformed Islamic divorce law. It shows the diversity of public views based on their professional backgrounds. In conclusion, I argue that the judges of the superior courts have led the process of transforming the law on the dissolution of marriage in Pakistan, at a time when there was a failure of political consensus or lack of political will, along with divergent opinions of *'ulamā'* on the issue, who follow the discursive tradition of Islamic law by issuing non-binding legal opinions (*fatāwā*) but refrain from challenging the binding court decrees of dissolution of marriage based on *khul'*.

I. Development of Women's Unilateral Right to No-fault Judicial Divorce (*Khul'*)

Traditionally, a Muslim wife does not have a unilateral right to no-fault divorce, unlike her husband who is entitled to dissolve the marital tie without any legal encumbrance simply by pronouncing *ṭalāq* (divorce).[5] Such disparity of rights was further cemented by the judicial discourse on Islamic divorce law in colonial India. In 1867, the Judicial Committee of the Privy Council, the highest court of appeal in the British Empire, held that the consent of a husband is mandatory for a wife-initiated divorce (*khul'*). The Council followed the Ḥanafī school, by holding that

> the matrimonial law of the Mohamedans, like that of every ancient community, favours the stronger sex. The husband can dissolve the tie at his will, subject to the condition of paying the wife her dower and other allowances; but she cannot separate herself from him except under the arrangement called Khoola [sic], which is made upon terms to which both

[5] In jurisprudential discourse, this disparity of spousal rights under classical Islamic divorce law has led to the assimilation of marriage with slavery. Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge, MA: Harvard University Press, 2010), 113-63.

are assenting parties, and operates in law as the divorce of the wife by the husband.[6]

This judicial precedent held its ground for a century, and it was not affected by the promulgation of the Dissolution of Muslim Marriages Act 1939, which expanded women's right to fault-based divorce under Islamic law. Under the Act, in addition to the eight prescribed grounds, a Muslim wife is entitled to divorce based "on any other ground which is recognised as valid for the dissolution of marriages under Muslim law."[7] The Mālikī school allows a judge to grant divorce to a wife without the consent of her husband in case the marriage breaks down (*shiqāq*).[8] The Anglo-Indian courts, however, did not follow the Mālikī school and the law remained unchanged until 1967 when the Supreme Court of Pakistan (SC) held that a Muslim wife has a right to obtain judicial *khul'* without the consent of her husband because the Qur'ān has placed both the husband and the wife on an equal footing with regard to their mutual rights and obligations.[9]

Chronologically, following the SC judgement in 1967, the law on judicial *khul'* developed in two stages. The first stage spread over two decades of the 1980s and 1990s. During this period, the law remained in a state of flux on two points: 1) standard of evidence to establish irretrievable breakdown of the marriage for judicial *khul'*; and 2) the extent of consideration for *khul'* (whether it should include all the financial rights of a wife i.e., dower, dowry, and maintenance). There were conflicting judgements on these two points. An amendment in the Family Courts Act 1964 in 2002 clarified that in a suit for dissolution of marriage if reconciliation fails, the court shall pass a decree for dissolution of marriage forthwith and restore to the husband the dower.[10] Thus, the failure of reconciliation was sufficient to establish that a marriage has irretrievably broken down and no further evidence was required to dissolve a marriage. However, the issue about the extent of consideration remained unresolved and led to the second stage of

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[6] Monshee Buzl-ul-Ruheem v. Shumsoonnissa Begum (Calcutta) [1867] 8 MIA 379; UKPC 19.

[7] Section 2 (ix), the Dissolution of Muslim Marriages Act (VIII of) 1939.

[8] Anderson calls this type of dissolution of marriage through a court based on the Mālikī school "forced *khul'*."Anderson, "Reforms in the Law of Divorce in the Muslim World," 41, 46.

[9] Khurshid Bibi v. Baboo Muhammad Amin PLD 1967 SC 97. Earlier, the LHC had acknowledged this right in Balqis Fatima v. Najm-ul-Ikram Qureshi PLD 1959 Lah 566.

[10] Proviso added to section 10 (4) of the Family Courts Act 1964 under the Ordinance LV of 2002.

legal developments on judicial *khul'*. This stage began from the 2002 amendment, after which the main point of judicial contention has been the determination of the financial rights of wives upon *khul'*. Since 2002, judges have considered the "reciprocal benefits" received by the husband during the marriage from a wife while determining the dower amount payable by the wife to the husband as consideration for *khul'*. This principle may lead to the acknowledgement of women's right to matrimonial property under Islamic divorce law in Pakistan. In this way, the transformation from expensive *khul'* to beneficial *khul'* will be completed. Based on current trends in case law, this transformation is likely to occur in the third stage of developments in judicial *khul'*.

Both the developments by the judiciary showcase a propensity to undertake a legal exercise that expands the project of gendered justice in cases of *khul'*, by actively engaging in Islamic law. The principles laid down in the judgements of the superior courts are discussed in the following paragraphs.

Irretrievable Breakdown of Marriage as a Ground for Khul'

Following the SC judgement in 1967 in the *Khurshid Bibi* case, Pakistani judges gradually accepted a wife's unilateral right to no-fault judicial divorce (*khul'*). However, the High Courts and the lower courts (the family courts and the district courts) dismissed several *khul'* petitions until the amendment in the Family Courts Act 1964 in 2002.[11] After this amendment, the judges of lower courts generally accepted *khul'* petitions, however, they required wives to return their dowers even in cases where there were reasonable grounds for a fault-based divorce. In some cases, even the high courts asked the wives to give up their dowries and maintenance rights along with their dowers for *khul'*. The amendment in the Family Courts Act 1964 in 2002 clarified that a wife must return only her dower in lieu of *khul'*. Since then, the courts have restrictively defined returnable dower to exclude bridal gifts or any other property received by wives before or after marriage.

During the 1980s and 1990s, the judges of the Lahore High Court (LHC) showed a tendency to reverse decisions of the lower courts where

[11] Siddiq v. Mst. Sharfan PLD 1968 Lah 411; Subhan Khatoon v. Nazar Muhammad PLD 1981 Kar 474; Muhammad Bilal v. Nasim Akhtar 1983 CLC 2390 (Lah); Said Muhammad v. Judge, Faisil Court 1985 CLC 2509 (Lah); Aali v. Additional District Judge Quetta 1986 CLC 27 (Quetta); Raisa Begum v. Muhammad Hussain 1986 MLD 1418 (Kar); Muhammad Abbasi v. Saima Abbasi 1992 CLC 937 (Lah); Mst. Saiqa v. The Judge Family Court Lahore 1994 MLD 2204 (Lah).

a wife's petition for *khul'* was refused.[12] For instance, in 1983 the LHC observed that *khul'* should be granted based on the evidence that suggests that there is no way for spouses to reconcile. Therefore, the lower court should have considered the evidence properly and allowed *khul'*.[13] In another judgement, Justice Javaid Iqbal criticized the judge of the Family Court for dismissing a petition for *khul'* on the basis of the latter's view that a woman who goes astray should not have a premium for her misbehaviour.[14] In *Safia Begum v. Khadim Hussain*,[15] Muhammad Zafarullah, J remanded the case to the trial court after observing that a wife could claim *khul'* as of right and it could only be refused when it was sought for immoral purposes. In this case, the court did not term as an immoral purpose the desire of the wife to contract a second marriage after the dissolution of her first marriage.

During the 1980s, the judges of the LHC remanded most of the cases to the lower courts after observing that the judges of these courts failed to apply the correct law as laid down by the superior courts. In one judgement, Justice Iqbal declared that the decision of the lower courts to deny *khul'* was illegal and held that *khul'* could not be denied on the basis that the marriage was exchange marriage (*watta satta*). He remanded the case to the district court for a fresh decision.[16]

From the early 1990s, in a number of judgements, the judges of the LHC stopped remanding the cases to the lower courts and instead dissolved marriages on the basis of *khul'* itself.[17] In 1991, Malik Qayyum, J

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[12] The judges of the superior courts led the legal transformation from fault-based divorce (*faskh*) to no-fault-based divorce (*khul'*). Therefore, in most of the cases cited in this paper, the names of the judges have been mentioned instead of the names of the parties to cases.

[13] Mst. Kalsoom v. Muhammad Aslam 1983 CLC 2056 (Lah).

[14] Mst. Rashidan Bibi v. Bashir Ahmad PLD 1983 Lah 549, 550.

[15] Safia Begum v. Khadim Hussain 1985 CLC 1869 (Lah).

[16] Khurshid Bibi v. Dildar 1983 CLC 3309 (Lah). In Mst. Ghulam Zohra v. Faiz Rasool and others 1988 MLD 1353 (Lah), the court remanded the case to the lower court, which had not granted *khul'*, to look at the statement of the wife who had clearly stated that she hated her husband and did not want to live with him. Likewise, in Mst. Nasim Akhtar v. Muhammad Athar Siddiqui 1989 MLD 119 (Lah), Malik Qayyum, J sent the case to the trial court after holding that the decision of the lower courts was unlawful since they had dismissed the wife's prayer for *khul'* without properly looking at the evidence, and had erroneously placed the burden of proof on her to defend against adultery charges.

[17] Only in Zainab Bibi v. Shaukat Ali 1993 CLC 48 (Lah), Mian Allah Nawaz, J remanded the case to the lower court without granting a decree for the dissolution of marriage based on *khul'*. In Shabbiran Bibi v. Faqir Muhammad 1994 MLD Lahore 1550, Munir A. Shaikh remanded the case to the trial court to issue the decree of dissolution of marriage on the basis of *khul'* and to record evidence on the consideration for *khul'*.

granted a wife a decree for the dissolution of marriage on the basis of *khul'* after observing that the lower courts had failed to decide the case according to the law as set by the superior courts.[18] Fakhar-un-Nisa Khokhar, J took it one step further by granting *khul'* because, in addition to not conforming with the law set by the superior judiciary, according to her the lower court misread injunctions of the Qur'ān on the right of *khul'*.[19] She observed the following:

> As far as a matrimonial life is concerned all the fundamental laws are contained in the Holy Qur'an where a man or a woman are at equal footing in respect of a right of one against the other. So when a husband is possessed of a right to divorce, the wife is entitled to Talaq by means of Khula'. These rights are based on the legal premises. The Holy Qur'an has expressly stated that women have a right against the men; similar to those men have right against the women. If a husband does not give consent for dissolution of marriage ties he is not allowed to cling to the woman to cause injury to her honour for the rest of her life and let her lead a miserable life devoid of love, affection and harmony.[20]

During the early 1990s, the High Court judges reprimanded the judges of the lower courts for denying the dissolution of marriage on the basis of

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[18] Mst. Balqis Bano v. Shamim Ahmad 1991 CLC 2057 (Lah). In Ghazala Yasmin v. Additional District Judge Rawalpindi 1992 MLD 2289 (Lah), Mian Nazir Akhtar, J granted a decree of *khul'* and held that the lower courts' decisions to reject the wife's petition were unlawful because the judges of the lower courts seemed to be convinced that the parties could live together for the sake of their son, which was not true. Similarly, in Mst. Zarina v. Additional District Judge, Jhang 1993 MLD 1507 (Lah), Justice Akhtar held that the judgements of the lower courts were without authority and issued a decree for the dissolution of marriage on the basis of *khul'* since the wife had developed severe hatred towards the husband. In his judgement, Justice Akhtar relied upon several judgements i.e., Muhammad Yaqoob v. Mst. Shagufta Begum 1981 CLC 143; 1981 CLC 1968; Khurshid Ali v. Mumtaz Begum 1980 CLC 1212; Muhammad Rafiq v. Surraya Bibi 1990 ALD 549; and Shahid Javed v. Sabba Jabben 1991 CLC 805. These judgements endorsed the principle that for claiming *khul'* a wife is not required to give "logical, objective and sufficient reasons." She can ask for *khul'* even if she fails to prove other grounds for dissolution of marriage. Likewise, in Mst. Huma Hafeez v. Shaukat Javaid 1993 CLC 855 (Lah), Mushtaq Ahmad Khan, J dissolved the marriage on the basis of *khul'* after observing that the lower courts had illegally denied *khul'* to the wife. Judges passed similar remarks in Shakila Bibi v. Muhammad Farooq 1994 CLC 230 (Lah) and Mst. Khurshid Mai v. The Additional District Judge Multan 1994 MLD 1255 (Lah).

[19] Mst. Shah Begum v. District Judge Sialkot PLD 1995 Lah 19.

[20] Ibid, 25. Three other judgements applied this principle and declared the judgements of lower courts to be unlawful. Mst. Nazir v. Additional Judge Rahimyar Khan 1995 CLC 296 (Lah); Mst. Rasoolan Bibi v. Additional District Judge Lahore PLD 1997 Lah 229; Manzooran Bibi v. Khan Muhammad 1998 CLC 1929 (Lah).

khul‘. Yet lower courts continued to reject *khul‘* petitions until the early 2000s.[21]

The above decisions show that the lower courts were hesitant to acknowledge women's unilateral right to no-fault judicial divorce (*khul‘*). After consistent application and acknowledgement of this right by the High Courts and the Supreme Court, the lower courts eventually gave in, but not until the legislature introduced the amendment in the Family Courts Act 1964 by specifying that the Family Court was bound to dissolve a marriage if reconciliation effort failed. Following this amendment, *khul‘* became a summary remedy because the wife did not have to prove her case based on evidence. However, the lower court judges imposed a high financial cost on women upon *khul‘* by requiring them to surrender their dowries and maintenance rights along with their dowers and bridal gifts.[22] In the following section case, law on the financial cost of *khul‘* is analyzed.

Financial Cost of Khul‘

In 1959, regarding the consideration for *khul‘* in the *Balqis Fatima* case, Justice Kaikaus held the following:

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[21] Some of the judgements are discussed here. In Sughran Begum v. Additional District Judge 1992 CLC 1733 (Lah), Tanvir Ahmad Khan, J held that the lower courts had given judgements without lawful authority and had been mainly swayed by the wife's failure to establish cruelty and alleged prospects of reconciliation in the exchange marriage (*watta satta*). Similarly, in Mst. Hafeezan Bibi v. District Judge Narowal 1995 MLD 136 (Lah), Nasira Iqbal, J observed that both the courts below had ignored the settled law on the subject of *khul‘* while dismissing the petitioner's suit and appeal, and held that it did not matter if the marriage was an exchange marriage (*watta satta*) since it was established that the wife had developed hatred towards the husband and could not live with him within the limits prescribed by Allah. A few years later, in Mst. Safia Bibi v. Muzalim Hussain 2001 YLR 3025 (Lah), Justice Iqbal held that "once the wife approaches the Court for dissolution of her marriage on the basis of Khula‘, the Court has no option but to accede to her request, since she is entitled to divorce on the basis of Khula‘ *ex debito justitiae* (as of right)." In 2002, in Mst. Nazli Mustahsan v. Additional District Judge Rawalpindi 2002 YLR 2604 (Lah), Muhammad Sayeed Akhtar, J declared as unlawful the judgements of the lower courts, which denied the wife's suit for dissolution of marriage on the basis of *khul‘,* because they did not pay attention to the fact that the wife had developed aversion to the husband and could not live with him anymore. However, instead of following the general practice of the LHC, he remanded the case to the lower court to rewrite the judgement.

[22] Similar observations are made in Carroll, "Qur'an 2:229," 91 and Shaheen Sardar Ali and Rukhshanda Naz, "Marriage, Dower, and Divorce: Superior Courts and Case Law in Pakistan," in *Shaping Women's Lives: Laws, Practices & Strategies in Pakistan*, ed. Farida Shaheed et al. (Lahore: Shirkat Gah, 1998) 131.

> If the dissolution is due to some default on the part of the husband, there is no need for any restoration. If the husband is not in any way at fault, there has to be restoration of property received by the wife and ordinarily it will be of the whole of the property but the judge may take into consideration reciprocal benefits received by the husband and continuous living together also may be a benefit received.[23]

For many decades, the judges of the Pakistani courts ignored "reciprocal benefits received by the husband" while issuing decrees for the dissolution of marriage on the basis of *khul'*. Rather in one case, Justice Tanvir Ahmad Khan imposed a heavy financial cost on the wife by requiring her to waive not only her dower but also dowry and right to maintenance as consideration for *khul'*.[24] A similar principle was applied in another case where the marriage had lasted for 17 years and four children were born during the wedlock.[25] This is despite the fact that in an earlier judgement Abdul Shakurul Salam, ACJ had held that as regards the consideration for *khul'*, the wife "compensated the respondent by producing a son and a daughter for him."[26] This principle was not applied until 2012 when the LHC dismissed a husband's petition and upheld the lower court's decision to grant *khul'* without the return of the dower because the wife had lived with the husband for a number of years which was regarded as "a benefit received" by the husband thereby disentitled him from seeking the return of entire dower.[27]

For the no-fault-based divorce (*khul'*), the wife has to return the dower to her husband as compensation for the dissolution of the marriage. The same is not the case for fault-based divorce (*faskh*). In practice, sometimes the boundaries between fault-based divorce (*faskh*) and no-fault-based divorce (*khul'*) are blurred because a wife might be forced to seek *khul'* and return her dower even in cases where her husband is at fault, simply because *khul'* is often faster to obtain. Judges have been conscious of this reality. Thus, in one case, the court observed

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[23] Balqis Fatima v. Najm-ul-Ikram PLD 1959 Lah 566, 582.

[24] Sughran Bibi v. Additional District Judge 1992 CLC 1733 (Lah).

[25] Mst. Rehana Tabbasam v. Amanullah 1994 MLD 1807 (Lah), per Falak Sher, J.

[26] Mst. Nasim Kishwar v. Muhammad Nawaz 1988 MLD 1306 (Lah), 1307. The marriage had lasted for more than two decades and the couple had two children aged 18 and 12 years.

[27] Shamas Ali v. Additional District Judge Sambrial PLD 2012 Lah 183. In the context of this case, Justice Munir ordered that the wife should return only part of the dower that she voluntarily offered to return in consideration for *khul'*. The principle of "reciprocal benefits" was applied by the Karachi High Court in Aurangzeb v. Mst. Gulzan PLD 2006 Kar 563 and the Peshawar High Court in Dr. Fakhr-ud-Din v. Mst. Kausar Takreem PLD 2009 Pesh 92 and Nasir v. Mst. Rubina 2012 MLD 1576.

that the need to seek *khul'* can arise in two situations: first, the wife may be aggrieved by the unbecoming attitude of her husband; and second, she may seek *khul'* for her personal reasons such as abhorrence or dislike for the husband. A court could dissolve the marriage based on *khul'* without any compensation when it is found that the wife sought *khul'* due to the fault of the husband.[28] In another judgement, the court observed that the wife had developed hatred against her husband because he was previously married and concealed this fact from his second wife at the time of marriage. Therefore, the court held that the husband contributed to the dissolution of the marriage and reduced the amount of returnable dower to half.[29]

The above judgements show that it is a settled principle of law that if a wife filed for the dissolution of marriage because her husband was at fault, she will not have to compensate him by returning her dower or by relinquishing her other financial rights for the dissolution of marriage based on *khul'*. Following the 2002 amendment in the Family Courts Act 1964, *khul'* is granted in a summary procedure. In practice, wives list cruelty, desertion, non-maintenance, and other grounds provided under the Dissolution of Muslim Marriages Act 1939 in their petitions, and ask for *khul'* as an alternative remedy.[30] In a large number of cases, the judges of the Family Courts dissolve marriages on the basis of *khul'* because this does not require the cumbersome judicial procedure of recording oral and documentary evidence, and cross-examination of witnesses. Furthermore, wives and their lawyers prefer *khul'* decrees because, due to summary procedure, such decrees can be obtained faster and without delays in adjudication and they are not appealable before the district court and high court. This means that even when a wife is entitled to dissolve her marriage based on the fault of her husband, she prefers to accept a *khul'* decree and relinquishes her dower. This mischief was remedied in 2015 when the legislature in Punjab amended the Family Courts Act 1964 to provide that upon *khul'*, a wife must return fifty per cent of deferred dower or twenty-five per cent of her paid dower.[31]

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[28] Muhammad Kaleem Asif v. Additional District Judge PLD 2009 Lah 484, 488, per Zubda-tul-Hussain, J.

[29] Mst. Rozeena Shaheen v. Abdur Rehman 2013 YLR 842, per Ijaz Ahmad, J.

[30] This observation is based on the analysis of sample petitions filed before the Family Courts in Lahore. I collected sample dissolution of marriage petitions from the local vendors of computing and printing services in Lahore.

[31] Section 8 of the Family Courts (Amendment) Act 2015 amended section 10 (5) of the Family Courts Act 1964. The FSC declared this amendment repugnant to the injunctions

In a few cases, where the dower consists of a substantial amount or immovable property, wives did not ask for *khul'* as an alternative remedy. In one judgement, the LHC allowed a wife's petition to retain her dower of Rs. 10 *lakh* (one million) because she did not ask for the dissolution of marriage on the basis of *khul'* in explicit terms and because she had proved other grounds like cruelty.[32] Justice Jamila Jahanoor Aslam confirmed this principle by observing that although the phenomenon of cruelty is well known in our society, it is "very difficult to prove grounds of cruelty and physical and mental torture."[33] However, in a few reported cases, the courts have granted decrees of dissolution of marriage on the basis of *khul'* even when the wives did not specifically ask for it. In 1993, Khurshid Ahmad, J upheld the decision of the district court to dissolve a marriage based on *khul'* in consideration of dowry and maintenance allowance even though the wife had not asked for it. The family judge had dismissed the suit for dissolution of marriage because the wife had failed to prove any fault-based grounds for the dissolution of marriage under the Dissolution of Muslim Marriages Act 1939.[34] In another judgement, the court observed the following:

> There is absolutely no bar on the power of the Qazi to dissolve the marriage if he is satisfied that refusal to dissolve the marriage will result in an unwanted and unhappy union. It is an established proposition of law that the marriage can be dissolved by the learned Judge Family Court on the ground of Khula even if plea of Khula is not specifically raised if the case is otherwise made out for exercise of power to dissolve the marriage.[35]

Therefore, despite the statement of the wife that she did not want to surrender her dower, the court dissolved the marriage on the basis of *khul'*, which required her to relinquish her right to maintenance and

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of Islam in its latest judgement dated February 17, 2022. Muhammad Imran Anwar Khan v. Government of Punjab Petition No. 4/I/2016. Chief Justice Meskanzai also declared the impugned amended law as violative of women's rights because it requires wives to partially return dower even in cases where the husband caused dissolution of marriage. In this way, it fails to achieve its intended objective of the protection of women's financial rights upon dissolution of marriage.

[32] Tabassum Khurshid v. Sardar Abid Iqbal 2008 CLC 1337 (Lah).

[33] Muhammad Afzal v. Additional District Judge Attok 2010 CLC 369 (Lah). The Court relied upon the SC judgement in Mukhtar Ahmad v. Ansa Naheed PLD 2002 SC 273, in which the court held that where marriage is dissolved on other grounds and not solely on the ground of *khul'*, the wife is entitled to recover dower and dowry.

[34] Khurshid Ali v. Mumtaz Begum 1980 CLC 1212 (Lah).

[35] Muhammad Iqbal Kocub v. Judge Family Court Lahore 1993 CLC 699 (Lah), 701, per Mushtaq Ahmad Khan, J.

dower.[36] The above apparently pro-women principle (because it allows women to leave unhappy marriages without having to prove Islamic grounds for dissolving marriage) sometimes prejudices the financial rights of women, especially in cases where their dower comprises immovable property. In such cases, women are forced to return their dowers even though they approached the court for the dissolution of their marriages based on the fault of their husbands on the grounds listed under the Dissolution of Muslim Marriages Act 1939. Unfortunately, the SC confirmed this principle without imposing any limitations in *Muhammad Arif v. Saima Noreen*.[37] In this case, the wife failed to prove the alleged cruelty of her husband before the Family Court, which dissolved the marriage but did not order the restitution of the dower (a house), and instead, ordered the husband to transfer it to the wife. The appellate court and the high court upheld the decision of the Family Court. The SC ordered that the wife should return the dower to the husband because her marriage was dissolved based on *khul'* though she did not specifically ask for *khul'*.[38]

In several judgements, the SC confirmed the principles laid down by the High Courts. For instance, in one judgement, Saad Saood Jan, J observed that the relationship between the husband and wife is intimate; it would be too embarrassing for either party to disclose to the court what had transpired between them in the privacy of their home. Therefore, there can hardly be any standard for assessing the wife's assertion that she had developed a hatred for her husband.[39] In another

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[36] Ibid, 702. Similarly, in Muhammad Akram v. Mst. Shakeela Bibi 2003 CLC 1787 (Lah), Justice Fakhar-un-Nisa Khokhar endorsed the same principle and observed that if the Family Court was convinced that marriage could not subsist, then the court could dissolve the marriage based on *khul'*, even if it was not pleaded in the plaint. Therefore, the lower court's decision to dissolve marriage on the ground of *khul'* was upheld even though the wife had pleaded the option of puberty and not *khul'*. This is because the court was convinced that she hated her husband. The court also considered the fact that the husband had two wives and children from them. He wanted to seize the property of the petitioner wife who was an orphan and a minor. Similarly, in Muhammad Ismail v. Judge Family Court Rahim Yar Khan 2009 YLR 1700 (Lah), Hakim Ali, J upheld the lower court's decision to grant *khul'* and observed that it is not necessary that the word *khul'* must be used in the plaint. Likewise, in Abdul Khaliq v. Judge Family Court 2003 MLD 1120 (Lah), Farrukh Lateef, J upheld the lower court's decision to grant *khul'* since the wife had developed hatred towards the husband, though she had claimed jactitation of marriage rather than *khul'*.

[37] Muhammad Arif v. Saima Noreen 2015 SCMR 804.

[38] Ibid.

[39] Amanullah v. District Judge Gujranwala 1996 SCMR 411. This principle is reiterated in Mst. Naseem Akhtar v. Muhammad Rafique PLD 2005 SC 293.

judgement, a full bench of the SC held that prolonged litigation between the parties, which was full of allegations and counter-allegations against each other, itself was a factor sufficient to hold that the wife had developed an intense dislike towards her husband and it was not possible for her to lead a happy matrimonial life with him.[40] Similarly, another full bench of the SC rejected a husband's plea in which he assailed the judgement of the Family Court which granted a decree of *khul'* on the solitary statement of the wife that she could not perform her matrimonial obligations within the limits as ordained by Almighty Allah.[41]

The above analysis of the case law shows that the judges of the superior courts have gradually effectuated the process of transformation of Islamic divorce law from fault-based divorce (*faskh*) to no-fault-based divorce (*khul'*). In this process, they have been supported by the legislature which amended the procedural law to facilitate the exercise of women's unilateral right to no-fault judicial divorce (*khul'*). However, this change in formal state law does not necessarily mean that it has been accepted by the *'ulamā'* who often contest this development and influence public views about the validity of *sharī'ah*-based family laws in

[40] Saleem Jehangir v. Khatm-un-Nisa 1997 SCMR 1601. In this case, the wife submitted that she was 17 years of age when her *nikāḥ* was performed and her whole youth was wasted in this litigation due to the vindictiveness of the petitioner who was determined to torture her and ruin her life. In Muhammad Siddiq v. Kalsoom Bibi 1984 SCMR 523, the SC justified *khul'* on the basis of prolonged litigation between the spouse.

[41] Abdul Aziz v. Mst. Malika and another 1997 SCMR 1599. This principle is applied in Abdul Ghafoor v. Judge Family Court 1999 SCMR 2631. In Muhammad Rafiq v. Kaneez Fatima 2000 SCMR 1563, the SC rejected the argument of the husband who asked the court to disregard the principle laid down in the Khurshid Bibi case (PLD 1967 SC 97) based on the article of Mufti Muhammad Taqi Usmani, who served as the judge of the Shariat Appellate Bench of the SC. Regarding the consideration of *khul'*, in Province of Punjab v. Zahoor Elahi 1989 SCMR 173, the SC dismissed the husband's petition seeking the return of property as he had not asked for it in his written statement before the lower court. Similarly, in Dilshad v. Mst. Nusrat Nasir and another PLD 1991 SC 779, per Muhammad Afzal Zullah, CJ, the SC held that a husband could not ask for the return of monetary benefits before a high court in the writ jurisdiction when he had not asked for the same because he considered it below his dignity. In both Abdul Riaz v. Hamidan Begum 1994 SCMR 2019 and Mukhtar Ahmad v. Ansa Naheed PLD 2002 SC 273, the SC confirmed the principle laid down by the LHC that where a marriage is dissolved on other grounds, and not solely on the basis of *khul'*, the wife is entitled to recover dower and dowry. Similarly, in Malik Ghulam Nabi v. Mst. Pirzada Jamila PLD 2004 SC 129, the SC confirmed two important principles: 1) the principle of *res judicata* does not apply with regard to a *khul'* petition because new circumstances may provide a fresh cause of action; and 2) a condition in the *nikāḥnāmah* (marriage deed) restraining the wife from approaching the court for dissolution of marriage on the basis of *khul'* is legally invalid.

Pakistan. In the following sections, views of *'ulamā'* regarding judicial *khul'* have been explored and their contentions as to this development have been discussed.

II. Contestations of *'Ulamā'* on Women's Unilateral Right to No-Fault Judicial Divorce (*Khul'*)

The first instance of a head-on collision between a judicial decree of dissolution of marriage and the legal opinion of a religious scholar (*fatwā*) is recorded in a judgement of the LHC reported in 1964.[42] In this case, the trial court decreed a suit for dissolution of marriage and following this decree, the wife entered a second marriage. Her ex-husband obtained a *fatwā* (legal opinion) which was in the form of a general question asking whether the second marriage of a woman, who obtained a divorce from a court of law, would be valid. To this, two *muftī*s (jurisconsults) replied that under the *sharī'ah*, no court of law can dissolve a valid marriage of any woman and her second marriage would be invalid. The ex-husband published his question and the replies in a pamphlet wherein he stated that according to the *fatwā*, the second marriage of his ex-wife was illegal. The ex-wife filed an application before the civil court for contempt proceedings against her ex-husband. The court issued notices to the ex-husband, the *muftī*s, and the publisher for contempt of court proceedings. The civil judge observed that the *fatwā* amounted to "saying that the decrees of the Court were vain and nugatory"[43] and submitted the case to the High Court for contempt proceedings against the respondents "so that the decrees granted by the Courts were not flouted, and that the minds of the people remain mesmerised by the grandeur and dignity of law."[44] The court accepted the unconditional apology of the publisher but convicted the ex-husband for contempt of the court because he attempted to incite the general public against the decree of the court by taking support from the *fatwā* to undermine the prestige of the court. However, the court exonerated the *muftī*s because their *fatwā* was in response to a hypothetical question and they did not know about the judgement of the court. This judgement provided a sufficient deterrent against recalcitrant husbands and no other case is reported on this issue.

As part of this research, I asked the leading *dūr al-iftā* (*fatwā* institutions) in Pakistan whether judicial *khul'* without the consent of the

[42] The State v. Muhammad Sheer PLD 1964 Lah 96.
[43] Ibid., 98.
[44] Ibid.

husband is in accordance with the *sharīʿah.* Along with this question, I sent the Urdu translation of section 10 (4) of the Family Courts Act 1964 and specified that under this section in a suit for dissolution of marriage if reconciliation fails, the Family Court issues a decree of dissolution of marriage without the consent of the husband by requiring the wife to return her dower. I received nine responses which represent various schools of thought. Except for the *fatwā* of Markaz al-Daʻwah al-Salafiyyah, Satiana, Faisalabad, the representative of the Ahl-i Ḥadīth school,[45] the *fatāwā* from other *fatwā* institutions stated that a decree of the dissolution of marriage based on *khul'* without the consent of the husband is invalid under the *sharīʿah*. Many of the *muftī*s, who wrote these *fatāwā*, relied upon the main sources of the Ḥanafī school and presented similar arguments. To contextualize these *fatāwā* within the broader framework of juristic discourse regarding the validity of judicial *khul'* without the consent of the husband, I briefly describe the views of contemporary *'ulamā'* in Pakistan in the following paragraphs. These views can be summarized under three categories.

First, some jurists regard judicial *khul'* without the consent of the husband as permissible under the *sharīʿah.* Jurists of the Ahl-i Ḥadīth school refer to various verses of the Qur'ān and Prophetic traditions (*aḥādīth*) in support of this view. According to them, the relevant parts of the Qur'ānic verses 2:229, 231 and 4:19 require husbands to either treat their wives fairly or separate them with kindness. And the Qur'ānic verse 4:35 provides for the appointment of arbitrators (*ḥakam*s) to reconcile spouses. Reference is also made to the saying of the Prophet (peace be on him) that there should be no harm and to the narrative account of Jamīlah bint ʻAbd Allāh—the wife of the Prophet's Companion Thābit b. Qays—who complained to the Prophet (peace be on him) that she hated her husband because of his ugliness. The Prophet (peace be on him) asked her if she was willing to return her dower and when she replied positively, he dissolved her marriage.[46] The Ahl-i Ḥadīth jurists criticize the position of Ḥanafī jurists as the denial of women's right to *khul'*, which is specifically provided in the Qur'ān and *sunnah*.[47]

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[45] *Fatwā* issued by Markaz al-Daʻwah al-Salafiyyah, Satiana, Faisalabad, dated December 21, 2015 (in file with the author).

[46] Ibid.

[47] Ḥafiẓ Ṣalāḥ al-Dīn Yūsuf, "'Aurat kō Ṭalāq kā Ḥaqq Tafvīż karnā Sharīʿat maiṇ Tabdīlī hē," *Muḥaddith* 45, no. 4 (2013), http://magazine.mohaddis.com/shumara/244-sep-2013/2679-aurat-talaq-haq-tafweez-shareiyat-tabdeeli, accessed June 23, 2018. For details, see Mubasher Hussain, "Khāvind kī Rażāmandī kē baghair Tanfīdh-i Khul' aur Ahl-i Ḥadīth Nuqṭah-i Naẓar: Aik Tajziyatī Muṭāla'ah," *Fikr-o Naẓar* 53, no. 2 (2015): 79.

Such a permissive view on judicial *khul‘* is also supported by Pir Muhammad Karam Shah al-Azhari, who was a prominent scholar of the Barelvi school. He served as a judge of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court of Pakistan along with Mufti Muhammad Taqi Usmani. In his exegesis of the Qur’ān, he does not regard the consent of the husband as mandatory for *khul‘*. Rather, in his opinion, the ruler/judge should first try to reconcile the differences between spouses and in case the reconciliation fails, he should separate them.[48] Shī‘ī jurists also authorize a *mujtahid* or *ḥākim-i shar‘ī* (legitimate ruler) to pronounce divorce if the husband neither divorces his wife nor performs his obligations and, through this conduct, he intends to torture her.[49] This view finds support in the *fatwā* issued by Ghulām Ḥusain of Jāmi‘ah Dār al-‘Ulūm Ḥaqqāniyyah, Akora Khattak, Nowshera, Khyber Pakhtunkhwa who stated that a court or arbitration council (*panchāyat*) can validly dissolve a marriage after establishing the fact of obstinacy (*ta‘annut*) of a husband, who neither maintains his wife nor divorces her.[50]

Other jurists have reached a similar conclusion by reformulating the legal question. Instead of asking whether the consent of a husband is required for *khul‘*, they ask what a husband should do if his wife asks for *khul‘*. In other words, what are the rights and obligations of a husband if his wife wants to dissolve the marriage without his fault? According to most jurists, it is permissible for a husband to respond positively. Several jurists state that when a wife asks for *khul‘*, it is obligatory for a husband to accept her demand. These jurists include Muḥammad b. Ismā‘īl al-Ṣan‘ānī, a few Shī‘ī jurists, and some modern scholars such as Maulānā Abū ’l-A‘lā Maudūdī,[51] ‘Abd al-Raḥmān al-Ṣābūnī,[52] ‘Āmir Sa‘īd al-Zībārī,[53]

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[48] Muhammad Karam Shah al-Azhari, *Żiyā’ al-Qur’ān* (Lahore: Zia ul-Qur’an Publications, 1981), 1:158. This view is contrary to the view of the founder of the Barelvi school, Aḥmad Rażā Khān, who in his *fatwā* regards the consent of the husband as mandatory for *khul‘*. Aḥmad Rażā Khān, *Fatāvā-i Riżviyyah* (Lahore: Raza Foundation, 1998), 13:268-9. Similarly, Mufti Muneeb ur Rahman, a leading Barelvi scholar, regards the consent of the husband as mandatory for *khul‘*. He, however, advises the husband of a wife who demands *khul‘*, to concede to her request. Mufti Muneeb ur Rahman, “Khul‘ aur Faskh-i Nikāḥ,” *Daily Dunya*, June 13, 2015, http://dunya.com.pk/index.php/author/mufti-muneeb-ul-rehman/2015-06-13/11611/56288277#.Wca749MjFE4.

[49] *Fatwā* from Malik Muḥammad Bāqir Ghallō of Ḥauzah-i ‘Ilmiyyah, Jāmi‘at al-Muntaẓar, Lahore (in file with the author).

[50] *Fatwā* issued by Ghulām Ḥusain of Jāmi‘ah Dār al-‘Ulūm Ḥaqqāniyyah, Akhora Khattak, Nowshera, Khyber Pakhtunkhwa, dated September 14, 2014 (in file with the author). In response to my query, they sent me this previously dated *fatwā*.

[51] Sayyid Abū ’l-A‘lā Maudūdī, *Ḥuqūq al-Zawjayn* (Lahore: Idārah-i Tarjumān al-Qur’ān, 2013 [1943]) 60-61.

and al-Shaykh Muḥammad al-Ghazālī.[54] In this respect, al-Ṣan'ānī argues that the Qur'ānic verse 2:229 requires that "the parties should either hold together on equitable terms or separate with kindness."[55] Therefore, a husband has only these two options and when a wife asks for *khul'*, it is not possible for the husband to live with her "on equitable terms." Therefore, it is obligatory for him to "separate with kindness."[56]

Second, traditional (*muqallid*) jurists of the Ḥanafī school regard the consent of the husband as essential for the validity of *khul'*. According to them, this requirement is based on the consensus (*ijmā'*) of jurists of four Sunni schools. They argue that in the reported traditions of the two wives of the Companion, Thābit b. Qays, the Prophet (peace be on him) merely advised him to divorce them and he did not act either as a judge or ruler to dissolve the marriage. Therefore, judicial *khul'* can only be granted if the husband agrees to it because according to the Qur'ān, only the husband has the right to divorce. Furthermore, according to them, *khul'* is a transaction which is based on the mutual consent of the parties and neither of them can be forced to do so. Mufti Muhammad Taqi Usmani, who also served as a judge of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court for more than two decades, is the proponent of this view.[57] Several contemporary jurists follow this opinion.[58]

Although most contemporary jurists support the above prohibitive view regarding judicial *khul'*, this does not mean that they completely disregard the existing substantive and procedural laws of divorce in Pakistan. In fact, many traditional jurists do not directly oppose the formal state law on *khul'*. Even the most prominent proponent of the

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[52] 'Abd al-Raḥmān al-Ṣābūnī, *Madā Ḥurriyat al-Zawjayn fī 'l-Ṭalāq* (Beirut: Dār al-Fikr, n.d.), 621.

[53] 'Āmir Sa'īd al-Zībārī, *Aḥkām al-Khul' fī 'l-Sharī'ah al-Islāmiyyah* (Beirut: Dār Ibn Ḥazm, 1997), 79.

[54] Muḥammad al-Ghazālī, *Ḥuqūq al-Insān bayn Ta'ālīm al-Islām wa 'Ilān al-Umam al-Muttaḥidah*, 4th ed. (Cairo: Nahḍat Miṣr, 2005), 130.

[55] Muḥammad b. Ismā'īl al-Ṣan'ānī, *Subul al-Salām* (Cairo: Maktabat Muṣṭafā al-Bābī al-Ḥalabī, 1960), 3:167.

[56] Ibid.

[57] Mufti Muhammad Taqi Usmani, *Islām maiṇ Khul' kī Ḥaqīqat* (Karachi: Maiman Islamic Publishers, n.d.), 18. It was first published in *Fiqhī Maqālāt* (Karachi: Maiman Publishers, 1996), 2:137-94.

[58] See *Fatwā* issued by Jāmi'at al-'Ulūm al-Islāmiyyah, Banuri Town, Karachi, dated December 28, 2016; *Fatwā* issued by al-Jāmi'ah al-Banūriyyah al-'Ālamiyyah, Karachi, dated November 6, 2010; *Fatwā* issued by Jāmi'at al-Rashīd, Karachi, dated January 9, 2017; *Fatwā* issued by Jāmi'ah Na'īmiyyah, Lahore, dated December 15, 2016; and *Fatwā* issued by Dār al-'Ulūm Haqqāniyyah, Akora Khattak, Nowshera, Khyber Pakhtunkhwa.

above view, Mufti Taqi Usmani, in one *fatwā* advised the husband to accept his wife's demand for *khul'* in case the parties have been litigating the dissolution of the marriage.[59] On the question regarding the validity of judicial *khul'*, the *fatwā* issued by the Dār al-Iftā' of Akora Khattak specified on the front page that "this *fatwā* is not for use in the court."[60] This is because according to Ḥanafī jurists, a judge has the authority to decide according to the views of jurists belonging to other schools and it also removes juristic differences (*raf' al-nizā'*). An order of ruler (*imām*) also performs a similar function, which means that legislation based on the views of jurists of a particular school removes juristic differences of opinions.[61]

An analysis of the views of the Ḥanafī jurists shows that they oppose judicial *khul'* without the consent of a husband primarily because of its doctrinal incompatibility with the views of classical jurists. In practice, they accept the validity of judicial decrees and their only objection is that the judges should not use the incorrect term *khul'* rather they should use the correct term *faskh* when they issue decrees for the dissolution of marriage.[62] When Maulana Muhammad Khan Sherani was the Chairman of the Council of Islamic Ideology, he expressed a similar view, suggesting that the practice of granting *khul'* without the consent of a husband is not in accordance with the *sharī'ah*.[63]

Third, several contemporary jurists affiliated with the Ḥanafī school allow the judicial dissolution of marriage based on *khul'* without the consent of the husband. They justify judicial *khul'* either as *faskh* (fault-based divorce) or *shiqāq* (irretrievable breakdown of the marriage). For *faskh*, they follow the views of the majority of jurists who regard fault-based dissolution of marriage as valid. As for *shiqāq*, they refer to the views of Mālikī jurists, who authorize the arbitrators to dissolve a marriage if the efforts for reconciliation fail.[64] A similar position has been adopted by the judges of the Federal Shariat Court in *Saleem Ahmad*

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[59] Mufti Muhammad Taqi Usmani, *Fatāvā-i 'Uthmānī* (Karachi: Maktabah-i Ma'ārif al-Qur'ān, 2006), 2:445, *fatwā* no. 2526, dated November 2, 1976.

[60] *Fatwā* issued by Ghulām Ḥusain of Dār al-'Ulūm Haqqāniyyah, Akora Khattak, Nowshera, Khyber Pakhtunkhwa, dated September 14, 2014 (in file with the author).

[61] For details, see Maulānā Muḥammad Zāhid, "'Adālatī Tansīkh-i Nikāḥ kā Shar'ī Ḥukm," *Fikr-o Naẓar* 39, no. 3 (2002): 3.

[62] This view is reflected in the *fatwā* issued by Jāmi'at al-Rashīd, Karachi, dated January 9, 2017.

[63] Council of Islamic Ideology, Session No. 199 (May 27-28, 2015), http://cii.gov.pk /announcements/Dissolution.pdf.

[64] Zāhid, "'Adālatī Tansīkh-i Nikāḥ kā Shar'ī Ḥukm"; Khālid Saif Allāh Raḥmānī, *Jadīd Fiqhī Masā'il* (Karachi: Zamzam Publishers, 2010) 3: 124-29.

v. Government of Pakistan.[65]

The foregoing views of Pakistani *ulama* exhibit a characteristic diversity of opinions among various schools of Islamic law regarding the validity of judicial *khul'*. While traditional *'ulamā'* regard judicial *khul'* to be incompatible with classical Islamic divorce law, they accept the validity of the decree of the dissolution of marriage. The *'ulamā'* who oppose judicial *khul'* position themselves strategically *vis-à-vis* state authorities on this issue by declaring that their non-binding *fatāwā* (legal opinions) are not to be used in courts, thereby implicitly conceding to the authority of the state.

III. Public Perception of Judicially Reformed Islamic Divorce Law

As part of this study, a short survey was conducted to assess the public perception of the judicially reformed state-enforced Islamic divorce law. The perception survey was conducted primarily at the Family Courts and various religious seminaries (*dīnī madāris*) in Lahore in 2015 and 2016 with a sample size of 1,000 respondents. The respondents of the survey were divided into four categories: litigants, judges of civil and district courts, lawyers, and students of religious seminaries who were learning to become jurisconsults (*muftīs*). Each category included 250 participants.[66] The respondents were asked an open-ended question about the compatibility of state-enforced Islamic divorce law and the *sharī'ah*, and later follow-up questions.

The objective of the perception survey was to ascertain whether the public perceives the judicially reformed state-enforced Islamic divorce law to be compatible with the *sharī'ah*. While 34.8% of the respondents considered such law to be not in accordance with the *sharī'ah*, 28.4% regarded such law as in accordance with the *sharī'ah*, 28.5% regarded it to be partially in accordance with the *sharī'ah*, and 8.4% did not know the

[65] Saleem Ahmad v. Government of Pakistan PLD 2014 FSC 43.

[66] Further relevant demographics of the survey are as follows: The ages of the participants varied from 18 to 65 years: 42.5% were between 26-35; 32.2% were between 18-25; 12.2% were between 36-45; 8.5% were between 46-55; and 2% were between 56-65 years of age. Most of the participants were graduates (36.7%) while 3.5% were uneducated. The master's degree holders were 24%; intermediate degree holders were 5.3%; matriculation diploma holders were 9%; primary educated were 5.4%; Dars-i Niẓāmī (religious education) degree holders were 5.5%; and 3.7% held another degree along with Dars-i Niẓāmī. Most of the respondents were urban dwellers (80%). Despite its geographic and demographic limitations, this survey provides insights into the public perception of judicially reformed state-enforced Islamic divorce law. Hopefully, this survey will be supplemented with more detailed surveys on this topic in future.

answer. The answers of the respondents varied based on their professional backgrounds: 43% of lawyers said yes while 36.5% said no, and 18% said partially; in contrast, only 13% of students of the religious seminaries said yes, 19% said no, and 36.5% said partially while 21% did not know the answer. Most judges (51%) said partially, 25.5% said yes, and 23.5% said no. Most litigants (50%) said no, 32% said yes, and only 8.5% said partially, while 9.5% did not know the answer.

When asked the follow-up question as to why they think that Islamic divorce law in Pakistan was not in accordance with the *sharīʿah*, the responses varied depending upon the backgrounds of the respondents. Most litigants lamented that the legal system was marred by delays and the Family Courts were not an exception to it. Lawyers, judges, and the students of the religious seminaries provided informed answers by referring to the Ḥanafī school which requires the consent of the husband for *khulʿ*. The judges and lawyers, who considered Pakistani divorce law to be in accordance with the *sharīʿah*, on the other hand, argued that Islamic law embraces change with changing circumstances and that it is futile to force a wife to live with her husband when she does not want to do so. Amongst the students of the religious seminaries, many pointed out that the judge is authorized to choose amongst the views of various jurists while adjudicating a dispute, that the consent of the husband is not required in cases of irretrievable breakdown of marriages (*shiqāq*), and that the Mālikī school authorizes arbitrators to dissolve marriages in cases of irretrievable breakdown of the marriage. Therefore, the decrees of the Family Courts for the dissolution of marriage are valid under the *sharīʿah*.

Conclusion

The foregoing analysis shows that the judges of the superior courts of Pakistan incrementally developed women's unilateral right to no-fault judicial divorce (*khulʿ*) and the legislature facilitated this transformation by reforming the procedural laws to ensure the efficacy of judge-led reforms. However, this development has been contested by traditional *'ulamā'*, who regard judicial *khulʿ* as invalid under the Ḥanafī school. It is interesting that despite their divergent opinions on the issue, *'ulamā'* refrain from directly challenging the authority of the state.[67] Such

[67] Prof. Munir argues that *'ulamā'* cannot legitimately challenge the validity of the binding decisions of the courts of Pakistan based on their non-binding legal opinions (*fatāwā*). Muhammad Munir, "Challenging State Authority or Running a Parallel Judicial System? *'Ulama* versus the Judiciary in Pakistan," *LUMS Law Journal* 4, no. 1 (2017): 1-28.

strategic positioning has, on one hand, worked to keep the normative authority of *'ulamā'* intact in society, and, on the other hand, foreclosed any possibility of their direct clash with state authorities. The legislature has been unable to develop a consensus on the reform of substantive Islamic divorce law, which is a politically sensitive issue because of the involvement of religious sentimentalities. As is evident from a perception survey conducted, the public opinion on this issue is divided and politicians refrain from drawing a public backlash by raising it in the parliament.[68] In the absence of a political consensus on this issue and the divergence of juristic opinions (*fatāwā*) of *'ulamā'*, who follow the discursive Islamic legal tradition, judges of the superior courts act as final arbiters in determining the binding interpretation of the law.

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[68] In Pakistan, the only substantial legislative reform in Islamic family law was undertaken under the Muslim Family Laws Ordinances 1961 by the military dictator, Ayub Khan. The 2002 amendment in the Family Courts Act 1964 was also introduced during the military regime of Parvez Musharraf.