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TWIN HALVES OF MEN[1]: AN EXAMINATION OF THE MODERN APPLICATION OF KHULA DIVORCE PROCEEDINGS IN ACCORDANCE TO CLASSICAL ISLAMIC LAW THROUGHOUT THE MUSLIM-MAJORITY WORLD

Introduction

Simply put, marriage in Islamic Law is a contract.[2] Unlike Western notions, be they influenced by various Christian Churches to think of the act of marriage as a holy sacrament, or by the post-Enlightenment secular state—still largely affected by the influence of the Church's thinking of marriage as a sacrament—marriage in Islam is a contract between two parties, undertaken so they may fulfil their human inclinations and desires, of both procreation and intimacy, within the permissible boundaries of God's law.[3] The first part of this paper will give a brief overview of the concepts of marriage according to Islamic Classical law, and the history and reasonings surrounding its exercise. The second part of this paper will then delve into much of the same except revolving around divorce in multifaceted approaches in Islamic law, one of which is the *khula*, or the woman's right to divorce her husband by forfeiting her *mahr*, which is typically a payment of money or other material possessions—ranging from anything to gold, a house, a vehicle, a parcel of land, furniture, etc.,— paid for by the groom to the bride at the time of their marriage, and is stipulated in the signed marriage contract between the bride and groom.[4] The principal of khula will then be more thoroughly examined as an option of divorce in Islamic law, along with its benefits and drawbacks, particularly as they relate to advancing the female agency and furthering—and retaining—women's rights within the Sharia.[5] Subsequently, this paper will examine the

[1] This title derives from the famous hadith transmitted by both Abu Dawud and Tirmidhi—both responsible for compiling two extensive bodies of hadith, widely considered valid by Sunni Muslims—saying "*Verily, women are the twin halves of men.*", emphasizing the equality of women and men in orthodox Islamic doctrine in terms of agency and autonomy, a notion that has been dealt severe blows due to cultural misunderstandings and the patriarchal nature of both Muslim-majority societies and non-Muslim majority societies.
[2] Nathan B. Oman, *How to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts*, 2011 UTAH L. REV., 287, 291-292 (2011).
[3] *Id.*
[4] Nathan B. Oman, *Bargaining in the Shadow of God's Law: Islamic Mahr Contracts and the Perils of Legal Specialization*, 45 WAKE FOREST L. REV., 579, 590 (2010); Although similar to the Western understanding of a dowry, the mahr can differ across cultures. *See Id.*
[5] The terms "[the] Sharia" and "Classical Islamic Law" will be used interchangeably in this paper, both referring to the same body of law as relates to the Muslim tradition.

modern application of Talaq and khula proceedings in several Muslim-majority countries, in accordance to the schools of jurisprudence—or *fiqh*—practiced the majority of its inhabitants, and briefly examine how several cultural norms influence or undermine its every practice for the Muslim laywoman. Lastly, this paper will conclude by revisiting the general benefits and drawbacks of khula as an option of divorce for Muslim women, serving as either a tool to further empower them, or in certain settings, to financially disenfranchise them.

I. MARRIAGE IN CLASSICAL ISLAMIC LAW

As mentioned, marriage in Islam differs from the traditional Christian-influenced notions that imbue Western understandings of marriage, and is seen as foremost a contract, not as a sacrament.[6] This being established, it is still crucial to note, however, that marriage as in institution in Islam too, is heavily inlaid with spiritual and moral undercurrents, meant guide the social and personal conduct of its believers.[7]

Entering a marriage in Islam is considered by religious Muslims to be "completing half their faith", a notion taken from a famous Hadith stating that "Anas ibn Malik reported that The Messenger of Allah, peace and blessings be upon him, said, 'Whoever Allah provides with a righteous wife, Allah has assisted him in half of his religion. Let him fear Allah regarding the second half.'"[8] The Qur'an, the undisputed epicenter of Muslim belief, is replete with several verses encouraging believers to get married[9], to wait in chastity if their circumstances do not allow them to[10], and various other instructions regarding the institution, with one famous verse saying "*Your wives are a garment for you, and you are a garment for them.*"[11] Furthermore, the Qur'an states "And of His signs is that He created for you, of yourselves, spouses, that you (may) find tranquility in them, and he has made between you affection and

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[6] Oman, *supra* note 2.
[7] Emily L. Thompson & F. Soniya Yunus, *Choice of Laws or choice of culture: How Western nations treat the Islamic marriage contract in domestic courts*, 25WIS.INT' L.J. 361, 363 (2007).
[8] *Al-Mu'jam Al-Awsat*, Hadith Narrator Imam Al-Tabarani.
[9] THE QUR'AN , 24:32.
[10] THE QUR'AN , 24:33.
[11] THE QUR'AN, 2:187.

mercy. Surely in that are indeed signs for a people who meditate."[12] These verses are profound in encouraging a husband and wife to have a close and intimate relationship, enjoining on them to safeguard, protect, and care for the others best interests, be they bodily, socially, mentally, or material, and are crucial in understanding the ultimate aim of what an Islamic marriage contracts intends to accomplish at the time it is created.

Given the importance of the institution of marriage in the lives of the believers, it is correctly assumed by large swaths of the Muslim world that the contract of marriage stands out from other agreements a Muslim enters into in his or her life, in terms of gravity and importance.[13] This is due to one crucial reason: the preservation of honor and bodily—and by extension, spiritual—sanctity.[14] A Hadith reported in Sahih Muslim states "Uqaba ibn Amir relates that the Messenger of God, peace be upon him, said, 'The [pre]-conditions most rightful of being fulfilled are those with which you make private parts lawful.'"[15] Much of the reasoning behind this can be attributed to a crucial concept in Islam known as *haya*. Often translated to mean "shyness" or "modesty," the concept of haya is used extensively in both Qur'an and Hadith, so fundamentally so that a famous hadith widely accepted across sects and schools of fiqh throughout the Muslim world enshrines that: "Ibn Abbas reported: The Messenger of Allah, peace and blessings be upon him, said, 'Verily, every religion has a character and the character of Islam is modesty.'"[16]

Thus, in Islam, the contract of marriage is dealt with especial care and rigor because "marriage allows one to breach the honor attached to the private parts of another's body."[17] Given such, a spouse is

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[12] THE QUR'AN, 30:21.
[13] *See infra* notes 15-17.
[14] *See infra* notes 15-17.
[15] *Sahih Muslim*, 1218.
[16] *Sunan Ibn Mājah* 4182. This commandment for modesty is often in terms of both bodily modesty as well as social and moral humility, making it all the more entrenched and relevant when it comes to marriage contracts, which allow one to engage in intimate physical and social acts. *Id.*
[17] Mufti Muhammad ibn Adam al-Kawthari, *Al-Arbain: Elucidation Of Forth Hadiths On Marriage*, 72 (2014), further elucidating the importance of the behind regulating marriage contracts because the nature of marriage gives the contracting parties imitate knowledge of the other that could be used against them in terms of ruining their honor and breaching their haya. *Id.*

held to an extremely rigorous standard in fulfilling their contractual obligations, and being a good partner for the aforementioned reasons, including physical, spiritual, emotional, and financial.

This idea is again underscored by the aforementioned Qur'anic notion that poetically analogized spouses to being "garments" to each other.[18] Like a garment, the Islamic marriage contract is made to made to cover and protect the wearer, concealing his or her faults in the eyes of society at large, and affording the contracting spouses both safety and solace in one another, turning their union into a safe haven where they can be intimate, bashful, and validated, so that they may be better and more enriching individuals and members of their communities. This understanding hinges on the initial notion of Islamic marriages being contractual relationships, after which one can enjoy the fruits of marriage in a manner permitted by God.[19] All in all, in accordance to Quranic scripture and many Hadith, marriage in Islam was—amongst whatever else it may be contrasted to be—an act of safeguarding one's honor and chastity, as well as being a positive and productive means of society building and increasing the population.

For a marriage to be carried out in accordance to Classical Islamic law, many requirements must be met. One, the bride-to-be must approve and accept the offer of the contractual union—known as the *ijab* in Arabic—out of her own free will, a concept called *qabool* in.[20] She cannot be beholden to the agency of her *wali*—her legal guardian who mostly, but not always, tends to be her father, brother, or paternal grandfather—and must accept the marriage outside his influence.[21] Though the concept of *walayah* is a multipronged and complex one in its own right, what is important to note for the purpose of this paper is that most schools of Islamic jurisprudence only permit the father or paternal grandfather of the bride-to-be to be her *wali* in the context of marriage, though notably in the Hanafi school of

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[18] *See supra* note 11.
[19] THE QUR'AN, 4:24 (". . .*Other women are lawful to you, so long as you seek them in marriage, with gifts from your property, looking for wedlock rather than fornication. If you wish to enjoy women through marriage, give them their bride-gift- this is obligatory- though if you should choose mutually, after fulfilling this obligation, to do otherwise [with the bride-gift], you will not be blamed: God is all knowing and all wise*.").
[20] See *infra* note 23; also *Sahih Muslim* 1421 ("*Sufyan reported on the basis of the same chain of transmitters (and the words are): A woman who has been previously married (Thayyib) has more right to her person than her guardian; and a virgin's father must ask her consent from her, her consent being her silence, At times he said: Her silence is her affirmation*.").
[21] *Id.*

jurisprudence, given certain conditions, a women doesn't need a *wali* at all to carry out her own wedding contract.[22] If the bride-to-does not agree with the union, it is imperative for her to say so, with a hadith outlining this going "The Prophet, peace be upon him, said, 'A matron should not be given in marriage except after consulting her; and a virgin should not be given in marriage except after her permission.' The people asked, 'O God's Messenger, how can we know her permission?' He said, 'Her silence (indicates her permission).'"[23]

Though cultural pressures can be, and most certainly have been, used to coerce women into marriage unions they do not desire, her rights in accordance to classical jurisprudence accord her full, unabridged agency in her decision.[24] Thus, in accordance to classical Islamic law, any marriage contract made under duress, is negated, for it had no valid standing in the first place, a notion also cited in many a hadith such as one quotes:

> It was narrated from Ibn Buraidah that his father said that girl came to the Prophet and said: 'My father married me to his brother's son so that he might raise his status thereby.' The Prophet gave her the choice, and she said: 'I approve of what my father did, but I wanted women to know that their fathers have no right to do that.'[25]

Once the offer has been accepted and the couple has agreed to enter a contract in marriage, an agreement reached with mutual consent and no duress, they must subsequently engage in determining the terms of their contract, where the aforementioned concept of a mahr comes in. As earlier stated the mahr, best—although not perfectly—conflated with the Western notion of a dowry, is a payment given to the wife by the husband, usually consisting of money but can be number of other things, such as gold or land,

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[22] Aayesha Rafiq, *Role of Guardian in Muslim woman's Marriage: A Study in the Light of religious Texts*, in International Journal of Innovative Science, Engineering & Technology, Vol. 2. (4), pp. 1254-1261 (2015); An important cultural note regarding the Hanafi exception is that it is in place to allow a woman to contract her own marriage with someone she deems fit, though many view the lack of approval by her family members to be a bad omen, and thus the marriage could be derived of *barakah*—or blessings—despite being completely legally valid. This being said, this can also be used to empower women to enter marriage contracts on their own agency when the men appointed to be her *wali* do not have her best interest at heart. *Id.*

[23] *Sahih al-Bukhari* 5136.

[24] *Id.*

[25] *Sunan ibn Majah* 1874. The previous Hadith in the same book, *Sunan ibn Majah* 1873 reiterates this notion saying "Abdur Rahman bin Yazid Al-Ansari and Mujamma bin Yazid Al-Ansari said: 'that a man among them who was called Khidam arranged a marriage for his daughter, and she did not like the marriage arranged by her father. She went to the Messenger of Allah and told him about that, and he annulled the marriage arranged by her father. Then she married Abu Lubabah bin Abdul-Mundhir.'" [CITE]

and is paid at the time of their marriage, in accordance to the stipulations that are to be signed in the marriage between the bride and groom.[26] In order to understand how several methods and aspects of Islamic divorce works, it is imperative one understands the nature of mahr and its central role in Islamic wedding contracts.

According to Muslims, in the Qur'an, God says "Give women their dower in good cheer. Then if they forgo some of it, of their own will, you may have it and enjoy it [with clear conscience]."[27] When discussing what should be given, this is elucidated by Contemporary Islamic scholar, Mufti Muhammad ibn Adam al-Kawthari who expands on this notion by saying "The various schools of Islamic law differ in terms of the mime amount that be given as dower, with the Hanafis saying that it must be to the values of ten dirhams (equivalent to 30.618 grams of silver) due to the Hadith 'There is no dower less than ten dirhams.'" (*Bayhaqī*) However, all the schools agree that there is no maximum limit set by the Shari'ah."[28] Furthermore, the minimum amount of a mahr can be practically anything, with a famous Hadith saying "Narrated by Sahl bin Sa`d, The Prophet peace be upon him, said to a man, 'Marry, even with (a mahr equal to) an iron ring.'"[29] This Hadith has been used to both illustrate the application of a mahr in one of its most modest forms, that of an iron ring, as well as being used to illustrate the importance of marrying in the Islamic tradition. Although women are encouraged not to waive their rights to a mahr to safeguard their own future and person in terms of having a "safety net" in the unfortunate event their marriages go awry, the Hadith does serve to show the simplicity of the concept.

Additionally, when discussing the general components of a mahr, in the contexts of traditional Islamic law, one must look at the two instances and the times at which they are bestowed to the wife. The first instance is given to the wife straight away, at marriage, and this part is called the *muqaddam*, paid to honor the bride's entrance into the marriage. The second instance, called the *mu'akhar,* is a portion of the mahr that is given to the wife in the event of a divorce (or in the case of a death) to provide her a sort of

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[26] *See* Oman, *supra* note 4.
[27] THE QUR'AN, 4:4.
[28] *See* MUFTI MUHAMMAD IBN ADAM AL-KAWTHARI, *supra* note 17, at 79.
[29] *Sahih al-Bukhari* 5150.

financial cushion. It is said that "the payment of the deferred mahr is taken very seriously in Muslim countries, as it is legally considered an unsecured debt ranking equally with other unsecured debts that must be paid by court order or jail term if necessary."[30]

Thus, it is well established that the mahr is amongst the preeminent rights of the wife, and her husband must pay it in cash or any other form of value. It is a marker of the husband's respect to her as a person, his respect to God by honoring His law, and a signifier that he is serious about their union and is ready to undertake the role and responsibilities of being a husband in terms of providing and protecting, as stipulated throughout classical Sharia, and its implications are readily felt in the event of an Islamic divorce, or an annulment of the marriage contract.[31]

Lastly, with the understanding of the mahr explained and expounded away, when discussing marriage and divorce in Islamic law and the rights of the husband and wife therein, one must look the economic dynamics and Islamic marriage contract prescribes to them, as each one has a different set of rights and, moreover, responsibilities when it comes to their role within the marital estate.[32]

The husband, once married, assumes the role of being the main provider of the household, which includes not his wife and any children born out of their relationship.[33] For the wife, her personal wealth remains her own to spend as she desires, and if she was to put any of it towards the welfare and advancement of her household, it is an act widely regarded as charity in the eyes of God, since the primary burden of financially providing for the household is relegated to the husband.[34] These acts could include anything from cooking and cleaning to just about any other financial expenses the wife

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[30] Lindsey E. Blenkhorn, *Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptial and Their Effect on Muslim Women*, 76 S. CAL. L. REV. 189, 191 (2002);, the author also mentions how "Mahr provisions were originally conceived in part as a protective mechanism for women, who rarely have assets of their own as a result of restrictions from either working outside the home or leaving the home without their husbands' permission", a crucial understanding of how the mahr came into being, conceptually.
[31] IBRAHIM AMIN, PRINCIPLES OF MARRIAGE & FAMILY ETHICS, PART 2 (1997).
[32] *Infra* note 35.
[33] AMIN, *Supra* note 31; *Infra* note 35.
[34] IBN HAZM, "MARATIB AL-IJMA", 11TH CENTURY CE.

voluntarily takes on. However, as a result the wife is expected to respect her husband's choices in financial and social matters for the most part, with the Qur'an saying:

> Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means. Therefore the righteous women are devoutly obedient (to Allah and to their husbands), and guard in the husband's absence what Allah orders them to guard (e.g. their chastity, their husband's property, etc.). As to those women on whose part you see ill-conduct, admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly, if it is useful), but if they return to obedience, seek not against them means (of annoyance). Surely, Allah is Ever Most High, Most Great.[35]

This understanding of each spouse's financial, and thereby social, role is crucial when heading into the *fiqh*, or jurisprudence, of divorce within Islamic law.

II. DIVORCE IN CLASSICAL ISLAMIC LAW

Unlike, for example, the Catholic Church, the Islamic tradition does not see the act of divorce as a grave sin, violating the insoluble sanctity of marriage; God permits believers to disestablish marriages and remarry.[36] However, though permitted, divorce is seen by many Muslims as a last resort, understanding that while allowed, it is best to be avoided and only implemented if the circumstances are dire enough for it.[37] A famous hadith covering this sentiment is one that reads "It was narrated from Abdullah bin Umar that: the Messenger of Allah, peace and blessings upon him, said: "The most hated of permissible things to Allah is divorce."[38] Another famous hadith, accepted near universally throughout the Muslim world states, "The Prophet, peace and blessings upon him, said: Allah did not make anything lawful more abominable to Him than divorce."[39] Thus, though free to divorce, many Muslims view divorce as an undesirable necessity for a couple whose marital union cannot be saved.[40]

If the union cannot be salvaged and the spouses cannot reconcile, there are many methods of divorce possible for Muslim couples. For marriages that have an indeterminate mahr, meaning the amount

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[35] THE QUR'AN, 4:34.
[36] Mansoureh Zarean & Khadijeh Barzegar, *Marriage in Islam, Christianity, and Judaism*. Relig. Inquiries, 67–80 (2016).
[37] *Sunan ibn Majah* 2018
[38] *Id.*
[39] *Abu Dawud* 2177.
[40] *Id.*

hasn't been finalized, and the marriage has not been consummated, the Qur'an says "It is no sin for you if ye divorce women while yet ye have not touched them, nor appointed unto them a portion [their mahr]. But give them [a gift of compensation], the rich according to his means, and the straitened according to his means, a fair provision. (This is) a bounden duty for those who do good."[41] Essentially, in this scenario, a husband is required to bestow upon his soon to be ex-wife a "suitable gift" upon her departure, as a sign of respect.[42]

However, in the case of a divorce of an unconsummated marriage that does have an already determined mahr, the husband must still pay half of the mahr, unless the wife expressly waives her right and pardons him from doing so, an act encouraged by God, with the Qur'an saying:

> And if you divorce them before you have touched them and you have already specified for them an obligation, then [give] half of what you specified—unless they forego the right or the one in whose hand is the marriage contract foregoes it. And to forego it is nearer to righteousness. And do not forget graciousness between you. Indeed Allah, of whatever you do, is Seeing.[43]

Where things get tricky in terms of divorce proceedings in accordance with classical Islamic, are cases where marriages have already been consummated, going back to the previously discussed notion of haya and modesty in Islam and how marriage contracts in Islam are what gives spouses the legal rights to engage in intimate physical and emotional knowledge of one another, which is often the case with consummated marriages, thus raising the bar when it comes to divorces in such cases.[44]

Firstly, the mostly widely known type of marital dissolution in Islamic law is called the *talaq*. The talaq is the unilateral right of the husband to claim to have "given talaq" to his wife, thus divorcing her.[45] This unilateral right is given to the husband because of his aforementioned mandated job as being the main "provider" of the household, and therefore, the termination of the marriage contract would

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[41] THE QUR'AN, 2:236.
[42] *Id*.
[43] THE QUR'AN, 2:237.
[44] MUFTI MUHAMMAD IBN ADAM AL-KAWTHARI, *supra* note 17.
[45] *Infra* note 56 at CHAPTER 8. [THERE IS AN ABBRIEVATION FOR CHAPTER IN THE BLUEBOOK]

impact him the most financially.[46] Thus, this unilateral form of talaq is the choice of the husband, and can be carried out with no say from wife, whatsoever.[47]

It begins with the husband claiming to "talaq" or divorce the wife three times.[48] These are all said on separate occasions, within the interval of three months, although factions within the Hanafi school permit a husband to deliver the statement of wanting to "talaq," or divorce the wife, all at once, after which there separation is final and there no going back, though this is a highly controversial and contested take.[49] In most cases, the first statement of talaq, where the husband essentially says unto the wife "I divorce thee," there is a three month long mandated cooling period called the "*iddah*," wherein the couple do not share a bed yet remain within the same living accommodation, with the aim of this period to allow them a chance at reconciliation, so not as to truly divorce and separate.[50]

According to Qur'anic scripture, this waiting period for wives of child-bearing age is three monthly cycles, so as to ascertain if they are pregnant or not, with the Qur'an saying "Divorced women shall keep themselves in waiting for three menstrual courses and it is unlawful for them, if they believe in Allah and the Last Day, to hide whatever Allah might have created in their wombs."[51] The same verse further states that "should their husbands desire reconciliation during this time they are entitled to take them back into wedlock. Women have the same rights against their men as men have against them; but men have a degree over them [in responsibility and authority] Allah is Exalted in Might and Wise".[52]

For divorced women who are past child-bearing age, the requirement is three lunar months instead of three-monthly cycles with the Qur'an saying, "And those who no longer expect menstruation among your women - if you doubt, then their period is three months, and [also for] those who have not menstruated. And for those who are pregnant, their term is until they give birth. God creates ease for him

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[46] AMIN, *supra* note 31.
[47] *Infra* note 56 at CHAPTER 8.
[48] *Id.*
[49] *Id.*; ZIYA US SALAM, TILL TALAQ DO US PART: UNDERSTANDING TALAQ, TRIPLE TALAQ AND KHULA (2018).
[50] THE QUR'AN, 2:228.
[51] *Id.*
[52] *Id.*

who are mindful of Him."[53] The same verse, also indicates that for married women, their period of iddah after being served a talaq is until the birth of her and her husband's child, with the next verse over (65:6) mentioning that it is the husband's duty to spend on her and keep her in his continued financially care until she delivers their child.[54] At the end of the iddah, or waiting, period if the couple has reconciled, a new marriage contract must be agreed upon and signed, relating to the prophetic hadith about having to "announce marriages."[55] After the first talaq and its waiting period, a second talaq and subsequent iddah period is allowed, but after the third deliverance of "talaq" and it's iddah, the couple's divorce is irreversible and they are to be separated, their contract permanently nullified.[56]

One of the biggest aspects to note with this form of divorce proceeding, and indeed something to be emphasized in its contract to a khula proceeding, is that if the husband utilizes his right and ability of a unilateral divorce, and if it finalized after the waiting period(s), he is return the mahr or pay the deferred mahr to the wife.[57]

Another method of divorce proceedings is the *talaq al-tafwid*, or "divorce of the delegation, or relegation," named thus due this type of divorce having to have been delegated to the wife to pursue in the initial marriage contract between the husband and wife.[58] The husband can elect to delegate the right of talaq to his wife as a provision within the marriage contract, although this provision can be added later on during their marriage, if the couple elects to do so. A resulting potential divorce from this type of

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[53] THE QUR'AN, 65:4.
[54] THE QUR'AN, 65:6.
[55] *Sahih al-Jaami* 7558.
[56] BURHAN AL-DIN AL-MARGHINANI, "AL HIDAYAH", AT CHAPTER 8 (1197 CE) (*"Al Hidayah*, or "The Guidance" is a seminal work of Hanafi Jurisprudence and rising to even more prominence due to its codification into law by the British for the Muslim population in their British Indian Empire. For more information on this, see WAEL B. HALLAQ, AN SHARI'A: THEORY, PRACTICE, TRANSFORMATIONS"374-376 (2009) (detailing how instead of the intrinsic virtues of the work, despite there being plenty, it rose to prominence because it "afforded an authoritative basis and a convenient platform on which to compile the numerous commentaries that emerged throughout the centuries to come", and how it remains a "commentarial substrate as well as a *madrasa* textbook" for the Hanafi fiqh, especially in South and Central Asia).
[57] *Id*.
[58] Maha Alkhateeb, *Islamic Marriage Contracts: A Resource Guide for Legal Professionals, Advocates, Imams & Communities* 18, PEACEFUL FAMILIES PROJECT (2012), https://www.api-gbv.org/resources/islamic-marriage-contracts/.

proceeding follows much of the same rules of the aforementioned husband's unilateral talaq, wherein the union cannot be recovered once dissolved, and she does not lose her mahr.

Understood as part of this delegation is that this right is only effective depending on the type of delegation and allowance granted to the wife in this respect.[59] Some examples include the ability to initiate a divorce in the event the husband takes a second wife, or if she was only relegated the right only once, instead of three.[60] Also important to note here is that the husband's right of unilateral talaq remains in place and unaffected by the delegated talaq given to the wife.[61] In situation where the wife is given this delegation, and chooses to act upon it, desiring to separate, but happens to be with child, she must wait until the child is carried to term, the duration of which the husband must still financially support her, and that child becomes the husband's financial responsibility until the child reaches adulthood.[62] If not pregnant, she is free to collect her deferred mahr and go, but again this is only allowed in situations wherein this stipulation is present in the couple's marriage contract, otherwise being unthinkable.[63]

An additional method of initiating a divorce proceeding in traditional Islamic law is the route of *faskh*, a judicial recession of a martial contract, done by a Qadi.[64] Faskh, meaning something that is rescinded or annulled, is a form of divorce done by request of the wife, where the divorced is effected via court order, if she suffered serious harm in the marriage and/or if her marital rights were not met.[65] These offenses can range from any number of things, varying in harshness.[66] Some of these include infidelity, failure to provide financially to the wife and household, if the husband is befallen to insanity or other condition that render him unable to protect and provide for the house and its welfare, domestic abuse or cruelty inflicted upon the wife at the hands of the husband, apostasy on his part and forcing his wife to

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[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*.
[63] *Id*.
[64] MACFARLANE, *infra* note 85, at 168
[65] LYNN WELCHMAN, BEYOND THE CODE:MUSLIM FAMILY AND THE SHARI'A JUDICIARY IN THE PALESTINIAN WEST BANK, 311(2000).
[66] JAMILA HUSSAIN, ISLAM: ITS LAW AND SOCIETY, 127-129 (2011).

abandon her religious observances, and impotency or infertility on the hands of the husband.[67] Essentially a wife must present these, or other varying, conditions to an Islamic court and have a Qadi judge over her request, applying the facts of the case with the relevant interpretation of fiqh at hand.[68]

Crucial to note about the tawfid is that usually subject to the condition that in order to acquire this delegated right to divorce in the marriage contract, the wife and her wali had to have been the ones to have initiated the contract.[69] In his seminal work of Hanafi jurisprudence, *Durr-al Mukhtar*, or "The Chosen Pearl", Imam Aladdin al-Haskafi, who was the Grand Mufti of Damascus, in the late 1500's Ottoman Syria, wrote in the year 1660 that "If the man married her on condition that she will have the right to divorce herself, then this will be valid."[70] Though this seems straight forward enough, it was been expounded upon by Ibn Abiden, another Hanafi jurist from Damascus who wrote a work titled, *Radd al-Mehtar ala al-Durr al-Mukhtar*, or "Guiding the Confused to the Chosen Pearl" which was an annotated commentary of Imam al-Haskafi's original work.[71] He wrote ". . .his is subject to the condition that the woman initiates the contract of marriage with her offer by saying: 'I marry myself to you on the condition that I will have the right to divorce myself whenever I wish' and the husband says: 'I accept this.'", which is further followed by the stipulation that "however, if the husband initiated the contract of marriage, she will not have a right to divorce herself."[72] Thus if the bride-to-be or her wali were the initial offering party of the marital contract, then this right of tawfid, will be delegated to her and she can use it to unilaterally divorce.[73]

However, this is one way where a bride can acquire this power of delegation to carry out a tawfid divorce if she so desired, and that is on condition of the husband giving it to her himself with the Imam

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[67] *Id.*
[68] *Id.*
[69] *Id.* at 126-127.
[70] SAMY AYOUB, LAW, EMPIRE, AND THE SULTAN: OTTOMAN IMPERIAL AUTHORITY AND LATE HANAFI JURISPRUDENCE, 86-87 (2020); *Durr al-Mukhtar sharḥ Tanwir al-Absar*, Published by Dar al-Kutub al-Illmiyyeh (2002, Beirut, Lebanon)
[71] *Id.* at 97-100.
[72] *Radd al-Mehtar ala al-Durr al-Mukhtar*, Published by Dar al-Maarifeh, Beirut, Lebanon.
[73] *Id.*

al-Haskafi saying "The condition of its validity is having ownership (meaning by actual marriage) or referring it to the marriage… such as he says: 'If I marry you, then you are divorced' (meaning 'or you have the right to divorce yourself')".[74] If a husband doesn't explicitly stipulate this though in the marital contract, and if the wife wasn't the initial offering party who asked—with her wali—for the right to be granted, then she cannot bring forth a tawfid divorce claim.[75]

Similar to the unilateral talaq and the talaq al-tawfid, a three month waiting period is followed after a positive ruling in a faskh divorce proceeding, to ensure the wife is not with child, and again mirroring the previous two forms of divorce, if she is, then her husband must provide for her until she gives birth and then provide for their child until that child reaches legal adulthood.[76] If she is not expecting, the wife is granted her deferred mahr, and is freed from the marriage after the divorce is finalized.[77]

III. KHULA, AN OVERVIEW

A final, aforementioned and more controversial—but equally important—method of divorce proceeding present in classical Islamic law is one wherein the wife initiates the divorce, and in turn returns her mahr to her husband, called the khula. The very word for this type of divorce comes from the Arabic "Khula al-Thuab," which means "to take off one's garments," going back to the concept of spouses being garments for one another, a notion which this paper has already thoroughly elaborated on.[78] This term reflects the perceived notion that a wife figuratively removes her protective "covering" by initiating a divorce with her husband and returning her mahr to him. Unlike the previously discussed

[74] AYOUB, *supra* note 70.
[75] *Id*.
[76] Alkhateeb, *supra* note 58.
[77] *Id*.
[78] *See supra* notes 11 &19

faskh divorce, a woman who brings forth a khula proceeding doesn't need to have an adequate offense or reason to divorce her spouse, though she could very well have one.[79]

Several examples from the Qur'an and Hadith serve to illuminate the concept of khul to Muslim jurisprudential scholars. One of the most prominent hadith establishing the concept of khul states:

> Ibn `Abbas Narrated: The wife of Thabit bin Qais came to the Prophet, peace and blessings be upon him, and said, "O Allah's Messenger! I do not blame Thabit for defects in his character or his religion, but I, being a Muslim, dislike to behave in un-Islamic manner (if I remain with him)." On that Allah's Messenger said (to her), "Will you give back the garden which your husband has given you (as Mahr)?" She said, "Yes." Then the Prophet said to Thabit, "O Thabit! Accept your garden, and divorce her once."[80]

This Hadith helped in establishing the principle in various schools of Islamic jurisprudence that a wife who files for divorce utilizing a khula proceeding must unequivocally waive her right to her deferred mahr, as part of her decision of leaving the marriage for what could have, or could not been, be a serious offense on the part of the husband, as would be necessary if she had opted for a divorce via a faskh proceeding. Additionally, the Qur'an provides for an understanding of khula with it being said that:

> [i]f a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and settlement is best; though men's souls are swayed by greed. But if ye do good and practice self-restraint, God is well-acquainted with all ye do.[81]

When choosing to go through with a khula divorce, the wife must still gain consent of her husband, and has to come to some form of mutual agreement with him for the proceeds to move forward.[82] However if the husband chooses to not consent to his wife's desire for a khula divorce, the wife can approach the court asking a Qadi to inspect the matter, and get to the bottom of why the husband is withholding his consent, for he may have his reasons.[83] Courts often take the wife's side in these matters as the khula is her God-given right in their eyes and thus, can effectively deliver her a declaration of divorce via khula if the husband pettily refuses to grant consent to her desire for such a divorce, but

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[79] Ashraf Booley, *Divorce and the Law of Khul: A Type of No Fault Divorce Found within an Islamic Legal Framework*, 18 Law, Democracy and Development (2014).
[80] *Sahih al-Bukhari* 5273.
[81] THE QUR'AN, 4:148.
[82] Booley, *supra* note 79.
[83] *Id*.

this notion is hotly contested, with certain schools being more (perhaps deliberately) ambiguous on the issue.[84]

Perhaps the most important feature of all when it comes to khula divorces it the requirement that the women give something up in exchange for her freedom from the marriage, most often or not returning either all or some of her mahr. It is said that the "principal of khula requires the wife to 'buy' her freedom from the marriage usually by retuning returning the mahr, although there are arguable exceptions to this, for example when the husband ill-treats the wife and effective forces here to seek divorce." Although it is noted that this "price" need not necessarily be the wife's mahr, but could be anything agreed upon by both spouses.[85]

Rules relating to khula proceedings may differ in different contexts, given the country's laws and from which school of jurisprudence they derive their family law.[86] For example, in traditional Hanafi fiqh, once a wife has announced her intention for khula, a husband cannot withdraw consent once he's given it or "retain the condition of the option", whereas the wife can withdraw her desire for khula any time before the divorce proceeding has been finalized or can "leave the hearing before his consent is given, thus retaining her condition of option, during which she may accept or reject the khula offer."[87] Jordanian scholar Jamal Nasir continues to write "This Hanafi rule is dropped in the modern laws of Syria (Art. 96), Jordan (Art. 103), and Kuwait (Art. 113), which grant both parties the right to withdraw the khula offer before it is accepted by the other party, following thereby Hanbali and Zaidi jurists."[88] These differences will be discussed next, taking into view how select varying Muslim-majority states apply different Islamic classical jurisprudential reasonings when it comes to their family law systems.

IV. CLASSICAL APPLICATIONS OF KHULA IN MUSLIM-MAJORITY COUNTRIES TODAY

[84] *Id.*
[85] JULIA MACFARLANE, ISLAMIC DIVORCE IN NORTH AMERICA: A SHARI'A PATH IN A SECULAR SOCIETY (2012).
[86] JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS (1990).
[87] *Id.* at 123.
[88] *Id.*

Throughout different Muslim-majority societies in the world, khula has applied (and perhaps even misapplied) in numerous ways, each influenced by its history, both medieval and recent, along with jurisprudential confession of their respective populations.

1. Iraq

Massively destabilized due to the illegal American and British-led invasion of its territory in 2003, Iraq has been embroiled by civil and regional conflict since, from the rise of the radical, militant terrorist quasi-state of ISIS to serving as a battleground for the proxy war not just between America and Iran but for the sectarian Saudi-Iranian conflict as well.[89]

With the rise of Iraq's new post-war constitution, Article 29 asserts the family is the foundational unit of society and "the State shall preserve it and its religious, moral, and national values" though issues governing marital and divorces issues of the Muslim population, who form the majority, are governed by the Iraqi Personal Status Law No. 188/1959.[90] Iraqi Christian communities and the (former) Jewish minority are not subject to the Personal Status Law in totality and are instead governed by their own personal systems and the country's civil court system.[91]

Moving away from pure state law, in terms of fiqh, the Iraqi government had to come to a decision on how it was form its laws, knowing it would have to mainly employ the Jafari school of jurisprudence for its Shia population, who form the majority of Iraq's Muslim population, and the Hanafi school of jurisprudence for its substantial, albeit minority, Sunni population.[92] Solving this issue, the Iraqi Personal Status Law was "drawn from both Hanafi (Sunni) and Jafari (Shi'ite) interpretations of the

[89] Tallha Abdulrazq, *Invasion of Iraq: The original sin of the 21st century*, Al Jazeera (Mar. 20, 2018), https://www.aljazeera.com/indepth/opinion/invasion-iraq-original-sin-21st-century-180320095532244.html; Mina Al-Oraibi, *The Fight for a New Iraq*, NY Times (Nov. 5, 2019); https://www.nytimes.com/2019/11/05/opinion/iraq-protests.html?searchResultPosition=1.
[90] Iraq: Status Law and Its Amendments (1959) [Iraq], 30 December 1959, available at: https://www.refworld.org/docid/5c7664947.html.
[91] *Infra* note Anderson at 543.
[92] *Iraq: Legal History and Traditions*, The Law Library of Congress, 2004 available at https://www.loc.gov/law/help/legal-history/iraq-legal-history.pdf.

Shari'a, indicating some compromises in ideology were made to create a unified nation-state laws that could adequately adjudicate personal status." This formation of the Iraqi Personal Status Law came into being in 1959 and is still used to this day in informing Iraq family law.[93]

This interesting mélange of differing fiqh has shown to manifest itself in many interesting ways. For example, on the subject of a general divorce (which is would be the aforementioned unilateral talaq afforded to the husband), Article 39(1) of the Iraqi Personal Status Law says, "A person wishing to divorce must file a suit at the Shari'a court requesting the divorce and a ruling on it. If he is unable to resort to the court, the divorce must be registered at the court during the prescribed waiting period."[94]

What this article essentially is saying that a husband must go to a court to divorce his wife and do so in front of Qadi, something not found in traditional Hanafi fiqh, and that if a husband cannot do so, he must go to the court and during the iddah period to recount that it is happening/has been completed and he has divorced his wife.[95] Speaking to this law, from a jurisprudential basis it has been said "[i]t is clear that these provisions as a whole constitute a major departure from accepted Sunni (and particularly Hanafi) doctrine, but fall considerably short of the Ja'fari insistence that only repudiations [talaqs] which conform to a strictly prescribed form shall be legally effective."[96] This provision in the Iraqi Personal Status Law examined as a compromise between both the Shia Jafari school of jurisprudence and the Sunni Hanafi school with the first part of the article, the main requirement, an appeasement to the Jafari fiqh, the school with the most following amongst the Iraqi population, because of the Jafari school requires a unilateral talaq to happen in front of a Qadi as well, and is an entire court ordeal, with there being two "just men" acting as witnesses to the divorce.[97]

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[93] Kelsey Cherland, *Developments in Personal Status Law: Iraq and Jordan* (CMC Senior Thesis, Paper 865, 2014), at 71.
[94] *Supra* note 90.
[95] *See supra* note 56 at CHAPTER 8.
[96] J.N.D. Anderson, *A Law of Personal Status for Iraq*, International and Comparative Law Quarterly, 9 (October 1960), 542-563, at 554.
[97] Imam Khomeini, *Tawḍiḥ al-Masaʾil*, vol. 2, at 518-522.

Contrasted with the Hanafi school, where the man can simply divorce his wife at his own accord, not having to do so formally in front of any witnesses, a Qadi, or any sort of formal Islamic court system, part two of the article serves as an apparatus for which this method can be employed, allowing to the husband that "if he cannot take the matter to court, then he must register the repudiation during the course of the 'idda [waiting] period", meaning a Hanafite man can divorce his wife at home, delivering her a talaq, and going to the court later to formalize it.[98]

In the Jafari fiqh, the predominant fiqh of Shia Islam, followed Twelver Shias, deals with khula marriages by maintain it is necessary that the wife no longer love the husband, and seeks out such a divorce out of fear for falling into adultery with another while she is still legally married to him.[99] Similar to the Hanafi school, proceedings for a khula divorce must be done in front of a Qadi, and involves a woman giving up her dowry or something of equal value, or similarly thereof, depending on the agreement reached upon by the two spouses.[100] These two schools of jurisprudence find common ground for this in the Iraqi Personal Status Law, which states the conditions of a khula divorce proceedings in Article 46 stating in 46(3) "The husband can divorce his wife through khul' in return for the payment of compensation be him and such compensation could be more or less than her dowry," essentially mandating the wife to return her mahr or something of its value to compensate the husband.[101]

Moreover, the first prong of the article, 46(1) states "Khul' [khula] is to sever the bond of marriage by pronouncing the formula of khul' or words of the same meaning. It is to be carried out before the judge through an offer and an acceptance taking into consideration the provisions of article 39 of this law," which again helps find common ground between both the Jafari fiqh and the Hanafi fiqh, a remarkable feat given the two schools are not even from the same sect of the faith.[102] The only problem with the wording of 46(1) would be the including the of taking of provision from article 39 which could

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[98] *See supra* note 56 at CHAPTER 8.
[99] Imam Khomeini, *Explanation of Matters (Muhashi)*, vol. 2, p. 529, 533 (2003).
[100] *Id*.
[101] *Iraqi Personal Code*.
[102] *Id.*

serve to “open[s] the door to a khul' which is itself effected extra-judicially, where recourse to a court was for any reason impracticable, provided it is registered in court before the expiry of the 'idda period”, throwing traditional fiqh for a loop, being a very drastic departure from the norms of khula since, as discussed, all khula proceedings, in both Hanafi and Jafari doctrines of jurisprudence must be brought before a Qadi, thus done so judicially.[103]

2. Pakistan

Founded on the very name of Islam in 1947 as a result of the bloody partition of British India, Pakistan has a long history of Islam with its southernmost province of Sindh being incorporated in the Arab Umayyad Caliphate after the conquest of Mohammed Bin Qasim as early as 712 AD, and the rest of its modern day territory coming into the faith with the Arab conquest of Persia (of which the modern Pakistani provinces of Baluchistan and Khyber Pakhtunkhwa were an integral part).[104] This initial spread of the faith was later imbued later in the region’s history, by the Ghaznavids and various other Persianate Turko-Afghan dynasties who spread Hanafi Sunni Islam, by way of both Sufi missionaries and military conquest, deep into the heart of the northern Indian Subcontinent.[105]

In Pakistani society today, religion and politics play an inextricable role from one another, with the country’s official name being “The Islamic Republic of Pakistan.”[106] Being a predominately Hanafi country, most Islamic legal decisions in the country are carried out according to the Hanafi school of Jurisprudence. Discussing the role of talaq and khula in the family law of Pakistan today, is a tedious business, due to the various differences of opinion, or *ikhtilaf*, on many issues within the Hanafi fiqh, but a general outline can be made.

Before delving into the fiqh from which Pakistan’s family law derives, it is important to note the history and nature of the country’s system in general. The Pakistani legal system is based on the common

[103] Anderson, *supra* note 96 at 556.
[104] DR. Y P SINGH, ISLAM IN INDIA AND PAKISTAN – A RELIGIOUS HISTORY, AT CHAPTER 5 (2016).
[105] *Id*.
[106] *Id*.

law of England and Wales and, of course, classical Islamic law.[107] The common law aspect of Pakistan's legal system, largely influencing the country's commercial and more secular laws, is due in large part of its former status an integral part of British India for nearly two centuries and later a British dominion and Commonwealth realm until its inception as an Islamic Republic in 1956.[108] The Islamic law portion of the country's legal system has traditionally always influenced personal status, family, and has, in more recent times, seen an increase in areas such as criminal law as well.[109]

At the time of the 1947 partition, the newly founded Pakistani state inherited various British Indian legal frameworks that governed personal status laws for South Asian Muslims.[110] One such of these laws was the Dissolution of Muslim Marriages Act, 1939, or the DMMA, which afforded Muslim women in pre-partition South Asia the power to divorce their husbands for various reasons ranging from long-term imprisonment to failure to perform his duties as a good Muslim husband.[111] This legislation however, failed to completely empower South Asian Muslim women because the nature of the divorce claim had to be primarily fault based wherein the wife had to prove her grievances, a difficult task when most the alleged abuse and/or neglect happened inside the home and testimony was scant.[112] Most interesting about the DMMA was that it was a significant departure from the traditional Hanafi framework that had traditionally defined almost all forms of Islamic legal jurisprudence for Sunnis in South Asia, a concept that would later reverberate with the nascent Pakistani state and its legal system.[113]

So in the place of Hanafi fiqh, the DMMA instead is based largely on the Maliki school, and deliberately so, in order to give Muslim women in British India more leeway in terms of divorce.[114] This was done due to widespread British evangelism in South Asia that was converting divorced Muslim

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[107] Herbert Liebesny, *English Common Law and Islamic Law in the Middle East and South Asia: Religious Influences and Secularization*, 34 CLEV. ST. L. REV. 19 (1986); *Pakistan Legal System* at https://www.globalsecurity.org/military/world/pakistan/legal-system.htm.
[108] *Id*. at 20, 25.
[109] *Id*. at 29.
[110] Liebesny, *supra* note 108.
[111] Muhammad Munir, *The Law of Khul' in Islamic Law and the Legal System of Pakistan*, 2 LUMS L.J. 33 (2015).
[112] *Id*.
[113] *Id*.
[114] *Id*.

women to Christianity at alarming rates due to their disenchant with Islamic marital laws in the face of being unilaterally divorced by their husbands[115]. One such example of this is Section 2(i) of the DMMA which suddenly allowed a South Asian Muslim woman to obtain a divorce if her husband has been missing for a period of four years.[116] It has been written that this "period of four years is based on the doctrine of the Maliki School of Islamic jurisprudence relating to the missing husband" and that "according the Hanafi School of thought, the wife of the missing husband cannot get separation until the people of the same age of her husband are alive . . . ."[117] This serves to show how the Maliki school of jurisprudence was more lenient with woman in many aspects and by adopting Maliki fiqh for a largely Hanafi population and related measures, though perhaps still rough around the edges in aspects, was revolutionary and gave Muslim woman more options to ease their burdens.[118]

Now when discussing how divorce law has come to be shaped in modern-day Pakistan, especially in relation how the khula proceeding is applied, one must look at the cases coming out of the Supreme Court of Pakistan. Legal scholar of the Sharia and academic, Dr. Muhammad Munir, a Pakistani, writes that by "seemingly resorting to ijtihad," the Supreme Court of Pakistan has claimed the "right to independent interpretation of the Qur'ān and Sunnah, where necessary" and that "their right to differ from the doctrines of traditionally authoritative legal texts of the various schools of thought in Islam, especially the Ḥanafi" and have thus "mainly relied on the Qur'ān and the Sunnah and not on the opinions of jurisprudents."[119] This is highly important when discussing the jurisprudential reasoning employed by the Pakistani Supreme Court on cases brought before it, due to there being another source besides the "just"

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[115] Yasar Arafat, *The Dissolution Of Muslim Marriage Act, 1939 May Provide More Rights To Women Of Subcontinent If Applied According To True Doctrine Of Maliki School Of Islamic Jurisprudence: An Overview*, J Appl Soc Sci (2015).
[116] THE DISSOLUTION OF MUSLIM MARRIAGESACT, 1939, section 2(i), available at http://chdslsa.gov.in/right_menu/act/pdf/muslim.pdf.
[117] Arafat, *supra* note 115, at 64-65.
[118] *Id*.
[119] Munir, *supra* note 111, at 58-59

the Quran and Sunnah in coming to their decision, and this is section 2 of the 1991 "Enforcement of Sharia Act."[120] Dr. Munir writes

> The explanation provided for section 2 states that: 'While interpreting and explaining the Shari'ah the recognized principles of interpretation and explanation of the Holy Qur'ān and Sunnah shall be followed and the expositions and opinions of recognized jurists of Islam belonging to prevalent Islamic schools of jurisprudence may be taken into consideration'.[121]

This is major because, similar to what happened with the case of DMMA, the Pakistani Supreme Court showed itself free to pick and choose the most sensible rule for the given case from any of the Islamic schools of jurisprudence, be it Shafi, Maliki, Hanafi, or otherwise.[122]

One prominent case from the Pakistani Supreme Court, *Khurshid Bibi v. Muhammad Amin*, addressed the issue of khula divorce proceedings, honing in on the issue of the husband's consent to it, amongst other things. In the case Khurshid Bibi was married to Muhammad Amin, who took a second wife upon which, Khurshid Bibi demanded separate living conditions, which Amin promised but failed to deliver to her. Khurshid Bibi brought a khula suit to dissolve their marriage.[123] In the case, the Supreme Court of Pakistan utilized the Maliki fiqh's ambiguous stance on the husband's denial of consent to the divorce proceedings.[124] Elucidating on the Court's favoring the Maliki fiqh in this case in place of Pakistan's more traditional Hanafi fiqh, Dr. Munir speaks of how that in the majority of schools of Islamic jurisprudence refuse to accept a khula proceeding where the husband hasn't consented and a sole request from the wife may not be enough to grant her request for divorce, but "on the other hand, Maliki jurists argue that the decree of the arbitrators is valid whether they order separation or union between the two, and it neither requires the consent of the husband nor of the wife."[125] Thus, in the case, the Supreme Court of Pakistan eventually rules, influenced by the Maliki fiqh, that the consent of the husband is not a mandatory requirement in order for a wife to be granted a khula divorce.[126] If the Qadi determines that the

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[120] *Id*.; ENFORCEMENT OF SHARI'AH ACT. 1991 ACT X OF 1991 An Act for the enforcement of Shari'ah, Section 2, available at http://www.pakistani.org/pakistan/legislation/1991/actXof1991.html.
[121] *Id*.
[122] *Id*.
[123] *Khurshid Bibi v. Muhammad Amin* (1967) PLD SC 97.
[124] *Id*.
[125] Munir, *supra* note 111, at 62.
[126] *Id*.

couple cannot live together peacefully, genuinely performing their marital duties to each other, and if the wife has agreed to return her mahr or provide some form of compensation, the khula proceeding is valid regardless of his consent.[127]

This is but one example of the literal ocean of Pakistani caselaw relating to the cherry-picking of various rules relating to personal status laws in the country from different schools of jurisprudence, often done to make the most sensible choice. Thus, we see in Pakistan that some Muslim societies can do this, and their rules of fiqh, at least on a state level, are not limited to one or two schools of fiqh.

3. Saudi Arabia

Heading over the birthplace of the faith, the Arabian peninsula, an interesting case study in the application is Saudi Arabia, one of the two "purely Sharia" legal systems in the world, after that of Iran, though both incorporate far more than simply "the Sharia" into their legal systems than they would otherwise claim.[128] Dominated by the a hardline Hanbali school of Islamic jurisprudence, the Kingdom of Saudi Arabia is known for its ardent following of the puritanical, often extremely conservative Salafist mode of thinking when it comes to Islamic law, a notion manifested throughout the country, though curtailed in recent years due to minor reforms.[129]

In order to understand how the Saudi state and its religious apparatuses use the Hanbali fiqh to dictate its decisions on law and legislature in the country claimed to be based on "classical Islamic law," one must look at the institutionalization of the Ulama and how the co-opting of the Salafist (also known as Wahabi), Hanbali scholars of the central Arabian peninsula (or the Najd), by the Saudi monarchy built this "Hanbali-Wahabi corporation."[130] The former religiously validated the latter's right to rule as an absolute monarch through various fatwas declaring that the true ruler the one who could maintain order and avoid civil conflict, and in turn, the latter elevated the Ulama's status to be the country's solely

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[127] *Id*.
[128] The Basic System of Governance, Royal Order No. A/90 (Article 1).
[129] NABIL MOULINE, THE CLERICS OF ISLAM: RELIGIOUS AUTHORITY AND POLITICAL POWER IN SAUDI ARABIA, CHAPTER 6 (2014).
[130] *Id*. at 146.

accepted religious mouthpiece, dispensing their version of the faith—a strict and unyielding one at that—across the country and wherever else Saudi influence may find itself.[131] Nabil Mouline says this was done "in keeping with a clerical habits that had been codified in Islamic lands since the High Middle Ages, the ulama simply confirmed the decisions of the factions that was most capable of ensuring and maintaining peace and power."[132]

In example of the Hanbali Ulama in Saudi using their power in relation to classical Islamic law lies, in their sanctifying their roles of preservers of the Royal House due to the patronage it provided them.[133] Due to bitter fights about secession and the threats underlying all talk of who held power in the country, and in trying to keep from away from civil war and fratricide the Salafist Hanbali ulama of the then still relatively recent Kingdom of Saudi Arabia agreed that King Saud would be the unquestioned sovereign of the Kingdom and Prince Faysal would be the Prime Minister with free management of the Kingdom.[134] Though they cited classical Islamic reasons such as keeping away from "fitna (grave discord), fawda (anarchy), al-maslaha al-'amma (the general interest), and al darar 'ala al-bilad wa al-'ibad (harm to the country and believers)," Mouline further states that that "to put it plainly, no text in the Hanbali-Wahhabi tradition or indeed the entire Sunni corpus authorized the Ulama to act in this way or make this decision."[135] Thus going to show a minor, but not infrequent, trend of spearheading completely new rulings in Islamic law done enacted by Saudi Ulama, manifesting itself in talaq laws throughout the country.

Both the exaltation of the of the Hanbali fiqh, along with the rise and power of the school's more Puritan leaning Ulama, contribute greatly to the trend of religious conservatism in the country. Thus, it has been said that in Saudi Arabia, "marriage law is very different than other Middle Eastern nations because of the characteristic power of 'body of Senior Ulema's' in any issue related to family law or any

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[131] *Id*.
[132] *Id*. at 121-122.
[133] *Id*.
[134] *Id*.
[135] *Id*.

type of law," affecting all personal status laws in the kingdom from marriage to divorce to custody.[136] Additionally, issues related to the continued infiltration of Bedouin Arabian cultural and traditional conventions in the way Islamic family law is carried out throughout the country, especially in terms of mahrs, which various tribes competitively raise against each other's suitors, viewing their own daughters as the most valuable and therefore worth more.[137] This profiteering of the mahr is not sanctioned by classical Islamic law, and is culturally imbued by customary Bedouin practices, raised even more issues in cases of talaq, especially with khul proceeds wherein the wife has forfeit her mahr to leave the marriage.[138]

A study out of Makkah in 2018 stated that "With 51 cases in the last two years, the Makkah province came first in the Kingdom in the number of khula incidents, where divorce is granted on the request of women by courts" showing the high trend of khula divorce rates in the country.[139] It is additionally stated that "that most husbands usually object to the khula verdicts at the Courts of Appeal but said the appeal judges often ignore their objections and approve the khula deeds" going to show that Hanbali ulama that dominate the Saudi legal scene, refuse to let cultural patriarchal objects get in the way of the purely classical teachings of Islam which grant the wife this right.[140]

Largely, the Hanbali fiqh provides a layout that is very much similar to the other four schools of Sunni jurisprudence in terms of divorce and khula.[141] One minor example of differing fiqh is if a women brings forth a khula proceeding while her husband is terminally ill.[142] If a wife wishes to divorce her husband this way, it is said that "Ibn Hanbal does not think that she inherits from him. [Imam] Shafi shares Ibn Hanbals view; Malik does not."[143] Using this for example, a woman in Saudi Arabia would not

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[136] Rakan Alharbi, *Comparative Analysis of Marriage under Islamic Law between Saudi Arabia and Egypt*, Part II (2014).
[137] *Id*.
[138] *Id*.
[139] Saudi Gazette Report, "Makkah tops other Saudi Regions in Khula Divorce" SAUDI GAZETTE (Dec. 10, 2018), http://saudigazette.com.sa/article/549923.
[140] *Id*.
[141] IBN RAWYAH, AHMAD IBN MUHAMMAD IBN HANBAL & SUSAN A. SPEKTORSKY, CHAPTERS ON MARRIAGE AND DIVORCE: RESPONSES OF IBN HANBAL AND IBN RAHWAY,52 (1993).
[142] *Id*.
[143] *Id*.

inherit anything from her terminally ill husband if she seeks a khula divorce during his illness, whereas a woman in Pakistan which, as discussed, largely applies Maliki fiqh as the preferred school of jurisprudence for family law and personal status related issues.

Another marked difference relating to khula proceedings is just exactly the wife must offer up as ransom in exchange for her freedom from the marriage. As mentioned, most notably, the wife gives back all or part of her deferred mahr to her husband.[144] In countries that employ Hanafi legal rulings for its Muslim communities such as Egypt or Jordan, this could mean that, in an instance where the wife was at fault, it is considered "undesirable for the husband to take from her more than he had given her as mahr although it is permissible to take extra."[145] In situations where the husband is at fault, however, he can legally take his compensation, but it considered *makhruh*, or severely disliked.[146] Contrast this with Saudi Arabia, where the prevailing Hanbali fiqh states that the question of "whether the husband could take from his wife more than he had given her as dower [mahr], or less" is answered by declaration that "Ibn Hanbal disapproves of a husband's taking back more than he had originally gave his wife; he says, for example, 'He should not take from her more than he gave her.'"[147]

V. ADVANTAGES AND DISADVANTAGES OF KHULA DIVORCE PROCEEDINGS

In many scenarios, the concept of khula can be seen as an unfettering tool of female empowerment, allowing for a women to apply her own agency in a situation context where she may have none to begin with, or where it is systematically deprived from her, as is the case in many societies that claim to follow classical Islamic jurisprudence.[148] Additionally, however, in certain contexts, the Khula can be seen as doubly oppressive due to a woman having to essentially "buy her freedom" though this has

[144] BURHAN AL-DIN AL-MARGHINANI, *supra* note 56 at CHAPTER 8
[145] *Id*.
[146] *Id*.
[147] IBN RAWYAH, AHMAD IBN MUHAMMAD IBN HANBAL & SPEKTORSKY, *supra* note 141.
[148] Booley, *supra* note 79 at 54-56.

been shown to be flexible depending on which school of jurisprudence is involvement as discussed with the issues of husbands not consenting to a khula between Maliki and Hanafi schools.[149]

On the notion of female empowerment, khula proceedings were especially helpful in instances of domestic abuse and marital violence where one of the advantages of the khula proceeding was the aforementioned process of which a wife could approach a Qadi in an Islamic court—which women traditionally had easy access too as it was seen as their God-given legal right—who would then "assign officials of the court to investigate the abuse or other harm that made these women's marriage unbearable. If abuse was proven, the court had the power to dissolve the marriage, as it often did."[150]

One example out of Egypt—a state which primarily uses the Hanafi fiqh in making its family law—focuses on the application of khula proceedings that have not only been used by Muslim women, but the Egyptian Christian women from the Coptic Orthodox Church as well, who resort to Egypt's Muslim personal status laws to be granted khula divorces, done by converting from the denomination of her husband.[151] Using it as an "opportunity for the empowerment of Christin women vis-à-vis the traditional and patriarchal institutions within the community," many Egyptian Christian women use it to threaten husbands to divorce them, dignity intact, else they convert to a different denomination of Christianity, and use the Sharia based Egyptian personal status laws to grant them a khula divorce.[152]

When speaking of the downsides of khula, Ashraf Booley argues that, although it is true that a khula divorce option could "act as a safety valve in cases where the woman is unhappy in her marriage or where there is abuse of a physical or emotional nature," as mentioned, women who are from more poverty stricken regions of the world and are extremely, if not entirely, dependent on the mahr and its maintenance from the husband, and thus cannot afford to exercise option of divorce proceeding.[153] Booley

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[149] Munir, *supra* note 111 at 62.
[150] WAEL B. HALLAQ, "AN INTRODUCTION TO ISLAMIC LAW" (2009).
[151] YUKSEL SEZGIN, HUMAN RIGHTS UNDER STATE-ENFORCED RELIGIOUS FAMILY LAWS IN ISRAEL EGYPT AND INDIA, at 54 (2013).
[152] *Id*.
[153] BOOLEY, *supra* note 79, at 54-56.

additionally states that "it may also be argued that the khul divorce would only favour those who have financial means and are not entirely dependent on their husbands."[154]

To examine these claims, we can use the tools of "fiqh-finding" to examine if any the requisite available school of jurisprudence would have a provision to see how much the wife would owe the husband upon her release from the marriage, as seen discussed.[155] A wife may owe more or less depending who is at fault, and the husband, if found to be truly at fault, can be pressured (though his right not legally revoked) not take any compensation or ransom from the wife, a stance pushed by the Hanafi school and used commonly.[156]

VI. CONCLUSION

Marriage and divorce, by virtue, are tricky and ambiguous areas in many legal across the world, be they secular or divine, or a combination of both. In the Sharia, much like the rest of the world, issues of personal status are filled with massive field of grey, with nothing ever being black and white. When given the issue of divorce it is easy to see how polarizing classical Islamic law can be to the unknowing individual who sees only a husband having the sole right of unilateral divorce and the wife, having the option of khula, has several conditions placed upon her if she seeks to leave a marriage she no longer wishes to remain in, which is not wholly incorrect. However, by looking throughout the vast repository that classical Islamic law has to offer, one can find loopholes and restrictions galore, depending on the given circumstance and given the chosen school of jurisprudence.

In Iraq, one can see how official personal status laws are made mixing the Sunni Hanafi school with the Shia Jafari school, in an attempt to harmonize the legal codes of conduct between the two largest groups of Muslims in the country.[157] In divorce proceedings, Iraqi Shia Muslim men must follow the Jafari school and have witnesses present at the time of delivering a "talaq", whereas an Iraqi Sunni

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[154] *Id*.
[155] *See supra* Part IV.2 (relating to the example of the Pakistani Supreme Court looking at possible options for a solution at various schools of fiqh and how this can be beneficial in many scenarios).
[156] *Supra* note 56 at CHAPTER 8.
[157] *See supra* Part IV.1.

Muslim man, who are not burdened by that require and simply report to the official court that he has delivered a talaq onto his wife, in line with Hanafi doctrine.[158] Since khula proceedings in both schools are more in less the same, whereas men from both schools must go to a Qadi if a wife brings forth a khula claim, the work to harmonize them has been easier.[159] By giving each group room to maneuver based on this split jurisprudential influence on the Iraqi Personal Status Law, Iraq shows a unique example of state crafted legislature intended to strike a nonsectarian peace, though the grim reality on the ground in Iraq in recent years may fall tragically short of this aim, and though at times Islamic-influenced Iraqi codes tend to favor the Jafari Shia school, who make up the majority in Republic of Iraq.[160]

In Pakistan, we saw how the state judiciary system can flexible with its choice and application of various schools of Islamic classical jurisprudence available at its disposal.[161] Despite being an overwhelmingly devout Hanafi country, Pakistan has repeatedly applied Maliki fiqh in its judicial arrangements and opinions, citing that it is often more fair to the woman, as was seen in the landmark case, *Khurshid Bibi v. Muhammad Amin*, brought before the Pakistani Supreme Court about the issue of mutual consent in a khula case.[162] With the example of the pre-partition 1939 Dissolution of Muslim Marriages Act, we saw a precursor to this action where the ulama of British India approbated themselves to the Maliki fiqh to overcome a social issue relating to talaq that was affecting Muslim women, a notion of thinking inherited by the Pakistani state. By employing Maliki reasoning with its more lax loopholes when it comes to a husband's consent in a khula proceeding, Pakistan serves as an example dispelling widely held stereotypes that following a singular fiqh is set in stone for Muslims, and they may not veer from it, lest they be "cherry-picking."[163] We see here though that, by choosing and applying one school of fiqh's ruling or stance on an issue over another, then that is indeed permitted, if not encouraged to be done to set a precedent that will widely benefit all, and reach a fairer conclusion of justice.

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[158] *Id*.
[159] *Id*.
[160] *Id*.
[161] *See supra* Part IV.2.
[162] *Id*.
[163] *Id*.

Examining Saudi Arabia, one can see how the Salafist Ulama of the Hanbali school of the country rule the country's religious scene with a royal mandate.[164] Although several Bedouin customary practices can influence the way the concept of the mahr operates in segments of Saudi society, and in turn affecting khula proceedings, the Hanbali ulama, though unrelentingly strict in their daily practice and judgements of Islamic law, prove to follow the pure Islamic law on the application of khula, ignoring the objections of husbands who do not wish to the wife to divorce them.[165]

Lastly, when dealing with whether or not khula can be a tool of empowerment or if it is another tool of oppression, one cannot say so definitively—and that is the entire point. Factors such as country, culture, socioeconomic status, history, and time effect the application of the khula, which is a tool in the hand that can use it, yet value-less in the hand that cannot. In modern-day Egypt we see it being used by Coptic Christian women who have no other way to emancipate themselves from undesirable marriages.[166] In poorer areas of the Muslim world, women simply cannot do without their mahr, and thus are more prone to forgo or renege a khula proceeding, unless an agreement on keeping the mahr, whole or in part, can be met with the husband, options for which are repletely provided in the various schools of Islamic law.[167] Going back to the premier point, Islamic legal jurisprudence is fraught with "grey" areas and there is no hard set dichotomy of good or bad, or useful or useless. Everything in the various schools of Islamic jurisprudence thing can be used, reused, and repurposed for the individual educated in his or her options to which the Sharia avails itself, and that both is the purpose and the inducement of it all.

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[164] *See supra* Part IV.3.
[165] *Id*.
[166] *See supra* Part V.
[167] *Id*.