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# An Unlikely Champion of Women's Rights under Muslim Personal Law: Mawdūdi on the Anglo-Muhammadan Law

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## Abstract

Sayyid Abul Ala Mawdūdi was one of the most renowned Muslim scholars of the 20<sup>th</sup> century. In addition to his portrayal as a gender insensitive / women unfriendly scholar, he is regarded as one of the founding fathers of political Islam in the modern era for developing a comprehensive political theory of Islam. Mawdūdi was a prolific writer who wrote on a wide array of subjects, although there are some areas in which his contributions have never attracted the academic attention they deserve. With this background, this paper analyzes Mawdūdi's book *Huquq al-Zawjain* written during the British Rāj which has generated debates in the post-colonial legal landscape of Pakistan about some important issues related to women's rights in marriage. Mawdūdi expressed unflinching disapproval of his contemporary Muslim scholars for their parasitic imitation of the rules of *fiqh* and their hesitation to have recourse to the divine sources, that is, Qur'ān and *Sunnah* for ushering solutions of then prevalent religious and social vices. Additionally, he criticized sternly the British Raj and the byproduct of its legal apparatus in the domain of family law, that is, the Anglo-Muhammadan law. Consequently, Mawdūdi presented a model for Muslim personal law inspired by and reconstructed from Qur'ānic verses and sayings of the Holy Prophet (SAW).

**Keywords:** personal law, women's rights, Mawdūdi, Anglo-Muhammadan Law, British Rāj

## Introduction

Sayyid Abul Ala Mawdūdi was one of the most influential religious scholars of his age.<sup>1</sup> His matchless contribution to political Islam generally overshadows other aspects of his scholarship of Islam. He founded *Jamaat-e-Islami* during the British Rāj and, thereafter, his major contribution without any doubt was within

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<sup>1</sup>Seyyed Vali Reza Nasr, *Mawdudi and the Making of Islamic Revivalism* (New York: Oxford University Press, 1996).

the field of political Islam.<sup>2</sup> In British India, his religio-political party kept itself aloof from the politics of the independence movement on the pretext that an independent homeland for Muslims would not ensure the establishment of an 'Islamic state' *ipso facto* - a utopian idea espoused and enthusiastically followed by him throughout his life.<sup>3</sup> This particular perspective of the independence movement was construed by some as if he was against the creation of Pakistan, though in reality he did not have trust / confidence in the leadership that anchored the movement, that she would have the requisite capability and competency to organize the envisioned state of Pakistan based on the principles of Islam.<sup>4</sup>

In addition to political Islam, another aspect of his contribution that has attracted academic attention is his writings on the gender discourse of Islam.<sup>5</sup> In this context, his writings emphasizing *purdah* or veiling of women have generally shaped the academic perspective.<sup>6</sup> If Mawdūdi is approached from this window into his Islamic scholarship, he does not appear to be gender sensitive and women friendly, as if his main focus was obligating women to put on a veil and withdraw from public life to a maximum possible extent. This gender discriminatory perspective of Mawdūdi is substantiated by one strand of his writings, although it is likely to be challenged when investigated based on the perspective emerging from another set of his writings.

Beyond these hyper projected portrayals, there are other aspects of his contribution to Islamic law which have not been given proper academic focus despite the fact that some of them grabbed the attention of the superior judiciary of Pakistan, such as the issue of *khul'a* and the nature of dower. Another such area is Mawdūdi's analysis of Muslim personal law developed during the British Rāj.

<sup>2</sup>Seyyed Vali Reza Nasr, *The Islamic Leviathan: Islam and Making of State Power* (Oxford: Oxford University Press, 2001); Seyyed Vali Reza Nasr, *The Vanguard of the Islamic Revolution: The Jamaat-i-Islami Pakistan* (London: I. B. Tauris Publishers, 1994); Pooja Joshi, *Jamaat-i-Islami: The Catalyst of Islamisation in Pakistan* (Delhi: Kalinga Publications, 2003); Frederic Grare, *Political Islam in the Indian Subcontinent: The Jamaat-i-Islami* (New Delhi: Manohar Publishers, 2005).

<sup>3</sup>Sayyid Abul Ala Mawdudi, *Tahreek-i-Azadi-i-Hind aur Mussalman*, [Freedom Movement in Sub-Continent and Muslims] Vol. 1 and 2 (Lahore: Islamic Publications, 2014).

<sup>4</sup>Sayyid Abul Ala Mawdudi, *Tahreek-i-Azadi-i-Hind aur Mussalman*, Vol. 2, 12.

<sup>5</sup>Shahbaz Ahmad Cheema, "Problematizing 'Authenticity': A Critical Appraisal of the Jamaat-i-Islami Gender Discourse" (PhD diss., University of Warwick, 2011).

<sup>6</sup>Sayyid Abul Ala Mawdudi, *Purdah* [Veil (urdu)] (Lahore: Islamic Publications, 2003); Sayyid Abul Ala Mawdudi, *Purdah and The Status of Woman in Islam*, trans. and eds., (Lahore: Islamic Publications).

Mawdūdī, while living within a geographically colonized territory, identified some fundamental constructive mechanics of Anglo-Muhammadan law and expressed his serious doubts regarding the realization of Islamic law in its true spirit under the legal system of the British Rāj which was primarily characterized by the sanctity of precedents. These issues were debated by Mawdūdī in his book *Huquq al-Zawjain*<sup>7</sup> which is analyzed in the current research paper.

*Huquq al-Zawjain* reconnected Mawdūdī with his socio-political context in addition to highlighting that some of his opinions were well ahead of his age. The tone and impact of Mawdūdī's opinions is gender sensitive despite the same were expressed in specific socio-cultural milieu. Still, in today's era, some doubts remain about the soundness and authenticity of some of those opinions from an Islamic perspective.<sup>8</sup> It is not the contention here that Mawdūdī should be considered a women's rights activist on the basis of these opinions, though at least his out of sight literature should prove enough to water down his over-emphasized gender insensitive portrayal.

Mawdūdī wrote *Huquq al-Zawjain* in the form of articles published in his own journal *Tarjuman-ul-Qur'ān* from 1935 onwards. In 1943, it was first published in a book format with some additions and amendments and has been published continuously since then. In the first preface of the book Mawdūdī pointed out that the object of writing articles on an ideal relationship of spouses under Islamic law, after having direct recourse to the principles laid down in the Qur'ān and *Sunnah* of the Prophet Muhammad (SAW), was to draw the attention of Muslim scholars / *ulama* towards how the prevailing vices related to Muslim family law could be cured.

## 2. Politico-Legal Context of the Book

During 1930s, the reformation of the Anglo-Muhammadan law was a burning issue. The Muslim Personal Law (*Shari'ah*) Application Acts of 1935 (for North West Frontier Province) and 1937 (for the rest of the British India) were enacted for the application of Islamic law to Muslims in supersession to customary law in selected domains.<sup>9</sup> An extremely limited option of judicial dissolution of marriage under *Hanafi* law was available to wives and the total absence of *khul'a* through

<sup>7</sup>Sayyid Abul Ala Mawdudi, *Huquq al-Zawjain* [Rights of Husband and Wife (urdu)] (Lahore: Islamic Publications, 2008).

<sup>8</sup>Mufti Taqi Usmani, *Islam mein Khula ki Haqeeqat* [Khula in Islam (Urdu)] (Karachi: Memon Islamic Publishers, n.d.).

<sup>9</sup>Faiz Badruddin Tyabji, *Muhammadan Law: The Personal Law of Muslims*, 3<sup>rd</sup> Edition (Bombay: M. N. Tripathi and Co., 1940) 31-32.

the judicial channel caused massive upheavals in Muslim families by forcing Muslim women to apostatize for the dissolution of their unpleasant marriages. These issues formed the background for Mawdūdi's book under analysis. After a prolonged public debate and scholastic outcry, Muslim women were granted extensive rights to get their marriages dissolved through courts under the Dissolution of Muslim Marriages Act 1939 (hereafter referred to as DMMA).<sup>10</sup>

The vast majority of Indian Muslims is the follower of the *Hanafi* school of law. Although there is no legal prohibition which prevents a *Hanafi* Muslim to switch over to any other *Sunni* school of law or even to the *Shia* school at the individual level, such a change for 'worldly purposes' is considered inappropriate. Keeping in view the majority of *Hanafi* Muslims among Indian Muslims, the British Rāj opted to prefer this school in the dispensation of justice over other schools of thought / law. It was a settled presumption that all *Sunni* Muslim inhabitants of India were followers of the *Hanafi* school unless proved otherwise.<sup>11</sup> Such a judicial presumption, in addition to virtually equating *Sunni* Islam with *Hanafi* school, rejuvenated and ignited sectarian allegiance religiously and socially. The colonial state sponsored projects of translating Islamic law books exclusively of *Hanafi* jurisprudence, irrespective of their deficiencies and inaccuracies, thus vested *Hanafi* school with authenticity. It is not argued here that there was a prior plan or conspiracy for preferring the *Hanafi* school over other schools; indeed, this convergence was an outcome of pragmatism and the colonial government's interest to keep the support of large majorities. So, on the one hand, the *Hanafi* school shaped the policy of the British Rāj. On the other hand, the Rāj's preference was likely to augment its authority.

British Indian courts decided that they would not approach the fundamental sources of Islamic law, that is, Qur'ān and *Sunnah* except through the cognitive window created by acclaimed Muslim scholars of antiquity. So, the courts resisted any temptation to give their own construction to various dictums found in the basic sources of Islamic law and followed the opinions of scholars which represented the established authority. Since Hanafi Muslims were in majority, the opinions of their masters were produced before the courts and generally applied by them.

<sup>10</sup>See text of the law in D. F. Mulla, *Principles of Mahomedan Law*, ed., Dr M. A. Mannan (Lahore: PLD Publishers, 1995).

<sup>11</sup>D. F. Mulla, *Principles of Muhammadan Law* (Bombay: Thacker & Company, 1905), 12.

In *Aga Mahomed v. Koolsom Bee Bee*,<sup>12</sup> the Privy Council had to decide whether to follow the plain wording of the Qur'ān or to construe it in the manner it had been interpreted by the renowned scholars and articulated in authentic books. According to the plain reading of the Qur'ānic verse 2:240-1, a widow is entitled to one year's maintenance after the death of her husband. But as per authentic books such as *Hedaya* (as translated by Hamilton) and *Imameea* (as translated by Baillie), this verse is considered to be abrogated and a widow is not entitled to any financial benefit except her entitlement under inheritance and will. Consequently, the court sided with the books of authority instead of construing the verse as it dictates apparently and held that "it would be wrong for the court on a point of this kind to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority."<sup>13</sup> In line with the same approach of conforming to the settled interpretations of the scholars of antiquity the Privy Council reiterated in another case *Baker Ali Khan v. Anjuman Ara*<sup>14</sup> that "it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions."<sup>15</sup> The above dictums demonstrate the judicial approach of conforming to settled interpretations by the British Indian courts instead of construing the religious texts themselves or allowing infiltrations of modern reappraisals by contemporary scholars and lawyers. Though such a demarcation of judicial territory and consistently following it for decades unhindered had its own benefits; however, the same was likely to keep the masses and scholars alike confined and conforming to an older version of interpretations and discouraging them to re-establish and redefine their own relationship with religious texts in the light of their own socio-cultural circumstances. This approach not only stagnated the past, it also forced the existing realities to bear the burden of the sacred past.

When the British courts imposed upon themselves that they would apply the opinions of the *Hanafi* school, it was quite probable that they might confront a situation where they were to decide in case of disagreement among *Hanafi* scholars as to what opinion should be adopted. It is well established that in *Hanafi* school, in addition to Imam Abu Hanifa, his two disciples Qadi Abu Yusuf and Imam

<sup>12</sup>*Aga Mahomed v. Koolsom Bee Bee*, (1897) 24 I.A. 196.

<sup>13</sup>A. A. A. Fyzee, *Cases in the Muhammadan Law of India and Pakistan* (Oxford: Clarendon Press, 1965), 4.

<sup>14</sup>*Baker Ali Khan v. Anjuman Ara*, (1903) 30 I.A. 94.

<sup>15</sup>Fyzee, *Cases in the Muhammadan Law*, 16.

Muhammad enjoy a special status. They are considered to be the founding fathers of the school and their opinions form the bulk of the *Hanafi* law. When they concur on an opinion, it was adopted by the British Indian courts. However, in case of their disagreement the courts had to prefer one opinion over another. So, internal difference of opinion among them posed a formidable challenge which had to be resolved one way or another by the British Indian courts.

The colonial jurisprudence in a matter of difference of opinion among the founding fathers of *Hanafi* school was pronounced by Justice Mahmood in *Abdul Kadir v. Salima*<sup>16</sup> after analyzing a number of cases. In a case of the restitution of conjugal rights entitled *Sheikh Abdool Shukkoar v. Raheem-oon-nissa*<sup>17</sup>, on the point that whether the wife has a right to refuse to surrender to her husband after the consummation of marriage on the plea that her prompt dower was not paid, the court followed the opinion of Imam Abu Hanifa over his two disciples and allowed such right to the wife. Justice Mahmood in *Abdul Kadir* case differed with this verdict and preferred the opinion of the two disciples that once a wife consummated a marriage despite the non-payment of prompt dower, she lost her absolute claim of refusal to surrender to her husband. To justify his stance, he articulated a general rule that in case of a difference of opinion among the founding fathers, the opinion of two would prevail over the third. Justice Mahmood said, "I take it as a general rule of interpreting that law, that whenever there is a difference of opinion, the opinion of two will prevail against the opinion of the third."<sup>18</sup> He further observed that Imam Abu Hanifa and Imam Muhammad were 'purely speculative juris consults,' whereas Qadi Abu Yusuf was well conversant with worldly affairs because of being Chief Justice of Caliph Haroon-ul-Rashid. So, Qadi Abu Yusuf's opinion "command[s] such high respect in the interpretation of Muhammadan law, that whenever either Imam Abu Hanifa or Imam Muhammad agrees with him, his opinion is accepted by well-understood rule of construction."<sup>19</sup> This so-called authentic articulation of Muhammadan jurisprudence in case of difference of opinion among *Hanafi* masters was reproduced in various textbooks on Islamic law published during the colonial era as a golden rule.<sup>20</sup>

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<sup>16</sup>*Abdul Kadir v. Salima*, (1886) 8 All. 149.

<sup>17</sup>*Sheikh Abdool Shukkoar v. Raheem-oon-nissa*, N. W. P. H. C. Rep., 1874, 94.

<sup>18</sup>(1886) 8 All. 149, 166.

<sup>19</sup>(1886) 8 All. 149, 162.

<sup>20</sup>See for instance, Mulla, *Principles of Muhammadan Law*, 17.

It is worth noting that in early 1930s, the then Chief Justice Sulaiman of Allahabad High Court in *Anis Begum v. Muhammad Istafa*<sup>21</sup> took strong exception to Justice Mahmood's decision in Abdul Kadir case as to generally preferring the opinion of the two disciples over Imam Abu Hanifa. He said that this rule of construction was not "meant to lay down any inflexible rule which would have universal application"<sup>22</sup> and it was merely an "*obiter dictum*."<sup>23</sup> He questioned the principle of majority propounded by Justice Mahmood and asserted that numerous instances could be cited where the opinion of Imam Abu Hanifa had alone been preferred.<sup>24</sup> Further, Chief Justice Sulaiman in his judgment surveyed in an extensive manner and graded the *Hanafi* books in three categories considering their authoritativeness: the first category comprised original textbooks, the second commentaries and the third comprised collections of *fatawa*.<sup>25</sup> He concluded that Imam Abu Hanifa's view "in the earlier centuries was generally accepted, and divergence from it become more pronounced in the later times."<sup>26</sup> In the age of Aurangzeb when *Fatawa Alamgiri* was compiled, "the conflict of opinion continued and no definite consensus of opinion seems to have been reached [as to following the majority of masters or opinion of two disciples], otherwise it was most probable that the approved opinion would have been mentioned."<sup>27</sup>

Despite delving into such intricacies and setting the jurisprudence aright, CJ Sulaiman followed the opinion of the two disciples in line with Abdul Kadir case because it had a force and sanctity of precedent in addition to the widespread acceptance of this view by other high courts of British India.<sup>28</sup> "[I]t would now be dangerous to go back upon this course of decisions and not to adhere to the well recognized principle of *stare decisis*..."<sup>29</sup> Consequently, a tricky and complicated relationship evolved during the British Rāj between *Hanafi* school on the one hand and the sanctity of precedent on the other. This unusual convergence not only facilitated the prevalence of the reductionist version of the *Hanafi* school but it also supplied it with state authority.

<sup>21</sup>*Anis Begum v. Muhammad Istafa*, (1933) 55 All. 743.

<sup>22</sup>Fyzee, *Cases in the Muhammadan Law*, 22.

<sup>23</sup>*Ibid.*, 33.

<sup>24</sup>Fyzee, *Cases in the Muhammadan Law*, 22.

<sup>25</sup>Fyzee, *Cases in the Muhammadan Law*, 28-32.

<sup>26</sup>*Ibid.*, 33.

<sup>27</sup>*Ibid.*, 33.

<sup>28</sup>Fyzee, *Cases in the Muhammadan Law*, 32-33.

<sup>29</sup>*Ibid.*, 34.



In this socio-legal context, Privy Council's decision in *Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa*<sup>30</sup> should have been appreciated. The court observed that under Muhammadan law *khul'a* was initiated by a wife but it was irrevocably concluded by her husband's willingness to endorse it. The court employed the phrases of 'bargain' and 'arrangement' to demonstrate *khul'a*'s dependence on the consent of both spouses in which, as a matter of fact, the consent of husband enjoyed greater significance. It was so because a husband had another option to dissolve a marriage by *talāq*; whereas a wife's request of *khul'a* could not have been materialized unless affirmed by her husband. The court pronounced that in *khul'a* "the terms of the bargain are matter of arrangement between the husband and wife."<sup>31</sup>

Deprivation of wives from any self-regulating window (extremely limited grounds for judicial dissolution of marriage and non-recognition of *khul'a*) available for dissolving painful marriages independent of their husbands under Anglo-Muhammadan law and the removal of civil disability as to disinheritance on apostasy by Caste Disability Removal Act 1850<sup>32</sup> paved the way for Muslim wives to apostatize for escaping unhappy marriages. During 1920s and 1930s, the number of Muslim women apostatizing increased substantially and this situation was also exploited by Christian missionaries for spreading their religion.<sup>33</sup>

Khalid Masud has conducted an original research to explore the impact of Anglo-Muhammadan law and the apostasy of Muslim women in British India.<sup>34</sup> He has analyzed a number of reported cases to demonstrate how the reductionist perspective of the *Hanafi* law on apostasy, as understood by the British Indian courts on the basis of various *fatwas* issued by *Hanafi* scholars of high esteem, contributed to the apostasy of Muslim women.<sup>35</sup> Further, the author clarified that

<sup>30</sup>*Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa*, (1861) 8 Moore's Indian Appeals 379.

<sup>31</sup>Fyzee, *Cases in the Muhammadan Law*, 167.

<sup>32</sup>See full text of the Act on <http://www.asianlii.org/mm/legis/code/cdra1850249.pdf> (Accessed on 05/05/2019)

<sup>33</sup>Muhammad Khalid Masud, "Apostasy and Judicial Separation in British India," in *Islamic Legal Interpretation: Muftis and Their Fatwas*, ed., Muhammad Khalid Masud, Brinkley Morris Messick, and David Stephan Powers, (Cambridge: Harvard University Press, 1996), 194-195; Muhammad Khalid Masud, "Modernizing Islamic Law in Pakistan: Reform or Reconstruction?" *Journal of South Asian and Middle Eastern Studies* 42, no. 2, (Winter 2019): 78.

<sup>34</sup>Masud, *Apostasy and Judicial Separation*, 193-203; Muhammad Khalid Masud, *Iqbal's Reconstruction of Ijtihad* (Lahore: Iqbal Academy, 1995), 153-178.

<sup>35</sup>Masud, *Iqbal's Reconstruction*, 158-160.

there was no unanimity among *Hanafi* scholars regarding the issue of the apostasy of Muslim women and its impact on their marriage. At least three distinct opinions could be traced in this regard but the opinion expressed by *Hedaya* and *Fatawa Alamgiri* was enforced by the British Indian courts, as these texts enjoyed special status not only in the eyes of the colonial judiciary but also among the *Hanafi* scholars of Indian subcontinent.<sup>36</sup> Khalid Masud points out that neither any original efforts were made to have direct recourse to the Qur'an and *Sunnah*, nor the genuineness of the intentions of apostatizing wives were investigated judicially.<sup>37</sup> Consequently, the wives were kept deprived of the judicial dissolution of their marriages except on extremely limited grounds. Since the *Hanafi* school had unquestionable authority and authenticity, its stratagem of apostasy for dissolving marriage found currency.

Considering the insistence of the British Indian courts to follow some standard books and the indifference of Muslim scholars about the resultant apostasy of Muslim women, Allama Muhammad Iqbal lamented and made earnest calls for having recourse to *Ijtihad* to get out of the impasse.<sup>38</sup> “[D]oes the working of the rule relating to apostasy as laid down in the *Hedaya* tend to protect the interests of the Faith in this country? In view of the intense conservatism of the Muslims of India, Indian judges cannot but stick to what are called standard works.”<sup>39</sup>

In 1931, *Mawlana* Ashraf Ali Thanawi wrote a comprehensive treatise on this thorny issue in the genre of *fatwa* titled *Al-Hilat al-Najiza li' Halilat al-'Ajiza*.<sup>40</sup> He diametrically revisited his earlier *fatwa* on the same subject issued in 1913.<sup>41</sup> He extended the justification for switching to the relatively less known opinion extended by the scholars of Balkh and Samarqand within the *Hanafi* school as to the non-dissolution of marriage on apostasy, along with widening the scope of judicial dissolution for Muslim women in line with the *Maliki* school.<sup>42</sup> On the one hand, he did not intend to give any indication that he was violating the parameters set by his own school and on the other hand, he was genuinely interested to broaden the avenue for judicial dissolution to avoid the menace of apostasy among Muslim

<sup>36</sup>Ibid., 160-162.

<sup>37</sup>Ibid., 162.

<sup>38</sup>Allama Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Lahore: Institute of Islamic Culture).

<sup>39</sup>Iqbal, *Reconstruction of Religious Thought*, 169.

<sup>40</sup>Mawlana Ashraf Ali Thanawi, *Al-Hilat al-Najiza li' Halilat al-'Ajiza* (Deoband: Maktaba Razi, 2005).

<sup>41</sup>Masud, *Apostasy and Judicial Separation*, 193-203.

<sup>42</sup>Masud, *Apostasy and Judicial Separation*, 203.

women. So, he clarified in the preface that in 'extreme necessity' another school could be followed with all its terms and conditions.<sup>43</sup> To achieve this purpose, an extensive correspondence with *Maliki* jurists abroad was carried out and reproduced in original Arabic format in the book.<sup>44</sup> Further, his treatise was shared with a large number of scholars to solicit their approval and support in the Indian subcontinent: a list of approving scholars was also appended to augment the book's acceptability and authenticity.<sup>45</sup>

*Al-Hilat al-Najiza li' Halilat al-'Ajiza* generated a widespread debate and a law dealing with judicial dissolution was enacted known as DMMA. Though the law provided an extended list of grounds for judicial dissolution to Muslim wives inspired by the Maliki school; however, the option of *khul'a* independent of the husband's consent was not legitimated which resulted in maintaining the authority of the *Hanafī* law at least in this respect.

It was in this background of confining to one school of thought and departure whereof was possible only after a substantial agony to Muslim family and culture when Mawdūdī wrote *Huqūq al-Zawjāyn*, calling for direct recourse to the Qur'ān and *Sunnah* and identifying some fundamental principles for organizing a Muslim family. In the post-independence context of Pakistan, reliance on the Qur'ān and *Sunnah* without any intermediary may not appear to have much significance as the courts have time and again emphasized that they are not bound by the opinions of Muslim jurists / schools of thought and they within the constitutional structure of Pakistan could approach the primary sources themselves and put upon them that construction which appears to them the most appropriate.<sup>46</sup>

### 3. Main Arguments of the Book

This book was written in a particular context and the appreciation of that context makes it convenient to understand its contribution and impact. For the ease of comprehension, some main arguments of the book are listed below.

Firstly, the book is a critical analysis of Anglo-Muhammadan law as developed and applied by the British Indian courts. This aspect of Mawdūdī's criticism represents him as a post-colonial scholar. Secondly, the book is a well-founded

<sup>43</sup>Thanawi, *Al-Hilat al-Najiza*, 28.

<sup>44</sup>Ibid., 197-263.

<sup>45</sup>Thanawi, *Al-Hilat al-Najiza*, 22-25.

<sup>46</sup>Muhammad Zubair Abbasi, "Judicial Ijtihād as a Tool for Legal Reform: Extending Women's Right to Divorce under Islamic Law in Pakistan," *Islamic Law and Society* 24 (2017): 384-411.

critique of the Muslim scholars of that age who hesitated to conduct a holistic reevaluation of the Anglo-Muhammadan law informed by the Qur'ān and *Sunnah* and thought it expedient to bring some isolated reforms to rectify the dismal situation. This dimension portrays him as a reformer of the Islamic legal tradition from within that tradition. Lastly, Mawdūdī's critical enterprise was followed by constructing its alternative as to how the prevalent vices of law could be cured. Mawdūdī's perspective of an ideal Muslim family law for the Muslims of Indian subcontinent was derived from the Qur'ān and *Sunnah*. Hence, the fundamental constructive argument was to return to the basics as contained in the divine sources and thereafter to carry out a thorough reevaluation of the detailed rules of the Muslim family law as embodied in the *fiqh* literature in the light of the principles derived from those primary sources.

#### 4. Mawdūdī's Criticism of the British Rāj and the Anglo-Muhammadan Law

There are two very basic requirements for organizing a society. The first is devising a comprehensive code of law and the second is the existence of its enforcing authority which can execute the law in line with its soul and spirit.<sup>47</sup> Anglo-Muhammadan law was at variance with Islamic law not just in format / shape but also in spirit; hence, its implementation, however faithfully that may be executed, could not be equated with the implementation of Islamic law.<sup>48</sup> Though Islamic law provides an equitable and a comprehensive code for organizing the spousal relationship, unfortunately it was distorted considerably by the Anglo-Muhammadan law and there only appears to be a farfetched resemblance between the two legal systems.<sup>49</sup> The adverse impact of the Anglo-Muhammadan law on social and cultural lives of Muslims went far beyond any other law; it devastated the honor and dignity of the Muslims in addition to depriving them of their morality and religious beliefs.<sup>50</sup>

Under the influence of the western civilization and particularly its principle of gender equality, many Muslims have been incapacitated to comprehend the logical and wise principles of Islamic law for organizing a family in which men are placed

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<sup>47</sup>Mawdudi, *Huquq al-Zawjain*, 9.

<sup>48</sup>*Ibid.*, 10.

<sup>49</sup>Mawdudi, *Huquq al-Zawjain*, 11.

<sup>50</sup>*Ibid.*, 11.

a degree above women.<sup>51</sup> In this regard, Mawdūdi expressed serious doubts as to the capability and capacity of the Anglo-Muhammadan law and its implementing machinery to put things aright.<sup>52</sup>

According to Mawdūdi, law and its implementing machinery are the most important pillars on which any legal system thrives. So far as an ideal construction of Muslim family law is concerned, I will turn to it shortly. At present, I want to emphasize in the light of Mawdūdi's perspective that establishing a faithful implementing / executing authority for any legal system is not less important than the law itself. Mawdūdi used the terminology of *Qad-a-Shari* to propound that courts should be manned by Muslim judges to decide the cases according to Islamic law among Muslim spouses, since a non-Muslim ruler cannot have the authority to decide in *Shari* matters.<sup>53</sup> Though a non-Muslim ruler's decisions are executed outwardly, yet they do not have implications internally.<sup>54</sup> This divergence in application -regulating external affairs without having an internal impact - has important consequences according to Mawdūdi. For instance, if a non-Muslim ruler invalidates someone's marriage and the wife after the invalidation contracts another marriage and begets children, neither the second marriage nor the children from this marriage have any legitimacy.<sup>55</sup>

Mawdūdi was particularly critical of the precedent based system introduced by the British Rāj. The introduction of 'professional case law' engendered far reaching consequences.<sup>56</sup> It deprived Islamic law of its flexibility and adjusting potential. In personal matters, each and every case has its specific context / circumstances which have to be decided in the light of the principles of law informed by its basic objectives. Further, often a judge in such cases is required to resort to *Ijtihād* in order to apply the principles of law on intricate facts in line with the overall objectives of the law. This cannot be achieved by a judge who does not have the capacity to conduct *Ijtihād* nor has the pre-requisite belief in the law.<sup>57</sup>

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<sup>51</sup>Mawdudi, *Huquq al-Zawjain*, 14; Also see, Shahbaz Ahmad Cheema, "The Concept of *Qawama*: A Study of Interpretive Tensions," *Hawwa: Journal of Women of the Middle East and the Islamic World* 2, no. 2-3 (2014): 235-251.

<sup>52</sup>Mawdudi, *Huquq al-Zawjain*, 14.

<sup>53</sup>Mawdudi, *Huquq al-Zawjain*, 81.

<sup>54</sup>Ibid.

<sup>55</sup>Ibid.

<sup>56</sup>Ronald Knyvet Wilson, *Anglo-Muhammadan Law: A Digest*, ed., A. Yusuf Ali (Bombay & Shimla: Thacker, Spink and Co., 1921), 46.

<sup>57</sup>Mawdudi, *Huquq al-Zawjain*, 82.

After elaborating the ideal situation that *Shari'ah* matters between Muslim spouses should be decided by a Muslim judge who not only believes in the law but also has the proficiency to conduct *Ijtihad*, Mawdūdi lamented that in 1864 Muslim *qadīs* were removed by the British Rāj and thereafter the personal matters of Muslims, which ought to have been settled according to the *Shari'ah*, were brought within the civil jurisdiction of courts exclusively.<sup>58</sup> This shift made it difficult for Muslims to procure legally valid decisions under Islamic law. According to Abdur Rahim, "the *fatwas* of the *Maulavis* [*qadis*] so far as they can be found in the pages of the old law reports, are faithful exposition of Muhammadan law on the points covered by them."<sup>59</sup> Furthermore, the judges appointed in British Indian courts did not have access to those resources which equipped them with the principles and detailed rules of Islamic law.<sup>60</sup>

Mawdūdi also presented a brief analysis of some famous books translated / edited during British Rāj, such as Hamilton's *Hedaya*,<sup>61</sup> Baillie's *Digest of Muhammadan Law*<sup>62</sup> and Macnaughton's *Principles and Precedents of Muhammadan Law*.<sup>63</sup> According to Mawdūdi, Hamilton did not understand Arabic nor was able to fathom basic terminologies of *fiqh*; he erred at numerous places during his indirect translation from the Persian version of the original book, forcing people to revert to original *Hedaya* for comprehension and clarification.<sup>64</sup> So far as Baillie's *Digest* is concerned, it was based on the translation of selected extracts from *Fatawa Alamgīri*.<sup>65</sup> Macnaughton's work was an amalgam of defective information as well as flawed comprehension and construction of Islamic law.<sup>66</sup>

Abdur Rahim said that those who had not studied Islamic law in Arabic texts directly were bound to face difficulties translating such books in English because of the failure of the latter language to provide exact substitutes for some technical

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<sup>58</sup>Ibid., 83.

<sup>59</sup>Abdur Rahim, *The Principles of Muhammadan Jurisprudence* (London: Luzuc Co.; Madras: S.P.C.K. Depository), 38.

<sup>60</sup>Mawdudi, *Huquq al-Zawjayn*, 84.

<sup>61</sup>Charles Hamilton, *The Hedaya*, ed., Standish Grove Grady (Lahore: Premier Book House, 1957).

<sup>62</sup>N. B. E. Baillie, *A Digest of Moohummudan Law* (London: Smith Elder & Co., 1875).

<sup>63</sup>W. H. Macnaughton, *Principles and Precedents of Moohummudan Law*, ed., William Sloan (Madras: J. Higginbotham Mount Road, 1864).

<sup>64</sup>Mawdudi, *Huquq al-Zawjayn*, 83-84.

<sup>65</sup>Mawdudi, *Huquq al-Zawjayn*, 84.

<sup>66</sup>Ibid.

terminologies.<sup>67</sup> With particular reference to *Hedaya's* preciseness and terseness, the learned author expressed his fear that its English translation by Hamilton might have led to misapplication of some rules.<sup>68</sup> Baillie's Digest was derived from *fatawa* collection which in comparison to book like *Hedaya* might be less prone to translation related difficulties.<sup>69</sup>

Mawdūdi referred to two decisions of the British Indian courts to support his arguments.<sup>70</sup> The first pointed out that the judges had very limited resources at their disposal for deriving and applying Islamic law and hence they developed an evasive attitude of not getting involved into any controversy related to Islamic law.<sup>71</sup> Despite such lapses and its admission judicially, Mawdūdi expressed his astonishment at how daring these courts had been to conduct *Ijtihād*.<sup>72</sup> Another decision mentioned by Mawdūdi reaffirmed the inadequacy of Islamic knowledge of the British Indian courts in addition to their frequent reliance on sources exterior to Islamic law such as principles of justice, equity and good conscience.<sup>73</sup> Mawdūdi sarcastically concluded that the Anglo-Muhammadan law was an outcome of this sort of *Ijtihād* which was devoid of Islamic knowledge and belief.<sup>74</sup>

In short, Mawdūdi criticized the following features of the British Rāj in the Indian subcontinent which were directly connected with the dispensation of justice in the domain of personal law:

1. Abolition of the institution of *qādi* and thereby resolving matters of personal law through civil jurisdiction.
2. Transplanting the system of precedents which was the core and kernel of the British common law.<sup>75</sup>

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<sup>67</sup>Rahim, *Muhammadan Jurisprudence*, 42.

<sup>68</sup>*Ibid.*, 43.

<sup>69</sup>*Ibid.*, 42-43.

<sup>70</sup>Khaja Husain Ali v Shazadi Hazari Begum, 12 Weekly Repoter, 344-7; Mallick Abdool Gafoor v Mulika, 10 Calcutta 1123. Both these cases have also been cited by some other authors of that period, e.g. see Al-Haj Mahomed Ullah ibn S. Jung, Digest of Anglo-Muslim Law (Allahabad: The Juvenile Press, 1932), xvii.

<sup>71</sup>Mawdudi, *Huquq al-Zawjayn*, 84; Khaja Husain Ali v Shazadi Hazari Begum (12 Weekly Repoter, 344-7).

<sup>72</sup>Mawdudi, *Huquq al-Zawjayn*, 84.

<sup>73</sup>Mawdudi, *Huquq al-Zawjayn*, 85; Mallick Abdool Gafoor v Mulika (10 Calcutta 1123).

<sup>74</sup>*Ibid.*, 86.

<sup>75</sup>*Ibid.*, 154.

1. Appointment of judges who did not possess qualification to resolve personal matters of the Muslims.<sup>76</sup>
2. Limited, defective, incomprehensible resources at the disposal of judges to decide litigious matters.
3. Development of the Anglo-Muhammadan law which did not conform to the spirit of Islamic law.<sup>77</sup>

These issues were highlighted by many scholars who wrote in the post-colonial era about the implementation of Islamic law during the British Rāj.<sup>78</sup> Mawdūdī's uniqueness lies in the fact that he pointed them out in 1930s when the British Rāj still had control over political and legal apparatus of the Indian subcontinent.

### 5. Mawdūdī's Criticism of his Contemporary Scholars

Mawdūdī was not only critical of the British Rāj and its justice delivery system but he also had serious concerns about the Muslim scholars of his age. Whereas he accused the British colonial government of maladministration of Muslim personal law and its replacement with the Anglo-Muhammadan law, he also did not spare the Muslim scholars for their unproductive role to find solutions of the thorny issues of their age.<sup>79</sup> His main criticism of them was that they were fundamentally confined to their overzealous and unwavering allegiance to their school of thought. They had embraced *fiqh* literature and kept it close to their heart and mind, whereas their main responsibility had been to have direct recourse to the divine sources,

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<sup>76</sup>Ibid., 12.

<sup>77</sup>Ibid., 154

<sup>78</sup>Michel R. Anderson, *Islamic Law and Colonial Encounter in British India*, Occasional Paper 7, Women Living Under Muslim Laws, <http://www.wluml.org/node/5627> (Accessed on 5/5/2019); Anisur Rahman, *Islamic Law and Colonial Encounter: On the discourse of 'Mohammedan Law' in British India* (July 1, 2012). Available at SSRN: <https://ssrn.com/abstract=2170464> or <http://dx.doi.org/10.2139/ssrn.2170464> (Last Accessed on 5/5/2019); Elisa Giunchi, "The Reinvention of *Sharī'ah* under the British Raj: In Search of Authenticity and Certainty," *The Journal of Asian Studies* 69, no. 04 (November 2010): 1119-1142; Scott Alan Kugle, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," *Modern Asian Studies* 35, no. 2 (May, 2001): 257-313; Ebrahim Moosa, "Colonialism and Islamic Law," in *Islam and Modernity: Key Issues and Debates*, ed., Muhammad Khalid Masud, Armando Salvatore and Martin van Bruinessen (Edinburgh: Edinburgh University Press, 2009), 158-181; Shahbaz Ahmad Cheema and Samee Ozair Khan, "Genealogical Analysis of Islamic Law Books Relied on in the Courts of Pakistan," *Al-Adwa* (December 2013): 23-36.

<sup>79</sup>Mawdūdī, *Huquq al-Zawjān*, 92



that is, the Qur'ān and *Sunnah* and construe them in a manner to cure vices with which the Indian Muslims were afflicted with at that time.<sup>80</sup>

According to Mawdūdi, many scholars lacked the understanding of how to apply various Islamic rules derived from *fiqh* literature to the socio-cultural context of the Indian subcontinent. Even those who were well versed and knowledgeable enough to determine as to how *fiqh* literature could be adjusted or negotiated for its application in the Indian context, without deviating from its principles rooted in Qur'ān and *Sunnah*, lacked moral courage and were scared of being branded as non-imitators (*ghayr muqallid*).<sup>81</sup> In a nutshell, Mawdūdi believed that the unresponsive and imitative tendencies of scholars had caused an irreparable loss of authenticity and authority of Islam itself. Muslim masses had started to think that Islam did not espouse any solution to their personal issues. It was not Islam which did not have the right answers; rather, it was either the incompetency of scholars or their fear of being stigmatized as a non-imitator which prevented them to present contextually tuned Islamic solutions.

In his book, Mawlana Ashraf Ali Thanawi urged the influential people of the Muslim community to get a law legislated based on his *fatwa* for the general benefit of the Muslim masses.<sup>82</sup> Mawdūdi did not have a soft corner for any such legislation. As per his opinion, misapplication of non-codified Islamic law caused its degeneration in British India and this dismal situation could be rectified only by proper interpretation and application of the same non-codified law. The Muslims of Indian subcontinent were not in need of any new legislation to cure the prevailing vices such as apostasy; rather, Islamic law was required to be brought to fore in line with its true spirit.<sup>83</sup> Responding to how this difficult task could be accomplished, Mawdūdi suggested that Muslim scholars should stop imitating *fiqh* and should articulate Islamic family law in the light of the social and cultural milieu of the subcontinent and the intricacies of spousal relationship.<sup>84</sup> Thereafter, a judicial machinery believing in that system and its judges, infused with its morality and equipped with its knowledge, should be assigned the task of its implementation.<sup>85</sup> Though Mawdūdi was not convinced that without establishing a proper Islamic government and judicial system the vices rampant in the Muslim families of Indian subcontinent could be fully cured, yet to some extent these could

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<sup>80</sup>Ibid., 93-96

<sup>81</sup>Ibid., 92-93

<sup>82</sup>Thanawi, *Al-Hilat al-Najiza*, 33.

<sup>83</sup>Mawdudi, *Huquq al-Zawjain*, 15.

<sup>84</sup>Ibid., 15.

<sup>85</sup>Ibid., 15.

be addressed if the law had been derived directly from the divine sources and applied accordingly.<sup>86</sup> According to Mawdūdi, Muslim scholars were not willing to set their school methodologies and prejudices aside to reestablish an invigorated relationship with the divine sources.

As has already been discussed above, apostasy among Muslim women was a thorny issue in 1920s and 1930s, which led to the enactment of DMMA. In order to avoid such incidences, Mawlana Ashraf Ali Thanawi argued for the adoption of the opinion of the *Hanafi* scholars of Balkh and Samarqand regarding the non-dissolution of marriage on apostasy of Muslim wives in preference to the *Hanafi* opinion reported in *Hedaya* and *Fatawa Alamgīri* and applied by the British Indian courts.<sup>87</sup> Mawdūdi was of the view that instead of switching over to another opinion within the same school of thought, it would have been more efficacious to investigate and address the causes of apostasy. According to him only 2% to 4% of women actually apostatized, while the rest employed this stratagem to avoid the prevalent modes of injustice and injury to women countenanced by the Anglo-Muhammadan law, in which they were deprived of any relief against cruelty, impotency, desertion, insanity of husband, his suffering from abhorrent diseases and his indulgence in loathsome habits.<sup>88</sup> Without addressing the issue comprehensively, if the last safety valve of apostasy for dissolving marriage was foreclosed for Muslim women by bringing together intricacies of *fiqh* from here and there, it would simply push them to commit suicide for unknitting their marriage.<sup>89</sup> These grievances of wives were later made grounds for judicial dissolution of marriage in DMMA.<sup>90</sup>

With reference to the option of dissolving marriage at reaching puberty, the rule of Anglo-Muhammadan law that a minor girl married by her father or grandfather could not exercise her option to dissolve her marriage on attaining puberty, while she had been granted such an option when her marriage was contracted by any other guardian<sup>91</sup>, was derived from the *Hanafi fiqh*. Mawdūdi severely criticized this rule of distinguishing father and grandfather from the rest of the guardians because it was not substantiated by the Qur'ān and *Sunnah* of the Prophet (SAW).<sup>92</sup> Such *fiqh* opinions should have been reviewed critically and

<sup>86</sup>Mawdudi, *Huquq al-Zawjayn*, 16.

<sup>87</sup>Thanawi, *Al-Hilat al-Najiza*.

<sup>88</sup>Mawdudi, *Huquq al-Zawjayn*, 109.

<sup>89</sup>Ibid., 110.

<sup>90</sup>Section 2 of the DMMA.

<sup>91</sup>Mulla, *Principles of Muhammadan Law*, 151

<sup>92</sup>Mawdudi, *Huquq al-Zawjayn*, 113.

minor girls should have been granted the option of dissolving their marriage at puberty unencumbered by such constraints in line with the objectives of Islamic law.<sup>93</sup> This unsubstantiated distinction was ultimately removed by the enactment of DMMA.<sup>94</sup>

## 6. Muslim Family Law and its Fundamental Principles

Mawdūdi did not only make enthusiastic demands to contemporary scholars for reverting to the basics, that is, Qur'ān and *Sunnah* for articulating a contextually germane solution for the Muslims of Indian subcontinent, he came up with a model of Muslim personal law founded on these sources for the reconsideration of the scholars.<sup>95</sup> According to Mawdūdi, Muslim family law possesses a hierarchal structure which could be best conceived when approached at three different levels: objectives of the law, its basic principles and detailed rules.<sup>96</sup> What the law intends to accomplish is described in the objectives. How those objectives should be achieved is laid down in the principles and sometimes, for enforcing the principles, detailed rules are to be formulated. As per Mawdūdi, they all are pillars of the same system and they should reinforce each other. No detailed rule is supposed to be applied in a manner to nullify any of the objectives.<sup>97</sup> Reconnecting with the previous debate, the rules formulated under the Anglo-Muhammadan law were basically in the category of 'detailed rules', developed without taking into account the 'objectives' of Islamic family law according to Mawdūdi.

Islamic family law aims to achieve two main objectives: the first is to cultivate Islamic ethics and the protection of chastity, and the second is to organize the relationship between spouses in a tremendously cordial and friendly manner.<sup>98</sup> The Qur'ān equates marriage with a fort / castle which protects its inhabitants, making the point that marriage would guard spouses from indulging into a licentious and an impious life.<sup>99</sup> Further, Qur'ānic references to the duality of gender as the foundation of mutual peace, love and harmony, spouses' creation from one *nafs* and the use of the metaphor of garment for each of them unfold such a relationship which cannot be established otherwise than by shared affection and warmth.<sup>100</sup> Even at the eve of the dissolution of marriage, Islamic law requires husbands to be

<sup>93</sup>Ibid., 117.

<sup>94</sup>Section of 2(vii) of the DMMA.

<sup>95</sup>Mawdudi, *Huquq al-Zawjayn*, 153.

<sup>96</sup>Ibid., 17.

<sup>97</sup>Mawdudi, *Huquq al-Zawjayn*, 17.

<sup>98</sup>Ibid., 17-24.

<sup>99</sup>Ibid., 17-19.

<sup>100</sup>Mawdudi, *Huquq al-Zawjayn*, 21-22.

humane and courteous with their wives.<sup>101</sup> In this context, Mawdūdi referred to various Qur'ānic verses persuading for or insisting on *Imsaaq bi Maroof* [maintaining marital tie with virtue and benevolence] and *Teshrih bi Ahsan* [parting ways on dissolution with virtue and benevolence].<sup>102</sup> These objectives may not be attained if spouses belong to different religions and belief systems and hail from divergent cultural and social milieu. Discouraging cross-religious marriages and encouraging marriages among people of equality should be appreciated from this perspective according to Mawdūdi.<sup>103</sup>

After explaining the objectives, Mawdūdi described the three principles of Islamic family law: the first principle explains as to how married life should be organized, the second deals with the methodology of the dissolution of marriage including *talāq* and *khula*, and the third principle necessitates the establishment of an Islamic judicial system or *Qad-a-Shari*.<sup>104</sup> Thereafter, there are a number of detailed rules devised for the realization of the above mentioned objectives and to facilitate the implementation of these principles.

Keeping in view the first principle, Mawdūdi talked about the rights and duties / obligations of husbands along with their discretionary authority. Mawdūdi's conception of *qawama* placed husband at the heart of Muslim family as a repository of rights and duties.<sup>105</sup> Reciprocally, wife's rights and duties flowed from it. This model, though impossible to be appreciated by feminists of various brands, yet based on Mawdūdi's elaboration seems internally coherent and logically connected. Internal coherence and logical connectivity are hallmarks of viability and vibrancy of any system. Being *qawama*, husbands are obligated to pay dower and maintenance to their wives and abstain from causing any kind of *zulm*, that is, injury/harm.<sup>106</sup> According to Mawdūdi, *zulm* and harm may have many manifestations, such as spiritual and physical transgressions, confining wife in marriage without discharging matrimonial responsibilities, and the inability to deal equitably with more than one wives.<sup>107</sup> Although husbands may have polygamous marriages but with the caveat that no injustice should be meted out to any existing wife.<sup>108</sup> In case of non-payment of dower, maintenance and infliction

<sup>101</sup>Ibid., 23-24.

<sup>102</sup>Ibid., 23.

<sup>103</sup>Ibid., 24-27.

<sup>104</sup>Ibid., 29-86.

<sup>105</sup>Ibid., 29-30.

<sup>106</sup>Ibid., 30-34.

<sup>107</sup>Ibid., 34-42.

<sup>108</sup>Ibid., 40-41.

of *zulm* and harm, a wife should have recourse to state and judicial authorities for relief and redressal.<sup>109</sup>

Correspondingly, Muslim wives, who are absolved from all sorts of financial responsibilities by their husbands, are required to remain faithful and obedient to their husbands.<sup>110</sup> In exceptional circumstances, a husband may resort to his discretionary authority ranging from extending advice to inflicting physical chastisement without leaving any mark on her body.<sup>111</sup> However, Mawdūdī criticized the misuse of this authority by husbands and a general impression of considering it as an unrestrained license to misbehave with wives.<sup>112</sup>

In addition to *talāq*, a Muslim marriage may be dissolved by *khul'a* which could be enacted in two different modes. Firstly, spouses may give it effect outside the court through mutual consent by agreeing on what a wife would return to her husband on the pronouncement of *talāq*.<sup>113</sup> Secondly, in case a husband does not agree to pronounce *talāq* despite the fact that the marriage has become an intolerable experience, particularly for the wife, she may approach the court which may dissolve it by way of *khul'a*.<sup>114</sup> Mawdūdī relied on his construction of the Qur'ānic verse 2:229 and the historical evidence of the Prophetic era to substantiate his argument and negated the claim made by mainstream *Hanafi* scholars that *khul'a*, just as *talāq*, is unenforceable without husband's consent.<sup>115</sup> According to Mawdūdī, a *qādi* may advise a wife seeking *khul'a* to continue the marriage but he cannot force it upon her against her will.<sup>116</sup> Though it is necessary to ascertain the presence of hatred developed by a wife towards her husband, yet the reasons extended by her for this hatred cannot be inquired into.<sup>117</sup> Further, it is out of a *qādi*'s domain to investigate whether a wife is seeking *khul'a* on genuine grounds or for the gratification of her sexual lust and desire.<sup>118</sup> So far as the value of the compensation for *khul'a* is concerned, that may be calculated taking into

<sup>109</sup>Mawdudi, *Huquq al-Zawjayn*, 41.

<sup>110</sup>*Ibid.*, 42-44.

<sup>111</sup>Mawdudi, *Huquq al-Zawjayn*, 44-48.

<sup>112</sup>*Ibid.*, 126.

<sup>113</sup> Mawdudi, *Huquq al-Zawjayn*, 59-62.

<sup>114</sup>*Ibid.*, 62.

<sup>115</sup>*Ibid.*, 60-67.

<sup>116</sup>*Ibid.*, 68.

<sup>117</sup>*Ibid.*, 68.

<sup>118</sup>*Ibid.*, 69.

account the circumstances of the concerned spouses, such as in/genuineness of the wife's claim or the husband's conduct during marriage etc.<sup>119</sup>

Mawdūdi severely censured those scholars who hold the opinion that *khul'a*, similar to *talāq*, is an internal affair of a family which could not be interfered with by the court, despite there being nothing in the Qur'ān and *Sunnah* to support such an argument.<sup>120</sup> He proclaimed that Islamic law has created a sort of equilibrium between spouses for fulfilling the objectives of marriage as mentioned earlier; if a husband does not find solace in marriage he may dissolve it and if it becomes painful for a wife, she may get it dissolved through courts.<sup>121</sup> Taking into account the pre-requisites of approaching the court by a wife for *khul'a*, Mawdūdi pointed out that it is a misconception that *talāq* is always unconditional and absolute; there are many formalities and conditionalities for exercising this right appropriately, such as the pronouncement of *talāq* with intervals, maintaining wife during the period of *iddat* (waiting period), and the impossibility of remarriage without intervening marriage (*halalah*).<sup>122</sup>

Referring to our earlier debate related to expanding the grounds for judicial dissolution of marriage in the context of numerous instances of apostasy among Muslim wives in British India, we have noted that *Hanafi* scholars pleaded for switching to the *Maliki* school owing to the 'extreme necessity' of not finding a suitable solution in the *Hanafi fiqh*. They argued for the expansion of the scope of judicial dissolution of marriage on grounds enumerated in the *Maliki* school, which are now part of DMMA, in preference to the *Hanafi* school; although the option of *khul'a* independent of the husband's consent was never contemplated by them as a viable solution. Since the jurisprudential debate triggered in that context was built on the internal methodologies of the *Hanafi* school, as to how and when one may switch over to another school, the option of *khul'a* remained derecognized in line with the classical *Hanafi* law.

In this context, when *Hanafi* scholars were facing difficulties to convince their own followers that switching over to another school was permissible in extreme necessity, Mawdūdi instead of confining himself to the shackles of any sectarian affiliation pleaded for approaching the basic sources directly and came up with a suggestion that Muslim wives had a right to get their marriages dissolved by way of *khul'a* through courts even without their husbands' consent. Considering this

<sup>119</sup> Mawdudi, *Huquq al-Zawjain*, 71.

<sup>120</sup> *Ibid.*, 72-74.

<sup>121</sup> Mawdudi, *Huquq al-Zawjain*, 72.

<sup>122</sup> *Ibid.*, 60.

aspect of Mawdūdi's contribution, he can be regarded as the architect of *khul'a* in the modern Muslim world.

Mawdūdi's opinion did not find favor in British India, although it later became the foundation of post-independence jurisprudence of *khul'a* in Pakistan. Some illustrative cases will suffice to make this point. In *Balqis Fatima v Najam-ul-Ikram Qureshi*,<sup>123</sup> the foundational case on *khul'a* in Pakistan, the court followed the construction of the Qur'ānic verse 2:229 as explained by Mawdūdi by referring to his *Huqūq al-Zawjain*. The theory of husband's monopoly over dissolution in both cases - *talāq* and *khul'a* - as propounded by *Hanafi* scholars has been refuted by the Pakistani judiciary unambiguously, while carving out space for dissolution on the basis of *khul'a* in case of the irretrievability of marriage as expressed by Mawdūdi.<sup>124</sup> In case of irreparable breakdown, the court should not refuse *khul'a* to a wife even if its objective was to contract another marriage after dissolution.<sup>125</sup> The issue of how much amount of dower is to be returned in *khul'a* is to be determined in each case on the basis of its peculiar facts. For instance, if a husband forces his wife to claim *khul'a*, she may not be required to reimburse anything.<sup>126</sup> The life spent by a wife in marriage may also be taken into account for determining *badl-i-khula*.<sup>127</sup>

The theory of dower as propounded by Mawdūdi in his *Huqūq al-Zawjain* was another issue which was brought before the superior judiciary of Pakistan but was not fortunate enough to be adopted like *khul'a*. Mawdūdi was severely critical of the perspective of the Anglo-Muhammadan law regarding deferred dower to be paid on either the death of a spouse or the dissolution of marriage.<sup>128</sup> In reality, that dower is treated as deferred in which a 'specific time' is mentioned for its payment and that non-specification of time makes its payment 'on demand.'<sup>129</sup> It seems quite irrational that the bliss of marital relationship is enjoyed by the husband but his financial responsibility in kind of deferred dower is kept pending to be taken care of by his legal heirs after his death.<sup>130</sup> On the nature of deferred dower, the Supreme Court of Pakistan preferred to follow in a recent case the same

<sup>123</sup>*Balqis Fatima v Najam-ul-Ikram Qureshi*, PLD 1959 Lah 566.

<sup>124</sup>*Khurshid Bibi v Baboo Muhammad Amin* PLD 1967 SC 97; Saleem Ahmad v Government of Pakistan PLD 2014 FSC 43.

<sup>125</sup>*Safia Begum v Khadim Hussain* 1985 CLC 1869 (Lahore)

<sup>126</sup>*Syed Haroon Sultan Bokhari v Syeda Mubarak Fatima* 2014 CLC 1270 (Lah)

<sup>127</sup>*Abdul Rashid v Shahida Parveen* 2013 YLR 2616 (Pesh)

<sup>128</sup>Mulla, *Principles of Mahomedan Law*, 430.

<sup>129</sup>Mawdudi, *Huquq al-Zawjain*, 32.

<sup>130</sup>*Ibid.*

perspective we have inherited from the British Indian courts that deferred dower is payable on either death or dissolution.<sup>131</sup> The court had the opportunity to follow Mawdūdi's opinion, regrettably it did not.<sup>132</sup>

## 7. Conclusion

Abul Ala Mawdūdi's contribution to various aspects of Islam and Islamic law is unparalleled and its width and spectrum is remarkable. Above all, his methodology of reevaluating different issues by approaching the divine sources, that is, the Qur'ān and *Sunnah*, without toeing meticulously jurisprudential methodologies formulated by the established *fiqh* schools and unhindered by the biases of school allegiances, has a far reaching impact on modern day schemes of the reappraisal of Islamic law. This methodology was aptly exemplified in his book *Huqūq al-Zawjāyn*. It facilitated him to explore the mechanics of the British Rāj in the construction of the Anglo-Muhammadan law and to alternatively come up with his own crafted blueprint of Muslim personal law. Mawdūdi deconstructed the hierarchal structure of Islamic law comprising its objectives, principles and detailed rules and argued that without keeping the objectives of law at the forefront, it is impossible to correctly execute the principles and detailed rules. The objectives of law are explicitly stated in the Qur'ān and *Sunnah*; hence their supremacy over the principles and detailed rules is unquestionable.

In the socio-legal context of the Indian subcontinent, *Huqūq al-Zawjāyn* formed part of a greater debate about the extended scope of the judicial dissolution of the marriages of Muslim women. In this background, *Hanafi* scholars urged the public to follow the *Maliki* school to lessen the stringent conditionalities of judicial dissolution under *Hanafi* law, with the intent of foreclosing ever increasing instances of apostasy among Muslim women, though they did not envision any possibility of *khul'a* without husband's willingness. Mawdūdi, while construing directly from the Qur'ān and *Sunnah*, argued for *khul'a* to be administered by the judicial organ in case of an irretrievable marriage even against the husband's consent. This model inspired the post-independence judiciary of Pakistan to replicate it.

Over the years, Mawdūdi's excessive engagement with political Islam and making adjustments to its ever changing realities overshadowed his genuine contribution to Islamic law. Moreover, his insistence on the classical parameters of veiling prevented the scholars from exploring the niceties of his gender

<sup>131</sup>Saadia Usman v Muhammad Usman Iqbal Jadoon 2009 SCMR 1458.

<sup>132</sup>Muhammad Zubair Abbasi and Shahbaz Ahmad Cheema, *Family Laws in Pakistan* (Karachi: Oxford University Press, 2018), 79.



discourse comprehensively. This paper has attempted to break with this tradition by unfolding another perspective of Mawdūdī's gender discourse by analyzing his treatise *Huqūq al-Zawjāyn*. On the one hand, this book is contextually linked to the period in which it was originally written. On the other hand, its invigorated spirit never ceases to attract the attention of post-independence judiciary of Pakistan due to some highly gender sensitive and women friendly constructions of Muslim personal law.

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