



BRILL

## ***Khul'*: Local Contours of a Global Phenomenon**

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### **Abstract**

This special issue of *Islamic Law and Society* takes a close look at contemporary manifestations of an Islamic divorce procedure known as *khul'*. Studying *khul'* is not an easy matter, in large part because it is not exactly clear what *khul'* is. Is *khul'* consensual or non-consensual, judicial or extrajudicial, fault or no-fault based? Does *khul'* result in *ṭalāq* (unilateral repudiation by a husband), or is it an entirely different form of divorce? Is *khul'* initiated by wives or by husbands? As we will explain below, the answer to all of these questions is “yes,” as *khul'* is all of these things.

### **Keywords**

*khul'* – Islamic divorce – judges – courts – gender – rights

This theme issue developed out of a panel at the 2016 meeting of the American Anthropological Association, where four of the authors (Van Eijk, Sonneveld, Stiles, and Vatuk) presented papers resembling the articles published here. We convened the panel after discussion about the significant variations we observed in the way *khul'* is understood and utilized by Muslims in different parts of the world. We realized that, despite a growing body of socio-legal work on Islamic law in practice, there are few in-depth comparative studies of how Islamic divorce differs in interpretation and practice from place to place. A project on the local contours of *khul'* seemed like an excellent start to a more comparative study of Islamic law in action.

The purpose of the issue is thus to explore the living practice of *khul'* in contemporary Muslim communities. Our approach is anthropological: We seek to understand *khul'* from the perspective of those who use it and live it, laypeople and legal practitioners alike. To this end, all of the authors have combined ethnographic and document-based research. We consider *khul'* in Muslim majority Zanzibar, Egypt, Indonesia, and Morocco, in the large Muslim minority community of India, and in small Muslim minority communities in Germany and the Netherlands. All of the articles consider *khul'* in Sunni contexts.

We find the historical sources for *khul'* in the Qur'an and in the *ḥadīth* literature. The primary verse in the Qur'an that serves as the basis for *khul'* is 2:229:

Divorce may be pronounced twice. Then they [women] are to be retained in a rightful manner or released with kindness. And it is unlawful for you [men] to take back anything of what you have given them, unless both parties fear that they cannot comply with Allah's bounds. If you fear that they cannot do that, then it is no offence if the woman ransoms herself. Those are the bounds set by Allah. Do not transgress them. Those who transgress the bounds set by Allah are the wrongdoers (Qur'an, verse 2:229 in Fakhry 2000: 41).

A well-established *ḥadīth* involving a woman known as either Habiba or Jamila is also a foundational source for *khul'*. The authoritative *ḥadīth* collections of al-Bukhari, Muslim, Abu Dawud, al-Tirmidhi, al-Nasa'i, and Ibn Maja all mention this *ḥadīth* (Zantout 2006: 3). The al-Bukhari version follows:

The wife of Thabit b. Qays b. Shammas [viz., Habiba] came to the Messenger, peace be upon him, and said: "O Messenger of God, I do not hate Thabit either because of his faith or his nature, except that I fear unbelief." The Messenger of God, peace be upon him, said: "Will you give back his orchard?" She said "Yes" and she gave it back to him and he [viz., the Prophet] ordered him and so he [viz., Thabit] separated from her" (al-Bukhari 1868: 266).

According to classical writings of the four schools of Sunni law, *khul'* requires the consent of the husband, despite the fact that Habiba's husband was not consulted in this *ḥadīth*.<sup>1</sup> In practice, Muslim women have few possibilities to

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<sup>1</sup> Classical Shi'a jurists generally agreed that a husband must consent to his wife's *khul'* request (Tucker 2008: 99).

end their marriages without the husband's consent and without the need to show cause in court. In the twentieth century, the introduction of non-consensual, no-fault divorce has often been proposed as a solution to situations in which a husband is unwilling to give his wife the *ṭalāq* (divorce by repudiation) that she desires (see Welchman 2007). In January 2000, the Egyptian government announced the introduction of a procedural law on personal status (Law no.1/2000) that does exactly this. Of the 400 clauses in the new law, one contains a provision establishing *khul'* as a non-consensual divorce, that is to say, a divorce in which the marriage is dissolved without the husband's consent. The law was the first of the new millennium, and many regarded it as a sign of the Egyptian government's desire to improve the rights of Muslim women. However, the introduction of the law sent shockwaves through Egyptian society. Opponents of the law, including religious scholars, journalists, members of parliament, and laypeople, criticized it on numerous grounds (Sonneveld 2012). Indeed, the provision regarding *khul'* was so controversial that the Egyptian media soon labeled the law as the "*khul'* law." Despite the controversy inside Egypt, scholars of Islamic law as well as national and international organizations advocating for the rights of Muslim women hailed the introduction of non-consensual *khul'* in Egypt as a model, and the law has served as an example for legislators throughout the region, notably in Jordan, Gaza, Morocco, Algeria, and Qatar (Welchman 2007: 116-119).

As Sonneveld (this volume) argues, there is something puzzling about the fact that although Pakistan introduced non-consensual *khul'* three decades before Egypt did, this highly innovative Islamic law reform has not received much academic attention outside of the field of South Asian studies (see Akbar Warraich and Balchin 1998; Carroll 1996; Holden 2012; Lau 2007).<sup>2</sup> This neglect may be because scholars interested in Muslim women's legal rights usually focus on one country or one region, with the result that developments in other parts of the world may go unnoticed. In socio-legal scholarship on Islamic law, and in the more narrow study of *khul'* and Muslim women's rights within family law, most research has focused on the Middle East and North Africa, from both

2 In the 1960s, Pakistan was the first country to grant Muslim women a unilateral form of *khul'* divorce in which the consent of the husband is not a prerequisite to make the divorce legally binding. It must be noted, however, that until 2006 the basic issue debated in case law was whether a woman seeking *khul'* must provide proof of her inability to live with her husband (Akbar Warraich and Balchin 1998: 201). In 2006, the Pakistan Supreme Court ruled that the *khul'* request itself is demonstrative of the wife's aversion to her husband. This ruling implies that a court can no longer refuse a *khul'* request to a wife (Lau 2007: 464). Since the implementation of the *khul'* law in 2000, Egyptian women in *khul'* cases have not been required to prove to the court that they are no longer able to live with their husbands; it is sufficient that they state in front of a judge that they hate living with their husbands.

historical (i.e., Admiral 2016; Dahlgren 2010; Messick 1996; Powers 2003, 2006; Sonbol 1996; Tucker 1998; Zilfi 1997) and contemporary perspectives (i.e., Carlisle 2017; Van Eijk 2016; Lindbekk 2013; Al-Sharmani 2017; Sonneveld 2012; Voorhoeve 2014; Welchman 2007). This regional focus on the Middle East and North Africa is limiting, inasmuch as developments that are characterized as innovative in this region seem to have precedents elsewhere in Africa and Asia, as shown by Stiles on Zanzibar (2009; this volume), Van Huis on Indonesia (this volume), and Holden on Pakistan (2012). Furthermore, there has been little research on *khul'* in countries in which Muslims form a minority (but see Bano 2012; Korteweg and Selby 2012; Vatuk 2008). In this volume, we move away from a regional approach to an approach that compares the understanding and utilization of *khul'* in diverse cultural, religious, and legal contexts in Asia, Africa, and Europe. A number of key themes and fruitful points for comparison emerge from this approach.

The first theme that emerges is the question of who has the authority to interpret and apply the *shar'ā*, and whether such authorities should practice *ijtihād* (independent legal reasoning) or *taqlīd* (adherence to earlier positions) in decisions about how *khul'* should be understood and utilized. In his article, Mahmoud Jaraba shows that Muslim religious authority is highly contested in Germany, and that religious leaders, family members, and clans all claim an authoritative position in interpreting *khul'*. Religious leaders typically practice either *taqlīd* or *fiqh al-aqallīyyāt al-muslima* (Muslim minority jurisprudence). Jaraba finds that about half of the religious leaders who receive *khul'* requests have not had a religious education, but that they nevertheless interpret and apply *shar'ā*. In contemporary Zanzibar, *kadhīs* (<Ar. *qāḍī*) are state-appointed Islamic judges, and most have had a formal religious education. There is no family law code in Zanzibar, and *kadhīs* have authority to interpret and apply the law in personal status matters for Muslims (Stiles, this volume). In the Muslim minority context of the Netherlands (Van Eijk, this volume), even non-Muslim judges occasionally invoke *khul'* as a way of settling a marital dispute, and in doing so are both interpreting and applying the teachings of Islamic law. Indeed, according to Van Eijk, Dutch civil court judges may force husbands to pronounce the *ṭalāq* (divorce) in cases in which a woman has successfully obtained a civil divorce but is unable to obtain a religious one. The situation is different in Egypt and Morocco (Sonneveld, this volume) and in Indonesia (Van Huis, this volume), where there is a separation between religious scholars and legislators who interpret religious principles and judges who apply those principles.<sup>3</sup>

3 In Indonesia, religious (state) court judges are trained at State Islamic Universities in both statutory Islamic family law and *fiqh* (at the faculty of *shar'ā* and law [*syariah dan hukum*]).

Our research shows that the issue that has provoked the most debate among those who claim authority in religious matters is the consent of the husband, which is the second theme uniting the articles. Whereas in India and Morocco the consent of the husband is necessary for a *khul'* to be valid, it appears to be irrelevant in the courthouses of Zanzibar and Egypt. A husband's consent is only occasionally required in Indonesia. Stijn Van Huis shows that there are several types of Indonesian divorce that technically end in a *khul'*. Historically, some have required a husband's consent, and some have not. In what is called a *khuluk* (< Ar. *khul'*), the wife offers compensation to the husband in return for his pronouncement of divorce. Traditionally, she cannot divorce her husband in *khuluk* without his consent. *Syiqāq* (< Ar. *shiqāq*) is a divorce petition initiated by the wife, and since it typically includes compensation for the husband, it technically becomes *khul'* and is irrevocable. A *syiqāq*-based *khul'* divorce is thus transformed into a judicial divorce that does not require the consent of the husband. If a husband refuses to accept compensation, however, *syiqāq* becomes a regular *talak* (< Ar. *ṭalāq*) divorce. In Germany, the question of the husband's consent is also complex. Jaraba finds that some religious authorities, those he calls conservatives, prohibit *khul'* without the husband's consent. Those he calls pragmatists, however, permit it. Interestingly, Jaraba notes that nearly all Egyptian religious leaders in Germany fall into the conservative camp and reject the interpretation of *khul'* as a non-consensual divorce. This is despite the fact that in 2000, the highest religious authority in Egypt, the Shaykh of al-Azhar, proclaimed that a woman's *khul'* request does not require the consent of her husband for it to be legally and religiously valid.

Two of the articles illustrate the exercise of *ijtihād* as it relates to *khul'*. In Zanzibar, Stiles reports, the Shafi'i-trained *kadhīs* (<Ar. *qāḍī*) with whom she worked do not require the consent of the husband for judicial *khul'*. In practice, it appears that *kadhīs* are exercising *ijtihād* rather than adhering to the classical Shafi'i position that a husband's consent is required. Furthermore, Stiles shows that *kadhīs* sometimes impose *khul'* on a wife as a punitive measure associated with her fault in the marital breakdown. In these cases, too, *khul'* does not require the wife's consent or desire for it. As noted, according to the 2000 personal status law, Egyptian *khul'* is a non-consensual, no-fault divorce. Egyptian women may now divorce through judicial *khul'* without the consent of their husbands. As Sonneveld's article shows (this volume), many activists have hailed this development as an example of using *ijtihād* to give Egyptian Muslim women an important tool for legal empowerment.

The third theme addressed across the five articles concerns financial matters relating to *khul'*. According to classical Islamic jurisprudence, *khul'* is a consensual divorce in which the wife compensates her husband for the separation, usually by returning some or all of her *mahr* (dower), as Habiba was required

to do in the above-mentioned foundational *ḥadīth*. The fieldwork of all contributors shows that across cultures, the practice of *khul'* consistently requires the wife to compensate her husband for the divorce. In both Indonesia and Zanzibar, colloquial terms for *khul'* in Bahasa (*tebus cerai*) and Swahili (*kununia talaka*), respectively, may be translated as “buying a divorce” (Van Huis, this volume; Stiles, this volume). Both Stiles and Van Huis identify the wife’s compensation of her husband as the defining factor that makes a divorce a *khul'*. However, we have found that the nature of the compensation varies tremendously based on local marriage norms and local interpretations of *khul'*. Often, this compensation requires the wife to return the prompt portion of her *mahr*, paid at the time of marriage, but local traditions surrounding *mahr* heavily influence the amount of the compensation (see Sonneveld and Stiles 2016). As Stiles reports (this volume), in rural Zanzibar, the entire *mahr* is often paid at the time of marriage. The compensation in *khul'* cases can thus be very high because a wife typically is expected to return the entire *mahr* – and sometimes more. *Khul'* may be less costly elsewhere, however, due to differing marital norms. Vatuk shows that in India, a wife who seeks *khul'* normally offers to waive her deferred dower. If her husband accepts the offer, no money changes hands, since the dower has rarely been paid by the time she decides to seek a divorce. As Vatuk notes, *khul'* agreements can be costly in other ways. For example, a woman may be required to give up custody of her children. Sonneveld finds that in Egypt, the registered prompt dower usually consists of a nominal sum and that *khul'* is rarely costly for women. Similarly, Van Eijk observes that in the Netherlands, the female plaintiff must pay back only a nominal amount in *khul'*. In Indonesia, according to Van Huis, recent law reforms permitting divorce on grounds of marital discord do not require any compensation, and thus are easier and less expensive for women than *khul'*.

The fourth theme our authors address is gender differences relating to the perception of *khul'*. We find that in some contexts, men view *khul'* as financially advantageous and initiate it themselves. Stiles has found that although the overall number of claimants seeking *khul'* in Zanzibari Islamic courts is extremely small, more men than women request *khul'*. Whereas Zanzibari men may view *khul'* as potentially lucrative, women view it as both costly and stigmatizing, since it is strongly associated with a wife’s responsibility for the marital strife. Similarly, in the Dutch case examined by Van Eijk, the wife in question wanted to divorce but did not request *khul'* because of financial concerns. Her husband would only agree to divorce by *khul'* to make it clear to others that it was his wife, and not he, who initiated the divorce. Vatuk has found that men in India sometimes perceive *khul'* to be to their advantage and will manipulate wives to request *khul'*. According to Sonneveld, the same

sometimes applies to men in Egypt. The Moroccan family code is unique in stipulating that if a judge determines that the husband pushed the wife into a *khul'*, the wife has the right to recover the compensation she paid.<sup>4</sup> Contemporary judges may impose *khul'* on a wife against her wishes. In the Dutch case analyzed by Van Eijk, non-Muslim judges suggested that the female plaintiff divorce through *khul'*, against her wishes. Stiles demonstrates that *kadhīs* in Zanzibar sometimes dissolve a marriage through *khul'* even if neither party requests it.

Our comparative approach challenges a number of conventional notions related to *khul'*. We find that *khul'* is not necessarily a wife-initiated divorce, but may be sought out by a husband or imposed by judges. We also find that the 'proper' definition of *khul'* is contested and debated both in Muslim majority and minority contexts, and by actors with and without a religious education. And we find that although judges who deal with *khul'* cases are usually Muslims, sometimes they are non-Muslims. We hope that our comparative effort will encourage scholars to develop more thorough and systematic comparisons of Islamic divorce and thus take the study of Islamic law in contemporary times in new directions.

### The Contributions

In the first essay in this issue, Stiles shows that in Zanzibar, *khul'* is primarily a form of judicial divorce. As noted, Zanzibari women try to avoid *khul'*, although *kadhīs* do utilize *khul'* as a fault-based divorce to dissolve a marriage when they consider a woman responsible for the marital strife. At the same time, *kadhīs* also emphasize that *khul'* is a right that a woman can use to extricate herself from divorce even when her husband is resistant. The regular use of *khul'* as a judicial tool in Zanzibar indicates that in this locale, *kadhīs* do not regard a husband's consent as a necessary condition for *khul'*. Indeed, in most court decisions that resulted in *khul'*, neither the wife nor the husband requested *khul'*. In many ways, legal practice in Zanzibar is similar to what Van Huis (this volume) describes in Indonesia prior to codification.

Van Eijk examines the use of *khul'* by civil court judges in the Netherlands. She considers *khul'* in the context of 'marital captivity,' a situation in which a

4 Instances of husbands' viewing *khul'* favorably are not unique to contemporary times: in the Ottoman period, judges investigated whether a woman's *khul'* request was made under coercion or by her own choice (Tucker, unpublished paper). In Marinid Morocco (mid-thirteenth to the mid-fifteenth century), women who divorced through *khul'* would attempt to establish the grounds of harm retroactively in order to recover that part of the dower (usually the deferred dower) that they had given up in the *khul'* (Admiral 2016: 127-28).

person is unable to dissolve a religious marriage, even if she has been divorced in a civil court. According to Van Eijk, it can be difficult for Muslim women in the Netherlands to obtain a valid Islamic divorce, especially when there is no consensus in the Dutch Muslim community about what constitutes a religious divorce. She examines a case in which a Dutch civil court judge helped a woman arrange for a *khul'* divorce. In the case in question, the woman's husband would not participate in a religious divorce, and she filed a tort claim. The judges recommended *khul'* because they reasoned that it was the plaintiff who wanted to divorce, not her husband. In this case, a secular judge's understanding of Islamic sources resulted in a court-ordered *khul'* agreement through a civil tort action.

Van Huis traces the decline of *fiqh*-based divorce in Indonesia from the late twentieth century until the present. Previously, *khul'* had been in widespread use, and Van Huis identifies multiple divorce practices that resulted in a *khul'* in Indonesian legal procedure. He thus draws our attention to the ways in which *khul'* is used differently even within specific regions: *khul'* has many manifestations. Specific legislation on divorce by the modern state has led to a waning of these divorce practices. The Marriage Law of 1974 expanded Indonesian women's options for divorce and, today, most divorces are enacted in court on the grounds of marital discord. Van Huis argues that this form of divorce preserves Islamic elements because it is rooted in both *syiqaq* (<Ar. *shiqāq*) and *khul'*, since divorce on the grounds of discord is irrevocable and can be female-initiated. Van Huis contends that the current state of divorce practice in Indonesia reflects a leniency toward female-initiated divorce that is historically characteristic of Indonesian Islamic legal practice.

Like Van Eijk, Jaraba considers *khul'* in a Muslim minority context in Europe. Jaraba examines requests for *khul'* by Muslim women in Germany who have been married by religious authorities but have not had a civil marriage. When they seek divorce, they appeal to religious community authorities. Jaraba divides religious actors into two categories based on their views on *khul'*: 'conservatives' and 'pragmatists.' His ethnographic research shows that conservatives refuse to use *khul'* as a female-initiated non-consensual divorce, despite the fact that many Muslim-majority countries like Egypt, Jordan, and Algeria have enacted laws permitting non-consensual *khul'*. Pragmatists, however, are willing to grant non-consensual *khul'* based on Muslim minority jurisprudence.

Vatuk analyzes how Muslims interpret and use *khul'* divorce in Hyderabad, India, where it is an extrajudicial form of divorce that is technically – although not always – initiated by a woman. A woman offers her husband compensation for the divorce and, if he agrees, he enacts *khul'* by accepting compensation and pronouncing *ṭalāq* (repudiation). In theory, Vatuk argues, a husband's



pronunciation of *ṭalāq* makes it easy for a woman to 'extricate herself' from her marriage. In practice, however, obtaining this kind of divorce is often more complicated than it seems, as a husband may prove resistant to *khul'* or may manipulate *khul'* to his own ends. Be that as it may, Vatuk finds that far more divorces are enacted extrajudicially through *khul'* than in the official courts under the 1939 Dissolution of Muslim Marriages Act (DMMA), which gives Muslim women the right to judicial divorce. Extrajudicial *khul'* is not always easy to obtain but it has the advantage that a woman does not need to prove grounds for divorce, as she would if she filed suit in a state court.

In the final essay of this volume, Sonneveld compares recent divorce reforms in Egypt (2000) and Morocco (2004). Whereas most Islamic law court studies focus on the impact of legal reform on women, Sonneveld argues that we must pay equal attention to the position of men in religion-based law reform. In Egypt, non-consensual, no-fault divorce through *khul'* is open only to women. In Morocco, however, another form of non-consensual, no-fault divorce, *shiqāq*, is open to both women and men, and men use it almost as frequently as women. Based on legal analysis and anthropological fieldwork, Sonneveld first explains how men and women in Egypt and Morocco navigate rights and duties in divorce. Then, she examines the differences in the way men and women try to obtain divorce in the two countries. Sonneveld concludes that when both men and women may opt for a non-consensual, no fault divorce, highly gender specific modes of divorce, such as *ṭalāq* and *ṭaṭlīq* (fault-based divorce initiated by women), quickly lose their popularity.

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