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ISLAMIC LAW AND SOCIETY 26 (2019) 111-148

Islamic Law and Society
brill.com/ils

Extra-Judicial *Khulʿ* Divorce in India's Muslim Personal Law

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Abstract

This essay examines *khulʿ* divorce as it is interpreted, understood, and practiced in India by Sunni Hanafi Muslims. My research was part of a broadly focused investigation of the impact of India's Muslim Personal Law upon women's well-being, begun in 1998 and on-going. I draw upon ethnographic and archival data collected between 1998 and 2001, as well as a recent review of the relevant case law. Widespread stereotypes represent Indian Muslim women as powerless to free themselves from unhappy marriages. However, they do have several legal options. One is to offer the husband a consideration for granting an extra-judicial divorce by *khulʿ*. This has distinct advantages over filing for divorce in a court of law. But its downside is that the husband must agree to release his wife from the marriage. Many refuse, others drive hard bargains or create other difficulties for the wife that are discussed in the essay.

Keywords

Hanafi law – India – women – *khulʿ* – *ṭalāq* – *faskh* – *qāẓī*

Introduction

This essay asks how *khulʿ* divorce is interpreted, understood, and practiced by members of India's majority Sunni Muslim population who – like most Indian Sunnis – follow the Hanafi school of Islamic law.[1] It is based in part upon ethnographic and archival research, conducted from October 1998 to May 1999 in

1 In 2011, the year of the latest census, India had approximately 172 million Muslims, 14.2 percent of the country's population (<http://www.censusindia.gov.in/2011census/Religion_PCA.html>).

 | DOI:10.1163/15685195-02612P06

Chennai, India, and during the fall and winter of 2001 in the city of Hyderabad (see Vatuk 2008a, 2017a: 116-153).[2] I also draw upon findings from a more recent review of the appellate case law on *khulʿ*, initially undertaken to determine how the state treats this form of extra-judicial Islamic divorce, asking to what extent and under what conditions *khulʿ* is recognized by the Indian judiciary as a legally valid way of dissolving a Muslim marriage. But High and Supreme Court judgments on matters related to *khulʿ* also provide insight into the difficulties and complications that are often connected with this form of divorce. I discuss some of these in the second part of the essay.

My research on *khulʿ* is part of a larger and on-going project that addresses broader questions about the impact of Islamic family law – as administered in India – upon women's well-being (see Vatuk 2001, 2005, 2009, 2015, 2017a). My fieldwork was centered in the official, state-sponsored family courts of Chennai and Hyderabad but also included observations of the proceedings in two all-woman police stations, several NGO-run dispute-settlement venues and a number of *qāẓī* offices (*dār-ul qaẓāt*). With the help of research assistants,[3] I conducted interviews with litigants, judges and other staff in the family courts, with police officers, lawyers and their clients, leaders of women's NGOs, and several *qāẓī*s and their clients. I also spoke with other Muslims who had dealt in the past with the judicial system and/or with Muslim religious authorities, in connection with their own or a relative's marital difficulties.

Woman-Initiated Divorce in the Muslim World

There is a rich and growing scholarly literature on divorce in Muslim majority countries around the world. Insofar as *khulʿ* is concerned, there are textually-based works on its development from the early days of Islam (e.g., Zantout

Roughly 75 percent are Sunni, most of whom follow the Hanafi *mazhab*, though there is also a relatively small number of Shafiʿi, mostly in southern India.

2 My Chennai fieldwork was funded by a U.S. Department of Education Fulbright-Hays Senior Research Fellowship, a sabbatical leave from the University of Illinois at Chicago, and an affiliation with the Madras Institute of Development Studies. A University of Illinois at Chicago Institute for the Humanities residential fellowship during the academic year 1999-2000 provided an opportunity to begin analyzing and writing up the data I had gathered there. In Hyderabad I was supported by an American Institute of Indian Studies Senior Fellowship and a semester-long research leave from the University of Illinois at Chicago. I was hosted in that city by the Department of Fine Arts of Telugu University. I thank these institutions for generously facilitating my work.

3 I owe a large debt of gratitude to Ms. R. Saraswathy in Chennai and Ms. Rafia Anjum, Ms. Rina Ambikeshwar, Mr. Muhammad Ayyub and Ms. H. Rayees Fathima in Hyderabad for their competent and cheerful research assistance.

2008) and studies by historians of early *fatwā* collections, court records and other documents from North Africa, the Middle East and the Mediterranean (e.g., Zilfi 1997; Tucker 1998; Powers 2002, 2003). Historians have also analyzed the progress of twentieth- and twenty-first-century divorce reform in Egypt (Cuno 2015), Tunisia, Algeria, and Morroco (Charrad 2001; Elliott 2009), for example. Of particular relevance to my work are the writings of legal anthropologists on woman-initiated divorce, including judicial and extra-judicial *khul‘*, in Kenya (Hirsch 1998), Malaysia (Peletz 2002), Indonesia (Bowen 2003), Pakistan (Holden 2012), Egypt (Sonneveld 2012), and Zanzibar (Stiles 2013).

Over the past century, family law reforms in the Muslim world have been gradually "constraining a husband's facility of *talaq* and widening the grounds on which a wife can seek judicial divorce" (Welchman, ed. 2007: 107. See also Esposito 1982; Welchman 2004; Tucker 2008). The 1917 Ottoman Law of Family Rights was the first to enable women, under certain circumstances, to obtain a divorce in a court of law. Since then, most countries that apply a version of Hanafi law have at least partially codified their divorce laws and have loosened, modified, or struck down those provisions that require a wife to obtain her husband's permission to divorce him. India did this in 1939 with the passage of the Dissolution of Muslim Marriages Act (DMMA), which allows a Muslim woman to divorce an unwilling or unavailable husband in a court of law.[4]

The Indian System of Personal Law

The Indian system of personal law is characterized by 'legal pluralism,' a term generally applied to societies in which two or more 'legal regimes' operate simultaneously within the same political/geographical space (cf. Galanter 1981, Griffiths 1986, Merry 1988, Tamanaha 1993, Sharafi 2008). In such societies the state may designate different bodies of law for different categories of citizens and/or a state-sponsored system of codified laws, courts and government-ap-

4 The DMMA is still in effect in India, as well as in Pakistan and Bangladesh. Pakistan introduced a new Family Law Ordinance in 1961 that restricts a man's freedom of unilateral divorce and polygyny. And in 1959 the Lahore High Court declared that a judge may grant *khul‘* to a woman, without her husband's consent, if he is convinced that two can no longer live together "within the bounds set by God." This and similar High Court judgments were endorsed by the Supreme Court in 1967, and in 2002 the legislature amended the 1964 Family Courts Act accordingly (Munir 2015: 53-58; Carroll 1996; Lau 2005). When Bangladesh gained independence from Pakistan in 1971, it retained its body of family law and its courts now largely follow Pakistani precedents on women's divorce rights (Serajuddin 2001; Hoque and Khan 2007).

pointed judges may co-exist with a plurality of more 'traditionally' grounded sets of norms and modes of solving intra-community conflict.

Insofar as matters of marriage and the family are concerned, the Indian system is plural in both senses (cf. Vatuk 2014). Each religious community – Hindu, Muslim, Christian, Parsi and Jewish – is governed by a distinct, state-imposed legal code.[5] Unlike some countries with similarly plural systems of religion-specific family laws,[6] the Indian state does not sponsor special religious courts, nor does it retain a cadre of religiously-trained judges to hear such cases,[7] which are heard instead in the regular civil courts or, in large cities, in specialized family courts. When a personal law petition comes before a judge, his own religion is irrelevant. He/she determines the litigant's religion and applies the appropriate legal code.[8]

As in many other former European colonies, the Indian practice of applying different codes of personal law to each religious community has a long history. Under the Muslim rulers who preceded the British takeover of large areas of the Indian subcontinent, disputes between Muslims were adjudicated by government-appointed *qāẓī*s. Non-Muslims were allowed to govern themselves in family matters. But in the eighteenth century the British began setting up British-style courts in which British judges applied common law and English statutes to their own countrymen living in India, as well as to the indigenous inhabitants.

5 A couple can opt out of being governed by one of these religion-specific codes by marrying in a non-religious, civil ceremony under a separate 'secular' marriage law, the Special Marriage Act 1954 (SMA), that was originally passed in 1872 to facilitate marriages between followers of different religions. Today, it may be used by any couple that prefers to wed in a non-religious ceremony (see Mody 2008). In addition, couples already married in a religious ceremony may register their marriages under it, after the fact. They are henceforth governed in matrimonial and other family matters by the SMA, rather than by the relevant provisions of the code under which they originally wed. This device is sometimes used by Muslims who wish to will to a chosen heir a larger share of their estate than the latter would receive under Hanafi inheritance law (Fyzee 1974: 366-7).

6 See, for example, Sezgin's 2013 comparative study of state-enforced religious family laws in India, Egypt and Israel.

7 The Parsis are a partial exception in that, since 1865, their own Parsi Matrimonial Court has had official jurisdiction over matters of divorce, judicial separation and restitution of conjugal rights within their own community (Sharafi 2014: 193-236).

8 The litigant's name provides the first clue to his or her religious affiliation but the determining factor is not the religion into which one was born but the personal law under which one married. Thus, for example, a woman born into a Hindu family and bearing a Hindu name but married to a Muslim man in an Islamic ceremony, will be governed by Muslim Personal Law. A Muslim couple married under the Special Marriage Act will be governed in family matters by its provisions, not by those of MPL.

However, fearful of the consequences of offending the religious sensibilities of their Hindu and Muslim subjects, the British hesitated to interfere unduly in their systems of personal or family law – derived, as they assumed, from their followers' respective sacred texts.[9] Unwilling to keep in place the existing institutions of adjudication, they decreed that Hindu and Muslim family disputes would be heard by British judges. But because the latter knew little or nothing about the relevant religious laws, Hindu *pandit*s and Muslim *qāḍī*s – some of whom had formerly heard disputes among their own co-religionists – were employed to guide and educate them (cf. Kugle 2001).

By 1862, the skills of these 'native' legal experts were felt to be no longer needed and their posts were eliminated. But influential members of the Muslim community – including some formerly employed in the British courts – soon began urging the authorities to resume the appointment of *qāḍī*s, arguing that they were needed to perform and keep records of Muslim marriages and to serve other religious needs of the faithful. In 1880 the government responded to this pressure by passing the Kazis Act,[10] which authorized – but did not require – state governments to appoint *qāḍī*s in any locality with a substantial Muslim population. However, the act assigned them no official duties nor did it entitle them to draw government salaries.

In accordance with the terms of that act, some states – including those in which Chennai and Hyderabad are located – still regularly appoint so-called 'government *qāḍī*s'. The position has often become – *de facto* – hereditary, passed down in the male line from one generation to the next. Its occupants earn modest incomes from fees, as compensation for presiding over Muslim weddings and preparing marriage contracts (*nikāḥnāma*) for the parties, registering and maintaining records of divorces, issuing divorce certificates (*ṭalāqnāma* and *khul‘nāma*), providing religious guidance on inheritance and ritual matters and, occasionally, helping to settle family and business disputes in accordance with the laws of Islam. Many supplement their incomes with earnings from other, non-religious, jobs.

Although all but one of the *qāḍī*s I interviewed and whose files I was able to consult were state government appointees, many unofficial *qāḍī*s also operate all over India, presiding over *dār-ul qaḍāt* or *‘adālat-i sharī‘a* (*sharī‘a* courts) run by religious sects, Islamic schools (*madrasa*s) or multi-sectarian organiza-

9 This policy was formally enunciated in 1772 in a *Plan for the Administration of Justice* issued by Warren Hastings, then Governor of Bengal. It applied only to Hindus and Muslims. Christians, Parsis and Jews were governed by English family laws. Sharafi (2014: 132) discusses some possible reasons for the Company's decision on this matter.

10 The British regularly used the letter K when Romanizing Urdu words derived from Arabic that contain the letter Q (*qāf*). The Indian government follows the same practice.

tions of *'ulamā'*, such as the All India Muslim Personal Law Board (AIMPLB).[11] In addition, numerous self-styled *qāẓī*s operate entirely independently. Some claim descent from pre-colonial Muslim judges and, for that reason, even if they are not highly educated in the religious law, enjoy a devoted following.

Indian Muslim Personal Law (MPL)

Muslim Personal Law (MPL) in India is mostly uncodified. Its provisions derive mainly from the Hanafi school, as modified by over two centuries of judicial decisions issued by the British colonial courts and, since 1947, by the post-independence High Courts and Supreme Court of India. It includes only four statutes, all enacted during the twentieth century on the demand of one or another organization or coalition of Muslim religious leaders who wished to address an issue related to some aspect of women's welfare or rights under Islamic law.

Thus, the 1913 Mussalman Wakf Validating Act (MWVA) legitimized the practice of setting up a charitable endowment for the benefit of one's own family or descendants, a device often used to provide more generously for the donor's female dependents than Hanafi inheritance rules allow. The 1937 Shariat Application Act (SAA) was meant to ensure that women would receive their prescribed Qur'ānic inheritance shares, of which they were (and still are) systematically deprived by customary norms that distribute the entire estate among the deceased's male offspring, descendants and/or collaterals.[12] The

11 The AIMPLB is a self-appointed body of 251 members (twenty-five of them women), representing the major Indian sects. Established in 1973 "to protect the Muslim Personal Law," it has become the most prominent, vocal, and influential lobbying organization for Muslim legal and other interests in the country. Recently it has been setting up increasing numbers of *dār-ul qaẓāt* and *sharī'a* courts all over the country and actively urging Muslims to patronize them, rather than resorting to the judicial organs of the state, for resolving family or marital disputes.

12 Due to pressure from large landholders in northwestern India, agricultural property was exempted from the law's provisions (Kozlowski 1987; Gilmartin 1988). Since then, some state legislatures have voted to include it but, even in those states, Muslim women – like their Hindu sisters (e.g. Agarwal 1994; Basu 1999) – rarely receive any portion of a parent's estate. Should the male heirs offer their sister a share of the inheritance, she often refuses to accept it, signifying by this self-abnegating gesture that she values their goodwill over crass material gain (cf. Kozlowski 1987; Fazalbhoy 2005). A woman determined to obtain her share can file suit under the SAA but few take this step, as it is certain to result in permanent estrangement from their natal families.

1939 DMMA gave women the right to a judicial divorce under one or more of nine grounds.[13]

Finally, the Muslim Women (Protection of Rights on Divorce) Act (MWA) of 1986 – the only MPL statute enacted in independent India – was drafted by Muslim religious leaders in response to a controversial 1985 Supreme Court decision in *Mohd. Ahmed Khan vs Shah Bano*, which dismissed a husband's appeal of a lower court order to contribute – under Section 125 of the Criminal Procedure Code (CrPc) – to the support of the aging wife he had divorced ten years earlier, after forty-six years of marriage (see Engineer, ed., 1987; Vatuk 2009). This judgment was widely regarded by Muslims as both offensive and contrary to Islamic law. Riots, demonstrations and widespread public unrest followed, resulting in the enactment of the MWA. Drafted by Muslim religious leaders, its purpose was to ensure that a Muslim man need not maintain his divorced wife beyond the end of her approximately three-month, post-divorce *‘iddat* period.[14]

Notably, none of these statutes was enacted on the initiative of the ruling government of the time. Each was drafted by Muslim leaders, who then lobbied members of the appropriate legislative bodies to support its passage. Indeed,

13 Grounds for divorce under this act are: (i) that the husband's whereabouts have not been known for a period of four years; (ii) that he has failed to maintain her for two years; (iii) that he has been in prison for seven or more years; (iv) that he has failed to perform his marital obligations for three years; (v) that he was impotent when they married and remains so; (vi) that he has been insane for two years or suffers from leprosy or a virulent venereal disease; (vii) that she was given in marriage by her father/guardian before the age of fifteen and repudiated the marriage before reaching the age of eighteen [the so-called 'option of puberty']; (viii) that her husband treats her with cruelty, i.e., (a) habitually assaults her or makes her life miserable by other forms of cruelty of conduct; (b) associates with women of evil repute or leads an infamous life; (c) attempts to force her to lead an immoral life; (d) disposes of her property or prevents her from exercising her legal rights over it; (e) obstructs her in the observance of her religious profession or practice; (f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qur'ān; (ix) "or on any other ground which is recognized as valid for the dissolution of marriages under Muslim Law" (<https://indiankanoon.org/doc/1458498>).

14 In a later development, a passage in the act that requires a man to make "reasonable and fair provision" for his former wife "*during* her *‘iddat* ," was interpreted by several High Courts to mean that, *before she completes* her *‘iddat*, the husband must make adequate provision for her future financial security. This interpretation was confirmed in 2001 by the Supreme Court in *Danial Latifi & Anr vs Union of India.* Advocates who represent female clients in the lower courts have become increasingly aware of the potential benefits of this judgment, which has led to a rise – at least in some jurisdictions – in the rate of resort to the act (see Vatuk 2015). Successful petitioners usually receive a one-time lump-sum payment, rather than the monthly stipend specified in most maintenance awards under Section 125 of the CrPC.

for over a century, neither the British colonial rulers nor the post-independence Indian state has taken an active role in promoting legislative 'reform' of Muslim Personal Law. This is due, at least in part, to the fact that today, although 10 percent of the world's Muslims live in India, they constitute a minority of only slightly over 14 percent of the country's population. Greatly outnumbered by the majority Hindus, many feel that their religion, traditions, culture, and often their very existence, are under threat. Particularly in the present political climate, with the recent sharp rise of Hindu chauvinist sentiments, the Muslim leadership is strongly committed to protecting, by any means possible, what it considers to be the community's long-standing right to govern itself in personal law matters.

The result is that, whereas in recent decades the governments of many Muslim-majority countries have introduced legislative reforms in the area of family law, sometimes in the face of widespread popular opposition, the Indian government has been unable – or at least unwilling – to attempt the same. Given the political risks of confronting its large Muslim minority on this most sensitive issue, the state has acted only when influential religious leaders have insisted upon drafting and pushing through Parliament a law of their own devising. This was the case with the MWA. However, an activist judiciary at the appellate level has begun to intervene indirectly in personal law matters by handing down decisions that interpret certain provisions of MPL in ways that will eventually impel the lower courts to deal differently with some types of divorce cases (see below and Subramanian 2014).

The Structure of the Indian Judiciary

The Indian court system has four levels. At the top is the Supreme Court of India, a federal court whose principal function is to hear appeals from the twenty-five state-level High Courts.[15] It also accepts writ petitions pertaining to human rights violations and constitutional issues. Its decisions set precedents for the High Courts, whose work is also largely appellate in nature, although they also hear writ petitions and enjoy original jurisdiction in certain matters specifically assigned to them by law. Decisions issued by one High Court are not binding upon others, although their judges freely cite and are often guided by judgments issued by their peers in other states. Under the supervision of each High Court are numerous District Courts, serving as courts of

15 There are currently twenty-nine states in the Indian Union but only twenty-five High Courts, four of which have jurisdiction over two adjoining states.

original jurisdiction, as well as hearing civil and criminal appeals from Subordinate Courts operating within their districts.[16]

Since the vast majority of Indian judges are Hindu and most of the rest are either Christian or Parsi, it is only rarely and entirely a matter of chance that a suit under Muslim Personal Law will be heard by a Muslim judge.[17] Furthermore, even if the sitting judge is Muslim by faith, he or she does not necessarily have any particular expertise in Islamic law, having been trained in the same institutions as other advocates. The Bachelor of Laws (LLB) curriculum normally includes only two semester-long courses on personal law. Sometimes the first semester is devoted to Hindu and the second to Muslim law but, more often, the syllabus is organized topically: a lecture on Hindu inheritance followed by one on Muslim inheritance, Hindu divorce law followed by Muslim divorce law, and so on. Lectures are supplemented by readings from a small selection of standard modern textbooks. Only a student who is highly moti-

16 All High and Supreme Court decisions are written in English, which is also the language spoken during hearings. Documents submitted as evidence, if originally written in some other language, must be translated into English – at the litigants' expense. The situation in the District and Subordinate Courts is more mixed, with litigants and witnesses allowed to speak in their own, local language, assuming that it is one that the judge also commands. I found this to be the case in the Family Courts of Chennai and Hyderabad as well. In Chennai, the advocates spoke English, sometimes interspersed with Tamil, to the judge, who spoke to Tamil-speaking litigants in that language, unless they were fairly fluent in English. Those who could not converse in Tamil – such as Urdu-speaking Muslims or Hindi-speaking Marwaris – were required to provide an interpreter. In Hyderabad, the Family Court judge communicated with litigants principally in Telugu but, when speaking to Muslims, was able to switch to Urdu, their mother tongue. As in Chennai, upper-class, Western-educated litigants spoke – and were spoken to – in English.

17 According to the 2006 *Sachar Committee Report on the Status of Muslims*, fewer than 5 percent of lower-court judges are Muslim. This is not, the Committee concludes, due to discriminatory hiring practices but because Muslims have, on average, markedly lower levels of educational achievement than the upper-caste Hindus who currently dominate the judiciary (<http://minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/sachar_comm.pdf>, 173-4, 372; see also <https://data.gov.in/catalog/literacy-rate-social-groups-and-major-religious-communities>). Muslim representation is no better in the higher courts. As of June 1, 2018, there was one Muslim among the twenty-five justices of the Supreme Court (<http://doj.gov.in/appointment-of-judges/list-supreme-court-judges>). At the High Court level there were only twenty-five Muslim justices (an average of one per court) and one Muslim Chief Justice. Thirteen High Courts had no Muslim justice at all – although five were so small that they had only two or three justices in all. Each of the remaining High Courts, whose benches range in size from ten to eighty-five, had at least one Muslim among their ranks. The Kerala High Court, with six Muslims out of thirty-seven judges, had the largest *number*, but the Jammu and Kashmir High Court, with three out of ten, had the highest *percentage* (<http://doj.gov.in/appointment-of-judges/list-high-court-judges>).

vated to delve deeply, on his or her own, into the finer points of Islamic law will learn much beyond its rudiments.

At the higher levels of the judiciary, on the other hand, there are some Hindu, as well as Muslim, judges who have acquired a degree of erudition on the subject of MPL. In their written decisions they cite relevant passages from English translations of pre-colonial treatises on Islamic law (for example, the twelfth-century *Hedaya* [Marghīnānī 1791] or the Mughal-era *Fatāwa-i ʿĀlamgīrī* [Nadvi 1988]) or quote from authoritative English translations of the Qurʾān – occasionally even from the original Arabic text. More often, they refer to British law manuals compiled in the nineteenth century (such as Macnaghten 1825; Baillie 1875) and works on Islamic law by twentieth- and twenty-first-century Indian legal scholars (e.g., Tyabji 1968; Mahmood 1980).

Extra-Judicial Divorce in MPL: *Ṭalāq*

Although there are no statistics on the number or the relative frequency of the various forms of Muslim divorce in India, the majority are, without doubt, accomplished by means of *ṭalāq*. Under MPL, an Indian Muslim man can divorce his wife unilaterally by the simple expedient of pronouncing the word *ṭalāq* (release) three times, either directly to, or with clear reference to, his wife. In India, rather than employing the legally 'approved' (*ṭalāq-ul sunnat*) procedure of pronouncing the three *ṭalāq*s one at a time, over the course of at least three months, Muslim men typically use the 'disapproved' method (*ṭalāq-ul bidʿat* or *ṭalāq-ul bāʿin*) of uttering the three *ṭalāq*s in quick succession – or, in the Indian-English phraseology, 'at one sitting.' Most Indian *ʿulamā* ' treat the resulting divorce as legally valid, with immediate and irrevocable effect.[18]

For a Muslim marriage to be legally valid, the groom must give – or promise to give – his bride a gift, usually in the form of money or gold jewelry. Following a divorce by *ṭalāq,* this gift (her *mahr*), falls due immediately. However, there is no enforcement mechanism to ensure that the wife receives it, either during the marriage or upon divorce, and in India few women do. It is rarely handed over at the time of marriage: the amount is almost always entered into the marriage contract (*nikāḥnāma*) as 'deferred' (*muwajjal*), rather than 'prompt' (*muʿajjal*).[19] A wife has the right, at any time, to ask her husband to pay what he

18 Some Indian sects, most notably the Ahl-i Hadith, deny the validity of a triple *ṭalāq*, arguing that it is not sanctioned by the Qurʾān and was not practiced in the Prophet's lifetime. Shiʿa Muslims regard three sequential pronouncements of *ṭalāq* as equivalent to one.

19 None of the Family Court litigants we interviewed had received her *mahr* when she married and only 6 percent of the approximately 1,000 Hyderabadi brides about whose

owes her. But few women would risk alienating their husbands by making a request that clearly conveys a lack of commitment to the marriage.

The practice of so-called ‘triple *ṭalāq*’ is much criticized in India. Outlawing it has for decades been high on the priority list of Muslim women’s activist NGOs, whose members insist that the conservative *‘ulamā’*, blinded by patriarchal self-interest, have for centuries incorrectly interpreted the words of the Qur’ān – in this and other respects – , thus misleading their illiterate followers as to the true meaning of the sacred text (cf. Vatuk 2008b; 2013a; Kirmani 2009; Tschalaer 2017; Suneetha 2012).[20]

Some Sunni religious leaders have characterized the triple *ṭalāq* as a serious “social evil” – even as a “sin” – but few are prepared to declare the resulting divorce invalid.[21] The AIMPLB has gone on record as “discouraging” its use and went somewhat further in a May 2017 meeting, warning that those who “misuse” it “arbitrarily” will face a “social boycott” (Rashid 2017).[22] How such a boycott would be implemented and by whom was not explained.

Challenges to *Ṭalāq* in the Higher Courts

The validity of divorces by triple *ṭalāq* – though not of *ṭalāq*, *per se* – has been challenged in several High Court appeals (e.g., *A. Yousuf Rowther vs. Sowramma* and *Jiauddin Ahmed vs. Anwar Begum*). In 2002 the Supreme Court, in *Shamim Ara vs. State of U. P.*, quoted from the Qur’ān (4:35) in support of its decree that a divorce by *ṭalāq* “must be for a reasonable cause and be *preceded by attempts at reconciliation* [italics mine]” by arbiters from the spouses’ respective families. That ruling has since been cited as a precedent in some high court decisions on the validity of divorces by triple *ṭalāq* (Agnes 2016).

In August of 2017 a five-member bench of the Supreme Court responded to a set of five conjoined writ petitions, each submitted by a woman who was challenging the legality of the triple *ṭalāq* divorce by which her own marriage

marriages I have information from *qāẓī* records had been given their *mahr* on their wedding day. Of these, almost all were either Shī‘a or had been married to Arab men. Within both communities it is customary to pay the *mahr* promptly.

20 One of the newest of these, the Bharatiya Muslim Mahila Andolan (Indian Muslim Women’s Movement – BMMA), has thousands of members all over the country and has taken a leading role in speaking out against the triple *ṭalāq* and other discriminatory provisions of MPL.

21 For one of many examples, see Shahabuddin 2005.

22 It is probably not a coincidence that the board issued this statement just as the Supreme Court began its deliberations over several writ petitions asking that the triple *ṭalāq,* be declared unconstitutional (see the *Shayara Bano* case, below).

had been dissolved, on the grounds that it violated her rights under articles 14, 15, 21, and 25 of the Indian Constitution (see *Shayara Bano vs. Union of India and Ors.*).[23] A number of individuals and women's groups submitted affidavits in support of the petitioners (see <http://www.lawyerscollective.org>), while the AIMPLB, in a 68-page counter-affidavit, raised strong objections, arguing that the cases were "misconceived and … based on misinterpretation of the law" (<https://barandbench.com>, 168). The court, in a split 3-2 decision, declined to declare triple *ṭalāq* unconstitutional. But it issued a six-month injunction on the practice and directed Parliament to enact appropriate legislation on the matter. This decision was widely hailed as a huge victory for Muslim women's rights but it is unclear whether or when the frequency of the practice might begin to decline (cf. Vatuk 2017b; Subramanian 2017).

To date, Parliament has not produced the legislation that the court directed it to enact, although one year earlier – in August of 2016 – a Muslim parliamentarian introduced a new Dissolution of Muslim Marriage Bill in the Rajya Sabha (the upper house of Parliament). The bill gives both sexes access to judicial divorce, while denying men the privilege of divorcing unilaterally by *ṭalāq.* It makes allowances for other forms of extra-judicial divorce (such as *khul'*) but only if the parties follow the prescribed procedures precisely. (<http://164.100.47.4/billstexts/rsbilltexts/>). In any event, this bill has not yet been put to a vote.

Woman-Initiated Divorce in India

Prior to the passage of the DMMA, a Muslim woman's divorce options were very limited. As Hanafi law was interpreted by most of the Sunni *'ulamā'*, two of the three forms of divorce that a woman can initiate (*khul'* and *mubārat*)[24] require the husband's consent. The third, *faskh-i nikāḥ,* is a 'recission' of the marriage, which can be ordered by a Muslim judge on a very limited number of grounds, most of which relate to some irregularity or impropriety in the marriage itself. Others include the husband's impotence and consequent inability to consummate the marriage, or his having disappeared so long ago that, by

23 Note that the question before the court was *not* whether a man can legally divorce his wife by *ṭalāq*, but whether he can do so *instantaneously,* by triple *ṭalāq.*

24 *Mubārat* is a divorce by mutual consent. It can be initiated by either party and negotiated between them. Little known among Indian Muslims, it is apparently infrequently used there. Another option, also seldom used in India, is *ṭalāq-i tafwīz,* a 'delegated divorce,' wherein a man, as a condition of the marriage contract, gives his wife the power of ending the marriage herself, either at a time of her own choosing or under certain specified circumstances (see Fyzee 1974: 158-60; Carroll 1982).

the time his wife's case comes before the judge, he will have reached ninety years of age (Esposito 1982: 85).[25]

However, prior to 1939 the act of apostasy was also held to automatically void one's marriage (Esposito 1982: 35-36). In the 1930s reports began circulating that growing numbers of Muslim women, desperate to free themselves from intolerable marital unions, were doing so by renouncing Islam. Concerned to halt this ominous trend, a few prominent religious scholars proposed drafting a statute that would give such women a more religiously acceptable way of divorcing an abusive or neglectful husband, while also ensuring that they could no longer do so by leaving the faith. Unable to achieve either of these goals within the strictures of Hanafi law, the *‘ulamā’* turned to the more permissive Maliki school for a solution. In 1939, after several years of effort, they were able to shepherd through the legislature a final version of the DMMA.[26]

Since that time, however, only a very modest number of appeals have been adjudicated under the act. A search in the on-line database www.indiankanoon.org for decisions mentioning the DMMA brought up only 239 cases decided between the year of its passage and 2015, an average of just over three per year.[27] The situation in the lower courts is similar. For example, Hyderabad Family Court records show that between 1995 and 2001, in a city with a Muslim population of approximately 2,100,000,[28] an average of only twenty-six DMMA suits were filed annually, of which only about half were pursued to judgment. Most of the latter resulted in a divorce decree, but usually only after a 'settlement' was reached in which the wife renounced some of the financial rights to which she is entitled under the act. *Ex parte* judgments were rarely issued unless the husband could not be located or had failed to appear in court.

25 Some recent studies of woman-initiated divorce in India describe the process by which – nowadays – some *qāẓī*s will rescind a woman's marriage by *faskh*. Typically, the woman must show that she has religiously compelling reasons for ending the marriage. Her background and home situation are then thoroughly investigated and the validity of her claims carefully assessed before her request is granted (see Lemons 2014: 375-377; Hussain 2007; Redding 2014).

26 For further details concerning the passage of the DMMA, see Masud 1996; De 2009, 2010; Minault 1997.

27 Note that neither this nor any other legal database or published law report includes an exhaustive list of every appellate decision issued in a given year.

28 <http://www.censusindia.gov.in/2011census/C-01.html>.

Extra-judicial Divorce by *Khulʿ* in India

The basic procedures by which a woman can obtain a divorce under classical Hanafi law are fairly well agreed-upon, notwithstanding ongoing disputes among scholars of *fiqh* on certain points of detail. The procedure most frequently used in India is the *khulʿ*. Its key requirements are an offer by the wife – and its acceptance by the husband – of some form of material consideration for releasing her from the marriage. If the husband is agreeable, he pronounces *ṭalāq* and the marriage ends irrevocably.[29] If he is unwilling to release his wife, there can be no *khulʿ*.

The scholarly literature on *khulʿ* in India has, until recently, been relatively meager. Of course, every Indian legal textbook on Muslim Personal Law lists it as one of the several possible ways of dissolving a marriage. Some texts cite case law on the subject, but their authors usually limit themselves to the precedent-setting 1861 case of *Moonshee Buzul-ul-Raheem vs. Luteefut-oon-Nissa* (see, e.g., Fyzee 1974: 163-166; Mulla 1977: 265), revealing little about how *khulʿ* actually operates, on the ground, in the present day.

Both the scholarly and the popular literature on Muslim divorce in India focus almost entirely on *ṭalāq*, to the virtual exclusion of any discussion of women's divorce options. Not only is the existence of the DMMA given little notice, but the various extra-judicial divorce options available to women – i.e., *khulʿ, mubārat,* and *faskh* – are almost never described, thus ignoring the reality that the vast majority of woman-initiated divorces in India are accomplished by one of these means. When I began my fieldwork, I was therefore surprised to hear *khulʿ* mentioned so frequently in my discussions with Muslim acquaintances about marriage and divorce in their community.

Due to India's distinctive history and culture, and because Muslims constitute a minority population within an avowedly secular, democratic, but Hindu-majority state, *khulʿ* operates somewhat differently there than in most Muslim-majority countries, including Pakistan and Bangladesh, formerly part of India and now its closest neighbors.

The fact that *khulʿ* in India is a strictly *extra-judicial* form of divorce makes it relatively easy, if conditions are right, for a woman to extricate herself from an unhappy marriage without going through the time, expense, and social opprobrium of initiating and pursuing judicial proceedings. However, the process of obtaining a *khulʿ* is not always simple or straightforward and success is not guaranteed. Negotiations with the husband are often complicated, almost

29 The proposal to divorce by *khulʿ* may come instead from the husband, but the requirements are otherwise the same (Fyzee 1974: 164).

always stressful, and frequently fail. Not only must a wife offer her husband a consideration for releasing her from the marriage, but she must also persuade him to accept it. Men often refuse to cooperate or will not even enter negotiations over the matter. Some have long-ago deserted their wives and cannot be located. Others take advantage of their wives' relative lack of power within the marriage and/or their ignorance of the law by compelling them, against their will, to sign *khul‘* agreements that contain onerous conditions. Others try to manipulate the law in creative ways, entirely for their own benefit.

Women Prefer Extra-Judicial Solutions to their Marital Problems

Divorce data from *qāẓī* records show very clearly that extra-judicial divorces by *khul‘* vastly outnumber those awarded to women under the DMMA. I have noted, for example, that in Hyderabad in recent decades an average of twenty-six suits were filed under the DMMA each year. Yet, during 2000-2001, one of the Hyderabad *qāẓī*s whose records we examined registered a total of 201 *khul‘*s. Each of the six other government *qāẓī*s in the city would doubtless have registered a similar number in that same year. And this does not take into account that an unknown additional number of *khul‘*s would have been facilitated by various 'unofficial' religious specialists attached to mosques or other Muslim institutions in the city. Clearly, insofar as enabling Muslim women to divorce is concerned, the DMMA serves a very minor role.

The figures cited reflect the fact that, while Indians in general are willing to patronize the government courts for mundane purposes, for private family matters they usually prefer – at least in the first instance – to consult the elders of their extended kin group and/or their village, caste (*jātī*), or neighborhood (*moḥalla*) council (*panchāyat*), the managing committee (*jamā‘at*) of their neighborhood mosque or a nearby *dār-ul qaẓā* or *‘adālat-i sharī‘a*. A fairly new institution, the NGO-sponsored, peer-run *nārī ‘adālat* (women's court) or *mahilā mandal* (women's circle) has begun to attract a female clientele to whose difficulties the male-dominated councils tend to be insufficiently sympathetic (Vatuk 2013b; Tschalaer 2017).

None the above-mentioned bodies has any state-backed authority to enforce its edicts. But respect for their members' claims to religious authority or for the positions of community leadership they hold, combined with the force of local public opinion, means that their decisions are likely to be heeded – or at least taken seriously – by the disputants. If dissatisfied with the outcome, one or the other party may ultimately turn to the state courts for relief. Most, however, will either grudgingly accept or simply ignore a decision that has

gone against him or her. Thus, only a small minority of marital conflicts ever come to the attention of the official judiciary.

There are many reasons for this. To go to court is expensive – fees are imposed at every stage of the process and under-the-table payments to court staff are required to ensure that one's case proceeds in a timely manner. Furthermore, a favorable outcome can hardly be hoped for unless one engages an advocate to guide one through the process, construct a credible case, and make the necessary court appearances, month after month or year after year, until the matter is resolved.[30] Cases often drag out interminably, particularly if they are contested: prolonging a case to the point at which one's adversary gives up in disgust is a favorite strategy of the skilled advocate.

Additionally, the fact that her case will probably be heard and decided by a non-Muslim judge may discourage a woman from taking her domestic problems to a court of law. She may fear that the judge will be prejudiced against Muslims or is insufficiently knowledgeable about MPL and unlikely to administer it in a fair and unbiased manner. Furthermore, the DMMA requires a wife to prove that her husband has committed one or more of the offences listed in the act as legitimate grounds for divorce. This may be difficult or impossible for her to do. No evidence of this kind is required for a *khulʿ*. In fact, more than one of the *qāẓī*s to whom I spoke claimed that they deliberately avoid questioning their clients very closely about what has led to their decision to seek a *khulʿ*, on the principle that what goes on within the four walls of a couple's home is no one's business but their own.[31]

Finally – and even more important for some – it is considered shameful for anyone, particularly a woman, to take a private family dispute to a court of law, rather than have it resolved within her kin group or mediated by a respected elder, a community-based body or a religious authority like a *qāẓī*. The very

30 The Family Courts Act 1984 (chapter IV, section 13) specifies that, except under special circumstances, litigants in the family court are not entitled to legal representation. The original purpose of this section was to enable the parties to come before the judge in person and argue their cases in their own language, rather than having to use the specialized vocabulary of the law. However, few litigants – especially women – have the necessary knowledge and skills to negotiate, without the help of an advocate, the complicated and lengthy process of filing and pursuing a legal case. In 1991 the Bombay High Court ruled that lawyers should not be barred from family court proceedings, because to do so presents a severe handicap to litigants, particularly the poor and uneducated among them. Other High Courts have followed suit and, in most family courts today, lawyers are routinely allowed to appear on behalf of clients, much as they do in any other civil court (Agnes 2011: 294-299).

31 In the case of *faskh*, however, such invasive inquiries are routine (see Redding 2014, for example).

presence of a woman in the overwhelmingly male space of the court premises attracts unwanted attention and casts a shadow upon her respectability.

Activist women's organizations thus routinely advise Muslim women who consult them for legal advice to try the cheaper and faster extra-judicial route, before thinking about taking their husbands to court. Some NGOs even maintain relationships with sympathetic *qāḍīs,* to whom they regularly send clients seeking a *khul‘* or a *faskh.*[32] Even lawyers sometimes suggest to prospective clients that, before engaging their services, women first attempt to divorce extra-judicially.

Extra-Judicial Divorce by *Khul‘* in MPL

A *khul‘* may be accomplished through an oral or written private agreement between a woman and her husband or, in the case of highly educated Muslims, in consultation with an advocate. It is sometimes negotiated in a police station or on the premises of a state court where, for example, a husband may be persuaded to concede to his wife's desire to divorce him, on the understanding that she will withdraw a maintenance suit that she has filed against him under Section 125 of the CrPC or drop a criminal case of 'dowry harassment' under Section 498a of the Indian Penal Code (IPC).[33] However, negotiations for *khul‘* are more often undertaken with the help of a *qāḍī* or an *imām* or by consultation with the *jamā‘at* of the couple's local mosque.

Most lay Muslims are familiar with the term *khul‘* and are aware that it designates a procedure by which a woman can divorce her husband. But few know precisely how to go about divorcing in this way. When contemplating such a move, they are therefore likely to consult a religious expert for advice. Spouses are often already living apart and are likely to be on bad terms, making it diffi-

32 On the role of Muslim-led women's NGOs in assisting women with legal issues of this and other kinds, see Vatuk 2008b, 2013a, 2017a: 154-195; Kirmani 2009; Schneider 2009; Tschalaer 2017.

33 This section, passed in 1983, makes it a crime for a woman's husband or one of his relatives to subject her to "cruelty", including – under subsection (b) – so-called "dowry harassment." The dowry (*jahez* or *stridhan*) is a gift of clothing, jewelry, household goods, and sometimes money that an Indian bride's parents give her, along with cash and costly consumer goods for the groom and his family, when she marries. Of Hindu origin, the custom has become widespread among Muslims as well. The contents of the dowry are usually agreed upon ahead of time, but if the husband or his family are dissatisfied with what they have received, they often begin to pressure the bride to extract additional money or goods from her parents. Should she be unable or unwilling to comply, they sometimes subject her to severe emotional and physical abuse.

cult for the wife to approach her husband directly. Or the family may already have approached him but, finding him unreceptive, hope that a *qāẓī* or other religious figure for whom he has – or should have – respect will be able to persuade him to cooperate.

When a woman consults a *qāẓī* about getting a divorce by *khulʿ*, he will explain how she must proceed and ask for the husband's address, so that he can send a registered letter instructing him to appear in his office on a given date and time. If his whereabouts are unknown, the wife or the male relatives who have accompanied her will be told to come back when they have located him, since a *khulʿ* is impossible without his consent. Should they fail to find him or should he adamantly refuse to cooperate, the *qāẓī* may suggest the possibility of a *faskh* or advise the wife to file for a 'court divorce' under the DMMA. But he is more likely to say that, in the absence of the husband, he can be of no further help.

If the husband is located and responds to the *qāẓī*'s summons, the *qāẓī* will usually urge him to accept his wife's offer, either on the terms that she or her elders propose or on some others more agreeable to him. Should he be successful in persuading the man to give his consent to a *khulʿ*, the two will be given an appointment to come back at a later date, with their witnesses, to have a formal divorce document (*khulʿnāma*) drawn up and signed. The *qāẓī* will then instruct the husband to finalize the divorce by pronouncing three *ṭalāq*s in his presence.

Waiver of the Mahr as the Usual Consideration for *Khulʿ*

It is generally accepted that the appropriate compensation for giving one's wife a *khulʿ* is the return of the *mahr*. However, very few women have received their *mahr* by the time they decide to seek a divorce.[34] Therefore, in most *khulʿ* transactions no money changes hands. The wife declares that she renounces any further claims to her *mahr,* the husband pronounces three *ṭalāqs* in quick succession and the marriage is over. Once she completes her *ʿiddat,* she is free to remarry.[35]

34 It is not uncommon for a groom to ask his bride on their wedding night to release him from the *mahr* obligations he has just committed himself, in writing, to honor. Understandably, she almost always complies. What she would have to offer him, if she later wanted a *khulʿ*, is unclear. I found no mention of such a situation in the *dār-ul qaẓā* files I examined, nor was it mentioned in any of our interviews.

35 In fact, very few divorced women marry again. Even if she would like to remarry, it is not easy for a divorcée to find a willing partner, especially if she is not young enough to be

However, not all *khul‘* agreements are concluded so simply or so inexpensively for the wife. *Qāẓī* records indicate that wives are often persuaded (or are instructed by the *qāẓī*) to forego, not only the *mahr,* but also the right to be maintained during *‘iddat.* In some *khul‘nāma*s it is written that the wife also gives up custody of the couple's minor children. She may agree to this because she plans to remarry. Since men are notoriously unwilling to take in a woman's children from a prior marriage, she may feel that she has little choice but to leave them behind. The financial difficulties she is likely to face after divorce may also affect her decision. But allowing her husband to retain custody of their children is often the only condition under which he will release her from the marriage.[36]

Khul‘ Divorces in *Qāẓī* Files

Two government *qāẓī*s in Hyderabad allowed me and my research assistants to examine a selection of divorce records from their files. A divorce register for the year 1993 contained 391 divorce entries, of which 211 (54 percent) pertained to a *khul‘* divorce. A bound volume of 355 divorce forms from another *qāẓī* documented 202 *khul‘*s, 57 percent of all the divorces he registered during the *hijrī* year 1421 (early April 2000 through the end of March 2001).[37]

The preponderance of *khul‘*s over *ṭalāq*s in both sets of records is striking. But one must not conclude from this that Muslim marriages are more likely to be dissolved at the wife's initiative than at the husband's. The reverse is certainly the case. The reason for the numerical difference lies in the rates at which the two kinds of divorces are registered. Since the procedure for divorcing one's wife by *ṭalāq* is both simple and a matter of common knowledge, few men feel the need to consult a religious expert beforehand. Most *ṭalāqs* are pronounced in private or are witnessed only by a few family members or friends of the husband. The wife herself need not even be present. The news that she has been divorced may be communicated in a letter from her hus-

considered a desirable wife for anyone but an older widower seeking a woman to keep house and care for his motherless offspring.

36 Under MPL, the mother has the right to physical custody (*ḥizānat*) of – though not legal guardianship over – sons until the age of seven and daughters until puberty. Thereafter – or earlier, if their mother remarries – the father can reclaim them. But, by this time, he usually has remarried as well and has perhaps fathered children by his second wife. He may therefore have little desire to take on the responsibility of rearing the children born to his first wife, particularly if he has had little contact with them in the interim.

37 Some *qāẓī*s keep their records according to the *hijrī* calendar, while others use C.E. dates.

band's lawyer, in a newspaper ad, or in a phone, fax, email or text message. Such *ṭalāq*s are rarely registered with a *qāẓī* or with anyone else – at least not right away. There is no legal, religious or customary requirement to do so; it is a purely voluntary act, usually done only after the fact and for some practical reason. For example, the man may need a signed and stamped document proving his marital status for some official purpose – perhaps to get a passport or a government job – or to assure the parents of a prospective second wife that he is legally divorced from the first. A *khulʿ*, on the other hand, if finalized in a *dārul qaẓā* or similar setting – as so many are – will be registered automatically, as part of the regular procedure.

Khulʿ in the Eyes of the State: in the Lower Courts

The issue of whether, and under what circumstances, a *khulʿ* divorce is consistently recognized by the Indian state as a legal dissolution of marriage under MPL has received little attention in the scholarly literature. Gopika Solanki, who conducted extensive research in the family courts and in several non-state dispute-settlement venues in Mumbai, reports that civil court judges routinely accept the validity of a divorce by *ṭalāq*, as long as it is backed up by a written document of some kind – a *ṭalāqnāma* certified by a *qāẓī* or a registered letter from a lawyer with a receipt signed by the wife. However, she says, they "do not readily recognize" women-initiated *khulʿ* divorces (2011: 138). It is puzzling that they should assume such a stance, since, once a husband has accepted his wife's offer and severs their union by pronouncing *ṭalāq* three times, the result is the same as an irrevocable, male-initiated divorce by *ṭalāq.* Solanki does not say whether, if presented with a written *khulʿnāma,* duly signed by both spouses, their witnesses, and a *qāẓī* or other religious figure, the judges of the lower courts she studied might in that case recognize the divorce as valid.

Since cases involving *khulʿ* come up infrequently before district or family courts – whose decisions are, in any case, rarely reported in law journals or in online data bases – one cannot easily generalize about what happens when they do. Even if one can obtain the necessary permissions to examine a court's files and succeeds in securing the cooperation of the record room staff, working with these documents is difficult and time-consuming. In 1998 my research assistant and I were fortunate to gain permission from the Chief Judge of the Madras Family Court to examine the files of 104 MPL cases heard from the beginning of 1988 to the end of 1997. *Khulʿ* was mentioned in only three of these and in none was its validity the matter at issue. In two cases, the wives, their male relatives, and their local *jamāʿat* had tried unsuccessfully to gain their

husbands' consent for *khul‘* and had therefore filed suit for divorce under the DMMA. After hearing the first of these, the female family court judge brokered a 'compromise,' having the marriage dissolved by *khul‘* in her presence. The agreement, signed by both parties, provided that the wife would receive no maintenance for herself but would have custody of their son until he reached the age of seven. The husband would pay Rs. 200 per month as child support and be permitted to take his son out for seven hours on the last Sunday of every month.

The second case was withdrawn before it came to trial, when the wife's father and brother managed – by offering major financial concessions – to persuade the husband to relent and give his wife the *khul‘* she desired. At this point the court had no reason to take a position on its validity. The wife was doubtless relieved to be free of her husband – albeit at a steep price – and no longer faced the prospect of lengthy and costly court proceedings.

In reviewing the details of appellate cases, I found considerable inconsistency among lower courts on the issue of the legal validity of *khul‘* divorces. This is perhaps not surprising, inasmuch as judges at this level rarely encounter such cases and are, in any case, unlikely to be highly conversant with the intricacies of Muslim divorce law. Their unfamiliarity with this form of divorce may make them hesitant to validate it.

There is inconsistency even among the decisions of judges in the same court. For example, in a 2012 case, *Smt. Zahira vs. Shri Aslam,* the petitioner was granted a court-ordered *khul‘* by the Delhi District Court, despite not having secured the consent of her husband, who had been served more than once but had repeatedly failed to appear in court. But in the following year a woman who faced a very similar situation failed to persuade a different judge of the same court to grant her a *khul‘* in her husband's absence (*Smt. Firdos Jehan vs. Sh. Mohd. Sufiyan Faridi*). In denying her petition, the judge observed that, in the first place, she had not offered her husband any compensation for releasing her. Moreover, he wrote, "[d]ivorce by way of Khula, can be effected only by mutual agreement between the parties and cannot be obtained by way of decree from the Court."

Khul‘ in the Eyes of the State: the Higher Courts

One Kerala High Court decision from 1973 (*K.C. Moyin vs. Nafeesa and Ors.*) suggests that the state should treat *khul‘* differently from *ṭalāq.* In this criminal case a man had charged his wife with bigamy. Having earlier been denied a divorce under the DMMA, she had, on the erroneous advice of a supposedly

learned acquaintance, declared herself divorced by *faskh*[38]and proceeded to marry another man. The High Court not only ruled in the first husband's favor but also added the *obiter dictum* that a woman cannot divorce her husband without his consent, except by resort to the DMMA: "[T]he dissolution of Muslim marriage at the instance of wives can be effected only under its provisions … [To] repudiate the marriage without the intervention of a Court is opposed to the law of the land."[39] But this judgment has not been widely cited, at least not at the appellate level. I could find only one instance, in a 2013 Gujarat High Court decision, *Whether It is To Be Circulated To … vs. Javed Hussain Mansuri*.

K.C. Moyin notwithstanding, a review of case law clearly shows that the higher courts have, for at least a century and a half, regularly recognized the validity of *khulʿ* divorces. An early illustration of the higher judiciary's position appears in the 1920 Lahore High Court's decision in *Musammat Saddan vs. Faiz Bakhsh*. The wife had asked her husband to release her by *khulʿ*, offering a consideration of Rs. 150. A *khulʿnāma* was executed and he pronounced the required 'three times *ṭalāq*.' But the wife never paid him the promised amount and he later filed for a declaration that they were still married. The lower court granted his petition but the High Court disagreed, ruling that "there was a complete and irrevocable divorce and the mere fact that the plaintiff did not pay the consideration did not invalidate it." The man was advised to sue for recovery of the debt, if he so wished.

An on-line search for *khulʿ, khula* and *khoola* in two databases of Indian High and Supreme Court decisions[40] turned up almost 150 occurrences of those words. But in less than thirty was an actual (or alleged) incident of this form of divorce a matter at issue.[41] These included a number of child custody cases and several suits for declaration of marital status. A few involved criminal charges of fraud or bigamy. Others were appeals of maintenance orders under Section 125 of the CrPC that had been awarded *after* the passage of the 1986 MWA.[42] In these the man argued that the lower court had erred in order-

38 In fact, a *faskh* can be decreed only by a Muslim judge, not by the woman herself, as the respondent in this case seems to have mistakenly believed.

39 Although the issue of *khulʿ* was not specifically mentioned in this decision, the general principle outlined by the judge (who happened to be a Muslim) would presumably apply to any kind of woman-initiated extra-judicial divorce.

40 The databases searched were www.indiankanoon.org and www.manupatra.com. *Khulʿ* is usually spelled "khula," or sometimes "khoola," in Roman script.

41 Most mentions of the word occurred in lists of the several permissible forms of divorce in Islamic law. Occasionally "khula" was part of a person's or an organization's name or as the Hindi/Urdu adjective meaning 'open' (from *kholnā,* 'to open').

42 This law was understood – by Muslim religious authorities and by most of the judiciary at the time – to limit a Muslim man's financial responsibility for his divorced wife to her

ing him to support the woman, because the two had already divorced by *khul‘* and she was, therefore, no longer his wife. Such appeals are a variation on a far more common one, in which a man asserts that a woman is ineligible for a maintenance award because he has earlier divorced her by *ṭalāq*.

The principal questions raised by judges in *khul‘*-related cases were whether or not a *khul‘* agreement had been executed in writing and, if so, whether a document to that effect had been submitted in evidence. If not, the appeal was usually dismissed. If so, the question was whether the document was 'genuine.' Did its terms accord with the requirements of Islamic law? Had both parties signed it? Was the wife's signature or thumbprint obtained willingly or under duress? Was she aware at the time of its true purpose? Whenever the responses to these questions supported a litigant's claim that the couple had divorced by *khul‘*, the judges did not usually hesitate to declare the marriage legally dissolved. In no case did they rule against the validity of a *khul‘* divorce for which there was a written agreement, adjudged to be genuine and to have been signed willingly and with both parties fully cognizant of its contents. The number of cases that met these conditions, however, was not very large.

One that did was a child custody case decided in 1997, *Shazma vs. Ashar Ali Zai and Anr,* in which the Delhi High Court recognized the validity of a divorce by *khul‘* that a couple, "in view of the [*sic*] temperamental incompatibility," had negotiated, "voluntarily decid[ing] to get the marriage dissolved by way of 'Khoola.'" But the judge further ruled that, whereas the *khul‘* agreement itself was valid, one of its conditions was not legitimate – namely, that the wife give up her right to physical custody (*ḥizānat*) of their young son. He therefore dismissed the husband's custody petition under a provision of the Guardians and Wards Act 1890 that gives priority to the best interests of the child.

In a much earlier, 1932, case (*Qasim Husain Beg vs. Bibi Kaniz Sakina*), the Allahabad High Court recognized the validity of a *khul‘* agreement between a couple that had separated before their marriage was consummated, after the husband discovered that his bride's mother's brother's wife was a woman of

‘iddat period, after which she would be ineligible to apply for a Section 125 maintenance order against him. If she has no other means of support, she can ask a magistrate (under Section 4 [2]) to order her adult children, parents or other natal relatives – specifically, those in line to inherit from her after her death – to maintain her. Should she have no relatives capable of doing so, the state's Wakf Board can be ordered to make suitable arrangements for her support. Such boards were initially reluctant to assume this new responsibility. They regularly appealed judgments ordering them to comply but were not always successful. In recent decades some have begun providing monthly stipends to destitute divorcées (see Vatuk 2015, 2017a: 246-73).

the 'untouchable' Sweeper caste.[43] The fathers of the bride and groom had then agreed to execute a *khulʿnāma,* written "in the presence of maulvies [men learned in Islamic law]." It set the condition that the bride would relinquish the *mahr* that she had already received. The lower court had refused to recognize the *khulʿ*, reasoning that, since the bride had not yet reached the age of majority, she was not legally capable of waiving her *mahr* rights. The appeals court disagreed, recognized the divorce, and granted the man's petition for recovery of the *mahr* debt.

Complications for Women in Connection with *Khulʿ* Divorce

As noted, issues pertaining to *khulʿ* do not come before the courts very often but, when they do, judges' decisions often reveal a variety of difficulties and complications that women may experience in connection with this form of divorce.

Deserted Wives May be Unable to Locate their Husbands

If the whereabouts of a woman's husband are unknown, it is impossible to obtain his consent for a *khulʿ* divorce. *Qāẓī*s do not routinely offer the alternative of dissolving the marriage by *faskh*. If the woman is determined to remarry and is able to prove one or more of the grounds specified in the DMMA, she can ask a court for a divorce decree. But a typically poor and uneducated Muslim woman is unlikely to be aware of the existence of the law and, in any event, cannot afford the cost – in money, time, and reputation – of filing and pursuing her case to judgment.

43 The so-called Sweepers rank among the very lowest castes in Hindu society: their traditional occupation involves removing, garbage and filth of all kinds, including human excrement, from higher-caste homes and their surroundings. For this reason, they are widely treated as 'untouchable' by persons of higher castes. Muslims generally consider themselves outside of the Hindu caste ranking system but, having lived for generations in a society in which caste hierarchies structure so many kinds of interpersonal relationships, many have absorbed the prejudices of their Hindu neighbors. Interestingly, the alleged Sweeper woman was not even a blood relation of the bride. But the fact that a non-Muslim of a despised social group had married into the bride's maternal family was sufficient to taint the reputation of the bride's entire kindred, making her unsuitable for marriage into a 'respectable' Muslim family.

Husbands May Refuse to Grant *Khul‘*

By the time a wife seeks to divorce her husband, their relationship has, in most cases, seriously deteriorated. Frequently the couple is living apart, the man having ejected his wife from the marital home or the woman having left, of her own accord, to seek refuge with her natal family. In such situations the husband has no real incentive to accede to his wife's request for a divorce. He can always take another wife while remaining married to – though not necessarily living with – the first. Her offer to waive her *mahr* rights is not usually a compelling inducement: in most cases he has not yet paid her any part of the it and there is little likelihood that he will ever be forced to do so, even if he later decides to divorce her by *ṭalāq*. Thus, out of pride, spite, jealousy, a sincere desire to get his wife back, or mere indifference to her fate, he often refuses to cooperate. He has little to lose – other than the remote possibility of a maintenance suit – by leaving her 'hanging' (*mu‘allaqa*): still married to him, though in name only, and forever unable to marry anyone else (Quick 1998). No religious or other authority can compel him to respond to a summons nor, if he *does* appear, to accept his wife's offer and grant her a divorce.

Husbands Consent to Give *Khul‘* but Impose Stringent Conditions

Even if a reluctant husband eventually accedes to his wife's pleas for a *khul‘*, he may impose harsh conditions in exchange for doing so. Although it is widely understood that the compensation for agreeing to a *khul‘* ought not to exceed the amount of the wife's *mahr*, men do on occasion negotiate for larger cash amounts or make other kinds of demands. I have cited one example, from a DMMA case in the Madras Family Court, in which the wife's male relatives could obtain the husband's consent to a *khul‘* only by allowing him to retain all of the money, jewelry, and other dowry items his wife's parents had given her when they married. This was a major concession on the wife's part, since these gifts are considered a married woman's personal property. They are intended to remain in her possession, not only during the subsistence of the marriage but also after a divorce. Should her husband or in-laws prevent her from taking them with her when she leaves their home, she can file suit for their recovery under the MWA. However, even if she is aware of this option, to pursue such a case is costly and is not always worth the trouble entailed.

The text of a *khul‘nāma* executed at a Delhi police station provides another example of the kind of hard bargain that even a man who is under arrest can drive, if his wife is sufficiently desperate in her desire to exit their marriage.

This agreement, reproduced in a 2012 decision from the Delhi District Court, *Mst. Arshi Riyaz vs. Jalil Ahmed*, reads, in part:

> pursuant to the compromise arrived at between the parties in Police Station Chandni Mahal, the respondent [husband] pronounced Khula Divorce to the applicant [wife] on 19.06.2010 … in presence of the witness and the applicant accepted divorce as per Muslim Rites and customs … it was agreed that the applicant has settled the present past and future maintenance from the respondent along with "Mehar" as well as "Stridhan" … that the children will be in the custody of the respondent in whole life [who] … shall spend all the amount over the upbringing, education of children and their marriage in future and the applicant shall not claim custody of the minor children in future in any manner whatsoever … [T]he custody of both the children was precondition of the divorce deed and it was agreed by the applicant that she will never claim the custody of both the minor children in future in any manner whatsoever.[44]

The Misconception that a Wife Can Divorce her Husband Unilaterally by Simply 'Pronouncing' *Khulʿ*

Muslims of both sexes are sometimes under the false impression that a woman can unilaterally 'declare' herself divorced by *khulʿ*, just as a man can divorce his wife by pronouncing *ṭalāq*. A woman who does this may later find, to her dismay, that she is still married: a serious problem, especially if she has, in the meantime, wed someone else.

I found several appellate cases in which a woman had made – or was alleged to have made – such a unilateral declaration of *khulʿ*. The case of *S. Nazeer Ahamed vs. The Director General of Police* was a writ of *habeas corpus* decided in 2006 by the Madras High Court. The husband sought to retrieve his wife from the home of her parents, who, he claimed, had been "detaining her illegally." She responded that she had left him willingly and had "pronounced Khula against [him] in the presence of two witnesses," submitting a written document relinquishing all of her (financial and other) rights. The court took this document as clear evidence that she was living by choice in her natal home and dismissed the husband's appeal. It was not asked to, nor did it, comment on the legality of the alleged *khulʿ*.

44 This document was probably written in the parties' own mother tongue (most likely Urdu) and translated by a clerk with an imperfect grasp of idiomatic English.

In two maintenance appeals, men alleged that they were no longer married because their wives had unilaterally declared themselves divorced by *khul‘*. Both wives denied having made such declarations and, since the husbands could present no evidence to support their claims, their petitions were dismissed (*Mumtaz Ahmad vs. State of Bihar & Anr,* 2013 and *Kadar Mian vs. Smt. Jahera Khatun and Anr*, 1998).

Privately Negotiated *Khul‘* Agreements May be Undocumented

An unknown, but probably significant, percentage of *khul‘* agreements are negotiated privately between husband and wife and/or in the presence of their respective families. The agreements are often purely oral but, even if committed to writing and signed, are not always preserved or are kept in only one copy, typically by the husband. As the case law makes clear, judges will not accept a purely oral assertion by one of the parties – particularly if it is denied by the other – that the couple was divorced by *khul‘* on some unspecified date in the past.

The Wife May be Coerced by her Husband into Consenting to a Divorce by *Khul‘*

Perhaps the most serious and most frequently encountered problem with *khul‘* divorce, from a woman's point of view, is that a man who is contemplating the possibility of ending his marriage sometimes calculates that a *khul‘* divorce has – for him – distinct advantages over a divorce by *ṭalāq*. If he can manipulate or coerce his wife into entering into a *khul‘* agreement, he will be free of his obligation to pay her *mahr* and can probably also evade his responsibility to support her during her *‘iddat*. Furthermore, he can blame her for the break-up and cast himself as the innocent victim of an unworthy wife. By engineering a *khul‘* divorce, he will not only save some money but also preserve his own reputation, while casting serious doubt upon hers.

Even if the relationship has long been ridden with conflict, his wife may not be as eager as he is to end their marriage. As in many societies, divorce in India almost always has more negative consequences for women than it does for men. Women's educational levels – on average – are much below those of their male counterparts and most lack employment skills and experience, never having worked outside of the home before they married, often at a very young age. They know that, if they leave the marriage, they will have difficulty sup-

porting themselves. Their parents or brothers may not be able or willing to assume the responsibility of providing them and their children with food and shelter over the long term. Furthermore, in India a divorced woman of any religion is socially stigmatized. She is usually blamed for the break-up of the marriage, especially if it was dissolved at her initiative. Furthermore, lacking a male protector, her morals are always suspect and she risks attracting unwanted sexual advances from any man with whom she comes into contact.

Yet husbands have numerous ways of foisting a *khulʿ* divorce upon an unwilling or unsuspecting wife. Several such instances came to my attention during my fieldwork and thereafter. One tactic is to badger or bully the wife unmercifully, until she is forced to give in and sign a *khulʿ* agreement that he has drafted. Another is to compel her to accompany him to a *dār-ul qaẓā,* threatening her with harm if she refuses to ask the *qāẓī* to draw up a *khulʿnāma.* A man may scheme to obtain a standard *khulʿnāma* form from a *qāẓī* – perhaps on the excuse that his wife keeps strict seclusion (*pardā*) and cannot, therefore, leave her house to come to the *dār-ul qaẓā*. If the *qāẓī* is willing, the man will take the form home with him, summon two witnesses, and either force his wife to sign the document, show it to her but deceive her as to its true significance, or simply forge her signature and bring it back to the *qāẓī* for *his* signature and official stamp.

After a woman activist described such a scenario to me, I asked two Hyderabad *qāẓī*s whether it could occur in their offices. Not surprisingly, both denied that it was possible. Yet, in a 2012 Madras High Court case it was alleged that a Chennai *qāẓī* had enabled a man to engage in that precise tactic. *S. Basheria vs. The State of Tamilnadu* was a writ petition, filed by a wife against both her husband and the Chief Qazi of Tamilnadu, whom she accused of having certified a fraudulent *khulʿnāma* that purportedly was drafted and signed by her but, in fact, had been composed by her husband. The latter had signed it before two witnesses, had forged his wife's signature on it, and had returned to the *qāẓī* to register it. Among other defects noted by the court, the document was undated, lacked the wife's name and some important information about the husband and his witnesses, and contained no mention of *mahr* or any other form of compensation – a basic legal requirement for *khulʿ*. But the *qāẓī* ignored these defects, affixed his signature and stamp, and declared the marriage dissolved.

When the wife later learned what had occurred, she complained to an All-Women Police Station and to the National Human Rights Commission. She then asked the High Court to impose damages on her husband and the State of Tamilnadu, by whose Wakf Board the *qāẓī* had been appointed. The court acknowledged that the *khulʿnāma* was fraudulent but dismissed the wife's

petition, pending the outcome of her husband's trial for forgery in an associated criminal case.

Shahnaz Bano D/O Aslam Khan (*Smt*) *vs. Babbu Khan S/O Nanhekhan Pathan,* 1985), a maintenance case under Section 125 of the CrPC, was filed shortly before passage of the MWA. The husband presented to the court a signed *khul‘nāma* as evidence that, because he was no longer married to the petitioner, she was ineligible for a maintenance award. She claimed to have signed the *khul‘* document under duress, but the judge decided not to rule on its validity, for the reason that – as the law stood at that time – the question of whether the woman was married or divorced was irrelevant, insofar as the man's responsibility to maintain her was concerned. His appeal was therefore dismissed.

In a 2010 case, *State vs. Abrar Ahmad S/O Mohd Aslam*, a wife accused her estranged husband of deceitfully obtaining her signature on a *khul‘* agreement. Without telling her what she had signed, he persuaded her to return home with him. They resumed sexual relations, though – according to her testimony – against her will. When she later learned that the paper she had signed was a *khul‘nāma* and that she had therefore been having sex with a man to whom she was no longer married, she went to the police and charged him with rape. But the man was acquitted after the woman failed to prove to the court's satisfaction that they had engaged in sexual intercourse without her consent. The court did not directly address the issue of the *khul‘nāma*'s validity but, inasmuch as the verdict rested on the assumption that the two were no longer married, it clearly treated the *khul‘nāma* as proof of a legal divorce. If, in the eyes of the court, the two had been legally married at the time, the question of consent would not have arisen – because, in Indian law, marital rape is not a crime.

Some Pros and Cons of *Khul‘* as it is Practiced in India

The availability in India of extra-judicial divorce by *khul‘* does have distinct benefits for a Muslim woman who finds herself in a marriage that is unsatisfying, unhappy, or worse. Every year, thousands of women successfully secure for themselves the freedom that this legal option provides. But the process of obtaining a *khul‘* is not always a simple matter. Even those who succeed may have to accept terms that take a heavy toll, both financial and otherwise. That a *khul‘* can be negotiated in private, obviating the need to seek a divorce in a court of law, has many advantages. But it also leaves women open to having unfair terms forced upon them or becoming victims of outright exploitation by unscrupulous husbands, occasionally abetted by religious authorities, court

personnel or police officers who, under the guise of assisting the couple to reach an 'amicable' agreement, end up brokering an inequitable settlement.

Khulʿ Divorce and Women's 'Agency'

A number of historians of the Middle East have noted a high incidence of *khulʿ* divorces in earlier centuries. Tucker, for example, found that more than half of all the divorces described in Palestinian *sharīʿa* court records from the eighteenth and nineteenth centuries were of the *khulʿ* type (1991: 241) and that women in nineteenth-century Egypt also frequently divorced in this way (1985: 54). Divorce registers from eighteenth-century Istanbul, examined by Zilfi, reveal a similar pattern (1997: 295-6).

Both Tucker and Zilfi suggest that their findings show that women who initiated *khulʿ* divorces were not totally oppressed and passive in the face of marital discord. Since the law offered women this way of leaving an unhappy marriage, they were able to control – at least to some extent – the course of their future lives. In using the law to free themselves from unwanted unions, they exerted a significant amount of 'independent agency.' As Zilfi puts it, a woman's right to initiate divorce "validated the notion that women, too, deserved to be satisfied in their mates," and thus "can be thought to have enhanced women's status" (1997: 295). Powers, similarly, in his analysis of three women's divorce *fatwa*s, dating from between the twelfth and fifteenth centuries, "call[s] into question the popular stereotype of the Muslim wife as a passive agent who is dominated and controlled by her husband" (2003: 30). He shows how these women, sometimes aided by knowledgeable male patrons, were able to use the law – and in some instances manipulate it – so as to achieve the outcome they desired.

One may then ask whether, in the very different historical and cultural setting of modern day India, the fact that Muslim women have the option of negotiating a divorce by *khulʿ* – while it admittedly falls far short of conferring upon them rights equal to those enjoyed by the men in their lives – nevertheless contributes to their ability to exert 'agency,' demonstrates their capacity for 'independent action' and enhances their relative 'bargaining power' within marriage.

One can agree that it takes a certain amount of courage and some independence of spirit for a woman to ask her husband to release her from the bonds of matrimony. There are many women whose marital situations have deteriorated to the point at which they feel they have no other choice but to cut all ties with their husbands. Some are then able to proceed, on their own, to do whatever is necessary to realize that goal. However, in the Indian cultural context,

when a woman is experiencing marital difficulties, it is typically not she alone, but her male relatives, who decide on the best course of action and take the lead in seeing it through. If they determine that she should get a divorce – sometimes because they want to arrange a second marriage for her and thereby free themselves from the obligation of supporting and sheltering her in their home indefinitely – she usually has little choice but to comply with their wishes. On the other hand, if she is strongly inclined to divorce her husband but her natal family opposes the idea, pressuring her to stay with him and try harder to accommodate his wishes, she is unlikely to be able to defy them.

A middle-aged woman, married for many years, may be able to independently decide that she desires a divorce and take the necessary action on her own. But most divorces in India occur in the early years of marriage, when the wife is young and inexperienced. For example, according to the divorce records I examined in Hyderabad, three-quarters of all divorcées had been married for under six and half of them for less than three years (2005: 29). It is also the case that a significant – though unfortunately unknown – proportion of brides are under eighteen years of age when they marry – although this fact does not show up in the records (Vatuk 2005: 23-24).[45] Such a young wife is unlikely to be able to act without family cooperation and guidance during the difficult process of initiating and following through on a quest for divorce.

I have argued, therefore, that there is an aspect of the actual practice of *khul‘* that does not always show up in law books, social surveys, Ottoman *sharī‘a* court records, or *qāẓī* registers of the kind that I examined in Hyderabad. In order to flesh out the kind of broadly focused but condensed account of *khul‘* in India that I have provided here, we need larger numbers of detailed personal narratives from women who know, from experience, what is involved when seeking – or trying to avoid an unwanted – *khul‘*. In-depth ethnographic observations of the kind carried out in recent years by legal anthropologists like Susan Hirsch (1998) and Erin Stiles (2009) in Africa and by Katherine Lemons (2010) and Jeff Redding (2014) in India are invaluable in this respect. Such detailed accounts of the complex interactions among those involved in the *khul‘* divorce process reveal much more about the way in which Muslim divorce law actually operates than I have been able to discover from the limited number of interviews and on-site observations that I have conducted or from the texts of court judgments that I have reviewed. The latter are valuable sourc-

45 One cannot rely on *qāẓī* records to determine the true age at marriage, because it is a crime to perform the marriage of an under-age girl. Therefore, when a *qāẓī* enters the bride's age on the *nikāḥnāma,* he almost invariably writes "18" (or some higher number), regardless of her actual age.

es but have serious limitations, including those imposed by their standardized structure, the legal rhetoric they employ, and the fact that the documents upon which their authors rely are not neutral accounts of what has 'actually' occurred but are, inevitably, self-interested and of uncertain 'truth' value. Hopefully, some of the issues that I have highlighted here, about the myriad ways in which the law of *khulʿ* operates, in practice, will receive closer and more critical examination by future scholars of India's Muslim Personal Law.

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