

TRADITIONALIST APPROACHES TO *SHARĪ'AH* REFORM:
MAWLANA ASHRAF 'ALI THĀNAWI'S FATWA ON
WOMEN'S RIGHT TO DIVORCE

by

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A dissertation submitted in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy
(Near Eastern Studies)
in The University of Michigan
2008

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Acknowledgements

I have been blessed with two of the most generous, intellectually-stimulating advisors a woman could ever ask for. Dr. Sherman A. Jackson has served as a mentor in ways obvious and subtle, and my respect and fondness for him have only increased over the years. And Dr. Barbara Metcalf—her serendipitous arrival toward the start of my career at Michigan has been unbelievably fortunate for me. She has set a high example through her scholarship and in her absolutely selfless role as academic advisor.

The presence of Dr. Alexander Knysh and Dr. Muhammad Qasim Zaman on my committee has also proven to be of great value. Dr. Knysh's warm personality and his gentle ways of encouraging his students are much appreciated. The astute comments and careful prodding of Dr. Zaman have provided important lessons that I will carry with me in my post-dissertation phase.

A number of *'ulamā* have also been a great source of support during the years spent working on the dissertation. Among them is Hafiz Ahmad Rabbani of Troy, MI, who was the first to help me get through the dense text of *al-Ḥīla al-Nājiza*. Mufti Abdurrahman ibn Yusuf also provided generous time and feedback on a few of the most difficult of the *Ḥīla*'s chapters. Shaykh Faraz Rabbani and his family had opened up their home in Jordan for an entire month so that I could cover the *fiqh* of marriage and divorce through an intense, daily-session routine. His deep insights, expansive knowledge of Ḥanafī law, and perpetual generosity have provided help beyond measure.

No one can get through dissertation-writing without a good support network. Noura Shamma and Sumayya Ahmed are two old friends who have provided not only emotional but also intellectual support. Also, each year, in turn, my friends old and new in Michigan, New Haven, and Rochester, MN have helped me get through what potentially could have been lonesome days in new locales.

My family has patiently waited as I completed the work on my dissertation. Only sisters know what kind of bond we share; without the warm affection of my two siblings (and their tolerance of my quirks), I would really have become lost in my books. I would like to thank my mother for always being there, never flinching in her unconditional love. As for Baba, he really should get the credit for any good that may come of this endeavor; he is my first teacher, to whom I am forever indebted. And my husband...what can I say? You have been my mainstay. This one is most surely for you.

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INTRODUCTION

Al-Ḥīla al-Nājiza: Ashraf ‘Ali Thānawi’s Fatwa on Women’s Right to Divorce

For the past two centuries the main criticism leveled against the ‘*ulamā*, the traditionally educated Muslim religious scholars, is that they are unwilling to engage in *ijtihād*. The critics assert that times have changed, our social context is not that of the peoples for whom Islamic law as preserved in the law books had been formulated, and for this reason it is necessary to “exert effort” (the verb root for the term *ijtihād*) in order to come up with a new vision for how to live Islam as Muslims in the modern world. Clearly related to this criticism is the idea that the ‘*ulamā* are out of touch with contemporary life.

Those who have called for *ijtihād*, be it Muḥammad ‘Abduh (d. 1905) in 19th century Egypt, Muḥammad Iqbāl (d. 1938) in 20th century pre-Partition India, or “progressive Muslim” activists in the 21st century United States, have been dissatisfied with the ‘*ulamā*’s consistent aloofness in the face of modernist discourses on *ijtihād*. In their desire to preserve the integrity of the tradition, and in the face of severe critique of the current relevance of the *Sharī‘ah*, modern ‘*ulamā* have often retreated to a posture of defensiveness and apologetics. Due to such distancing from the entire enterprise of “reform,” the ‘*ulamā* have then been labeled as being reactionary, rigid, fundamentally unchanging in their legal and religious views. The label has definitely stuck, such that

many academic scholars of Islam, Muslim activists, and even some lay Muslims believe the *'ulamā* to be simply a relic of the past.

The essential problem however is not that the *'ulamā* are unwilling to engage in *ijtihād*. Many *'ulamā* of the modern period, particularly those who are most highly trained, continue to see the importance of taking into account contemporary context when explicating the application of the *Sharī'ah*. Still, despite the ongoing creative legal thought within the work of contemporary *'ulamā*, those outside these scholarly circles persist in faulting the *'ulamā* for “resistance” to *ijtihād*. The reason for this inability to perceive the vitality of the *'ulamā*'s work stems from the fact that each group is utilizing a very different definition of the term “*ijtihād*.” Modernists and traditionalists seem to be talking past each other on the topic of legal reform, and this is so because they have a fundamentally different view about where this reform should come from, and how it should develop.

In the Islamic tradition, the term *ijtihād* has had a specific meaning and role. It is a legal term, describing a legal function, where a jurist, using the primary sources as a backdrop and the methodological tools (*uṣūl al-fiqh*) and past precedent as guidelines, adjusts existing laws or develops new ones in order to maintain relevance and applicability. For the *'ulamā*, long-settled issues of Islamic law form the base of the Islamic legal edifice, and as in other legal systems, provide an essential and aspired-to structure of coherence and consistency. It is this legal tradition that forms the justification for the legal work of the *'ulamā*, and is the source from which they derive their authority. This does not mean however that they view the tradition to be a stagnant body of law. Those legal rulings not decisively established through the primary texts of the Quran and

the Traditions (*ḥadīth*) of the Prophet Muḥammad, and those that had originally had their roots in the custom and practice of a particular social context, continue to be open to debate and reevaluation when necessary.

Modernists however do not see the term *ijtihād* as a solely legal discourse. Instead, they use it as a way to encourage social mobilization and intellectual rejuvenation. For the Indian philosopher Iqbāl, *ijtihād* was “a principle of movement”,¹ for present-day liberal Muslims it is “engaging and transforming the social order and the environment in a just and pluralistic fashion”.² In these circles there is not much discussion on how this *ijtihād* is supposed to occur, what form it should take, if it should take place within a formalized methodological system, or its relation to past precedent. In many cases, even the value and role of the primary sources themselves are not agreed upon, with many thinkers propagating the rejection of *ḥadīth* and the apparent meaning of Quranic verses that do not fit the given social agenda. The notion of *ijtihād* held by modernist Muslims not only criticizes the contemporary relevance of specific points of Islamic law; it also aims to revisit important epistemological issues, calling into question the reliability and authoritativeness of the primary source material and of core Islamic doctrine.

For the *‘ulamā*, who have historically seen themselves to be the custodians of tradition, such a definition of *ijtihād* is simply not tenable. Questions on the reliability of the source material and the legitimacy of agreed-upon tenets of faith must necessarily be seen to be long-settled, if only to allow for a level of continuity in Islamic belief and practice. Their hesitation in the face of modernist calls for *ijtihād* is understandable if one

¹ Masud, *Iqbal’s Reconstruction of Ijtihād*, 103.

² Safi, “Introduction,” in *Progressive Muslims*, 8.

recognizes that the role of the *'ulamā* is essentially one of bringing order and systematization to the way the lived reality of Islam is articulated and promoted. However, the *'ulamā* themselves recognize, as they always claim to have done so, that to truly have a “livable Islam,” *ijtihād* in the case of non-decisively established legal matters is a necessity. They argue that without the ability to reevaluate specific legal rulings according to changing space and time, the work of the jurist can only lead toward an oppressive and stifling adherence to the pre-existing body of Islamic law.³

This dissertation takes up the issue of *ijtihād*, creative legal reform, as defined and upheld by contemporary *'ulamā*. It centers in on a particular issue—women’s right to divorce—within a particular context—mid 20th century colonial India—as a way to highlight the approaches of traditionalist Muslim scholars toward Islamic law, legal reform and the continuing relevance of the Islamic legal tradition.



In 1933,⁴ the renowned Ḥanafī jurist Mawlana Ashraf ‘Ali Thānawī published an important treatise, which would later hold significant implications for Muslim women’s right to divorce in India and abroad. This long fatwa, entitled *al-Ḥīla al-Nājiza li’l-Ḥalīlāt al-‘Ājiza* (*The Successful Legal Stratagem for Helpless Wives*),⁵ was essentially a treatise on the need to reform divorce laws. In cases where the husband was unwilling,

³ See for example ibn ‘Abidīn, *Nashr al-‘urf*.

⁴ In his signature at the end of the treatise, Thānawī dates the treatise as being completed in the eleventh month of 1351 AH. Some have converted this date to 1931, but it actually corresponds to about February, 1933.

⁵ The text has also been reprinted under a slightly different title, with subtitle in Urdu instead of Arabic: “*al-Ḥīlat al-Nājiza, ya ‘nay Aurtaun ka Ḥaqq-i Tansīkh-i Nikāh*” (*The Successful Legal Stratagem: Women’s Right to Abrogating the Marital Contract*).

the Ḥanafī school had traditionally allowed women no recourse to divorce save through the presence of a Muslim judge who could review the most serious cases in order to decide whether or not to pronounce divorce. The Anglo-Muhammadan courts of British India attempted to apply Ḥanafī law in such civil matters, but since their courts did not usually have Muslim judges adjudicating these cases, observant Muslim women were forced to seek out a legal dodge, or “*ḥīla*,” in order to escape their failing or abusive marriages. The only recourse they could find (which was also a step encouraged by Christian missionaries in the early 1900s⁶) was to renounce Islam, to declare themselves to be *murtadda*, which according to the Ḥanafī school would automatically dissolve the Islamic marital contract. In an initial fatwa about this course of action, issued in 1913, Thānawī took a strong stance against the apostasy of such women and condemned their actions outright, without really providing them with an alternative. But as the women’s resort to apostasy received more and more attention in Muslim circles, Thānawī put out a legal device of his own in 1933, *al-Ḥīla al-Nājiza*, in order to provide “a more direct route of salvation” for women who become so “desperate and distraught” that they are forced to leave Islam in order to escape their marital situations.

While assisting oppressed women was an important stated goal of the project, a more pressing need informed the entire modus operandi: that of maintaining the legal authority of the traditional *fuqahā*, given that modernist and secular Muslim spokesmen were also claiming authority on this issue. *Al-Ḥīla al-Nājiza* was not a text that was meant to be accessible to the masses. It was not meant to be a rallying call for women in hard-pressed situations. Instead, this text was primarily a call to internal dialogue within scholarly circles. The fact that it was meant primarily for legal specialists is clear from

⁶ Masud, “Apostasy and Judicial Separation in British India,” 195.

the intentional complexity of the language and legal jargon used (though this complexity was also meant to send a message to non-*'ulamā* about the fact that legal discourse was the exclusive right of the *'ulamā*). Limiting the pool of interpretive resources to within the four *madhhabs*, or Sunni legal schools, is yet another device used to make sure authority does not leave the hands of the traditional jurists. In the face of British propaganda about the mistreatment of Indian women, intensified in the early 20th century through such debates as the one surrounding the age of consent for marriage, Muslim modernists (like their counterparts among the Hindus) had already begun radically redefining a range of established practices in relation to women.⁷ Thānawi attempted to avoid what he and other scholars deemed the Muslim modernists' methodological weakness by maintaining legal continuity, and therefore interpretive authority. Such a strong show of their legal training and skills would then be a way to further bolster the *'ulamā*'s claims to authority.

In *al-Ḥīla al-Nājiza*, Thānawi offers up the following three main solutions to the problem of women having no current recourse to divorce in the *Sharī'ah*: 1) petitioning the existing British authorities to appoint Muslim judges in every district, so that women would not have to continue to put up with such painful situations; 2) to look within the Ḥanafī school itself and find what other options women might have; and 3) to borrow from the Mālīki school in cases where no other options were available. This dissertation examines the rulings in *al-Ḥīla al-Nājiza*, the context in which the treatise was written, and its ultimate consequences in India and abroad, as a window into the legal thought and modes of discourse utilized by traditionalist *'ulamā* of the modern period.

⁷ Minault, "Women, Legal Reform and Muslim Identity in South Asia." See also: Sinha, "Introduction."

Events leading up to *al-Hīla al-Nājiza*

As a mufti, Mawlana Thānawi had already seen cases in which women were seeking divorce before the composition of *al-Hīla al-Nājiza*. From as early as 1907, Thānawi had been giving fatwa on cases where the woman was clearly entitled even according to Ḥanafī law to a divorce (*faskh*). He would explain the legal rulings for each case faithfully according to the Ḥanafī school, clarifying for instance that a pre-pubescent girl upon reaching puberty could in certain cases validly ask for an annulment. But such explanations of the technical legal rule were consistently followed up by Thānawi with a caveat: the only way her request for a divorce could actually be granted was if a Muslim judge verified her request. Since there were few or no Muslim judges working within the British legal system, Thānawi expressed his helplessness in these *fatāwa* (sing. fatwa), stating that nothing could be done without recourse to a Muslim judge.⁸

Particularly in the context of intense Hindu-Muslim debate and competition for numbers, the prospect of women's using the *hīla* of apostasy seemed intolerable.

In his discussion on the use of this legal device, Muhammad Khalid Masud cites a number of cases from British legal records where in fact women did use apostasy as a means of acquiring divorces. A good number of these cases took place between the years 1920-1925 in the Punjab, with a particular Christian clergyman repeatedly cited on the certificates of baptism these women produced (in order to prove their apostasy and subsequent conversion to Christianity).⁹ In one disturbing case, the woman was asked to

⁸ See section on *faskh an-nikāḥ* in Thānawi, *Imdād al-Fatāwa*, 2, 467-75.

⁹ Masud, *Iqbal's Reconstruction of Ijtihād*, 157; also 176, n. 11 and n. 20.

eat pork as proof that she had indeed converted (which she refused to do, and then had to appeal her case since she lost the first time).¹⁰

In general, however, it seems that the British courts granted the women what they were seeking. The Ḥanafī law that these courts based their judgments on was as follows: if a woman were to apostatize from Islam, her marriage contract would automatically break, but she must be forced to reconvert and remarry her original husband. The British courts upheld the first portion of this ruling, on apostasy breaking the marital contract, as part of the family law of Anglo-Muhammadan law. They did not enforce any ruling on apostasy, either death for a male, or reconversion and remarriage for a woman. Such laws would have had to have been a part of the separate criminal law applicable to all Indian subjects of whatever religion. This “selective” application of Islamic law served to exacerbate the already existing fears Indian Muslims had about the intentions of the British government and missionary efforts within colonial India. Though it is possible that some sympathetic local Muslim scholars had offered this strategy to desperate women (since only those trained in Islamic Law would be knowledgeable of this particular ruling), most Muslims of that time saw the strategy as one that would weaken Muslims.

In 1913, when Thānawī was first faced with the apostasy of a woman in a divorce case, he shows in his fatwa no awareness of the legal realities on the ground. Nowhere does he acknowledge the lack of recourse women had to divorce in cases where the husband was unwilling, even in cases where it was obvious that the woman was facing severe difficulties by being compelled to remain in the marriage. Instead, Thānawī approaches the case purely with a view toward the issue of apostasy on its own. For the

¹⁰ Ibid., p. 159.

first 1913 fatwa, the petitioner (*mustafti*) asked Thānawi about a situation where a woman returned to her family's home a few months after the consummation of the marriage, and when the husband asked her to return to him, she refused. Her family asked the husband to grant her *khul'* (a form of Islamic divorce initiated by the woman, in which she must negotiate his approval), but he refused and instead decided to apply to the government for his wife's return. When the family found out about this, they immediately taught the woman words of unbelief, which she subsequently pronounced. This action of hers was presented before the court, and the marriage was deemed annulled, unless the husband could procure a fatwa defying this ruling.

Thānawi's response to this petition is unequivocal in its condemnation of the woman's apostasy. At the end of the petition, the *mustafti* asks "...is her marriage contract annulled according to God or not?" to which Thānawi responds:

Annulled. Uttering words of unbelief, intentionally and knowingly, whether one actually believes in those words or not, whether it is one's own view or someone else's instructions, necessarily constitutes unbelief in all cases. Since unbelief causes annulment of the marriage contract, the marriage [in question] is dissolved. At the same time the marriage contracts of all those who consented to such instruction are also annulled. The only difference [between the status of the marriage contract of Zayd's wife and that of the wives of those who taught her words of unbelief] is that according to the Sharī'a, Zayd's wife should be forced to embrace Islam and to marry the same first husband. She is not allowed to marry any other person. The wives of those who taught words of unbelief and of those who supported them, however, are allowed to marry whomever they wish after completing the *'iddat* [Arabic: *'idda*, the specified waiting period after the annulment of marriage].¹¹

Thānawi goes on to cite various proof-texts from Ḥanafī sources that back up his fatwa. He cites the prevailing view (*ẓāhir ar-riwāya*) of the Ḥanafī school, which states that if a woman apostasizes, her marriage contract dissolves, but she must be compelled to reconvert, and she can then only marry her previous husband. Thānawi seems to be making grand pronouncements in this fatwa, some that have no connection to reality: for example, under British colonial rule, who exactly would compel the woman to reconvert?

¹¹ As quoted in Masud, *Islamic Legal Interpretation*, 194.

Also, in this first fatwa, Thānawi seems not to be aware that the woman may have been using apostasy as a *hīla*. Instead, his concern is that religious belief is being so casually flouted. Thānawi seeks to punish anyone who would even consider such trivialization of faith, and his fatwa is mainly meant to be a deterrent.

As news of these apostasy cases began to spread, and the motive behind these acts of apostasy became more clear, it became apparent that an approach such as Thānawi's in his 1913 fatwa was no longer viable. One of the first to call public attention to the need for *ijtihād*, or a renewed legal approach, to this issue was the celebrated poet and philosopher Muḥammad Iqbāl, who was based in the Punjab where the cases noted above would have been most widely publicized. He gave a lecture in 1930 lamenting the situation, and calling the *'ulamā* to take this situation seriously and devise a strategy to tackle the legal conundrum. Otherwise, for the law to remain unchanged in the face of major societal movement would mean the eventual failure of the entire Islamic legal edifice as it stood in the Subcontinent. In his words:

In the Punjab, as everybody knows, there have been cases in which Muslim women wishing to get rid of undesirable husbands have been driven to apostasy. Nothing could be more distant from the aims of a missionary religion. The Law of Islam, says the great Spanish jurist Imam Shatibi in his *Al-Muwafiqat*, aims at protecting five things—*Din*, *Nafs*, *'Aql*, *Mal* and *Nasl*. Applying this test I venture to ask: does 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. The result is that while the peoples are moving the law remains stationary.¹²

Writing in 1930, Iqbāl refers to the apostasy issue as one that “everybody knows,” which means that it had probably been some time since news of these cases had leaked out to the public. He felt it to be a serious enough issue that it required public awareness and initiatives to bring about legal change. For Iqbāl even if this is the law as it has been

¹² Muḥammad Iqbāl in *The Reconstruction of Religious Thought in Islam*, as quoted by Masud, *Iqbal's Reconstruction of Ijtihād*, 164-5.

preserved in the *Sharī‘ah*, it was the imperative duty of the *‘ulamā* to face this issue with a creative and productive approach. If they really saw themselves as the protectors of faith and religion in India, how could they allow the use of religious law to take one *out* of one’s religion?

Thānawi’s extended fatwa *al-Ḥīla al-Nājiza* was published three years after Iqbāl’s speech. Some scholars have attributed Thānawi’s work to Iqbāl’s call to action, saying that it was Iqbāl’s speeches and writings that prompted Thānawi to begin work on his text. This view is incorrect if the implication is that Thānawi suddenly began work on the text solely on the basis of Iqbāl’s call, since it is clear that Thānawi had been concerned with the need for a better way to handle woman-initiated cases of divorce long before Iqbāl’s lecture. (It is plausible to assert however that the debates spurred by Iqbāl’s drawing attention to this issue may have indeed played a part in the way Thānawi then articulated his own legal stance through the elaborate project of *al-Ḥīla al-Nājiza*). Even two decades prior to the publication of *al-Ḥīla al-Nājiza*, Thānawi had been encouraging Muslims to petition the British government to appoint Muslim judges so that family law cases could be properly handled. Now that the lack of Muslim judges had taken such an ugly turn, in the form of apostasy from the religion itself, it is no surprise that Thānawi felt the need to address this issue more directly. He began correspondence with Māliki scholars in Mecca and Medina in order to find appropriate solutions to the crisis of Muslim judicial authority in colonial India some two years before Iqbāl’s lecture. According to one of the scholars who aided Thānawi in the compilation of the *Ḥīla*’s rulings, Maulana ‘Abd al-Karīm Gumthallawi, Thānawi had worked diligently and expended great effort for five years before publishing the treatise, which means he began

work on this issue as early as 1928.¹³ Not only did Thānawi consult with Māliki scholars before expounding a new approach to the issue within an Indian Ḥanafī context, he also made sure to utilize the expertise of fellow Indian Ḥanafī scholars, checking and rechecking his conclusions with them during these years of work, before publishing his final version. *Al-Ḥīla al-Nājiza* was Thānawi’s creative and well thought-out attempt to not only help Muslim women in need, but to also simultaneously reclaim the authority of the ‘*ulamā* by making *ijtihād* through a collaborative effort at legal reform.

This dissertation studies in some detail the text of *al-Ḥīla al-Nājiza* as well as its surrounding context (including its situatedness within the intellectual work of Thānawi himself) as a way of exploring the following questions: How did the ‘*ulamā* deal with the changed conditions they found themselves in under colonial, non-Muslim rule? In what ways had their claims to authority come under attack in the modern period, and how did they seek to reclaim or rearticulate their exclusive authority over defining Islamic Law and interpreting the Islamic tradition? How did they deal with competing voices from within the ranks of the Muslims themselves? What tools from within the existing Islamic tradition did they use to voice their concerns? How did contemporary debates and competing claims to authority affect the ‘*ulamā*’s own engagement with issues of reform and *ijtihād*? How did the ‘*ulamā* attempt to take ownership of the “woman question,” and in what ways did they articulate their own ideas for reform in this sphere? And finally, was his attempt at creating new loci of ‘*ulamā* authority for Muslim minorities within non-Muslim majorities at all successful?

This dissertation addresses these questions in six sections. Chapter I introduces the context surrounding the compilation of *al-Ḥīla al-Nājiza*. It evaluates the crisis of

¹³ ‘Aziz al-Hasan, *Ashraf al-Sawānih*, 3, 245.

authority that the *'ulamā* were facing in the colonial period and discusses the legal challenges, similar to those in other parts of the Muslim world, that faced the *'ulamā*. Chapter II goes into a specific debate that brought the legal work of the *'ulamā* directly into question: that of the controversy surrounding *taqlīd* (loyalty to a single legal school thought or *madhhab*) and *ijtihād* (creative engagement with Islamic Law to adapt to changing times and circumstances). How did Indian *'ulamā*, and Thānawi in particular, address these issues in order to keep Islamic Law relevant to contemporary conditions, yet ensure their own authority? This chapter also introduces those aspects of *al-Ḥīla al-Nājiza* that served women seeking divorce. Chapter III gives an overview of the *Sharī'ah* rulings on marriage and divorce, with a particular focus on the legal rulings in the Ḥanafī school. It then covers the bulk of the rulings in *al-Ḥīla al-Nājiza*, which outline the procedures needed to grant women a divorce in various situations. This chapter shows that even here, though he is using the Māliki concept of *jamā'at al-muslimīn al-'udūl*, the provision to allow a local council to replace the authority of a Muslim judge, Thānawi seeks to adhere to Ḥanafī rulings in the actual divorce proceedings as much as possible. After presenting an overview of marriage and divorce law, and outlining the detailed procedures on how a woman could procure a divorce through a Māliki-sanctioned council, the next chapter, Chapter IV, goes back to the first section of *al-Ḥīla al-Nājiza*, on delegating the right to *ṭalāq* to women in their marital contracts (*tafwīḍ al-ṭalāq*). Granting the *ṭalāq* (the form of unilateral divorce that normally falls under the exclusive preserve of the husband) to the woman is a radical way of challenging social taboos limiting women's rights, while still maintaining strict allegiance to one's own legal school. Chapter V focuses on Thānawi's treatment of women in his other works, and

argues their relevance as background for his approach in *al-Ḥīla al-Nājiza*. A concluding section considers the practical effects and implications of *al-Ḥīla al-Nājiza*, particularly with respect to contemporary Muslim minorities in non-Muslim majority nation-states.

CHAPTER I

Contextualizing al-Ḥīla al-Nājiza

The *‘ulamā* held a central position within the intellectual realm of pre-modern Muslim societies. Charged with the important task of determining the correct form of Islamic practice and belief, they were seen as the authorities to whom Muslims must turn in order to discover the continually unfolding will of God on earth. “Ask those of remembrance if you know not”¹⁴ goes the Qur’anic injunction, and traditionally the inference taken has been that “lay” Muslims must consult the scholars of religion in order to know how to truly live one’s life in accordance with Islam. The literate members of Muslim societies were mostly trained in religious institutions, or *madrasas*, and those possessing such training could take on any number of roles, including that of courtiers, scribes, judges, and teacher-scholars of the advanced religious sciences.

Marshall Hodgson, in his illustrious *Venture of Islam*, describes the role of the *‘ulamā* in pre-modern societies thus:

Among Sunni and Shi‘i Muslims, a host of pious men and women who came to be called the *‘ulamā*, the ‘learned’, worked out what we may call the *‘Sharī‘ah-minded’* programme for private and public living centered on the *Sharī‘ah* law. As might be expected, these *‘ulamā* scholars dominated Muslim public worship. They exercised a wide sway, but not exclusive control, in Muslim speculative and theological thought. They exercised an effective—but never decisive—pressure in the realms of public order and government, and controlled the theoretical development of Muslim law. The fields of Arabic grammar, or some sorts of history, and even sometimes of Arabic literary criticism were largely under their influence. [M]any aspects of culture escaped their zealous supervision... Their work, however, gave a certain dignity to the whole social edifice. As a whole, that edifice reflected the aspirations

¹⁴ Qur’an, 16:43.

of the *'ulamā*', and the intellectual and social patterns that followed therefrom, more than it reflected any other one set of ideals.¹⁵

The influence of the *'ulamā* thus permeated many aspects of Muslim life. Their scholarly work was what constituted the primary intellectual universe in pre-modern Muslim societies, and since court authority also lay in their hands, they were often able to enforce their legal pronouncements with state backing. The *'ulamā* articulated how the *Sharī'ah* should be applied within the private realm through discourse on ritual practice, Sufi teachings on spiritual uprightness, and the deliverance of Friday sermons, as well as within the public realm through their judicial powers. In India, as well as in the central Muslim lands, charismatic figures such as local saints, who were not necessarily from the *'ulamā*, did play a (sometimes “competing”) role when encouraging religious awareness, particularly in non-urban areas. But the discourse of the *'ulamā* was always acknowledged as holding the authoritative role in religious thought and legal determinations.

Sharī'ah and the 'ulamā

The Arabic term *Sharī'ah* is most commonly translated into English as “Islamic Law”, but this translation is not quite complete or totally encompassing of the varied socio-spiritual dimensions Muslims conjure when they hear the Arabic term. It is fairly accurate in the sense that it captures the term’s function as a means of legal structure that facilitates the rule of law, but only if the term is accompanied with an understanding of the way “law” is understood, used and applied in the context of Islamic legal and spiritual

¹⁵ Hodgson, *The Venture of Islam*, vol. I, 238.

traditions. Contemporary western use of the term law brings to mind not only a prescriptive set of rules to be applied for the proper functioning of society, but also carries with it the notion of state control and enforcement. The term *Sharī'ah*, on the other hand, is much broader than this modern conception of law. It is used to describe the totality of what God's expectations are with regards to His servants, so that it includes right conduct and moral virtues in every aspect of a Muslim's life, be it in the realm of social, economic, political, or religious practice, thus encompassing much that is beyond the scope of any court. The *Sharī'ah*, therefore, can be said to be the prescriptive rulings that dictate the totality of the observant Muslim experience.

The laws of the *Sharī'ah* are derived by Muslim jurists, or *fuqahā*, who are required to have solid grounding not just in *fiqh* (the science of deriving the legal rulings of the *Sharī'ah*), but also to have intimate familiarity with other Islamic sciences such as those dealing with Qur'anic exegesis (*tafsīr*) and the Traditions (*ḥadīth*) of the Prophet Muḥammad. Traditionally, Muslim jurists received training for a number of years before being granted *ijāzas* (certificates of permission from senior experts) to teach, explicate and derive the law themselves. Women have been known to be trained in the legal sciences, from as far back as the Prophet's time through the medieval period, and to have reached high levels of proficiency as jurists. However, generally the *fuqahā* have been men, and this is true most likely due to social and cultural factors, since there is technically no religious bar for women to participate in the science of deriving law.

Historically there have been specific institutions that ensured the application of the *Sharī'ah* in Muslim societies. The first, and most authoritative with regards to enforcement, was the Islamic court system, or *qāḍa*. The judges, or *qāḍīs*, who worked

for these courts were most often trained in the science of *fiqh*, and obviously had the backing of the government in order to have their decisions hold weight. Not every aspect of the *Shari'ah* was applied through the courts or with the backing of the government. Generally the Islamic courts would deal with issues very similar to those that are brought for litigation in modern secular legal system, such as cases of civil dispute (e.g. involving divorce, inheritance, and trade-related settlements) and criminal punishment.¹⁶ Matters dealing with religious observance rarely reached the courts, unless there was some cause of concern for how the overall good of society might be affected by their negligence or over-emphasis.

The *'ulamā* who gave fatwa (religious opinions) were termed *muftis*, and their opinions held great weight as well, except that they did not have the backing of the state to have their opinions enforced. This does not mean however that their authority was less than that of *qāḍīs*; in fact, some of the most pious and renowned muftis refused to serve in the court system in order that their legal work remained true to the religious tradition and did not become “corrupted” by interference from the state. Very often even the *qāḍīs* were required to check their judgments against the opinions of *muftis*,¹⁷ since the latter were seen to be more highly trained and competent in the science of deriving religious law. *Muftis* today are consulted on matters related to every aspect of life, not only those things that are dealt with in court.

The rulings of the *qāḍīs* and the *muftis*, together with the more subtle yet diffuse (and varying) pressure of customary practice (*'urf*) that had become imbued with Islamic

¹⁶ “In theory the *qāḍī*'s jurisdiction was general and included both civil and criminal cases; in practice most criminal cases were handled by the police and military governors.” Masud, et al., “*Qāḍīs* and their Courts: An Historical Survey,” in Masud, et al., *Dispensing Justice in Islam*, 13-4.

¹⁷ *Ibid.*, p. 29.

teachings, served to reinforce the implementation of the *Sharī'ah* in Muslim societies. Islamic courts did not seek to enforce punishments against men and women who did not pray or fast; rather, it was the teachings that the jurists would impart, along with the social pressure to remain committed to religious practice, which encouraged adherence to religious ideals. In all cases, the *Sharī'ah* was only meant to apply to Muslim citizens of any given area. Non-Muslims were allowed to have their matters adjudicated in their own law courts (unless for example the case involved a civil dispute involving the Muslims themselves). In pre-modern Muslim societies, non-Muslims citizens in Muslim countries were not expected to conform to the injunctions of the *Sharī'ah* and were basically left alone to manage their communities as they saw fit.

The *'ulamā* did not promote any type of overarching ecclesiastical body to govern how they come to their legal decisions. In pre-modern societies, they had the freedom to give fatwa according to what they deemed most fitting, in light of the primary and secondary sources of Islamic Law. In order to avoid a proliferation of unfounded or inaccurate opinions, Sunni jurists developed the system of the legal schools (*madhhabs*), institutionalized some time around the fourth Islamic century, in order to ensure that coherence could be maintained within legal verdicts and practice. Four came to be seen as equally legitimate. The four legal schools, namely the Ḥanafī, Shāfi'ī, Māliki and Hanbali, along with similar structures in Shī'ī law, served to protect against arbitrariness in the giving of religious rulings. Jurists were trained according to the methodology of one particular legal school, and, unless they perceived the need to change, they strove to remain within the confines of the positive legal injunctions as well as the methodological rules of their own school. All of the schools based their rulings on the Quran and *ḥadīth*;

they only differed from each other in the methodologies utilized to approach these primary sources. In the pre-modern period, this was the closest Muslim jurists came to “codification” of Islamic Law. The acceptance of all four methodological schools as being legitimate allowed for a variety of opinions to continue to exist, while simultaneously providing a stabilizing force to the interpretation of religious law, since any difference of opinion had to be justified within the confines of these legal schools of thought.

It was this acknowledgement of the methodological process that made the *‘ulamā* who they were. Difference of opinion always existed among the scholars, from the earliest days of Islam, in part because the variance of cultural and political practice across Muslim time and space meant that the *Sharī‘ah* was often articulated with a view toward particular circumstances. But what they shared as religious scholars was a common recognition of the status of the religious tradition as it had been articulated through time, and the need to work within the methodological framework of the legal schools to come to their own legal decisions.

Tradition as Process

It is important to consider the meaning of “tradition” somewhat, since we are often told that tradition is a static entity, a structure that must be “upheld” by its reactionary custodians, never questioned or redefined by them. In contrast, according to

the anthropologist Talal Asad, tradition is more “a dimension of social life and not a stage in social development.”¹⁸ It is, according to the philosopher Alasdair MacIntyre,

an argument extended through time in which certain fundamental agreements are defined and redefined in terms of two kinds of conflict: those with critics and enemies external to the tradition who reject all or at least key parts of those fundamental agreements, and those internal, interpretative debates through which the meaning and rationale of the fundamental agreements come to be expressed and by whose progress a tradition is constituted.¹⁹

Tradition is, then, more a creative process, a discourse, through which appeals to the past are made in order to find one’s place in a changing context. It is a discursive method through which boundaries are surely defined, but boundaries are also pushed and redefined at the same time. Limits are set up, the crossing of which entails an abandoning of the tradition, causing one to be seen as “external” to its borders. But within these limits there are pulls and tugs, and though heated internal debates may occur, all of these variations on what truly constitutes the tradition can be seen to be in some way “acceptable.”

In Muslim societies, it has been the *‘ulamā* who took it upon themselves to work out these boundaries, whether they searched for legal limits or theological, and these boundaries of orthodoxy and orthopraxy are then challenged, defended and upheld by members of their own class. It is the *‘ulamā* who continue to insist on a method of verification by which their tradition can be sanctioned. “The *isnād*,” which defines the authority upon which one can enter and contribute to the discursive tradition, “is a ‘continuous support’ only insofar as it is an unbroken chain of trustworthy persons whom one can *name*, and whose personal authorization, or *ijāza*, confirms the reliability of whatever tradition has been transmitted through so many generations.”²⁰ This insistence

¹⁸ Mahmood, “Interview with Talal Asad.”

¹⁹ MacIntyre, *Whose Justice?*, 12.

²⁰ Graham, “Traditionalism in Islam,” 522.

on an *ijāza* to transmit a tradition is not meant in the context of *ḥadīth* alone; in fact, the *ijāza* is seen as the license needed to embark on any type of transmission of knowledge. It is one of the tools used to set the limits of the “internal debates,” but once it is acquired, considerable dexterity is allowed for the one who wishes to participate. William Graham, historian of religion, sums up the role of such a discursive tradition within Islam: “Traditionalism” is not “some imagined atavism, regressivism, fatalism, or rejection of change and challenge.” Instead, the concept of tradition assures for the Muslim “that a personally guaranteed connection with a model past, and especially with model persons, offers the only sound basis in an Islamic context for forming and re-forming oneself and one’s society in any age.”²¹

Islamic Law in the Indian Subcontinent and the Challenge of Colonialism

As elsewhere in the Muslim world, Indian *‘ulamā* have also played the part of being the custodians of tradition. Prior to the colonial period, all Indians, i.e. including both Hindus and Muslims as well as other religious groups, usually resorted to local forms of arbitration and adjudication. Under Mughal rule, there were Islamic courts and *qāḍīs* that Muslims and others could resort to, but the hierarchy of legal jurisdiction was nowhere near as structured as it would become under the Anglo-Muḥammadan courts. Cases could be settled via arbitration done through village councils (*panchāyats*), or by having the contending parties have their case adjudicated by a *qāḍī* (judge) in as informal

²¹ Ibid.

a setting as a mosque or the home of one of the disputants, as long as witnesses were present.²²

While we have scattered evidence that confirms the above, further research needs to be done on studying the role of the *'ulamā*'s articulations of the *Sharī'ah* in the pre-modern period. We do not have much information, for example, on what effect the pronouncements of muftis had on religious practice in precolonial India, or even how *qāḍīs* of this period interpreted and applied Islamic Law. While important studies based on court records have been conducted on the work of Muslim *qāḍīs* in the Ottoman lands, for instance, since no such records exist for India it is difficult to say how the *Sharī'ah* was actually enforced. As Muḥammad Qasim Zaman points out, fatwa collections such as the 17th century *Fatāwa 'Alamgīriyya* (known as *Fatāwa Hindiyya* outside of South Asia) hint at a possible diversity of legal practice, since the stated goal of this text was to provide a “more authoritative” compilation of Islamic legal rulings.²³ The very existence of this text however, and its continued use among present-day Ḥanafī *'ulamā*, is proof that the Indian religious scholars were connected with the broader Islamic legal tradition, and felt it important to promulgate “authentic” versions of Islamic legal thought at least at this point in the precolonial period.

According to Masud, Peters and Powers, “The *qāḍī* system developed by the 'Abbasids continued to operate under the Mughals in India (1526-1858).”²⁴ Muslim judges were the ones who adjudicated cases such as those concerning family law, and attempted to abide by the *Sharī'ah* when doing so. This situation changed in important ways, however, with the onset of British colonialism. In 1765, when the East India

²² Kozłowski, Gregory, *Muslim Endowments and Society in British India*, 107.

²³ Zaman, *The Ulama in Contemporary Islam*, 20.

²⁴ Masud, *Dispensing Justice in Islam*, 15.

Company acquired control of the finances of Bengal, Bihar and Orissa, their influence also extended to the judicial administration.²⁵ Legally areas like Bengal remained officially under Mughal rule, and under the terms of the treaty, “the British could not change the position of the shariah as the law of the land.”²⁶ But already in 1772 structural changes began to take place, with the British setting up civil and criminal courts that were headed by British judges, who were helped in the legal decision making process by officially appointed “*maulvis*” and “*pundits*” (Muslim and Hindu legal scholars respectively).

According to Asaf A.A. Fyzee, this policy was a continuation of the basic structure laid down in Mughal times. The Mufassal Regulation of Warren Hastings, 1772, later re-enacted formally in the Regulation of 1780, stated:

That in all suits regarding inheritance, marriage and caste, and other religious usages or institutions, the laws of the Koran with respect to the Mahomedans, and those of the Shaster with respect to the Gentoos [Hindus], and where only one of the parties shall be a Mahomedan or Gentoos, the laws and usages of the defendant shall be invariably adhered to.”²⁷

Discovering what exactly the law was according to these two religious traditions was no easy task. Islamic Law had never been codified, and in fact the legal corpus consisted of a range of possibilities in terms of the legal rulings. Important texts of the Ḥanafī school, such as the one commissioned by the Mughal emperor Aurangzeb ‘Alamgīr (d. 1707) (the *Fatāwa ‘Alamgīrīyya*, mentioned above) included under any given topic the whole range of Ḥanafī precedent, highlighting the most authentic or reliable opinion, but in no way rejecting the “minor” opinions of the school.²⁸ Hindu law

²⁵ Zaman, *The Ulama in Contemporary Islam*, 21.

²⁶ Masud, *Dispensing Justice in Islam*, 37.

²⁷ Fyzee, “Muḥammadan Law in India”, 412.

²⁸ Though the British condemned the variety of precedent in Muslim and Hindu law as a sign of “arbitrariness”, they recognized the role and importance of precedent in their own laws back in England.

had similar if not greater challenges. Whereas the Muslims at least had existing compendiums of religious law, the British had to commission a panel of *pandits* to produce a similar compilation of Hindu religious law. The Brahman scholars had to pick out sentence by sentence laws from the Sanskritic texts, after which these were translated into Persian (since so few British at the time knew Sanskrit) and then finally into English. “The arduous process of compilation made clear the artificially contrived nature of the whole enterprise.”²⁹

As the judicial seats became increasingly occupied by British rather than Indian judges, however, the legal rulings as contained in these “native” structures of law came increasingly into conflict with the common law of the metropolis. As early as 1726 the colonial court judges were instructed to give judgment “according to justice and right.” According to Fyzee, “This is the first use of a general expression the meaning of which was not defined with precision but came to mean British notions of justice and right, as understood by British lawyers.”³⁰ This rule was later spelled out as saying that “when no specific rules were laid down” the judges were to act “according to justice, equity and good conscience.” The latter phrase was frequently cited, and was eventually defined more concretely “to mean the rules of English law if found to be applicable to Indian society and circumstances.”³¹

“The common law, which formed the basis of jurisprudence in England, was, to be sure, based upon a presumption of antiquity and stability in legal culture... Yet the common law, as a succession of precedents derived from individual cases, flexible in accommodating multiple interpretations, embodied in its very nature the history of England. In it could be seen, so English jurisprudence believed, the changing ‘habits’ and ‘usages’ of the English people. There was no sense that Hindu ‘usages’ were similarly responsive to historical change. [Colonial] conception of Hindu law implied that Indians lived a timeless existence.” Metcalf, *Ideologies of the Raj*, 13.

²⁹ Metcalf, *Concise History*, 57.

³⁰ Fyzee, 412.

³¹ *Ibid.*, 412-413.

In relation to criminal law, the British, in the interest of securing order and control, soon established their own standards. The British replaced certain Islamic punishments (such as those requiring amputation and stoning) with prison sentences. On issues such as capital punishment, rape and theft, they issued “new regulations aimed at bringing Ḥanafī criminal law more closely into line with the stricter and more severe British notions of justice.”³² Crimes like murder were no longer to be resolved among affected parties, but as crimes against the state. With the eventual passing of the Indian Penal Code 1860 and the Code of Criminal Procedure in 1861, “the theoretical primacy of the shariah in criminal cases” was finally abolished.³³

Unlike criminal law, the laws of personal status continued to retain a connection to each religious community’s legal tradition. The fact that the British did not insist on legal uniformity in this area is perhaps not surprising, given the fact that ecclesiastical courts were still in operation in the metropolis. However change was subtly affected even in these matters. The major contention the British authorities had against application of Islamic law was the perceived arbitrariness or indeterminacy of Ḥanafī legal rulings. While “judicial discretion” still played a role in deciding cases in England, it was Indian precolonial law and legal practice that was seen by the British to be “uncertain, unsystematic, and arbitrary.”³⁴ As mentioned above, colonial officials desired a source more reliable and consistent than simply consultation with *maulvis*, and they came to decide on specific texts within the Ḥanafī tradition as being the most authoritative as a way to systematize their application of Islamic law. Such an attitude on the part of the British posed a dual attack against the *‘ulamā*: not only had their primary role in society

³² Masud, *Dispensing Justice*, p. 38.

³³ *Ibid.*

³⁴ Zaman, *The Ulama in Contemporary Islam*, 22.

as interpreters of the sacred law been usurped, but they were also being told that the sacred law itself lacked cohesion and was therefore somehow methodologically or structurally unsound. The entire basis on which the authority of the *'ulamā* rested—that of a methodological discourse based on the Islamic legal tradition—was being fundamentally called into question.

Effects of the Colonial Presence: Communal Awareness and the “Woman Question”

One of the effects of recognizing two distinct religious groups and the distinct laws that would govern each (at least in terms of civil matters) was the increase of communal awareness among the Muslims and Hindus of India. “The proclaimed British intention of maintaining impartially the right of each religion to the free public practice of its observances encouraged co-operative action within communities to seek redress for any infringement of that right.”³⁵ A new communal consciousness formed among the various Indian religious groups. Census operations served to further institutionalize such divisions, dividing India into Hindu “majority” and Muslim (and other) “minority” populations. The latter official divisions would lend themselves to “electoral, representative politics” in the early 20th century.³⁶ Of course, even in the precolonial period there were in some sense “Hindus” and “Muslims,” but they were not demarcated communities. “... to count these communities and to have leaders represent them was a

³⁵ Hardy, *Muslims of British India*, 116.

³⁶ van der Veer, *Religious Nationalism*, 19.

colonial novelty, and it was fundamental to the emergence of religious nationalism” towards the closing of the colonial period.³⁷

Increasing communal awareness lent itself to a desire to define the borders of each respective community, and to then police these borders. As we shall see below, the emphasis on religious education, particularly for the masses, was a corollary to the formation of communal identity. Concern for retaining members within community boundaries was enhanced by fears of losing co-religionists to the other side. Fears of apostasy and conversion had engulfed both the Muslims and the Hindus, in part due to the efforts of Christian missionaries. Both groups also feared losing members to each other, particularly in the advent of mass political movements after 1920. The Arya Samaj for example was a Hindu socioreligious movement formed in 1875.

Defiantly Hindu, Aryas participated in public debates with members of other faiths, and, stirring implausible fears that Hindus would disappear in the face of Muslim and Christian conversion, they created new rituals to convert, or purify (by a ceremony called *shuddhi*), non-Hindus and members of lower castes.³⁸

The Muslims feared these efforts, and some among them formed their own organization in the early 1920s with the intention of retaining Muslims within the fold of Islam. The Tablighi Jamā‘at was “one of many Muslim movements stimulated to action by aggressive Hindu attempts to ‘reconvert’ those seen as nominal Muslims to Islam,”³⁹ and through its success as a movement it continues to enhance “individuals’ identity as Muslims,” while remaining aloof from public life and staying away from competition to “secure communal interests in the larger society.”⁴⁰

³⁷ Ibid., 19-20.

³⁸ Metcalf, *A Concise History of India*, 141-2.

³⁹ Barbara Metcalf, “Jihad in the Way of God.”

⁴⁰ Ibid.

Another important effect of colonial pressure was an evolving critique of contemporary Muslim (and Hindu) culture and practice. The rhetoric of reform was ever-present and all-pervasive: in the realm of not just religious practice but also education, customary practice, and individual rights, each religious community had numerous subgroups weighing in on any given issue. Among these issues one of the most persistent was that of women's status and reform. This was an issue shared across communal lines, and even across intra-Muslim divisions. The modernists as well as the *'ulamā*, for example, though perhaps fundamentally divided on the tools and method of reform, both agreed that "the status of women required amelioration."⁴¹ As Gail Minault explains:

Both Hindu and Muslim social reformers saw the roots of decline in a subsoil of rituals and customs that they regarded as unnecessary accretions, corruptions of a pure standard embodied in a reinterpreted past. For both Hindu and Muslim reformers, the solution to their current decline included the purification and rectification of religious life, and to that end, the reform of the role of women who were viewed - paradoxically - as both the chief perpetrators of wasteful and invidious customs and as the chief victims of such customs. For the reformers, therefore, women needed to be rescued from ignorance and superstition and also from abuse.⁴²

It now became the responsibility of the men in each community to look after their women, taking care to reform both the practices that were perpetuated by women that harmed communal well-being, as well as those practices enshrined in cultural norms that served to endanger the women themselves. Even though women may be the beneficiaries of such reform efforts, it was the men who were the actors in this sphere. Through such discussions of reform surrounding the woman question, "Women became symbolic, not only of all that was wrong with cultural and religious life, but also all that was worth preserving."⁴³

⁴¹ Minault, "Women, Legal Reform, and Muslim Identity in South Asia," 1.

⁴² Ibid.

⁴³ Ibid.

The “woman question” had long become a central forum for debate between the British and their Indian subjects. Issues surrounding the mistreatment of Indian women by Indian men became an important moral justification for the continuation of British imperialism. As early as 1817 with the publication of James Mill’s *History of British India*, specific practices among particular groups, “such as the self-immolation of widows (popularly known as *sati*), female infanticide, the veiling of women (*pardah*), child marriage, and enforced widowhood, were treated as emblematic of all India and Indian culture as a whole.”⁴⁴ The “civilizing mission” of the British was paired against the “barbarity” of the native population, thus providing a biting justification for continued colonial rule in India.

It was not long before members of both the Hindu and Muslim communities began to try and take ownership of the issue of women’s reform. This became an important element of the nationalistic spirit that grew among Indians in the early 20th century. Mrinalini Sinha discusses the effects of the cooption of these issues actually had on women’s rights with respect to the Hindus:

The impact of the ideological resolution of Indian nationalism on actual reforms for women...was ambiguous at best. On the one hand, it provided Hindu revivalists, especially in the second half of the nineteenth century, with a patriotic language through which they could articulate their patriarchal resistance to legislative initiatives aimed at improving the condition of women...On the other hand, however, it also made possible the gradual emergence of a fragile new consensus—shared even by many of the leading Hindu revivalists of the late nineteenth and early twentieth centuries—in favor of certain limited reforms for women.⁴⁵

Such a consensus formed among Muslim reformists as well, be they modernist or from among the *‘ulamā*. However, both communal groups looked to their respective textual traditions for justifications of the reforms they promoted: the Hindus looked to their

⁴⁴ Sinha, “Introduction,” 29.

⁴⁵ *Ibid.*, 31-32.

Shastric and Vedic legacies, the Muslims to their own scriptural sources. The question of women's reform thus served to further enhance the growth of communal consciousness discussed above. "As their discourses concerning the reform of women's intellectual and religious lives evolved, Hindus and Muslims either revived or created certain norms and boundaries for their communities. Reformers thus helped to articulate separate identities, to define what it meant to be either a Hindu or a Muslim, for both men and women."⁴⁶

The Need for a Muslim Response

As we shall see in the following chapter, in many ways the reaction to British accusations against the unsystematic nature of the *Sharī'ah* took the form of the *taqlīd* vs. *ijtihād* debate. This was an intra-Muslim discussion, with multiple parties involved. This debate was carried on by distinct sectarian groups. The call of the Ahl-i Ḥadīth to abandon *taqlīd*, or adherence to one of the Sunni legal schools, had roots in an earlier time, but their argument gained strength in the face of British disdain for Islamic legal practice in India. In face of colonial critique, the Ahl-i Ḥadīth desire to return to an imagined time of perfection seemed ever more enticing. "Modernist" Muslim thinkers also were against *taqlīd*, not to reestablish a more "pristine" formulation of the law based directly on the primary sources, but rather in order to infuse a greater level of flexibility in the interpretation of the *Sharī'ah* so that it could be brought in line with modern (Western) sensibilities. The work of individuals such as Sayyid Aḥmad Khan (d. 1898), founder of the Muḥammadan Anglo-Oriental College and the Aligarh movement, and

⁴⁶ Minault, "Women, Legal Reform and Muslim Identity in South Asia," 1.

later that of the poet-philosopher Muḥammad Iqbāl (d. 1938) represented some of the approaches to “modernizing” Islamic law.

Chapter II outlines in detail the *‘ulamā*’s response to this challenge against *taqlīd* and the adherence to the accepted methodological schools. Responding to the criticism of both the non-Muslim rulers who had overtaken judicial authority in India, as well as that of the various Muslim parties involved in the debate, the *‘ulamā* of colonial India rallied around the concept of *taqlīd* as they never had before. Due to the way the debate had now come to be formulated—that if one commits to *taqlīd* it necessarily follows that one cannot engage in *ijtihād*—the *‘ulamā* strongly fell on the side of *taqlīd*, and defended the need for committing to one of the four *madhhabs* as being a central religious obligation. If difference of opinion based on a traditionalist discourse and the following of minority opinions within the Ḥanafī school had been previously tolerated by Indian *‘ulamā*, now they felt the pressure to privilege the stronger opinions (*zāhir al-riwāya*) of the school as to make them seem almost incontrovertible. However, in their response to the objections against *taqlīd*, as well as other challenges to their authority that they faced (outlined below), the *‘ulamā* did engage in subtle, often unacknowledged, forms of *ijtihād* as they developed their own creative ways of responding to the needs of their time.

The proliferation of print media was one aspect of modern Indian society that posed a particular difficulty for the *‘ulamā*. In the pre-modern period, the primary means for disseminating religious knowledge was through oral transmission. However, the introduction of the lithographic press in the early part of the nineteenth century began to offer new avenues for communication, and these were soon recognized and embraced by Indian Muslims. As Francis Robinson puts it, “Increasingly from now on any Aḥmad,

Maḥmūd, or Muḥammad could claim to speak for Islam.”⁴⁷ Not only could individuals from the Ahl-i Ḥadīth camp and the modernists question the basis for the ‘*ulamā*’s authority, they could now through the use of print disseminate their ideas far and wide. The wide availability of texts, including those that formed the core Islamic intellectual heritage (even though in translation), circumvented the need for any “*isnād*” justifying participation in religious discourse.

To counter this challenge, the ‘*ulamā*’ embraced the opportunities offered by print media themselves. They engaged in “pamphlet warfare” with opposing Muslim groups, printing their own inexpensive rebuttals against the Shī‘ah, the Hindu Arya Samajis (discussed below), the Ahl-i Ḥadīth, and modernists like Sayyid Aḥmad Khan.⁴⁸ They benefited from more easily available legal texts from outside India, and began publishing their own fatwa collections as a way of disseminating their teachings. “Elitist” commentaries on *ḥadīth* collections were written, in order to defend both the Ḥanafī madhhab as well as to demonstrate the ‘*ulamā*’s continuing competency in the Islamic legal and textual traditions.

Along with speaking to outsiders and rearticulating their claims to authority, a major concern for reformist ‘*ulamā*’ like the Deobandis was to police their communal borders by promoting improved religious practice. For this they published longer manuals in simple Urdu prose in order to reach as many Muslims as possible. Thānawī’s text *Bihishti Zewar* is a prominent example of this effort. Written at the beginning of the twentieth century, it demonstrates the ‘*ulamā*’s concern for reforming not just men but also the women in their society, who prior to such reformist efforts were only expected to

⁴⁷ Robinson, Francis. “Technology and Religious Change,” 245.

⁴⁸ Metcalf, *Islamic Revival in British India*, 211-12.

have a minimal familiarity with scripturalist teachings. “It claimed to offer the whole knowledge necessary for a woman: the alphabet, letter writing, simple religious duties, the stories of the prophets, and practical advice on cookery, care of the sick, and domestic management. Endlessly reprinted, the book became a standard gift for new Muslim brides.”⁴⁹ Those men who benefited from religious instruction in the past did so by participating in public gatherings at the “mosque, court, school, and sufi hospice.” Publications like the *Bihishti Zewar* brought religious learning to a wider expanse of people in a wholly original manner. Eventually consulted by men as well as women for their religious needs, “the text itself, therefore, is part of an important cultural transformation.”⁵⁰

One of the most significant transformations in responding to British and Muslim discontent with the *‘ulamā*’s approach to learning was the formation of the Deoband school itself. When encountering Muslim (as well as Hindu) traditional institutions of learning in colonial India, the British were dismayed at the lack of clear distinctions between religious and secular topics of study. For them, this was a confirmation of India’s medieval culture.⁵¹ As self-styled “enlightened” rulers, they could distinguish such medieval education from the “useful” education that they themselves could further.

Utilitarian thinkers such as James Mill (d. 1836) were among those who criticized traditional religious learning as it existed in India. When discussing how education should be funded by the East India Company, he says for example:

The great end should not have been to teach Hindoo learning, or Mahomedan learning, but useful learning... In professing, on the other hand, to establish Seminaries for the purpose of teaching mere Hindoo, or mere Mahomedan literature, you bound yourself to teach a great deal

⁴⁹ Ibid. p. 211.

⁵⁰ Metcalf, *Perfecting Women*, 2.

⁵¹ Zaman, “Religious Education and the Rhetoric of Reform,” 296.

of what was frivolous, not a little of what was purely mischievous, and a small remainder indeed in which utility was in any way concerned.⁵²

Such criticism not only redirected British patronage, but challenged the status of the *madrāsas* in India, and thereby the roles of the *‘ulamā* who graduated from such schools. It was not only the British who perpetuated these claims, but also modernist Muslim thinkers, as well as certain reform-minded individuals from among the *‘ulamā* themselves.

Colonial administrators had relegated religion to a separate sphere, divorced from the political and educational apparatuses set up by the state. Some *‘ulamā* responded to such denouncement of their institutions. It was now up to the *‘ulamā* to determine how best they could continue their function as “upholders of the faith” in this changed religious context. They were affected by the critique of British administrators and modernist Muslims with regards to the lack of systematization in Islamic religious education, and ended up creating wholly new institutions, the most renowned of which was the *madrāsa* at Deoband.

The seminary was formed in 1867 in the town of Deoband, located some ninety miles northeast of Delhi. It was formed soon after the failed Mutiny of 1857 against the British, and its brutal retaliation against the Muslim population in particular. Some *‘ulamā* had attached themselves to the few existing Muslim princely states such as Hyderabad and Bhopal. Others had taken up posts with the British on account of their literate status, and, having become familiar with forms of British institutional setup, were then able to carry these lessons into how they reenvisioned Islamic learning in India. They

⁵² James Mill, Revenue Department dispatch, February 18, 1824, Bengal, E/4/710,-para. 83, India Office Library and Records, British Museum, quoted in Zaman, “Religious Education and the Rhetoric of Reform,” 298.

recognized that something needed to be done in order to preserve religious learning in the face of the new challenges of their period, and the north Indian *'ulamā* who formed the Deoband seminary did so with this feeling at heart.⁵³

While maintaining a traditional approach to *taqlīd* of the Ḥanafī *madhhab*, instruction at Deoband offered a renewed focus on the study of *ḥadīth*. It also followed a set curriculum, gave periodic exams and “graduated” students like Western institutions of learning, and overall consciously made an attempt to systematize its approach to religious teaching and learning. Its formation was an attempt to preserve a classical approach to tradition, but the preservation itself was wholly modern:

The Deobandi seminary (or *madrasa*) taught classical Islamic texts. But the school utilized the formal classroom pattern known from British schools, fostered Urdu as a language of prose, and forged networks of supporters through subscriptions, publications, and an annual meeting. In contrast to rationalists like Sayyid Aḥmad Khan, Deobandis cherished the sufi tradition of personal relations to holy men, devotional exercises, and belief in charisma. As Vasudha Dalmia has argued in relation to Hinduism, the traditionalist organizations and teachings were to prove the more enduring. However much they were responding to the changed conditions of their day, these reformers succeeded by drawing on symbols and language familiar from their historic traditions.⁵⁴

The institution itself, along with its scholars’ use of print media and personal contacts, constituted an effective strategy at bolstering the position of the *'ulamā*. Numerous Deoband-affiliated madrasas began appearing soon after its formation, and present-day South Asian Deobandi madrasas number in the thousands.

Ashraf ‘Ali Thānawī (1864-1943) was one of the key figures affiliated with the influential Deoband madrasa. One of the most prominent of all the leading Deobandis, Thānawī was both an accomplished jurist (*faqīh*) as well as an influential Sufi and spiritual guide to thousands. According to Muḥammad Qasim Zaman: “Few figures from modern South Asia better illuminate the culture of the traditionally educated Muslim

⁵³ This discussion on the political climate surrounding the formation of Deoband is taken from Barbara Metcalf, *Islamic Revival in British India*, 87.

⁵⁴ Metcalf, *A Concise History of India*, 143-4.

religious scholars, the *'ulamā*, and their efforts to defend their scholarly tradition and articulate their authority in conditions of momentous religious and political change than... Thānawi.”⁵⁵ His *fatāwa*, Quranic commentaries, popular works (like the *Bihishti Zewar*) and transcribed spiritual discourses have continued to be republished and have won numerous followers and disciples over the past century. “His writings, and those of some of the disciples who lived in close proximity at his Sufi lodge and whose work he commissioned and oversaw remain unmatched among the *'ulamā* of South Asia in their range and their sheer volume.”⁵⁶ Thānawi was the quintessential representative of the Deobandi approach to religious instruction, since his work embodied the reformist tendencies of the traditionalist approach and remains influential to this day.

Thānawi’s work on *al-Ḥīla al-Nājiza* must be seen within the historical context described above. It was written in the face of British and Muslim charges against the *'ulamā* for legal indeterminacy, a “useless” approach to learning and knowledge acquisition, and a supposedly profound inadequacy in dealing with contemporary circumstances. Other related factors would also play into Thānawi’s particular desire to write the *Ḥīla*. The colonial presence and the resulting Anglo-Muḥammadan court system were a major challenge to the work of the *'ulamā* like Thānawi, concretely in the form of loss of judicial authority, and more nebulously in terms of challenges to Muslim sense of self or identity. Thānawi’s broader work as well as his composition of *al-Ḥīla al-Nājiza* directly confronted these problems.

As we saw in the Introduction, Thānawi had been voicing his concerns about the need for Muslim judicial authority from very early in the 20th century. According to one

⁵⁵ Zaman, *Ashraf 'Ali Thānawi*, 1.

⁵⁶ *Ibid.*

of his disciples, Maulana ‘Abd al-Karīm Gumthallawī, Thānawī had exerted considerable effort on various occasions to petition for the appointment of Muslim judges via his students. Thānawī had sent Maulana ‘Abd al-Karīm to a meeting in 1347/1928 at Delhi convened for this very purpose. Along with “members of the Assembly,”⁵⁷ “notables of Delhi,” and ‘*ulamā*’ from Deoband and the sister school at Saharanpur, prominent figures such as Mawlana Anwar Shāh Kashmīri (d. 1933) and the modernist Muḥammad ‘Ali (d. 1931) were also present. Such efforts on the part of Muslims continually failed to realize, but according to Gumthallawī, Thānawī maintained hope for some opening, and would pray for the establishment of Islamic *qada* “every day” at his Sufi hospice in Thana Bhawan.⁵⁸

At the same time, there were also leading Muslim figures who were against working through British institutions. Like the non-cooperation movement of Mohandas Karamchand Gandhi (d. 1948), which began to gain ground in the 1920s,⁵⁹ prominent Muslim spokesmen, including those from among the ‘*ulamā*’, felt that refusing to work with the system was the best way to put pressure on the British to have Muslim needs met. Mawlana Abul Maḥāsīn Muḥammad Sajjād (d. 1940) was someone who had tirelessly dedicated his life to the establishment of a parallel court authority for the Muslims alongside that of the British court system. With the support of key Deobandi figures, including Thānawī, Sajjād was able to establish “Imarāt-i Sharīat” or *Sharī‘ah* courts in the province of Bihar.⁶⁰ It was probably due to his own personal contacts and charisma, and the esteem that other scholars such as Abul Kalam Azad were held in by

⁵⁷ It is not clear which “Assembly” is being referred to here.

⁵⁸ ‘Aziz al-Hasan, *Ashraf al-Sawānih*, 3:243.

⁵⁹ Metcalf, *A Concise History of India*, 176-191.

⁶⁰ Ebrahim Moosa, “Shariat Governance in Colonial and Post Colonial India.”

the people of Bihar, that this project of informal judicial authority was successful here.⁶¹ But other provinces did not follow suit, as had been Sajjād's hope, and despite the recent efforts of organizations such as the All India Muslim Personal Law Board (AIMPLB; a self-appointed body formed in 1973), to this day the project to establish Muslim courts outside the formal state system in all the various regions of India has remained unrealized.

It seems that the concern of scholars such as Thānawī and Sajjād about the need for Muslim courts centered around other issues aside from simply the need to enforce Islamic Law. Of course the latter was a major cause for concern, but the bigger fear perhaps was the loss of the Muslim minority's cultural rights and political voice if "proper" adjudication to support an "Islamic way of life" was not established. Numerous figures from all sides had something to say about what constituted a proper Muslim identity, and in their discussions they grappled with how to define their newly forming communal borders (and, consequently, they pondered who would then be most fit to lead).

These discussions came to center around defining the concept of "*qawm*" or nation from an early period. In the late 19th century earlier modernist figures like Sayyid Aḥmad Khan had emphasized the common link between the Muslim and Christian religious traditions. However, by the time of Muḥammad Iqbāl some fifty years later, a distinct sense of separateness had developed. Among Deobandi scholars, there were figures such as Mawlāna Ḥusain Aḥmad Madani (1879-1957), leading figure of nationalist politics and head of the '*ulamā*-based organization *Jamī'at-i 'ulamā-i Hind*, which from its origin in 1919 allied itself with the Indian National Congress during the

⁶¹ Papiya Ghosh, "*Muttahidah qawmiyat in aqalliat Bihar.*"

nationalist movement. The JUH supported a united India and were against the formation of a separate Muslim state when that demand arose in the final years of colonial rule. For Madani, the Muslims and Hindus of India were part of one *qawm*, since according to him nationalistic identity was based on one's territorial and not religious links.⁶² Thānawi however, seemed to have a very different conception of the term *qawm*:

Nowadays the modernists are very concerned with the idea of *qawmi imtiyāz* [cultural markers]. I say to them that you should consider prayer (*namāz*) to be the true *qawmi imtiyāz*, and adopt it for yourselves. What could be a more distinguishing characteristic for your *qawm* than this, a thing that from the time of the Prophet till the Last Day will remain the particular *imtiyāz* of the Muslim, be he rich or poor, noble or lowly...[From the prayer] it becomes clearly apparent to the *kuffār* that these people are all from one *qawm*, from one religion. Thus I must say as a final resort that if you cannot establish prayer for the sake of religion and worship, then at least consider it your *imtiyāz-i qawmi* and adopt it [for this reason alone].⁶³

For Thānawi, forming a distinct sense of identity was crucial for the Muslims if they could be expected to remain tied to religious practice and belief. The two things were intricately related for Thānawi: the prayer itself was what should mark one as being an Indian Muslim, as the Muslims of India were a distinct body unto themselves, brought together on the platform of right practice.

For this reason, nothing could be more threatening for this sense of religious identity than the fear of apostasy. The fact that this step was being taken by women, who had now come to symbolize what was “worth preserving” in cultural and religious life, was all the more alarming. The situation surrounding the composition of *al-Hīla al-Nājiza*, where women had begun to convert out of Islam for the sake of obtaining divorces, was not an isolated situation. Thānawi had been aware of other incidents of “*irtidād*” or apostasy and had written against such actions, as well as sent his own students to villages where it was known that the Muslims were being converted so that

⁶² Barbara Metcalf, “Observant Muslims, Secular Indians,” 107.

⁶³ Thānawi, Ashraf ‘Ali. *Iṣlāḥ al-Muslim īn*, 140-41.

they could be taught the basics of religion and brought back to Islam. Thānawī published tracts such as “Blocking the Trial of Apostasy” (*al-Insīdād li-fitna al-irtidād*), “A Glimpse of Islam” (*Islam ki ayk jhalak*), and “The Rational Advantages of Prayer” (*Namaz ki ‘aqli khubiyān*). According to his disciple Maulana ‘Abd al-Karīm, the latter two tracts were even published in Hindi, as a way to reach a greater number of “nominal” Muslims.⁶⁴ As far as Thānawī’s efforts against cases of apostasy however, his most far-reaching effort would be *al-Hīla al-Nājiza*. The threat of apostasy itself was not as serious in this situation as it might have been in others in which he was involved, but his work on the *Hīla*, while combating instances of apostasy, served to tackle other important issues such as legal representation, women’s reform, and the possibilities for *ijtihād* in the changed social and political context of Thānawī’s colonial India.

⁶⁴ ‘Aziz al-Hasan, *Ashraf al-Sāwanih*. 3: 240.

CHAPTER II

Ashraf ‘Ali Thānawi on Taqlīd and Ijtihād

In order to lay out a systematic defense of *taqlīd*, or the adherence to one of the four Sunni legal schools, Thānawi composed a 112-page treatise entitled *al-Iqtisād fi al-taqlīd wa al-ijtihād (The Middle Way Between Taqlīd and Ijtihād)*.⁶⁵ He begins his treatise with the following lamentation:

Among the great sources of religious strife (*fitna*) of our time is that of the debate on *ijtihād* vs. *taqlīd*. Those involved in this debate have begun taking all sorts of liberties on this issue. One person says that *ijtihād* and *qiyās* (analogical reasoning) is forbidden for the *mujtahids*, and *taqlīd* for the non-*mujtahid* is also forbidden; in fact, it amounts to disbelief (*kufr*) and polytheism (*shirk*). Another person claims that *taqlīd* is impermissible and *ijtihād* is in fact permitted for every individual. Still another person acknowledges the permissibility of *qiyās* for those who are capable, and also the permissibility of *taqlīd* for the common people, but he is against *taqlīd* of the school of Imam Abu Ḥanīfa in particular, labeling him to be one who went against the *ḥadīth*, and is instilling hatred [for the Ḥanafī school] in the hearts of people...⁶⁶

Clearly in Thānawi’s time there was no longer a consensus on the need to follow a single *madhhab*. Much disagreement surrounded the issue, resulting in “hatred and enmity...abuse and vilification,”⁶⁷ such that Thānawi felt compelled to lay out a detailed analysis of the issue at hand, and prove once and for all the real need for *taqlīd*.

Thānawi’s defense of the institution of *taqlīd* is unequivocal—to commit oneself to the rulings of a single legal school was an indisputable religious obligation, and those

⁶⁵ I was not able to date this document, even after searching through a number of bibliographical lists of Thānawi’s work.

⁶⁶ Thānawi, *al-Iqtisād*, 3.

⁶⁷ *Ibid.*, 3.

who called for *ijtihād* in the sense of a renewed approach to the primary textual sources of religious law were clearly misguided. But when one steps away from the strong rhetoric used in his defense of *taqlīd*, a slightly different picture emerges. Those questioning commitment to a single *madhhab* mainly lamented the inability of the old legal structures to cope with current realities. They understood *taqlīd* to be a strict adherence to the existing rules contained within pre-modern legal texts, and so wondered how the Muslims could cope with the new life situations they faced every day in modern-day colonial India. By studying the broader legal approaches of Thānawi, it becomes apparent that his definition of *taqlīd*, or at least his actual approach to it, was very different from what the modernists and others believed. While Thānawi, like other traditionalist scholars of his day, was a strong advocate of *madhhab* allegiance, this did not mean that certain forms of *ijtihād* could not continue to take place.

Orientalist commentary on the *taqlīd* and *ijtihād* debate: The Case of Joseph Schacht

In the core lands of the Arab Muslim world, the concept of *taqlīd* has not maintained anywhere near the force it continues to have in South Asia. Writing in 1964, Joseph Schacht had pronounced the doctrine of adherence to a single *madhhab* to be basically defunct in these regions. He acknowledges that modernist thinkers in the Near East had a hard time justifying the reforms they desired within a traditionalist legal framework, a framework that, according to Schacht, “denies the right of *ijtihād* to later generations.” Just as in India, Arab *‘ulamā* put up resistance to efforts toward *ijtihād*, but their resistance proved unsuccessful:

Nowadays a position has been reached in which many Islamic scholars of a traditional background, without necessarily sharing all the opinions of the Modernists, recognize their effort as legitimate and act, in a way, as their advisers; the uncompromising demand of *taqlid*, the unquestioning acceptance of the traditional doctrine of one school of law, in particular, have lost much ground.⁶⁸

It is interesting to note how Schacht's language in this passage reflects the way he has imbibed the critique of the modernists, so that he, like the modernist reformers, labels followers of *taqlid* as inherently opposed to any and all forms of *ijtihād*, and views the act of *taqlid* as essentially blind and inflexible. Still, his summation of the situation in the Arab lands seems accurate enough, as the insistence on adhering to one school is not a commonly held position within many Arab religious circles today.

While the modernists (and other anti-*taqlid* activists like the Salafis) seemed to have had a strong level of success in the Arab lands, in India this was not so. Schacht points out that in some ways even India had become influenced by the modernists, and he cites as an example of this the Dissolution of Muslim Marriages Act, passed in India in 1939.⁶⁹ This act borrowed extensively from the Māliki school in laying out laws pertaining to woman-initiated divorce. Schacht attributes the passing of this act to the work of the modernists, since he assumes that any such mixing of *madhhab* rulings (*taḥfīq* or “unrestrained eclecticism”⁷⁰ in his words) could only be advocated by the modernists. Schacht obviously was not aware of the fact that it was Thānawī's work in *al-Ḥīla al-Nājiza* that had been used as justification for the act. Perhaps even after knowing this Schacht would view Thānawī's role as simply an “adviser,” in the same way that he characterized the role of Arab *'ulamā* with respect to modern legislation above, since he

⁶⁸ Schacht, *An Introduction to Islamic Law*, 102.

⁶⁹ *Ibid.*, 104.

⁷⁰ *Ibid.*, 106.

seems to only be able to allow at most a passive acceptance of legal change on the part of the *'ulamā*.

While Schacht's treatment of *taqlīd* and *ijtihād* in the Arab world seems simplistic, and his inability to conceive of any active efforts toward legal reform among the *'ulamā* also is striking, his estimation of the situation in modern South Asia, notwithstanding the comment on the Dissolution of Muslim Marriages Act, is accurate. Unlike the Arab lands, Schacht believed that the debate on *ijtihād* in South Asia was still alive, and continuing to stall the process of "modernization" of the legal codes in countries like Pakistan. Due to the institution of Anglo-Muhammadan law in colonial India, much of the Islamic legal rulings relating to such fields as penal law and laws of evidence had long been replaced with laws based on "codes of British inspiration."⁷¹ But many issues within civil law, particularly those relating to family law, continue to be debated, and the reason progress in this area is blocked, according to Schacht, is largely because of the continuing debate on *ijtihād*. He says:

The development of modernist legal thought in Pakistan has remained under the shadow of the problem of *ijtihād*. This is not surprising, because the concept of *ijtihād* has much exercised the minds of scholars in that part of the Islamic world for the last few hundred years. Under the spell of this problem, modernist legal thought in Pakistan has shown itself more conditioned by the traditional system, even though in a negative way, than has corresponding thought in the Near East.⁷²

Schacht's allusion to the centuries-long debate on the issue of *ijtihād* is worth further consideration. It is most likely due to the nature of this debate, and the important parties involved, that the debate on *taqlīd* and *ijtihād* has continued in South Asia to the present day in a way that it has not in the Arab Muslim world.

⁷¹ Ibid., 95.

⁷² Ibid., 104.

Debating *taqlīd* and *ijtihād* in colonial India

It should be noted first off that defense of *taqlīd* was not a phenomenon unique to the ‘*ulamā* of India. Schacht made it seem so in the way he contrasted attachment to *taqlīd* in South Asia as opposed to the Near East, but important critiques of “*la-madhhabiyya*” were compiled by Arab ‘*ulamā* just as they were by Thānawī and other Indian scholars. Muḥammad Zāhid al-Kawtharī (d. 1951), one of the most well-known Syrian scholars in the modern period, had tirelessly attacked those who called for the abandonment of *madhhab* allegiance. Other contemporary Arab scholars like Shaykh Dr. Muḥammad Sa‘īd Ramaḍān al-Buṭī continue to publish tracts denouncing Salafi thought, and calling for renewed commitment to the concept of *taqlīd*.⁷³ Though a Salafi approach to the “Qur’an and Sunnah” seems prevalent in many parts of the Arab world, those from among the ranks of the ‘*ulamā* express a severe dislike of non-*madhhab* following practitioners of the faith. Al-Kawtharī, for example, has the following condemnation included in his work:

Now, along comes a group of reformers ill-disposed to the sanctity of the heritage, and starts to advocate the abandonment of the madhahib in favor of a new *ijtihād*. To them I have but this to say: you ought to have your head examined by a physician of the *Sharī‘ah*. Such people have taken leave of their senses or are in the employ of the enemies of Islam. The righteous believer will have no dealings with such rabble-rousers for he is deeply aware of the debt Islam owes the eponyms of these schools. They call themselves Muslims but are in fact false pretenders who have unfortunately succeeded in infiltrating even the ranks of the ‘*ulamā*.⁷⁴

It should be clear from such rhetoric that defense of the concept of *taqlīd* was not merely a Indian phenomenon, and in fact al-Kawtharī’s condemnation of those who abandon *madhhab* allegiance is stronger than even what can be found in the works of Thānawī and

⁷³ See for example his *Salafīyya* (1998) and the famous *al-Lāmadhḥabīyya* (2005).

⁷⁴ al-Kawtharī, *Maqalāt al-Kawtharī*, as quoted in Muneer Fareed, “Against *Ijtihād*,” 355.

more contemporary Deobandi scholars like Muḥammad Taqī Usmānī⁷⁵ of the Dār al-‘Ulūm Karachi (the latter do not condemn *madhhab* detractors as “false pretenders,” for example). But, as pointed out above in the section on Schacht, the concept of *taqlīd* and resistance to blatant forms of *ijtihād* holds much more sway over legal debates within South Asian circles of Islamic learning and preaching, as opposed to the religious-minded Muslims in the Arab world. While it is beyond the scope of this work to attempt to address the various responses to *taqlīd* in the Arab world, the following discussion will attempt to shed light on the approach to the debate surrounding *taqlīd* influential in this region.

The need to be careful in avoiding an excessive attachment to *taqlīd* had been articulated in India as early as the 18th century in the work of the great *ḥadīth* scholar Shāh Walī Allah (d. 1762). Walī Allah did not denounce following a *madhhab* per se, but through his advocacy of the study of *ḥadīth*, he placed a strong emphasis on knowing the textual bases of the rulings contained within the various schools. He believed that expertise in the science of *ḥadīth* was a necessary prerequisite to a proper articulation of Islamic Law, and that a critical approach could and should be taken toward the corpus of law contained within each *madhhab*.⁷⁶ This approach to *ḥadīth* had a strong influence on future developments in Islamic scholarship in India, with competing groups claiming his legacy, including the Ahl-i Ḥadīth and the Deobandis.

While Walī Allah did not ever criticize the following of a single *madhhab*, other groups within India had much to say about the doctrine of *taqlīd*. The Ahl-i Ḥadīth, for example, while claiming lineage to Shāh Walī Allah, were in fact strongly opposed to the

⁷⁵ See, for example, ‘Uthmānī, *Taqlīd ki shar‘i haythiyyat*.

⁷⁶ Metcalf, *Islamic Revival*, 37; also see Ghazi, *Islamic Renaissance*, 157–58.

existing body of the legal tradition, and believed that it was necessary to bypass the authority of the legal schools and derive legal rulings directly from the Qur'an and Sunnah. As we saw in the chapter on the breakdown of *'ulamā* authority, both the arguments of the Ahl-i Ḥadīth and the legal system laid down by the British, combined with the response to both these trends in the form of Deobandi reformism, served to produce an ideologically fraught approach to the concept of *taqlīd* in colonial India.

The vast majority of Muslims in South Asia adhere to the Ḥanafī legal school. Traditionally, Sunni legal scholarship has always acknowledged and fully accepted four legal schools, or *madhhabs*, the Ḥanafī, Mālikī, *Shāfi'i*, and Hanbali, and the legal rulings of each are considered to be equally valid within the *Sharī'ah*. Within South Asia, however, practice is really limited to the Ḥanafī school alone (aside from some pockets of *Shāfi'i* dominance, in some southern coastal regions for example). The *madrasa* at Deoband focuses solely on Ḥanafī interpretations of the *Sharī'ah*, as did older Indian institutions.

Muslim belief in the doctrine of *taqlīd*, or the adherence to a single legal school of thought, had been under attack for quite some time in colonial India. Traditionally, the *madhhab* system limited authority to the four schools, while simultaneously bestowing upon inter- and intra- *madhhab* differences a level of orthodoxy. As discussed in the previous chapter, the British were pushing for codification, and so could not tolerate what they viewed to be arbitrariness in the body of Islamic law.

However, the British administrators of colonial India were in a bit of a precarious situation: they feared communal backlash and so felt they *had* to administer the religious laws of each respective community, at least in civil matters that did not affect governance

of the colonial state; at the same time, they saw Islamic law (and Hindu laws) as being too flexible for easy and consistent application. The solution for them was to emphasize the doctrine of *taqlīd* in a way that it was hardly practiced before. Certain texts were accepted as being “authoritative” Ḥanafī works of law, to the exclusion of other previously accepted texts and opinions, and only those deemed authoritative were to be applied through the Anglo-Muḥammadan courts. Scott Kugle notes that prior to the establishment of the British courts, Muslim *qāḍīs* in India would regularly take into account a variety of factors before choosing whatever legal rulings to apply in a given case. They would consider factors such as the social realities of the areas in which they resided and administered law, as well as the overall good of the specific community. But in the colonial context, with religion being one of the only arenas through which colonial subjects could engage politically, and the British constantly upholding a “return” to the “pristine” texts of medieval sacred texts to find the most authentic articulations of religious law, the indirect promotion of *taqlīd* was thereby inevitable. According to Kugle, “By assuming the reality of *taqlīd*, the British essentially *created* stagnation and enforced it.”⁷⁷ In his words, “The British did not create the term *taqlīd*, but they gave it a new legal reality.”⁷⁸

Not only were the British critical of the flexibility inherent within the *madhhab* system, but so were the Ahl-i Ḥadīth. Like other Islamist groups such as the Salafis or the Wahhabis, the Ahl-i Ḥadīth, still a very small numbering the colonial period, called for the return to a “purer form” of Islam that was stripped of its *madhhab* accretions and instead was more directly derived from the Quran and the teachings of the Prophet.

⁷⁷ Kugle, “Framed, Blamed and Renamed,” 297.

⁷⁸ *Ibid.*, 291–99.

Consequently, traditional *'ulamā* were forced to contend with the accusations of arbitrariness by both the non-Muslim British as well as the Muslim Ahl-i Ḥadīth, and thus they too began to rally around the doctrine of *taqlīd* with renewed enthusiasm.

Modernist thinkers also had strong critique of *taqlīd*, as they viewed it to be the strongest preventive factor against progressive development of Islamic Law. They found the legal concepts of *taqlīd* and *ijmā'* (the consensus of past authorities) to be over-limiting and authoritarian in nature.⁷⁹ They felt that being restricted to the confines of one legal school or even the agreed-upon rulings across the legal schools left no room for growth and movement, particularly in the face of the new and developing challenges of the modern day.

Muḥammad Iqbāl was one of the most visible modernist proponents of a new approach to *ijtihād*. In his writings in both Urdu and English, Iqbāl expressed deep disappointment at the loss of Muslim prestige in his day, and he demonstrates a keen desire for the revitalization of Muslim thought and practice in the modern day. In his view, part of this process of revitalization was the need to revisit critical issues within Islamic Law that no longer seemed to fit within the changed social and political context of his day. "If we ponder over the present life conditions," he wrote, "we find that similar to the need for a new theology to support the principles of religion, we require a great jurist for a modern interpretation of Islamic Law."⁸⁰ While desiring a change in legal approach, Iqbāl realized that the task would not be an easy one, and that it would require not only mastery of the Islamic tradition but also intimate familiarity with the conditions of the present day. He also felt that while change was necessary, there would still need to

⁷⁹ Zaman, "Consensus and Religious Authority," 154.

⁸⁰ As quoted in Masud, *Iqbal's Reconstruction of Ijtihād*, 84.

be checks put in place so that unnecessary excesses in legal reform were not indulged in. Due to the lack of a such a qualified jurist, one who had not only the religious but also social and political expertise and a strong degree of circumspection, Iqbāl felt that the task of *ijtihād* should be taken on not by an individual but rather a committee appointed for the task: “As far as I know, no jurist with such extraordinary intellectual calibre exists in the Muslim world. If we realise the importance of such a task we may see that it is the task for more than one mind...”⁸¹

Taqīd was a concept that simply did not hold up any longer in the eyes of modernist thinkers such as Iqbāl. Heartened by the positive influence of European thought on Muslim thought in places like India, Iqbāl believed that the time for an important shift toward “collective *ijtihād*” was on the horizon. In his well-known treatise *Reconstruction of Religious Thought in Islam*, Iqbāl describes the hope inspired by such a shift:

It is, however, extremely satisfactory to note that the pressure of new world forces and the political experience of European nations are impressing on the mind of modern Islam the value and possibilities of the idea of *Ijma*. The growth of republican spirit, and the gradual formation of legislative assemblies in Muslim lands constitutes a great step in advance. The transfer of the power of *Ijtiḥād* from individual representatives of schools to a Muslim legislative assembly which, in view of the growth of opposing sects, is the only possible form *Ijma* can take in modern times, will secure contributions to legal discussion from laymen who happen to possess a keen insight into affairs. In this way alone we can stir into activity the dormant spirit of life into our legal system, and give it an evolutionary outlook.

Judging from the above passage, it is interesting to note that while Iqbāl is most easily characterized as a “modernist,” in this passage he still retains a recognition of the position of the *‘ulamā*. The “legislative assembly” that he calls for is meant not necessarily to supplant the authority of the *‘ulamā*, but to provide a forum where the *‘ulamā* can consult with “laymen” about areas that lie outside of their expertise before coming to a decision

⁸¹ Ibid., 84.

on any particular legal ruling. It is perhaps due to his reluctance to denounce the work of the *'ulamā* outright that, unlike other modernist thinkers, Iqbāl continues to garner respect among Indian *'ulamā*. Still, his approach to *ijtihād* and his discomfort with *taqlīd* were not in line with the *'ulamā*'s own expressions on the concept of *taqlīd*.

The combination of responses toward the concept of *taqlīd* from all three groups—the colonial administrators, the Ahl-i Ḥadīth, and the modernists—provoked a response in the *'ulamā* of further closing ranks around the importance of adhering to a single legal school. So many different parties wanted entry into the task of Islamic legal interpretation that defense of *madhhab* allegiance seemed to be one of the best ways to preserve not only a continuity with the past tradition but also a degree of authority for the *'ulamā*, since they had traditionally been the only ones qualified to explicate the rulings of their respective legal schools.

Traditionalist scholars did not take attacks against *taqlīd* in stride. These *'ulamā* had to find novel and creative ways of meeting the challenge to authority they faced via the attack on *taqlīd*. Polemical arguments on the part of Ahl-i Ḥadīth scholars, for instance, were met with equally strongly worded arguments from the traditionalist side. As we will read in Thānawī's own reaction against the call for *ijtihād*, some of the "defense" mounted from traditionalist scholars in various forms of writing was deeply cognizant of the various arguments being laid against the institution of the *madhhab*. His treatise on *taqlīd* and *ijtihād* was only one of numerous tracts written in defense of the institution. Compilation of longer, more "elitist" *ḥadīth* commentaries defending the doctrines of the Ḥanafī school were another form of defense.⁸² In fact, the distinctive practice at Deoband of devoting the entire culminating year of study to the review of the

⁸² Zaman, *The Ulama in Contemporary Islam*, 38–59.

six main *ḥadīth* commentaries, with an emphasis on the place of these *ḥadīth* in relation to Ḥanafī doctrine, was itself a sort of “training ground” for future defenders of *taqlīd* and the Ḥanafī school.⁸³

In some ways, the formation of Deoband itself was one of the strongest defenses of the concept of *taqlīd*. If we define *taqlīd* as not only the commitment to a single school, but also more broadly an allegiance to only those who are rightly qualified to interpret the rulings of that school, the institutionalization of *‘ulamā* authority in the form of Deoband can perhaps be seen as the key component for why *taqlīd* has survived so robustly in South Asia when it has not in many other regions of the Muslim world. Unlike in much of the Middle East, for example, the formation of Deobandi institutions through the support of private individuals was a means of maintaining and rearticulating the *‘ulamā*’s influence in the face of state takeover of the judicial sphere. The success of Deobandi scholars in reaching broad audiences through the use of print media, and through their willingness in post-colonial states like Pakistan to work through the judicial system toward the codification of Ḥanafī law,⁸⁴ has made it virtually a sign of disloyalty

⁸³ On this particular form of *ḥadīth* study at Deobandi madrasas and its relation to defending Ḥanafī doctrine, see Zaman, *Ashraf ‘Alī Thānawī*, 15–17.

⁸⁴ For an interesting comparison of the positions of Saudi vs. Pakistani *‘ulamā* on the question of *taqlīd*, see Zaman, *The Ulama in Contemporary Islam*, 97. When comparing the positions of Saudi vs. Deobandi scholars, Zaman makes the point that traditionally, the Hanbali school has always been more open to *ijtihād* than the Ḥanafī, and for this reason it makes sense why the Ḥanafīs would be more open to codification of the law, since it is a way for them to continue upholding *taqlīd*. The appraisal seems fair enough with regards to the Hanbali school, as it does indeed have a more open approach to *ijtihād* because of its particular history, but Zaman himself makes the point that even the Ḥanafīs have found ways to make *ijtihād* when necessary, even in modern times. A different explanation for why Ḥanafī *‘ulamā* are open to codification as opposed to Saudi scholars can be linked to a separate point that Zaman makes. He mentions that Ḥanafī *‘ulamā* in Pakistan have much less authority in the judicial realm than do the Saudi Hanbalis, so in my view their acceptance of codification may simply be a policy of “the lesser of two evils.” Since they cannot have much say on what direction legal thought and judicial practice takes in Pakistan, they see codification as the only way to preserve some adherence to the *Sharī‘ah*. The Saudi *‘ulamā*, on the other hand, do not have to worry about their work being sidelined, so they can be more open about their attempts at *ijtihād*. Even if Pakistani *‘ulamā* are themselves predisposed to doing *ijtihād*, they have to be much more careful in saying this, because then their position as “custodians of tradition” could then easily be ignored. Openly approving *ijtihād* and the act of borrowing between *madhhabs* would open up the following

to the Islamic tradition if one claims membership to any other ideological stance other than *taqlīd*. Proof of this can be seen in the religious practice of Salafi-minded groups like the Jamā‘at-i Islami: while individuals like Abū’l-A‘lā Mawdūdī (d. 1979) made vociferous attacks against the *‘ulamā* and the tradition as it had continued to be interpreted in South Asia, even he, and his *jamā‘at*, continued to remain loyal to Ḥanafī practice in their daily ritual affairs.

As mentioned above, abandonment of even the most “trivial” markers of Ḥanafī practice were attacked by the Deobandi ulama, and numerous tracts were published defending and explicating the rulings of the Ḥanafī school that the Ahl-i Ḥadīth in particular tended to discount. From such scathing critique of non-Ḥanafism in India, it would be easy to draw the conclusion that, despite all their rhetoric surrounding the legitimacy of each one of the four schools, the real belief was that the Ḥanafī school was the only choice for a truly upright Muslim. The defense of *taqlīd* of the Ḥanafī school was so strong that even students at Deobandi institutions would become confused about the status of the other madhhabs. One anecdote that Thānawī is said to have mentioned in his Sufi discourses tells of how convincing a particular *ḥadīth* scholar at Deoband was. In his classes on *ḥadīth* he would use his knowledge to convincingly prove the verity of Ḥanafī rulings. His students, amazed by their *ḥadīth* teacher’s skillful defense of Ḥanafī doctrine, proclaimed, “If Imam Shafi’i was sitting here with us, he too would become a Ḥanafī!” Interestingly, the *ḥadīth* scholar, more knowledgeable of the traditionalist basis

question: if they are not upholding a tradition in its “pristine” form, and are receptive to change, why then can other elements within the Pakistani legal system not do the same thing, without the help of the *‘ulamā*?

for Deobandi thought, became angry at their proclamation. “You idiots,” he exclaimed, “if Imam Shāfi’i was sitting here in our midst, *we* would all become *Shāfi’is!*”⁸⁵

The fact that this anecdote is repeated within Thānawi’s writings shows two things: 1) it was an acknowledged fact, even among Deobandis, that even low-level Deobandi scholars had some confusion on the real meaning of *taqlīd*, and took it too far such that their allegiance lay with the Ḥanafī school and not to all four as should be the case in a proper regime of *taqlīd*, and 2) such staunch Ḥanafīism was condemned, at least to some degree, by the *akabirin* or higher-level scholars within the Deobandi hierarchy. As Thānawi lays out in his tract defending *taqlīd*, allegiance to the Ḥanafī school was a function of convenience and common-sense, not because it had some particular superiority above the other schools. *Madhhab* allegiance was of functional importance, and not upheld due to some intrinsic religious duty to adhere a particular school.

Such a view of *taqlīd*—that it was necessary due to purely functional reasons—was not unique to the *muqallids* of the modern-day or those of Deoband. Many academics such as Schacht and more recently Hallaq and others, view *taqlīd* to be a sign of stagnation and resistance to change. But others, such as Sherman Jackson, have shown that *taqlīd* was always, even in medieval times, known to be of functional importance. It was needed to allow for minority opinions to exist within a framework that would preserve some methodological boundaries; it also allowed for such minority opinions to exist without unjust encroachment from the state into the jurisdiction and authority of the legal scholars.⁸⁶ *Taqlīd* was never meant to be seen as an end in itself, but rather a way to best uphold a balanced approach to Islamic legal practice.

⁸⁵ This anecdote was related to me by a Deobandi student of knowledge in 2006.

⁸⁶ Jackson, *Islamic Law and the State*.

Thānawī's text on the *taqlīd* vs. *ijtihād* debate

Despite what might be expected from what many perceive as the “staunchly Ḥanafī” nature of Deoband, Thānawī also held to a very similar position on the need for *taqlīd*. In his 112-page tract *al-Iqtīṣād fi 'l-taqlīd wa 'l-ijtihād*, Thānawī lays out a well thought-out defense for the need for *taqlīd*. The thoroughness and organization of the text is striking. He lays out a map of his argument at the start of the treatise, and then follows through with numerous examples from the *ḥadīth* and the *āthār* (practice of the Companions) in order to validate each claim that he makes. Thānawī lists the following seven goals or “*maqāṣid*,” or points he wishes to prove, right at the start of the treatise: 1) It is permissible for the *mujtahid* to make *ijtihād* and for the non-*mujtahid* to make *taqlīd* on legal rulings that either have no basis in the textual sources [i.e. Qur'an and Sunnah] or what is included in the texts (*nuṣūṣ*) is of an ambiguous nature; 2) It is permissible to use analogical reasoning based on the *ratio essendi* (*illa*) of established rulings and extend them to new cases, and taking an interpretive and not strictly literal approach to specific *ḥadīth* is permissible for the *mujtahid*. It will also be permissible for the non-*mujtahid* to make *taqlīd* on such matters; 3) If one does not have the ability to make *ijtihād*, even if he is a master in the *ḥadīth* sciences, for such a person it will be impermissible to make *ijtihād*, despite his mastery of the *ḥadīth*. Therefore, simply having extensive knowledge of *ḥadīth* is not what qualifies one for *ijtihād*; rather, the person must also possess the ability to make *ijtihād* (which Thānawī defines in the same chapter); 4) Adhering to *taqlīd shakḥṣi*, i.e. *taqlīd* of a single individual (or, rather, this

person's methodological school), is permissible; 5) It is necessary in this era to make *taqlīd shakhsī*; 6) An extensive list of criticisms against the concept of *taqlīd*, and the proof against each one; and 7) Just as it is blameworthy to deny the necessity of *taqlīd*, it is also incorrect to be rigid and fanatical in favor of the concept, and the need for balance between the two extremes.⁸⁷

An example of Thānawī's Use of Ḥadīth: On the Permissibility of Taqlīd Shakhsī

Over the span of a hundred or so pages, Thānawī meticulously and systematically deals with each one of his above-stated goals. His collection of *ḥadīth* and *āthār* to prove each point is impressive; at times even minor arguments have multiple *ḥadīth* with commentary included. His method of argument when proving the fourth goal, showing the permissibility of making *taqlīd* of a single *mujtahid*, is a good, concise example of how he uses the *ḥadīth* to prove his points. To demonstrate the permissibility of *taqlīd shakhsī*, Thānawī cites one *ḥadīth* and two *āthār* to prove his point.

The first *ḥadīth* is a statement of the Prophet, in which he tells his Companions, “I do not know how long I will be among you, so you should follow (*iqṭadu*) these two individuals, who will come after me.” While saying this, the Prophet is said to have pointed to Abu Bakr and ‘Umar. Thānawī uses this *ḥadīth* as his first proof for *taqlīd shakhsī*, saying that the language of the *ḥadīth* indicates that the statement “who will come after me” should be interpreted as indication toward the leadership or *khilāfah* of Abu Bakr and ‘Umar once the Prophet is gone. Thānawī says that what can be gathered from this *ḥadīth* is that each one, first Abu Bakr and then ‘Umar, will hold positions of

⁸⁷ Thānawī, *al-Iqtiṣād fi'l-taqlīd wa'l-ijtihād*, 5–6.

leadership in succession (not at the same time), and no where did the Prophet say to the other Companions that they should make sure to seek the proofs for any rulings Abu Bakr or ‘Umar may hand down. He then explains how this *ḥadīth* is a proof for *taqlīd shakhṣi*, and also defines the concept:

It was not even the regular habit [of the Companions] to ask for proofs for each ruling [given to them by the scholar-leaders among them]. This is the very essence of *taqlīd shakhṣi*, since the reality of *taqlīd shakhṣi* is that when a person is confronted with an issue, due to the [perceived] superiority of another individual the latter is considered the sole authority by the former, and this scholar’s opinions are sought out and implemented [in all cases].⁸⁸

Thānawī then mentions another tradition, this one relating the practice of the Companion Mu‘ādh ibn Jabal. Mu‘ādh had been sent to Yemen by the Prophet. The *athar* goes as follows: “Mu‘ādh came to Yemen as teacher and leader. We asked him about a man who died and left a daughter and a sister. He [Mu‘ādh] ruled that the daughter gets half [of the deceased’s inheritance] and the sister gets half. And the Prophet was alive [at this time].” In his commentary on this tradition, Thānawī says that it is obvious that the Prophet sent Mu‘ādh as the sole source of knowledge to the people of Yemen, and, as can be seen from the account of his ruling on inheritance shares, they never asked him for proofs for each ruling that he gave. In the second *athar* that Thānawī relates, he quotes an account from after the death of the Prophet about Abū Mūsa al-Ash‘ari and ‘Abd Allāh ibn Mas‘ūd, two prominent Companions. When the first was asked about a ruling on which ibn Mas‘ūd’s opinion had already been sought, Abū Mūsa became angry and said, “Do not ask me [about your affairs] as long as this master (*al-ḥibr*) is among you.”⁸⁹

Thānawī uses these three accounts to prove his point that the practice of *taqlīd shakhṣi* was already established in the time of the Prophet, and had been given the permission of the Prophet himself. In this section Thānawī does not bring up the

⁸⁸ Ibid.,31.

⁸⁹ Ibid., 32.

arguments of those who argue against *taqlīd shakhṣi*, but his “proofs” and the commentary he gives on them take into account the arguments of his detractors. Polemicists from among the Ahl-i Ḥadīth were especially being targeted in Thānawī’s explanation, since they accused those who adhered to the rulings of one scholar or legal school of “blind imitation.” It was the practice of the Ahl-i Ḥadīth to demand and provide proofs for every argument and legal ruling. Traditionalist scholars like the Deobandis felt that such an approach to the law placed too much burden on the lay Muslim, since he was made to feel guilty for not knowing the proofs from Qur’an and *ḥadīth* for each religious ruling that he followed.⁹⁰ Obviously, traditionalist scholars would also feel threatened by such demands for proofs: they were supposed to be the experts, the ones who had mastered the legal sciences. Just as one did not ask a physician for the physiological and chemical proofs for why a certain drug had been prescribed, why would a layperson ask the *‘ulamā* for their reasoning and arguments? Such demands for explication for the background of each ruling were not only cumbersome for both the *muqallid* as well as the *‘ulamā*; they also were an indication of mistrust in the one being approached for answers.

Proving the Necessity of Taqlīd

Thānawī’s discussion of his fifth goal, on proving the necessity of *taqlīd shakhṣi* in his day, is perhaps the most compelling section of his treatise. He begins this section by giving a proof for how something can be said to be *wajib*, or obligatory, according to Islamic Law, even though its specific mention has not been made in the primary textual sources of the Qur’an and Sunnah. This of course would be an allusion to the major

⁹⁰ Metcalf, *Islamic Revival*, 265.

complaint of Ahl-i Ḥadīth and the modernists against the obligation of following a single legal school: they argued that *taqlīd* could not possibly be necessary when it was not mentioned by God or the Prophet to be an obligation. The specific proof Thānawi mentions is the obligation of writing down and compiling the Qur’an. Thānawi cites a *ḥadīth* of the Prophet in which he calls himself an “*ummi*, I don’t write, neither do I compute (*la naktubu wa la naḥtasib*).” Thānawi says that from this *ḥadīth* it could be said that the Prophet looked down on the act of writing, and since the compilation of the Qur’an had neither been commanded by him nor undertaken by his Companions while he was alive, the Qur’an should never have been preserved in written form. Of course this argument is absurd, says Thānawi; no one ever asks for the “proofs from Qur’an and Sunnah” on the necessity of writing and compiling the Qur’an. This is because everyone acknowledges that the compilation of the Qur’an was a necessary prerequisite to other obligations explicitly laid out in the primary texts, such as preservation of *dīn* (religion) and the need to convey the Word of God. An act that is a necessary prerequisite for an intrinsic obligation (something that carries *wujūb bi’l-dhāt*) is itself an obligation, and it would carry *wujūb bi’l-ghayr* (obligation based on external justifications).⁹¹

Upon laying out this convincing proof for why something not mentioned in the textual sources could still be *wājib*, Thānawi states that the ruling on *taqlīd shakhṣi* is the same as that of the compilation of the Qur’an. It has the status of *wujūb bi’l-ghayr*—it is not obligatory in its own right, since it is not specifically mentioned in the primary texts, but it is obligatory because it is a necessary prerequisite for five obligations that *are* explicitly required by the Qur’an and Sunnah. These five obligations, the necessity of

⁹¹ Thānawi, *al-Iqtisād*, 34.

which Thānawi proves in a separate section through numerous clear proofs taken directly from the primary texts, are the following:

1) The intention behind both knowledge and practice must purely be for the sake of religion (*dīn*); 2) One's whims and desires must be kept in check by *dīn*, i.e. one's whims must be made subordinate to one's religion, and (not the other way around) where one's religion is made subservient to one's whims; 3) One must protect oneself from anything that would cause harm to one's religion; 4) The consensus of those on Truth (*ahl-i ḥaqq*) must not be countered; and 5) One must not step outside the boundaries of the legal requirements of the *Sharī'ah*.⁹²

These five *wājibāt* are clearly established from numerous texts, and according to Thānawi, in this day and age *taqlīd* is absolute requirement for the above five religious duties to be met. As can be see from the summary of his analysis below, his entire line of reasoning with respect to the need for *taqlīd shakhṣi* uses these five obligations as a backdrop.⁹³

Thānawi then enters into an interesting analytical discussion of why *madhhab* allegiance is necessary for the fulfillment of these five religious obligations. He utilizes a narrative style outlining cause and effect to prove his argument. Thānawi says that if the obligation of *taqlīd* is denied, then there can be three possible alternatives that will naturally result: a) some people, though unqualified to do so, will begin claiming the right to make *ijtihād*, b) others will deny the permissibility of both *ijtihād* and *taqlīd*, and will attempt to follow the Qur'an and *ḥadīth* with a literal approach, and c) some will not attempt *ijtihād*, but they will also not commit to one *madhhab*, rather they will pick and choose between the rulings of all four schools.

Those who will attempt *ijtihād* on their own will begin to make serious mistakes, such that they will end up committing acts that are not sanctioned by any one of the four schools. By way of example, Thānawi says that such a person may examine the

⁹² Ibid., 35.

⁹³ Ibid., 35–41.

obligation of *wuḍū* (ritual ablution) and say that the Arabs at the time of the Prophet were required to perform *wuḍū* before prayer because they rode on camels and worked as shepherds. Due to their constant contact with the filth of these animals, they were commanded to make *wuḍū* before each prayer. Their proof for this could be that if one looks at the parts that are washed during *wuḍū*, they are only those portions of the body that are normally exposed (and therefore liable to come in contact with animal filth). In our day, we take showers every day and live in enclosed homes in much cleaner environments, the modern *mujtahid* would say, and so we do not need to perform *wudu* like the Muslims of pre-modern Arabia.

The mistake committed by such a line of reasoning, according to Thānawī, is that since these individuals are not true *mujtahids*, they are not able to discern even the basic distinction made between those rulings that must be followed purely out of obedience to God's command (*ḥukm ta'abbudi*) and those rulings that can be said to have a *ratio essendi* (*ḥukm mu'allil*). There could be numerous other possibilities of confusion on this distinction, Thānawī says, such as disregarding the need for witnesses at the time of marriage, or ignoring the abrogation of certain previously allowed acts such as temporary marriage. In these two cases, like in the *wudu* example above, those who understand the legal sciences know that there is no room for reinterpretation of these rulings, since the need for witnesses and the abrogation of *mut'a* are both *ḥukm ta'abbudis*, and are not open to interpretation. The *'ulamā*, due to their experience and training, are fully aware of the important distinction between these two types of rulings, but the lay person who thinks himself capable of *ijtihād* will not understand the significance of this distinction,

and will fall into committing acts that are against the consensus of the *fuqahā*, which is a violation of obligation #4 of the five obligations initially outlined by Thānawī.

The second group, the one that denies the permissibility of both *taqlīd* and *ijtihād*, will try an extremely literal route of interpretation. While many rulings are laid out explicitly in the Qur'an and *ḥadīth*, there are also numerous examples of rulings that do in fact require *ijtihād*, as can be seen by the many particularities included within *Fatāwa* collections. Since such literalists will not be able to pick up on these obligations that can only be discerned through interpretive *ijtihād*, they will be neglectful of many religious duties and will thereby violate obligation #5 of the five listed by Thānawī at the start.

Thānawī goes on to explain that this literal approach will also contradict the consensus of the jurists, and, like the neo-*mujtahids* above, the literalists will also violate obligation #4. An example Thānawī gives to illustrate this is the *ḥadīth* from *Ṣaḥīḥ Muslim* that states: "The Prophet prayed *Zuhr* and *'Asr* together, and *Maghrib* and *'Ishā* together, without any cause of fear neither due to travel." Thānawī says that someone taking a literal approach to the *ḥadīth*, without having the necessary tools of legal reasoning, etc., will end up acting on this tradition of the Prophet, and will begin combining prayers in a manner not sanctioned by any one of the four legal schools.

According to Thānawī it is the final group, the one that neither attempts *ijtihād* nor commits to *taqlīd* of a single school, but instead decides to choose at will between the rulings of the four schools, that seems to be the most dangerous. He claims through his reasoning that this group could end up violating not one or two but up to four of the five religious obligations outlined at the start of his argument. He starts off with another example relating to ritual ablution. If someone decides to have his blood drawn (for some

medical purpose), according to the *madhhab* of Imam Abu Ḥanīfa his *wuḍū* would be broken. The person could say that I am taking the opinion of Imam *Shāfi‘i* in this case, and I consider myself to still be in a state of ritual purity. Then this person goes and touches his wife with desire, which violates his wudu according to the *Shāfi‘i* school. Now he says that I will take the opinion of Imam Abu Ḥanīfa in this case, since according to him, touching the opposite gender does not break the *wuḍū*. If the man then performs the ritual prayer, his prayer will not be valid according to any of the legal schools at all. By playing with the rules and mixing between *madhhabs*, this person belonging to the third group will, like the previous two groups, violate the consensus of the scholars. Since there is a high likelihood that he will pick and choose according to his desires, he will also end up violating obligation #2, which requires one to put one’s religious obligations before one’s desires and whims. If such a person ends up continuing down the path of putting his desires first, he will begin to engage in study of the legal rulings with the intention not of perfecting his religion but for the sake of knowing which rulings would best fulfill his desires, thereby violating obligation #1 (where one’s intention in seeking knowledge and implementing it must be for the sake of religion alone). Finally, once such a person becomes accustomed to giving his baser self (*nafs*) such leeway, he will end up becoming lax not just in the derivative branches (*furū‘*) of the law but also in the actual core principles (*uṣūl*) of the law, and this would lead him down a slippery slope that would most definitely cause harm to one’s religious belief and practice. From the latter “dangerous” progression, the person will finally end up violating obligation #3, which requires one to protect one’s *dīn* from harm.

Thānawī's style of arguing, evoking the absurdities of a legal slippery slope that would occur by doing *talfīq*, is that of an effective academic type of debate. The fact that Thānawī assigns the most violations of religious obligations to practitioners of *talfīq*, and not to practitioners of *ijtihād*, shows that while writing this treatise his primary opponents are the Ahl-i Ḥadīth, and not necessarily the modernists (who called for *ijtihād* without resort to any of the legal schools). It is easy to imagine a very similar argument being laid out against the proponents of *ijtihād*, and in fact, according to his reasoning, one can easily see him arguing that those who wish to engage in *ijtihād* without proper training could in fact break all five of the religious obligations. But by viewing the proponents of *talfīq* as those prone to most religious transgressions, Thānawī's analysis shows that he either felt the Ahl-i Ḥadīth to be a greater threat, or else he felt that they would be the easiest to reach through the writing of such a treatise.

By laying out his arguments about what harms can come due to ignoring the obligation of *taqlīd* in this way, Thānawī is confident that he has proven how the lack of *taqlīd* violates all five of the religious obligations that he lays out as a backdrop to his entire analysis. Thānawī's defense of *taqlīd* provides an important summation of the kinds of perspectives traditionalist scholars take when laying out their ideas on *madhhab* allegiance and the need for *ijtihād*. We see from his argument that adherence to a single *madhhab* is not a religious end in itself; he himself admits that there is nothing intrinsically sacred about the legal schools that warrants allegiance to them. Instead, the need to adhere to these schools is purely based on external obligations that, according to Thānawī, are impossible to fulfill without *taqlīd shakhsī*. *Taqlīd* of the four schools as a whole is not enough: one cannot simply say that "all four schools are correct, therefore I

should be allowed to choose between the ‘*ulamā*-verified rulings of any of these four,’ because this will in fact lead to more violations of religious obligations than not accepting any of the schools at all. *Taqīd shakhsī*, the following of only one school at a time, is the only way to have one’s religious obligations properly safeguarded.

In a different section of this treatise, Thānawī makes it clear that the choice of which *madhhab* to follow is purely based on practical concerns; one should follow the Ḥanafī school in India only because it is the main one adhered to in the region. If one moves to another locale where there is no recourse to Ḥanafī scholars and another *madhhab* is prevalent there, it would be *wājib* to switch to the other *madhhab* so that one’s daily religious inquiries could be properly handled by the scholars of the new region. As for a new convert, or one who has never before practiced *taqīd* of a legal school, if he resides in a place where only one *madhhab* is prevalent, then like other *muqallids* he too would be obliged to commit to the main school of the region. However, Thānawī says that if the convert or new *muqallid* lives in a place where more than one school is present, he can pick whichever *madhhab* he likes, but he must then remain committed to that one school.⁹⁴

While Thānawī’s analysis demands adherence to a single school, it also does not include anything that rejects the use of *ijtihād* outright. In fact, when looking at his appraisal of the second group, the one that rejects both *taqīd* and *ijtihād*, it is apparent that Thānawī acknowledges the need for interpretative engagement with the legal tradition, albeit within specified boundaries. Later on in this same text, Thānawī gives some treatment to the issue of *ijtihād*, and describes under what particular circumstances it can be undertaken. Since the treatise is written primarily in defense of *taqīd*, he

⁹⁴ Ibid., 53–54.

perhaps felt it inappropriate in this context to record within a strong defense of *ijtihād* as well. But reading between the lines, the reader can see that while Thānawī is a strong proponent of *taqlīd*, he is not by extension an opponent of *ijtihād*.

On the Proper Approach to Ijtihād

Towards the end of *al-Iqtisād fi 'l-taqlīd wa 'l-ijtihād*, Thānawī warns against having an unhealthy attachment to *taqlīd shakhṣi*. Thānawī explains that committing oneself to the opinions of a single *mujtahid* should not be done out of the belief that it is he who establishes the legal rulings, but rather should be done out of the belief that the *mujtahid* is one who clarifies the legal rulings and their context as well as someone who makes apparent the will of God and His Messenger. Here we see that the point of following a *madhhab* is not for the sake of the *madhhab* itself, but in reality it is for the sake of deciphering what the Qur'an and Sunnah actually require of the *muqallid*.

Thānawī explains that there can be room for change if the opinions of one's school are somehow not in conformity with the Qur'an and Sunnah, or it is found that another ruling is for some reason preferable to the one already followed in one's school:

Thus as long as no legal bar or any reason for negation [of one's school] is found, *taqlīd* will continue to be maintained. But if a far-sighted scholar, one who has deep comprehension [of legal matters] and is of a balanced nature, or a common person (*'āmmiyy*) by way of instruction from a God-fearing scholar finds in his heart that the preferable ruling in a particular issue should be different [from the one in the school that he follows], then he must look to see if this preferable ruling really is in conformity with the *Sharī'ah* or not.⁹⁵

Thānawī goes on to explain that even in this case, the rule that seems to be preferable (*rajih*) should not be followed if switching from the less preferable (*marjūh*) would cause confusion and discord (*fitna*) among the adherents of the school. He gives a few

⁹⁵ Ibid., 84.

examples to back this up, including a *ḥadīth* in which the Prophet tells his wife ‘A’isha that even though he knows the Ka‘bah’s structure in his time was not in conformity with the exact dimensions of the original Abrahamic structure, he refuses to rebuild it because many of the Meccans were still new to Islam and they might take offense at any change brought about in the ancient structure. Thānawī uses this *ḥadīth* as proof for the fact that maintaining *taqlīd* of one’s school, even in cases of less desirable legal opinions, is of greater importance when it serves the broader needs of the school’s adherents.

Thānawī then explains that this is the case only when the two opinions, the preferable and less preferable, are both still in conformity with the *Sharī‘ah*. On the other hand, if it is found that the following of a particular ruling either entails neglect of a religious obligation, or requires one to act on what is clearly impermissible according to the *Sharī‘ah*, then it would be *wajīb* to leave the position of one’s own school and adopt the more correct ruling.⁹⁶

Interestingly, in this section Thānawī does not explicitly state what happens in the more common scenario: what happens when there is discovered a different opinion that is preferable to the one already followed in one’s school, and it would not pose any hardship for the adherents of that school if they had to make the switch? What if the switch would in fact be of *benefit* for the *muqallids*? In this text Thānawī is silent on what to do in such a situation. But when looking at Thānawī’s own approach to legal matters, we find that he was willing to reevaluate matters within his own school and follow “less preferable” opinions, or take on minor positions in opposition to the dominant view of the Ḥanafī school. In some cases, as we will see in *al-Ḥīla al-Nājiza*, he was willing to cross not only intra-*madhhab* but also inter-*madhhab* boundaries.

⁹⁶ Ibid., 86.

Examples of *Ijtihād* in Thānawi's Own Legal Work

Manuals on the science of giving fatwa (*uṣūl al-iftā'*) often describe a ranking of the different types of jurists (*ṭabaqāt al-fuqahā*), with reference in particular to how much or what kinds of *ijtihād* each type of scholar can engage in. Up to seven or more levels can be found in these classifications, ranging from those jurists who are considered absolute *mujtahids* (*mujtahid muṭlaq*) and are able to formulate their own methodological schools, those who can make *ijtihād* on questions not covered by the imam of their school (*mujtahid fi'l-madhhab*), and those who only have thorough knowledge of the existing opinions of their own school and can choose between these opinions according to context and situation (*mujtahid fi'l-masā'il*).⁹⁷ In one of his texts Mufti Muḥammad Taqī 'Uthmāni, the leading Deobandi scholar of the present day, has a simplified version of this classification in which he includes only the above three levels, the last of which he calls "*mutabaḥḥir 'ālim*" rather than "*mujtahid fi'l-masā'il*."

According to 'Uthmāni, the "*mutabaḥḥir 'ālim*" has the following three qualities:

1) He not only knows the legal rulings of his school, as the layperson (*'āmmiyy*) is expected to, but also knows the proofs for these rulings, at least in a general way; 2) He is able to give fatwa and choose between the various opinions contained within the corpus of law of his own legal school according to contemporary needs and cultural sensitivities (*'urf*). For those new issues on which no ruling can be found within the existing rulings of his school, he is able to utilize the methodological rules and restrictions of his school

⁹⁷ See, for example, Keller, *The Reliance of the Traveler*, 869.

to pass rulings on these new situations, and 3) “In certain special situations” he is permitted to leave the confines of his own school and adopt rulings from a different legal school altogether.

Since these are the exact same qualifications that non-Deobandi traditionalist scholars list for the *mujtahid fi’l-masā’il*, ‘Uthmāni’s decision to use a wholly other title is telling. Perhaps the terms *ijtihād* and *mujtahid* have acquired such loaded meanings in the South Asian Muslim context that even use of agreed upon titles that allude to these concepts is seen to be too risqué by Deobandi *‘ulamā*.

According to Deobandi scholars, Thānawī was a *mutabaḥḥir ‘ālim* or a *mujtahid fi’l-masā’il*, one who was able to make *ijtihād* on specific issues (though not on broader methodological issues). For purely practical reasons, however, Thānawī went through great trouble in order to avoid coming off as engaging in any form of *ijtihād*. As can be judged by his meticulously argued work on the need for *taqlīd shakḥṣi*, Thānawī likely believed that the campaign of those pushing for *ijtihād* was just too strong, and to make any concessions on his own perceived position on the *taqlīd* vs. *ijtihād* debate would give them too much leeway to continue pushing their agenda.

However, in his work, Thānawī actually engages in *ijtihād* numerous times, elucidating new approaches to old issues in novel and creative ways. One example of this is his reevaluation (*taḥqīq*) of *salam* or futures contracts. Thānawī held that there was no minimum period of validity for these contracts, even though the opinion of the later Ḥanafīs was that this minimum was thirty days. Thānawī did not technically go “outside” the Ḥanafī school to justify his opinion; rather, he demonstrated how this minimum period had originally been determined by the Ḥanafīs on the basis of customary practice

(*urf*). Since the customary practice of his own time had changed, Thānawi felt he was justified in coming to a new conclusion on this issue.⁹⁸

The *fatāwa* covered in Chapter V also are examples of Thānawi’s use of *ijtihād*. His fatwa on having a balanced approach to obedience to one’s parents is one such example.⁹⁹ In this text, Thānawi brings together numerous rulings relating to “*ḥuqūq al-wālidayn*,” parental rights, in a way that had never been done before. He outlines not just the usual treatment of the necessity to obey one’s parents, but he also gives detailed rulings on how such obedience must be balanced with the rights of one’s wife, children, and one’s own self. A particularly striking ruling included in this fatwa is on the requirement to divorce one’s wife if one’s parents command so. Many scholars hold that, as long as the parents are not commanding this for some corrupt reason, the son must obey and divorce his wife. Thānawi takes a different, apparently minority position, and says that one must only divorce one’s wife if the husband himself will not suffer harm. Elsewhere, in a different fatwa, Thānawi says that a man is not obliged to divorce his wife on the command of his parents, if either he *or his wife* will not be able to bear the consequences.¹⁰⁰ Again, it is possible that most if not all of the points he includes in this fatwa have some sort of legal precedent, but his compilation of the rulings in this manner, and his particular approach to individual and spousal rights under the topic of *ḥuqūq al-wālidayn*, is distinctive. It shows his willingness to rearticulate and even rethink issues relating to family and individual rights in the face of changing social dynamics.

⁹⁸ Thānawi, *Imdād al-Fatāwa*, vol. 3, 70. I am grateful to Shaykh Faraz Rabbani, a Damascus-trained Ḥanafī scholar, for this reference.

⁹⁹ Thānawi, *Imdād al-Fatāwa*, vol. 4, 480–85.

¹⁰⁰ Thānawi, *Imdād al-Fatāwa*, vol. 2, 467.

Another striking example is his fatwa on the permissibility of women’s leadership.¹⁰¹ Unlike other longer *fatāwa* of his, especially those on more “controversial” topics, this one has not a single reference to previous jurists’ work, and judging from the contents of his fatwa it seems likely that he was in fact using his own legal judgment when giving this ruling. According to the majority opinion, it is impermissible for women to hold the position of caliph. A *ḥadīth* of the Prophet is one of the major justifications of this rule, in which the Prophet says, “No people (*qawm*) will succeed who entrust their affairs to a woman.” The questioner cites this *ḥadīth* and then asks Thānawi if it applies to contemporaneous women leaders. Thānawi’s response is surprising, especially given his usual stances on women’s participation and visibility in the public sphere. He uses a number of different examples from the Qur’an and *ḥadīth* to prove that certain forms of women’s leadership, including leadership of democratic (“*jumḥūrī*”) states, are indeed permissible. Thānawi is obviously taking into consideration the changed circumstances of his time: absolute power of the nation’s sovereign is no longer the only form of governmental authority, and his fatwa is an attempt at not only coming to terms with new forms of government, but also what role gender played in such new forms of governmental authority. What is most noteworthy in this case is that he is willing to reinterpret the most common interpretations of a *ṣaḥīḥ ḥadīth* when engaging in his evaluation of changed political realities.

In all of these examples, however, Thānawi does not ever claim the act of *ijtihād*. If anything, he goes out of his way to demonstrate his *taqlīd* of past authorities, even on many of these issues. This is a necessary element of the rhetoric of reform for him as a traditionalist scholar: legal rulings definitely needed to evolve according to the changing

¹⁰¹ Thānawi, *Imdād al-Fatāwa*, vol. 5, 91–93.

needs of the time, but this evolution could only occur within the perceived confines of the tradition. As Zaman and others now point out, even something as seemingly reactionary as a commentary would often be a method of engaging in *ijtihād*.¹⁰² The key reason for this was that the locus of authority had to be maintained—and that locus for the *‘ulamā* was the tradition itself.

A Prime Example of Thānawi’s Efforts Toward *Ijtihād: al-Ḥīla al-Nājiza*

As we saw in the Introduction, the problem of the lack of Muslim judges held serious consequences for women who wanted out of their marriages. Even in cases where Ḥanafī law clearly allowed a woman the right to *faskh* or divorce, her divorce could not be finalized unless it was presented in court and approved by a Muslim judge. Thānawi had been seeing cases in requests for *fatāwa* relating to this problem from as early as 1322 AH (1904 CE). He had been calling for years in his *fatāwa* for the reestablishment of Muslim courts. Every time he deals with cases of woman-initiated divorce in his *Imdād al-Fatāwa*, for example, there is some mention of the need for Muslim judges to review these cases.

The *Imdād al-Fatāwa* has a pre-*al-Ḥīla al-Nājiza* example of such a query that is particularly dramatic.¹⁰³ A young girl had been married off pre-puberty, and came to know that the family she married into was morally corrupt: her husband and father-in-law planned to prostitute her out to local men just as they had been doing to her mother-in-law (the girl’s husband had been pimping his own mother!). Thānawi’s response to the

¹⁰² Zaman, *The Ulama in Contemporary Islam*, 38.

¹⁰³ Thānawi, *Imdād al-Fatāwa*, vol. 2, 467–70.

question sent in by her father, about whether or not her marriage could be annulled, is deceptively hands-offish. He basically lists all of Imam Abu Ḥanīfa’s conditions for annulling such a marriage, and says that according to whatever had been described in the letter, all of these conditions did not exist in the girl’s case. But in a skillful move at the end of the fatwa, Thānawi says that according to a minority opinion within the Ḥanafī school, her case could be resolved and her marriage annulled. If the father could locate a Muslim judge who could procure a fatwa that accorded with this minority opinion, the girl could then have the option of *faskh*. In this fatwa, Thānawi goes through a long discussion of the dominant opinion within the Ḥanafī school in order to prove his own allegiance to the *madhhab*, but his citation and subtle promotion of the minority opinion is in fact an example of him engaging in *ijtihād fi’l-masā’il*.

Despite the fact that Thānawi does provide a way out for the girl in the case cited above, there still was the sticky problem of the need for Muslim judges. Without an institutional setup that made sure to not only include Muslim judges but also one that allowed Muslim litigants to take their cases only to such judges, the practice of Islamic Law in colonial India had truly become “dysfunctional.” “Without a *qāḍī*, even relatively simple matters such as the dissolution of a marriage or the determination of the ‘waiting period’ [required to be observed by a widow or divorcee before remarriage] could not be resolved.”¹⁰⁴ Some muftis would recommend taking such cases to other principalities, such as the Muslim-ruled princely state of Bhopal where *qāḍīs* had been retained in the court system.¹⁰⁵ Thānawi also clarifies that the judge can even be appointed by non-Muslim governmental authorities—only the judge himself had to be Muslim for the

¹⁰⁴ Zaman, *The Ulama in Contemporary Islam*, 27.

¹⁰⁵ *Ibid.*, 27.

ruling to have efficacy.¹⁰⁶ Ideally, Muslim judges appointed by the British would be required to consult with muftis in order to make sure they were ruling properly according to Islamic Law,¹⁰⁷ but it was difficult enough to find a Muslim judge, let alone put on more restrictions such as the need to consult muftis.

In his introduction to *al-Ḥīla al-Nājjiza*, Thānawī does call for the reinstatement of Muslim judgeships, but he does this only as a smokescreen for the important changes that would follow in the rest of the treatise. By the time he is writing *al-Ḥīla al-Nājjiza*, he knows very well that restoration of Muslim judgeships is simply a pipe dream. The very compilation of the rulings in *al-Ḥīla al-Nājjiza* is itself an act of surrender: he knows that the reestablishment of Muslim judicial authority in colonial India is basically an impossibility. Thānawī had been receiving inquiries about such cases for several years before the compilation of *al-Ḥīla al-Nājjiza*, and each time he would face a new one he would basically throw his hands up, declaring that none of these cases could properly be dealt with until Muslim judgeships were restored. By the time of his writing *al-Ḥīla al-Nājjiza*, he had already been involved in his own project of advocacy of Muslim judicial authority, and the writing of the *Ḥīla* was essentially a declaration of the failure of this project.

The two main solutions laid out in *al-Ḥīla al-Nājjiza*, the promotion of *tafwīḍ al-ṭalāq* (granting the woman the right to *ṭalāq*) and the allowance of Māliki-legitimated councils to replace the jurisdiction of the courts, both were examples of *ijtihād* by Thānawī in this particular work. Each of these concepts was not purely novel, and did previously exist in each respective school, but given the context of the promotion of each

¹⁰⁶ Thānawī, *Imdād al-Fatāwa*, vol. 2, 469.

¹⁰⁷ Thānawī, *al-Ḥīla al-Nājjiza*, 17.

ruling, the way in which each was appropriated, and the ultimate implications of both these doctrines, in effect Thānawī was engaging in very creative acts of *ijtihād*.

As we shall see in Chapter III, promoting *tafwīd al-ṭalāq* was an exceptional move on Thānawī's part, as it challenged both cultural mores as well as the sensitivities of the 'ulamā themselves. While the concept is attested to in some form or another in all of the four legal schools, it is rare to ever find a traditionalist scholar who is comfortable with advocating its practice. In fact, more often than not many modern-day traditionalist scholars (including Thānawī himself) dissuade individuals from utilizing this legal allowance for women, unless it is granted with numerous restrictions. Thānawī's *ijtihād* therefore is not so much on the legal formulation of the ruling, since *tafwīd* had always existed within Ḥanafī law, but rather in the way *tafwīd* was promoted as a legal solution to the problem of lack of judicial authority. Unlike the rest of *al-Ḥīla al-Nājiza*, which promoted consultation with the 'ulamā in the formation of the legal councils, promoting *tafwīd al-ṭalāq* did not do as much for bolstering 'ulamā authority. The only goal that would be met by promoting *tafwīd*, aside from the obvious benefits that women would accrue, would be that *madhhab* allegiance would be maintained. His act of advocating *taqlīd* here then becomes a simultaneous act of *ijtihād*. Unfortunately, it is not surprising that this aspect of his text, though the most effortless in implementation, was never seriously taken up by either the 'ulamā nor the general South Asian Muslim population.

The other major area in which Thānawī made *ijtihād* was adopting the concept of *jamā'at al-muslimīn al-'udūl*, or the use of a council of righteous men to stand in the place of Islamic courts. This was an example of Thānawī not simply reevaluating the rulings contained within his own school, but rather going outside the school completely

and borrowing from the Māliki *madhhab*. According to the Mālikis, the *jamā‘at al-muslimīn* takes the place of a *qāḍī* in cases where there is no *qāḍī* present, or the *qāḍī* is known to be corrupt. In Sherman Jackson’s brief study of this legal concept, he states that the *jamā‘at al-muslimīn* is generally not known to have served as *qāḍī* in criminal cases, or cases of adultery or consuming alcohol. Instead, just as it is used by Thānawī, the Mālikis used it primarily to resolve civil disputes, such as those relating to marriage and divorce. “In fact,” Jackson says, “in the majority of cases [cited in Māliki texts] the principle appears to be invoked with the aim of protecting the rights of women where these appear to be under attack or where through benign judicial neglect they are likely to be squandered.”¹⁰⁸

According to the Mālikis, the only qualifications for those participating in the *jamā‘ah* are that they be men who are known for their piety and have knowledge of the legal rulings for the case at hand (e.g. divorce).¹⁰⁹ They do not necessarily have to be *‘ulamā*, but they should know the relevant rulings and how to apply them. The men should be known and respected within their communities, and be individuals “to whom the people commonly refer to on important matters.”¹¹⁰ From this description the *jamā‘ah* seems to be comprised of the “village elders,” people whose word carries weight within the locality. According to Jackson, this may explain why the *jamā‘ah* has to be made up of men.¹¹¹

¹⁰⁸ Jackson, Sherman, “*Jamā‘at al-Muslimīn al-‘Uḍūl*,” (unpublished draft), 5–6.

¹⁰⁹ Personal interview with Māliki scholar Shaykh Saleh bin Siddina, Fremont, CA, February 16, 2007. Also see the Medinan Māliki Salih al-Tunisi’s response to Thānawī in his letter appended to *al-Ḥīla al-Nājiza*, 128.

¹¹⁰ Aḥmad al-Dardīr in *al-Sharḥ al-saghīr*, as quoted in Jackson, “*Jamā‘at al-Muslimīn al-‘Uḍūl*,” 9.

¹¹¹ Jackson, “*Jamā‘at al-Muslimīn al-‘Uḍūl*,” 10.

Thānawī takes this concept of *jamā‘at al-muslimīn* and uses it toward similar aims as the Mālikis within his own legal context. Just as Mālikis may have been forced to come up with this concept when facing non-Muslim rule under “the Christian kings of Spain, [or] the nominally Muslim rulers of sub-Saharan Africa” in order to not be completely stumped in their practice of Islamic Law,¹¹² Thānawī used the concept toward the same ends in order to continue to keep Islamic Law relevant and applicable in colonial India. Though he is not coming up with an entirely new concept, Thānawī is engaging in *ijtihād* when adopting the ruling of the *jamā‘ah* because it is a concept never before applied within Ḥanafī practice in India.

Thānawī’s use of the *jamā‘at al-muslimīn* was unprecedented in colonial India. It was therefore again a form of *ijtihād*, because it constitutes an important attempt at securing a new position of authority for the *‘ulamā* in colonial India. The *‘ulamā* may have been weakened in other areas where their word used to carry weight, such as in the judicial system, but creating a new locus of authority that would be dependent on the expertise of the *‘ulamā* was an effective move by Thānawī. His adaptation of the Mālikī concept not only provided an alternative to the British legal system, but also demonstrated to the Muslims that the *‘ulamā* still had legal stratagems and expertise to remain relevant and vital for Muslim practice in modern India.

One thing that should be noted in the context of Thānawī’s borrowing from the Mālikis, however, is that he did not necessarily make use of all of Mālikī rulings that could possibly have been relevant in the issue of women’s right to divorce. If the Ḥanafis are the most restrictive of the four schools in granting women options for divorce, the Mālikis are by far the most lenient. Any form of harm that the woman suffers on behalf

¹¹² Ibid., 4.

of the man, if inflicted without any justifying legal grounds, constitutes reason for faskh and the woman may procure a divorce from a Māliki *qāḍī*. So if the husband is proven even to be rude or have a harsh manner with his wife, even if “he turns his face way without responding when she speaks to him,” this constitutes grounds for divorce in the Māliki school.¹¹³

Thānawī could have used this opportunity of reevaluation of Ḥanafī positions relating to faskh, and taken greater advantage of the Māliki expertise that he had access to through the correspondence with the Mālikis of Mecca and Medina. He could have allowed for divorce in cases of physical and emotional abuse, for example. But Thānawī is very careful when borrowing from the Mālikis. His commitment to *taqlīd* is only compromised to the level that he feels is absolutely necessary. Some of the rulings that he received from the Māliki scholars in his correspondence were much more lenient than he was expecting. For example, one Māliki mufti from Medina, Shaykh Alfa Hashim, wrote to Thānawī saying that in the case of the missing husband, if the woman feared that she would fall into fornication or if she did not have the means to support herself, the usual waiting prescribed by the Mālikis of four years, four months, and ten days could be cut down to just a year, or even six months according to the Ḥanbalis.¹¹⁴ Thānawī does mention this allowance in his section the return of the missing husband, but notes that if it can be avoided this ruling should not be followed, since the other Deobandi muftis he was working with from Saharanpur felt this to be too great an allowance. After mentioning their qualms and the need to avoid the allowance of the shorter waiting period if possible, Thānawī says, “Still, when there is strong evidence that there is the risk of

¹¹³ Personal interview with Māliki scholar Shaykh Saleh bin Siddina, Fremont, CA, February 16, 2007.

¹¹⁴ Thānawī, *al-Ḥīla al-Nājjiza*, 122.

zina then the judge has the option to rule for the one-year waiting period.”¹¹⁵ We see Thānawi being conflicted on the issue of borrowing between madhhabs here: he knows that the shorter waiting period is allowed, he has had the ruling confirmed by the experts of the very legal school that he is already borrowing from in the 4-year rule. But Thānawi’s attempts at *ijtihād* have to be done carefully; he cannot alienate himself from the other Ḥanafis around him whose approval of his work is necessary for it to carry any practical weight. Thānawi has to play a delicate game of maneuvering between remaining committed to his own school and borrowing from another, if he can hope for his work to be accepted by his other Ḥanafī peers. Thānawi was attempting to provide a “collective fatwa”¹¹⁶ that would act as a type of “consensus” of Ḥanafī *‘ulamā* in colonial India, something along the lines of what Iqbāl had been calling for in the need for “collective *ijtihād*.” He could not afford to upset the balance between *taqlīd* and borrowing from the Mālikis, if his attempt at *ijtihād* were to be successful.

Finally, another aspect of *ijtihād fi’l-masā’il* can be seen in a fatwa by Mufti Muḥammad Shafī‘ (d. 1976) that is appended to *al-Ḥīla al-Nājjiza*. As we saw in the introduction, when faced with a case of apostasy in 1913, Thānawi had ruled according to the prevailing opinion (*zāhir al-riwāya*) in the Ḥanafī school, which hold that an apostate woman must be forced to reconvert and remarry her first husband. Shafī’s fatwa, on the other hand, provides detailed argument for why the prevailing opinion should no longer be acted upon. As the *‘ulamā* had learned the hard way already, if the main view of the Ḥanafī school would be applied in colonial India, the woman could have her marriage annulled, but there was no authority that could force her to reconvert and remarry her

¹¹⁵ Thānawi, *al-Ḥīla al-Nājjiza*, 71.

¹¹⁶ Zaman, *Ashraf ‘Ali Thānawi*, 64.

husband, as the legal ruling required. Such a situation provided ample encouragement for women to begin using apostasy as a means to escape their marriages, since she could use a very simple *ḥīla* or legal stratagem of her own to procure the divorce she desired.

In his fatwa, Shafīʿ details all the rulings that apply to a situation where one of the spouses is not Muslim. He categorizes the rulings based on whether the difference in religion between the spouses was already present before marriage, or if it occurred after marriage. For the latter case, numerous situations are outlined, including what happens if either of the spouses converts to Islam, as well as if either of the spouses converts out of Islam. All of the rulings outlined save one are the accepted rulings in the Ḥanafī school, and Shafīʿ does not have any particular comment on them.¹¹⁷ It is only the ruling that applies to a woman leaving Islam that is controversial. (As for the man’s apostasy, the ruling on this is clear and uncontroversial: the marriage contract breaks according to all the legal schools, and his punishment is that he must be killed.)¹¹⁸

Regarding the status of a Muslim woman’s marriage in the case of her apostasy, the Ḥanafī school has three opinions. These are: 1) the marriage contract breaks and she must be forced to reconvert and remarry her first husband (and this is the dominant opinion of the school); 2) her apostasy has no effect on the status of her marriage at all, and 3) the woman becomes the slave of her (now ex-) husband.¹¹⁹ Using the dominant opinion as a legal stratagem to escape their marriages was apparently not limited to women in colonial India. In the Arabic texts Shafīʿ cites to back up his fatwa, more than a few mention the reasoning for why the woman must be forced to remarry her first

¹¹⁷ Thānawī, *al-Ḥīla al-Nājiza*, 104–05.

¹¹⁸ *Ibid.*, 106.

¹¹⁹ *Ibid.*, 112–13.

husband: “in order to close the door [of using this stratagem] upon her.”¹²⁰ It is not due to any specific command in the primary texts that the woman must be forced to remarry her first husband, rather it is an interpretive liberty the jurists had taken in order to block the use of apostasy for the purpose of seeking an easy annulment of the marriage. In the Urdu sections of the fatwa, Shafīʿ does not bring attention to this fact, since open acknowledgement of the interpretive basis of this aspect of the ruling may weaken his overall argument.

By arguing against the continued use of the main opinion of the school, and by promoting the adoption of the second rule (where her apostasy has no effect on the marriage), Shafīʿ engages in his own “*ijtihād fi’l-masā’il*”: “Due to the current conditions in Hindustan it is no longer feasible to act upon the first agreed-upon (*muttafaq ‘alayh*) opinion, because after giving ruling on the annulment of the marital contract the Muslims have no power at their disposal to force the remarriage...Therefore there is no alternative other than to give fatwa according to the [second] opinion.”¹²¹ Shafīʿ had undertaken an *ijtihād* of his own, with the permission of other scholars including Thānawī (who all sign off at the end of the fatwa), in order to protect against future misuse of the serious act of apostasy.

The timing and placement of Muḥammad Shafīʿ’ s fatwa is also worthy of note. Women may have been compelled to act on the original Ḥanafī ruling due to their desperate situations, and some ‘*ulamā*, feeling sympathy for the women and seeing no other route for granting women a divorce, may even have given them the idea to seek escape in this way (since very few non-scholars are even familiar with these rulings).

¹²⁰ Shafīʿ cites this statement on the authority of the pre-modern Ḥanafī jurists Abu’l-Nasr and Abu’l-Qasim; Thānawī, *al-Ḥīla al-Nājiza*, 108.

¹²¹ *Ibid.*, 113.

Now that Thānawi had provided a more suitable means of escape, the need to block any further misuse of the apostasy rules could easily be fulfilled. Shafī's opinion is appended to the text of *al-Ḥīla al-Nājiza* and formulates an important part of this collective legal endeavor on the part of Thānawi. Not only does Shafī's fatwa serve to block further misuse of apostasy, it also serves as a final reminder for the very important justification behind Thānawi's abandonment of *taqlīd* and resort to the Māliki school.

As we have seen, Shafī's fatwa was only one protection used against any accusations of illegitimate legal reform in the promotion of *al-Ḥīla al-Nājiza*. Thānawi takes numerous precautions in order to demonstrate his unflinching loyalty to *taqlīd* and to the Ḥanafī school: he continues to call for the reestablishment of Muslim judges, even though he is likely sure of its impossibility; he promotes *tafwīḍ al-ṭalāq*, something still not culturally acceptable for Indian lay Muslims and *'ulamā*, because this was the easiest way he could find to help the women and still remain within the Ḥanafī school; he gets around the problem of needing Muslim judges, but not by saying that the ruling of a non-Muslim judge would count, but by borrowing from another *madhhab*, something a lot more in line with his advocacy of *madhhab*-allegiance; he makes it clear that even such borrowing between *madhāhib* has to be done with the utmost precaution, only in situations where one's own *madhhab* simply cannot cope with the situation; he further promotes *madhhab* authority by putting himself in a humble position before the practitioners of the Māliki school, showing that to truly adhere to a *madhhab*, one must put oneself at the mercy of its interpreters; he takes from the Māliki school in as few rulings as possible; and lastly, he has numerous Ḥanafī scholars within India sign off on his document, in order to further demonstrate his care in taking any step that could be

construed as a new undertaking—he could not possibly be doing anything too radical or “*ijtihādi*” if all of these fellow Ḥanafī scholars had signed off on his work.

A strong show of *taqlīd* then was of utmost importance in this project of *al-Ḥīla al-Nājiza*. However, as can be seen from the earlier legal examples given above, and what we can gather from *al-Ḥīla al-Nājiza*, we see that the problem for Thānawī was not *ijtihād* per se, but the manner in which *ijtihād* was undertaken, and, perhaps most importantly, the fact that only the ‘*ulamā* could engage in such an act. In order to bolster the authority of the traditionalist ‘*ulamā*, it was important not only to strongly promote *taqlīd*, but also simultaneously allow enough room to undertake *ijtihād* to make necessary adaptations. This *ijtihād* could be done under numerous guises (for example, through commentary, basing *fatāwa* on classical sources, borrowing between *madhhabs*, and highlighting things within one’s own *madhhab* in novel ways), but essentially legal reform had to be undertaken in order for the ‘*ulamā*’s work to remain relevant. The trick would be to undertake this reform, this attempt at *ijtihād*, while still being loyal to the regime of *taqlīd*.

CHAPTER III

Guidelines for the Jamā‘at al-Muslimīn: Rulings Related to Women’s Right to Divorce in al-Ḥīla al-Nājiza

Despite calls for Muslim judgeships and *tafwīḍ al-ṭalāq* (transferring the right of divorce to the wife), the bulk of *al-Ḥīla al-Nājiza* is dedicated to solving the conundrum of granting women the right to divorce when neither of the above two are feasible options. Women are afforded specific rights within an Islamic marriage, and the right to unilateral divorce is not one of them (unless this right is transferred to her by her husband). To understand the rulings covered in *al-Ḥīla al-Nājiza*, it is important to first understand the structure of Islamic marital law, in order to see the significance of the *Ḥīla*’s rulings.

Marriage and Divorce in Islamic Law

Marriage

Marriage is pointed out by Islamic scholars to be the only institution that has existed from the time of Adam, and one that will continue to exist in the Afterlife. In the Quranic view of marriage, it is the coming together of two individuals in “*mawaddah* and

rahma,¹²² love and mercy. Also in the Quranic context, it is the coming together of a woman under a man's care, such that she is provided for and maintained on condition of her acknowledging his degree of authority over her.

The texts of reformist writers tend to stress the fact that marriage is a “*sunnah*” of the Prophet, and one that is essential to maintaining the chastity of both men and women, as well as vital to the proper functioning of Muslim society as a whole. In these discussions, marriage is mentioned to be a *sunnah*, but is emphasized such that it almost seems to be *fard*. The assumption in these texts is that those who are in need of sexual gratification, or even those who truly wish to follow the Prophet Muḥammad, *must* marry. While it is acknowledged by such reformist thinkers that each party must carry out their duties within marriage, no legal connection is made between the act of marriage and its subsequent responsibilities.

Traditional legal texts do address a link between the two, however. Ḥanafī *fiqh* manuals list the act of marriage as not only taking the legal ruling of *sunnah*, but in fact being able to take any of the five categories of legal rulings, depending on the context. Thus, at times it can be *fard* (obligatory), at times *wājib* (necessary), at times *sunnah* or *mustahabb* (recommended), at times *makrūh* (disliked), and sometimes even *ḥarām* (forbidden). In his Book on Marriage in the *Radd al-Muḥtar*, the illustrious Ḥanafī scholar ibn ‘Abidīn describes marriage as being:

Fard (obligatory) for someone who fears for his or her chastity.

Wājib (requisite) for someone whose desire is overwhelming.

Sunnah (recommended) for someone [male] who has the ability to have sexual intercourse, pay the mahr (marriage payment) and maintain a wife [or a female who has the ability to fulfill the duties of a wife].¹²³

¹²² Qur’an, 30:21.

Makrūh (disliked) for someone who fears they will be unjust to their wife or husband.

Ḥarām (forbidden) for someone who is sure they will be unjust to their wife or husband.¹²⁴

Numerous legal scholars have discussed the categories of marriage in this way. One modern-day Jordanian scholar repeats the argument of past *fuqahā* by mentioning the reasoning behind such categorization. When one fears or is sure that one will fall into the sin of fornication, marriage becomes *wājib* or even *fard*, but only on condition that 1) the man has enough means to provide a *mahr* and her regular maintenance and 2) that neither party fears the possibility of “*jūr*” or oppression/injustice on their part. He justifies the latter part of his argument by saying:

When there is a clash between the fear of *zina* by not marrying on the one hand, and the fear of injustice in case the marriage does take place, the fear of injustice takes legal precedence. There would be no obligation [for marriage] in this situation, rather it would be *makrūh*, since injustice is a sin tied to the rights one owes one fellow human being, while prohibition against *zina* is from the rights of God Most High. When these clash, it is the right of the human being which takes precedence, due to his/her need [for the right to be fulfilled], and the complete freedom from need (*ghina*) of the Lord Most High.¹²⁵

Injustice in this context would be for either party to not be able to fulfill the most basic duties of their spouse, and these duties encompass the physical, material, and emotional needs that each has toward the other.¹²⁶

Discussions on what duties each spouse owes the other are often highly gendered within Islamic legal discourse. So, while taking care of the financial burden of caring for the wife is the man’s main responsibility, in general the legal texts cite the wife’s sexual availability as her primary religiously required obligation within marriage. In fact, the

¹²³ The Shāfi‘is have a slightly different opinion about this situation: “The majority [of *fuqahā*], except for al-Shāfi‘i, hold that it is recommended for a person to marry, as long as he is of a balanced (*mu’tadil*) character. That is, he does not fear that he will fall into *zina* if he does not marry, nor does he fear that he will be oppressive (*yaẓlim*) to his wife if he were to marry... But al-Shāfi‘i says that marriage in this case is *mubāh*, it being permissible both to marry or to leave off marriage. [In such a situation] if he remained unmarried to free up time for worship and study, this would be better.” ‘Anbar, “*az-Zawāj*,” 739.

¹²⁴ As summarized by Hartford in *Islamic Marriage*, 24–25.

¹²⁵ Abul-Ḥajj, *Subul al-wifāq*, 11.

¹²⁶ As explained by the contemporary Ḥanafi scholar Faraz Rabbani, personal communication, Amman, Jordan, January 2006.

legal definition of *nikāḥ* in Ḥanafī texts is “A (legally) specific (*mawḍuʿ*) contract that grants the exclusive right to sexual enjoyment,”¹²⁷ with this definition usually being clarified saying that it is the man’s exclusive right to sexual relations with the woman. This terse definition in the words of Ḥanafī legal scholars attempts to describe the legal institution of marriage in the most basic way possible; according to the Ḥanafīs, this is the absolute minimum that can be entailed from any given marriage. Obviously, the woman also has right to sexual enjoyment of her husband through *nikāḥ*, but the reason why *nikāḥ* is defined this way, as *his* exclusive right to enjoy *her* sexually, is that through an Islamic marital contract, the man ensures that only he can have relations with her (whereas according to the *Sharīʿah*, he himself can possibly have other legitimate sexual relationships)¹²⁸ Another, more thorough and non-*madhhab* specific definition of the term marriage (here “*zawāj*,” used interchangeably with *nikāḥ*) covers the same ideas:

[*Zawāj* or *nikāḥ*] is a contract that makes entails permissible sexual enjoyment with a woman by way of intercourse, touching, kissing, hugging and the like. This is if the woman is not related by blood, through the bonds of wet-nursing, or through an existing in-law relationship (*sihr*). Alternatively, [the *nikāḥ*] is a contract established by the Lawgiver [*al-shāriʿ*, i.e. God] to bring about the ownership of sexual enjoyment for the man over a woman, and to make permissible sexual enjoyment for the woman with the man. The effect of this contract with respect to the man is that he gains the exclusive right for this and it would be not permissible for anyone else to enjoy, whereas for the woman the effect of the contract is that it makes permissible sexual enjoyment but does not grant her the exclusive right to it.¹²⁹

Such definitions of marriage, particularly those such as the Ḥanafī one mentioned above, attempt to describe what can be considered marriage on the most basic possible terms. While they are meant to legally *define* the term “marriage” within the context of Islamic law, they are not meant to *describe* the institution and what it entails. Islamic scholars do provide more full descriptions of marriage, in legal textbooks as well but more often in books on religious and spiritual counsel. It is in the latter especially that the

¹²⁷ Abul-Haaj, *Subul al-wifāq*, 9.

¹²⁸ *Ibid.*, 9–10.

¹²⁹ ‘Anbar, “*az-Zawāj*,” 738.

ideals of marriage are laid out, where descriptions on how to conduct one's marital life according to the *sunnah* of the Prophet are mentioned in detail. It is common here to find exhortations to treat one another with kindness, generosity, and sensitivity. In these texts as well, the ideal Islamic marriage is portrayed with a view toward differentiation of roles based on gender. The following description of marital life, which describes the spousal roles along the public/private divide, is taken from a contemporary text that echoes Victorian era Euro-American descriptions of marriage:

The Prophet (Allah bless him and give him peace) stated, "Everyone of you is a guardian (of his immediate charge) and is responsible for them...The man is a guardian over his family and responsible for them. The woman is a guardian over her husband's house and responsible for it..." (Bukhari, 893). Based on this, Islam distributes the tasks between wife and husband. The wife is given the home as her domain. In maintaining the home, she should keep it clean, tidy and peaceful, thus protecting it against the intrusion of devils and jinns. The husband is responsible for supporting and maintaining the family. And this was how the Prophet (Allah bless him and give him peace) divided the work between his daughter Fatima and her husband 'Ali.

Men and women marry in order to complement each other's nature. A man marries a woman for her loving kindness and tenderness, not for a masculine disposition. Likewise, a woman marries a man to share her life with someone who is developed and dependable, not to be dominated by a tyrant or left to fend for herself.¹³⁰

Such descriptions of course describe what is viewed to be one ideal form of a harmonious marriage. It is one in which each role is more or less clearly defined, and one where each party actually accepts their respective roles and acts accordingly within marriage. As we see from Thānawī's description of marital duties in the following chapter, this view also has its own particular sociological context that it draws from.

¹³⁰ Hartford, *Islamic Marriage*, 44–45. For a medieval text that echoes the same sentiment, see Farah, *Marriage and Sexuality in Islam*, 93–126.

*Divorce*¹³¹

According to Islamic Law, a couple can become divorced in three ways: a man can decide, for any or no reason, to divorce his wife by pronouncing a *ṭalāq*, in which case he would be required to pay her the full *mahr* immediately; a woman can ask her husband to divorce her through the process of *khul'*, and he may ask for monetary or other compensation that they mutually come to agreement upon; and a woman may go to court to seek a *faskh* (divorce) of her marriage, which would be done in a case where her husband is not willing to let her go, or where she wishes to leave but still feels entitled to the *mahr* that had been promised her.

The unilateral right to “call off” a marriage is reserved for the man in an Islamic marriage, through the action of *ṭalāq*. *Ṭalāq* literally means the act of setting free, or releasing from bonds. In legal usage, *ṭalāq* is the act of “releas[ing] [someone] from the bonds of a marriage contracted according to the *Sharī‘ah*.”¹³² There are numerous legal rulings that govern the act of unilateral repudiation. If the word “*ṭalāq*” is used, even in jest without the intention of an actual repudiation, a divorce always goes into effect (except in very few exceptional cases, such as a “*ṭalāq*” spoken in the state of sleep or drunkenness¹³³). The act of repudiation is taken very seriously by the jurists, to the point

¹³¹ Throughout this dissertation I have used the term “divorce” to refer to any occasion that counts as a divorce according to Islamic Law, whether through court sanction or through an extra-judicial move (such as through pronouncement of *ṭalāq* or *khul'*, as discussed below). The term “annulment” is used for when a marriage contract becomes nullified without necessarily counting as an Islamic divorce (e.g. on the occasion of a girl reaching puberty and exercising her right to refuse the marriage). The technical difference between the two is that in the former case the couple would have used up one of their three divorce pronouncements before becoming permanently irrevocably divorced (*baynūna kubra*); in the latter case, such as in the case of the young girl, if they were to remarry they would still retain all three.

¹³² Abul-Haaj, *Subul al-wifāq*, 239.

¹³³ According to the *Shāfi‘is*, a *ṭalāq* pronounced in a state of drunkenness is effectual. For Ḥanafis, a *ṭalāq* pronounced due to force or intimidation counts.

that, according to Sunni scholars, it is binding even if there are no witnesses to the statement at all.

The act of *ṭalāq* is governed by a large set of rulings. Once a *ṭalāq* is pronounced by the husband, he and his wife are considered immediately divorced, and she must begin to observe her waiting period (*‘iddah*).¹³⁴ Depending on the way in which it is pronounced, a *ṭalāq* can be considered revocable (*raj‘i*), in which the man can take the divorced wife back at will before the expiry of her waiting period, or it can be considered irrevocable (*bā’in*), in which the woman must agree to a remarriage if the man wishes to take her back. Here they would have to undergo a whole new contract, and she would receive a new dower (in addition to the one he had to pay her for the “first” marriage).

Ṭalāq raj‘i seems to be treated as the more general, or default, mode. It applies only to the woman whose marriage has been consummated; for a couple who has signed a *nikāḥ* contract but have not yet been alone together¹³⁵, only a *ṭalāq bā’in* can occur. The following is a summary of the situations in which a *ṭalāq raj‘i* goes into effect:¹³⁶ 1) the husband pronounces a divorce on his wife using unambiguous terms, or calls his wife “divorced,” even if this is done in jest (since the words are assumed to carry intention); 2) he pronounces divorce in an indirect manner or in metaphorical terms (e.g. “leave,” “go back to your family” or “veil yourself from me”), if said with the intention of divorce; 3) he did not ask for, and she did not agree to, a monetary compensation in return for his

¹³⁴ *‘iddah*: period of sexual abstinence; waiting period before a woman can remarry after death or divorce of her spouse. *‘iddat al-wafāt* is the waiting period specifically for death of the spouse. It always equals four months and ten days. The waiting period for the divorcee is generally three menstrual cycles or, if she is pregnant, until the delivery of the baby. A woman is expected to spend the *‘iddah* in her marital home, and she continues to receive financial support from him during this time.

¹³⁵ A marriage is considered consummated, and a woman is entitled to her full *mahr*, as soon as there is *khalwa* (a period of privacy or isolation).

¹³⁶ The discussion on the legal rulings related to revocable and irrevocable divorce is based on the Ḥanafī text, Abul-Ḥaaj, *Subul al-wifāq*.

pronouncement of divorce¹³⁷; 4) he did not pronounce divorce thrice in one statement; 5) he did not add superlative adjectives to the divorce pronouncement, such that a more severe (*bā'in*) divorce could be indicated.

Once a *ṭalāq raj'i* takes place, the man and woman are considered religiously divorced. The state of their divorce is a “lighter” state than if they were to be complete strangers: she is not required to cover in front of him while completing her *'iddah*, and in fact is encouraged to adorn herself such that he would relent and take her back. Taking her back during the time of *'iddah* is easy: the man only has to make up his mind and inform her of his decision. Even a tender gesture or kiss would be enough to bring them legally back together as man and wife. Once the period of *'iddah* has passed, however, the woman becomes irrevocably divorced from him. As long as they have not been divorced thrice already, they may remarry, but this would be based on a mutual decision to come back together (not based on the husband's will alone), and a new contract, with new *mahr*, would have to take place.

The common situations for an irrevocable divorce, or *ṭalāq bā'in*, are as follows:

1) the marriage has not yet been consummated; 2) the man pronounces three divorces at once, or says “You are divorced thrice”;¹³⁸ 3) the man uses adjectives to indicate multiple

¹³⁷ This is essentially the same as a *khul'*, where a woman receives a divorce by paying the man some mutually agreed upon sum. The difference is only minor: here it is the man who initiated the divorce, whereas in a *khul'* it is the woman who first asks for the divorce. In both cases, however, there must be a mutual decision to divorce, and a mutual acceptance of a sum. As will be explained later, a *khul'* can also be granted by a man with no exchange of money at all.

¹³⁸ Shī'i Imāmi doctrine does not count three utterances of divorce in one setting as a triple repudiation. Such an episode counts only as a single occurrence of divorce. However, all four Sunni schools have *ijmā'* (consensus) that this results in a *baynūna kubra*. Ibn Taymiyya was the first to challenge the consensus of the Sunni schools in the eighth/fourteenth century, a challenge for which he was imprisoned. Some modern Salafi and Wahhabi thinkers have revived this opinion of Ibn Taymiyya, and give fatwa in contradiction to Sunni doctrine, allowing a man and woman to stay together after a permanently irrevocable divorce occurs. On the Shī'i position and that of Ibn Taymiyya, see Rapoport, *Marriage, Money and Divorce*, 96–105. For the use of Ibn Taymiyya's opinion among contemporary Wahhabi scholars, see Vogel, “The Complementarity of *Iftā* and *Qaḍa*,” 262–69.

divorces, with the intention of (at least) three (e.g. “I divorce you a million times”, “I divorce you many times over”. If he did not intend three, it would count only as one); 4) he uses adjectives to indicate the stronger divorce, and intends a *ṭalāq bā’in* when doing this (e.g. “I divorce you through the strongest divorce”, “I divorce you absolutely”); 5) at the completion of a woman’s *‘iddah*, even if originally divorced via a *ṭalāq raj’i*; 6) on the woman’s acceptance of a man’s offer to divorce her with monetary compensation.

The above situations describe the various ways in which a couple can become irrevocably divorced, but it must be noted that there are two levels of irrevocability. There is the *baynūna sughra*, the lesser one, and *baynūna kubra*, the greater. The lesser state of irrevocability occurs when three divorces are not specified or intended, and the *baynūna kubra* occurs when a couple has gone through any form of divorce thrice. If he pronounced a *ṭalāq raj’i* at the start of the marriage, and another two at other times (even years later); if she had asked and received a *khul’* and they remarried, and were again divorced twice; or if he were to simply pronounce three divorces at one setting; all of these situations would lead to a state of *baynūna kubra*. If this were to occur, the man and woman would be considered *ḥarām* to each other and could never remarry unless she remarried, consummated the marriage with the new husband, and then eventually became widowed or divorced from this second marriage.¹³⁹ Such consequences are said to be imposed to drive home the seriousness of the act of divorce, and to prevent men from

¹³⁹ The woman could become “*ḥalāl*” or permissible for her ex-husband by contracting a marriage solely for this purpose, known as *tahlīl*. The marriage to the second man would be considered valid but sinful in the Ḥanafī school, since the two parties married with the intention of divorce (so that she could go back to her first husband). In the context of *tahlīl*, *khalwa* (simply being alone with the spouse) does not take the place of consummation. Intercourse must take place. Thānawī, *Imdād al-Fatāwa*, vol. 2, 451–52.

being able to use the threat of divorce as a tool of psychological tyranny over their wives.¹⁴⁰

In cases where it is the woman who is desirous of leaving the marriage, there is the option of *khul'* (lit. letting go). Like *ṭalāq*, this procedure does not need the intervention of the court for a divorce to be established. But unlike *ṭalāq*, this right is not unilaterally given to the initiating party. Following the legal assumption that divorce is the right of the man to give, *khul'* is a divorce procedure that is initiated by the woman but dependent on the approval of the man to actually become effective.¹⁴¹ When asking him to “let her go,” she may offer a sum (often the sum he had given her as *mahr*) and they must mutually arrive on an agreement. He may ask for the amount of the *mahr*, or less than this in exchange for the divorce; it would be *makrūh* for him to ask for more than the *mahr*.¹⁴²

And finally, in the case where the woman wants to divorce but the husband refuses, or she feels wronged in her marriage and wishes to divorce while keeping her *mahr*, she may take her case to court to petition for a *faskh* or court-ordered divorce. It is these cases that *al-Ḥīla al-Nājiza* deals with: situations where the woman cannot get her husband to agree to grant a divorce, for example, when he is impotent, has gone insane, or is not supporting her financially. The Ḥanafī school has traditionally been the most conservative when it came to the issue of allowing women the option of *faskh*. The woman could take her case to court, and it would be up to the judge to decide whether or not to grant the divorce. As has been discussed, even in pre-modern times Ḥanafī judges

¹⁴⁰ Hartford, *Islamic Marriage*, 144.

¹⁴¹ Perhaps due to the terminology used in modern-day legislation in Muslim countries such as Egypt and Pakistan, there is a widespread notion that a woman may pronounce *khul'* in the same way that a man pronounces *ṭalāq*, with the only difference being that she must return her *mahr*.

¹⁴² Abul-Ḥaaj, *Subul al-wifāq*, 300.

would look for ways to ease a woman's situation by allowing recourse to rulings from other schools of law. In *al-Ḥīla al-Nājiza*, Thānawī attempts to stay as close to the rulings of the Ḥanafī school as possible, borrowing only those aspects of extra-*madhhab* legal rulings that he deemed to be absolutely necessary to adopt.

It should be noted however that even within the Ḥanafī school, a woman may be religiously entitled (*diyānatan*) to a divorce, but not judicially (*qaḍā'an*). For example, if a man was impotent but the woman had no way of proving his impotence, he would be religiously obligated to divorce her¹⁴³ (if she so desired) and would be sinful if he did not. The rulings that are outlined below are the Ḥanafī law with respect to court procedure; they do not necessarily reflect what would be morally or ethically expected of the man according to this same school of law.

The chapters in this section of *al-Ḥīla al-Nājiza* are comprised mainly of Ḥanafī rulings, with numerous citations from major Ḥanafī texts (with a heavy reliance on the *Fatāwa 'Alamgīriyya*, *Durr al-Mukhtār* and its commentary *Radd al-Muḥtār*, and the *Hidāya*). For the Mālikī borrowings, he cites from the *Mudawwana* of Saḥnūn and others, and relies heavily on the *fatāwa* he receives from contemporary Mālikī scholars in the Ḥijāz, the texts of which are appended to the end of *al-Ḥīla al-Nājiza*. The main rule borrowed from the Mālikīs however is that of the *jamā'at al-muslimīn* (as discussed in Chapter II). *Al-Ḥīla al-Nājiza* is meant to be a guide for such informally-constituted legislative bodies, in order for them to know how to apply the *Sharī'ah* in woman-initiated divorce cases. As for the detailed rulings of how to effect the divorce, Thānawī tries to remain as close to the Ḥanafī school as possible, borrowing only in limited issues from the Mālikī school.

¹⁴³ Abul-Ḥaaj, *Subul al-wifāq*, 242.

The Rulings in al-Ḥīla al-Nājiza: the Option of Faskh

The Case of the Impotent Husband

Among the lore attributed to the enigmatic figure of Khaḍīr,¹⁴⁴ the famous Quranic companion of Moses, there is a story that serves to illustrate certain pre-modern attitudes toward impotence and castration.

There was a man who once had the good fortune of meeting Khaḍīr, and was shown favor by him. Khaḍīr promised to turn him into the most fortunate man alive, but the man was to describe himself what characteristics should be granted to him in order to have this happy result take place. Afraid to be hasty in what to ask for, the man began searching around for someone who could be considered the most fortunate of men, so that he could ask to be granted the very same characteristics. In his search, he came upon an individual who was clearly the most respected and by all apparent means the most successful of men. He was wealthy beyond expectation, and was known to have been blessed with many children. The first man approached this wealthy one and told him of his good luck, that Khaḍīr was going to grant him anything he wished in order to make him the most fortunate of men. He told him, I will ask Khaḍīr to grant me all that you have, as it is obvious that you are indeed a lucky man. But the wealthy one surprisingly became morose, and warned him not to ask Khaḍīr for any such thing, for he was in fact the most sorrowful of all men. When asked to explain, he told his own story: He was married to a woman whom he loved dearly, but she fell ill and was pronounced to be nearing her death. As she lay on her death bed, she jokingly taunted her husband that he did not really love her as much as he claimed, because once she was dead, he would surely go out and marry once again. In a fit of passion, he decided to prove his dying beloved wrong in the most absolute way he could think of. He castrated herself before her eyes. His love may have been proven, but through a turn of events, she began to recover, and soon regained her full health. The source of his sorrow was two-fold: not only was he now castrated and completely impotent, but his recovered wife now slept with any man that she desired. All of the many children attributed to the wealthy man were, in fact, not even his own.¹⁴⁵

This story is illustrative for our purposes because it hints at the level of stigma attached to castration and impotence in Muslim societies (something perhaps common throughout in both pre-modern and modern societies). In regions where divorce was an

¹⁴⁴ Also called Khiḍr, “the Green One.” Generally accepted as one of the prophets, Khaḍīr is featured in Sūrah al-Kahf as one who had been granted special knowledge of worldly events, knowledge that even Moses did not possess. The story of Moses and Khaḍīr is an important account explaining the reason for the existence of evil in the Quranic worldview. According to the Islamic tradition, Khaḍīr is believed to still be alive, and many Sufi accounts exist of serendipitous sightings and meetings, even in the present day.

¹⁴⁵ Thānawī, *Tadbīr wa tawakkul*, 203.

even greater stigma for women, such as perhaps in South Asia, social reality would force a woman to stay with her husband, even if it meant for her to never have children and to never be sexually satisfied. But in other Muslim societies in which the real possibility of remarriage existed, a man would most likely happily agree to a *khul'* and grant her whatever settlement she desired, instead of allowing her to take such a case to court and make public his sensitive condition.

In the event that the man, despite the risk of exposure, still stubbornly refused to grant a divorce, the woman could decide to take her case to court. The chapter on the *'innīn*, or the impotent one, describes the court rulings that would apply to such a situation. Thānawī lays out the rulings in this chapter in the way that they would be applied by the Ḥanafī courts. This chapter in particular takes no *rukḥṣas*,¹⁴⁶ or permissions, from the Mālikī school. Since the Ḥanafī school allows the spouse of an impotent man to seek divorce, Thānawī keeps the rulings as is, and expects that the only borrowing to occur in this situation would be from the Mālikī permission for the *jamā'at al-muslimīn al-'udūl*.

Thānawī begins the chapter with the following series of questions, presented in the form of an *istiftā* (request for a fatwa):

- 1) What is the legal definition of impotence [a person who is *'innīn*]?
- 2) Will the spouse of an impotent husband be granted the option of divorce (*faskh-i nikāḥ*)?
- 3) If she will be granted this option, under what circumstances will this occur, and with what conditions will it be granted?

¹⁴⁶ *rukḥṣa*: “ease”, permission; this is a legal ruling taken from a different legal school in order to counter the intractability or inapplicability of one’s own school on that particular issue.

- 4) After the divorce, will the woman be entitled to the full *mahr*, or half? And will she be required to observe the waiting period (‘*iddat*’)?¹⁴⁷

Definition of Impotence

As an answer to the first question, Thānawi cites from the *Fatāwa al-‘Alamgīrīyya*¹⁴⁸. The ‘*innīn*’ is one who “despite the presence of the specified member, is unable to have intercourse, regardless of whether his condition is due to illness, physical weakness, decrepitude, or the effects of sorcery. And if the man is such that he is able to have intercourse with certain women to the exclusion of others, then he will be considered as ‘impotent’ with respect to those women with whom he is unable to have relations.”¹⁴⁹

The ‘*innīn*’ then is not the same as the *majbūb*, or castrated one. Various reasons are given for why he might not be able to sustain an erection, but none of these ends up having a bearing on the way the ruling plays out. Even if he has the seemingly rare condition of being impotent with certain types of women and not with others, if he cannot have intercourse with the wife who brings the case the court, she is granted the divorce, as long as it can be established in some way that intercourse did not take place.

It is significant that the jurists mention the latter case as a possibility, that a man may be deemed to be able to have intercourse with some women, and not others. No further explanation is given for this condition in this citation. One reason why it may be

¹⁴⁷ Thānawi, *al-Ḥīla al-Nājīza*, 43.

¹⁴⁸ It is known as *al-Fatāwa al-Hindīyya* outside of South Asia. This is a major text of the Ḥanafī school composed under the leadership of Shaykh Nizam of Burhanpur (d. 1679) by a committee of scholars at the behest of the Mughal emperor Awrangzeb ‘Alamgir (d. 1707).

¹⁴⁹ Thānawi, *al-Ḥīla al-Nājīza*, 43.

important to include such a definition would be to allow the woman the possibility of *faskh* even if the husband is known to have had children with previous wives, or even with current co-wives. The existence of offspring from other wives is clearly rejected as a legal bar preventing a woman from seeking divorce on the basis of impotence.

Later in the chapter, Thānawī further elaborates on conditions that are related, but not equal to, that of *'unna*. The *'innīn* is one whose physique is sound, but who cannot have an erection. A man who is *khaṣiyy*, meaning one who has a penis but lacks testicles, will take the same ruling as the *'innīn*. As for the *majbūb*, the one whose penis has been castrated, or one whose penis is so small as to be considered nonexistent, such a person would take slightly different rulings, as will be explained below.

Granting a Divorce: The Process

Thānawī states that if a woman is married to an impotent man, she may indeed be granted a divorce, as long as certain circumstances and conditions are met. A particular procedure must be followed to ascertain the verity of the situation, otherwise, any woman who wanted to leave with her full *mahr* could accuse the man of impotence and be granted a *faskh*. Thānawī goes into much detail explaining how this procedure works.

Thānawī begins by saying that when a woman hopes for divorce on the basis of the husband's impotence, she must first take her case to court. The judge is then expected to proceed with a proper study of the case at hand. He must first approach the husband; if the husband himself admits that he is indeed unable to have intercourse with this woman, then he should be given one year's time to be able to seek medical treatment for his condition. The husband's admittance of the problem leads to the most simple and

straightforward procedure. It is when he refutes the wife's claim that complications result.

If the husband denies the fact that he is impotent, a number of other steps would need to be taken. Most of these revolve around whether or not the woman can be shown to be either a virgin or else a *thayyiba* (i.e. a non-virgin; one who has been previously married, or known to have been morally loose), and also around whether the man would be willing to take an oath to confirm his own claims. Thānawi explains these steps, and then summarizes the general principles as follows: “When through some proof it is established that the woman is no longer a virgin, but in fact is a *thayyiba*, regardless of whether this is known because she was married previously and has children from her first marriage, or by the woman's own admittance, or via the physical examination, in all three of these cases the man's oath will be accepted [as the burden of proof will be on the wife], and the wife will not be granted a divorce. And in all three of the above cases, if the man refuses to take oath then the woman's claim will be accepted and the man will be given a year's respite. In the case where physical examination confirms that the woman remains a virgin, the man, without being asked to take an oath, will be given a year's time.”¹⁵⁰

Here we see that only two things can prove the man's impotence at the start of such a court case: 1) either he has to refuse to take an oath swearing that he is not impotent, or 2) her virginity has to be established by a physical examination given by court-appointed women.¹⁵¹ Once his impotence is established in either of these two ways,

¹⁵⁰ Thānawi, *al-Hīla al-Nājiza*, 45–46.

¹⁵¹ Thānawi says that even the testimony of even one “upright and experienced (*'adil, tajrube-kaar*)” woman is sufficient. This is one of the rare cases where the testimony of just one person, and that too, a woman's, is accepted as proof in an Islamic court. However, in a footnote Thānawi points out that the

the man is given one lunar year to seek treatment.¹⁵² After the passing of a year, if the woman brings the case back to court, the same sort of procedure will be repeated. If she is shown to still be a virgin via physical exam, or he again refuses to swear an oath, then she is given the right to ask for the divorce, which would take place right then in court.

The process of granting the divorce would be as follows. The judge would give the woman the option of either asking for the divorce right then, or else choosing to remain with her husband despite his impotence. If she chose the latter, she would not have the right to petition for a divorce on the basis of impotence ever again. If she chose the former, the judge would first request the husband to pronounce a *ṭalāq* himself, which would be counted as one irrevocable divorce. If even at this point he refuses, the judge would pronounce the divorce himself, which would also be equivalent to one *ṭalāq bā'in*. The fact that the judge asks the husband to pronounce a *ṭalāq*, even after having gone through this tedious, minimally one-year, long process, shows how much importance the Ḥanafis gave to the man's right of *ṭalāq*. It is obvious that even in such judicially established cases of impotence, there is a level of trepidation in usurping this exclusive right of the husband.

testimony of one woman is sufficient if the case is being adjudicated through the court system. On the other hand, if the case is being reviewed according to the Māliki permission for *jamā'at al-muslimīn al-'udūl*, then the physical examination must be performed by a minimum of two such women. Since a Māliki *rukhsa* is being taken here, all of the related Māliki precepts must be followed. Thānawī, *al-Ḥīla al-Nājiza*, 45.

¹⁵² Thānawī cites Ḥanafī opinions indicating the duration of a solar year, but says that the lunar year is the relied-upon position in the school. He does say however that since a solar year is only a few days longer, it would be more precautionary to choose this ruling. Thānawī, *al-Ḥīla al-Nājiza*, 44.

Conditions That Must Be Met for the Divorce to be Valid

The above discussion describes what the procedure would be for a woman to be granted a divorce on the basis of impotence. For this to actually go through, however, there would be a few external conditions that would have to be met. Only if these were in place could the woman bring her case to court.

Firstly, the woman must not have had knowledge at the time of the *nikāh* that the man was impotent. If she already knew of this fact, she could not petition for a divorce afterwards.

The second condition is that the couple must not have had intercourse even once throughout their marriage. This single occurrence would eliminate her right to seek a *faskh* on the basis of impotence, since judicially, the woman is only entitled to intercourse once in her life. This is true after the judicial review of this case has begun as well. Notice that in the procedural rules listed above, if the man was able to have intercourse even once in the year he was undergoing treatment, she would lose her right to ask for divorce. In the Arabic citations, Thānawi mentions ibn ‘Abidīn’s statement that she is entitled to sex as a religious right but not judicially (*diyānatan* but not *qaḍā’an*). He also includes another reference which says that the man would be sinful for withholding sex from her despite his ability to do so. In contrast to ibn ‘Abidīn’s statement, the latter citation seems to indicate that if the man truly became impotent and could no longer have sex, he would not be sinful if he refused to cater to her sexual needs. In any case, for the purposes of the judicial courts, only one instance of intercourse would be considered her right. The main reason for this seems to be that if even one

instance occurred, it would be difficult to prove the case in her favor; there would be no way to know that the man was truly impotent if she had lost her virginity.

The third condition is that upon learning of her husband's impotence, she did not state her contentment with or acceptance (*riḍa*) of her current marital state. For example, she did not ever say something to the effect of "Whatever the situation, I will manage somehow to deal with it." If she expressed such contentment with her state of affairs, her right to petition for divorce would be lost. It should be noted, however, that unlike in other legal scenarios, her silence on this matter would not be taken as consent. Thānawi cites from the *Durr al-Mukhtār* in Arabic to further elaborate this point: "If he is found to be impotent or castrated and a long period of time passes before the case is brought to court, she would not lose her right [to divorce, despite having waited for so long]."

The fourth condition for her divorce to go through, would be that she asks for the divorce as soon as this right is granted to her by the judge, in the very same meeting (*majlis*). If she delays and does not avail herself of this right upon it being granted, she will lose her right to ask for it in the future.

The fifth and final condition that Thānawi lays out is that the woman must go through the court procedure to procure a divorce. She cannot take the matter into her own hands and consider herself divorced (and able to remarry) without such a proper adjudication through the courts. In places where such courts do not exist, Thānawi reminds the reader that the Māliki *jamā'at* must be utilized to effect the same procedure outlined above.

Mahr and 'Iddah After Divorce Due to Impotence

Thānawi then answers the final of the four questions listed at the start of the chapter. With regards to *mahr*, he says that the woman would be entitled upon divorce to the entire sum of the *mahr*, as long as “*khalwa ṣaḥītha*”, a state of privacy, had occurred between both spouses.¹⁵³ She would also be required to observe the *‘iddah*. If no *khalwa* had occurred, then she would be entitled to only half of the agreed-upon *mahr*.

At the end of this chapter, Thānawi includes a number of addendums. It is here where he differentiates the difference between an *‘innīn*, a *khasiyy*, and a *majbub*. For the castrated one, the *majbūb*, the man would obviously not be given a year to seek treatment. In this case, once her claim about his state is verified (via physical examination if necessary), she would be granted a divorce straightaway.

Thānawi closes the chapter with a brief review of the source and justification for the rulings he has discussed. He says that all the rulings laid out in this chapter follow the known and accepted positions of the Ḥanafī school. He also mentions that the Mālikī school is almost completely in agreement with the Ḥanafīs on the issue of the *‘innīn* and its related rulings. The only thing for the purposes of this section that entails any borrowing is the use of the *jamā‘at al-muslimīn al-‘udūl*. He warns the reader that this chapter has been written in a summarized form, and that further detailed rulings can be found in the books of *fiqh*. He urges those in need of help on more detailed issues related to the *‘innīn* to consult with scholars qualified to give fatwa in this area. Again, all of this is included to reiterate once more the importance of scholarly review and authority.

¹⁵³ *Khalwa ṣaḥītha*: seclusion, period of isolation between two members of the opposite sex. In this context of marriage this seclusion is usually considered to be the equivalent of consummation.

The Case of the Insane Husband

The following questions are listed at the head of this particular chapter:

- 1) Can an insane person's wife seek judicial divorce?
- 2) If she can, what are the related procedures and conditions?
- 3) After the divorce, what will be the rulings for her *mahr* and waiting period (*'iddah*)?

Thānawī starts off this section with a lengthy passage in Arabic that lays out the argument of those who grant the woman a divorce based on her husband's insanity. The relied-upon opinion of the Ḥanafī school is that the woman is not entitled to divorce. However, all three of the other schools—the Mālikī, Shāfi'i and Hanbali—as well as a minor opinion within the Ḥanafī school, allows for such a divorce. Those who allow it base their ruling on the fact that insanity (*junun*) counts as one of the “defects” found in a person which can warrant a divorce. The Mālikīs, Shāfi'īs and Ḥanbalīs all concur on the following to be defects for which one could legitimately ask for divorce: insanity, *judhām* (leprosy), *baraṣ* (another leprosy-type disease), *ritq* (closed vaginal opening),¹⁵⁴ and *qarn* (vaginal growth or protrusion).¹⁵⁵ Imam Muḥammad,¹⁵⁶ one of the two main students of

¹⁵⁴ The question may arise: why would a man need to seek a judicial divorce, when he has the perpetual right to *ṭalāq*? If he is faced with such a situation, where he is deceived into marrying a woman who is not even capable of intercourse, then he may want to divorce her but be unwilling to pay the promised *mahr*. If he were to receive a judicial divorce, since the “fault” would not be with him, he would be absolved of paying the *mahr*.

¹⁵⁵ Interestingly, some modern-day jurists extend the category to include medical conditions such as AIDS and other minor forms of sexually transmitted diseases.

¹⁵⁶ When Ḥanafīs refer to their own “Imams” or their own “three Imams,” they are indicating Imam Muḥammad (ash-Shaybānī) along with Imam Abu Yūsuf and their teacher Imam Abu Ḥanīfa. When Ḥanafī

Imam Abu Ḥanīfa, only accepted three of these five as defects that warrant a *faskh*: *judhām*, *baraṣ*, and insanity. He is the lone Ḥanafī source cited as holding to this opinion; the main opinion of the Ḥanafī school as cited at the start of this chapter is that “neither spouse will be given the option of divorce based on a defect in the other, even if the defect is repugnant (*faḥīsh*).”¹⁵⁷

In order to keep as far away from borrowing between schools as possible, Thānawī lays out his argument for the woman’s right to separate based on Imam Muḥammad’s explication of this ruling. According to Imam Muḥammad, the woman is entitled to divorce in the case where she discovers his insanity before consummation of the marriage. If this occurs, the case will become like that of the impotent husband, and as we shall see, the procedure for procuring the divorce will be similar to the one followed in the impotency case.

Who is a Majnūn?

The fact that Imam Muḥammad likens this case to that of the impotent spouse shows that his allowance for divorce here seems to be less about a “defect” in the spouse, and more about the woman’s judicially-upheld right to one session of intercourse. However, even though he makes her an allowance in this case, there are restrictions placed on what level of insanity must be present for her to take her case to court. Imam Muḥammad’s opinion is transmitted using different words in the various foundational texts of the Ḥanafī school. In the *Mabsūṭ* it says “she cannot stand to live with him any

texts refer to the “*Shaykḥayn*” (“the two Shaykhs”), the reference is to Imam Muḥammad and Imam Abū Yūsuf.

¹⁵⁷ As cited from al-Haskafī, *Durr al-Mukhtār*.

longer” (“*la tuṭīq al-maqām ma’ahu*”) and in the *Kitāb al-Āthār* he is quoted as saying that she must “fear that he may kill her.” Thānawi reconciles these two seemingly differing statements by offering the following rule as the measure. If common sense would dictate based on the man’s level of violence that he may be capable of murder, then she would be entitled to the *tafrīq*. To sum up, Thānawi says that the general rule is that a woman may seek a divorce in those cases where she may suffer unbearable harm at the hands of her insane spouse. Judging by the generality of the way he summarizes his argument, it seems that he mentions the rule of fearing the man capable of murder to be the more precautionary view to take. Just like Imam Muḥammad’s first statement (“*la tuṭīq al-maqām ma’ahu*”), Thānawi’s own rule is constructed in language broad enough to allow some room for interpretation.

After mentioning this allowance within the Ḥanafī madhhab for divorce on the grounds of insanity, Thānawi goes on to elucidate further the rulings Imam Muḥammad lays out on this issue. According to Imam Muḥammad, if the man’s insanity is “*ḥādith*”, the judge should rule for a year’s waiting period, as in the case of the impotent husband, in order to see if there is any improvement in his condition. But if the insanity is “*muṭbiq*,” the woman’s claim should be confirmed and she should be given the option for divorce right away. These two terms, *ḥādith* and *muṭbiq*, are the exact words used by Imam Muḥammad. The literal meaning of the second term is fairly clear—“total” or “complete”—but since *ḥādith* is not explained anywhere in the Imam Muḥammad reference, Thānawi feels that this leaves not only ambiguity in this word’s meaning, but also weakens our confidence in the meaning of the term “*muṭbiq*”, since we do not know for sure its opposite. Thānawi looks at other chapters in the legal texts that deal with the

insane person, such as the chapters on *wakālah* and fasting, and attempts to see if the terms are clarified there. He finds similar dichotomous differentiation done in these other chapters, but the terms used are not the same. In some, the terms *‘ājil* (short-term) and *ājil* (long-term) are used, in others *mustaw‘ab* (having comprehension) and *ghayr mustaw‘ab* are used, and in still others, *i‘rāḍ* (temporary) is set opposite to *ašli* (permanent). It seems that these divisions are not indicating the same types of mental conditions, and for this reason Thānawī is uncomfortable making a judgment based on analogy about the true meaning of Imam Muḥammad’s use of these terms in the context of the insane husband. Therefore, Thānawī feels it is best that in all cases a one-year period for treatment be given before the divorce is granted. He says applying the one-year rule would be particularly important if the case is being adjudicated through a council of men rather than a court, because in the Māliki *madhhab*, a year’s wait is required in both cases of insanity, whether the person shows no recovery from his symptoms (*junūn muṭbiq*) or he shows periodic recovery from them (*junūn ifāqah*). As mentioned before, following a *rukḥṣa* (permission) from a different school requires that all of its related conditions and requirements also be met.

Granting a Divorce: The Process

Thānawī lays out the procedure for the divorce as follows: the spouse of the insane person should bring her case to court, and prove that her husband’s insanity is of the dangerous type. The judge should investigate and if this is truly the case, he should give the husband a year for treatment and recovery (and have this decision and all subsequent decisions to be announced to the insane person’s *walī* or representative in

order that the husband has much as chance at truly recovering and saving his marriage as possible). After a year's passing, if she returns with her claim, and the husband's illness is still present, then the woman should be given the option to choose to divorce. She must ask for the divorce in the very same court session in which she is granted the option. If she avails herself of the option, the *qāḍī* should effect the divorce right away. Notice how similar this procedure is to the one followed in the case of the impotent husband.

Thānawī points out that once the ruling for divorce based on insanity is given, if it is given purely according to Ḥanafī rules then it will be as if the marriage had been non-existent. The Ḥanafī texts use terms such as “*radd*” for this particular type of annulment, which indicates that it will not be counted technically as a divorce. This technicality only becomes relevant if the husband and wife ever remarry. If they do, the man will still be able to pronounce three, and not two, *ṭalāqs* before the couple enters the state of permanent irrevocability (*baynūna kubra*, or *ṭalāq mughalladha*). However, Thānawī was not able to ascertain whether the Mālikīs considered this case to be an annulment or a divorce. Therefore, he says that if the ruling is given on specifically Mālikī bases (some of which will be mentioned below), then Mālikī scholars should be consulted if such a case of remarriage and then subsequent divorce occurs.

Conditions That Must Be Met for the Divorce to be Valid

As in the case of the impotent husband, certain conditions must be met for the woman to legitimately be granted a divorce. These are:

- 1) The woman must not have known of his insanity before their *nikāḥ*.

- 2) The woman did not express contentment with the situation after knowing of his condition.
- 3) Once the year's respite passes, and the woman brings her case again to court, the judge will give her the option and she must ask for the divorce in the *very same* judicial session. If the session comes to an end, or if the woman stands up or someone has her stand, then she will lose her option.
- 4) The spouse of the insane has one extra condition: once she learned of his insanity (the type that warrants a divorce), she did not initiate intercourse, nor did she make any sexual moves toward her husband.
- 5) Like the spouse of the impotent one, the spouse of the insane person cannot separate from him of her own accord, but must go through the judicial process. And where no courts exist, she must approach a legal council which will take the place of the court, as explained in the introduction.

Thānawī offers some explanation to these conditions that he lists. The first condition seems fairly obvious: if a woman knew of the man's insanity when marrying, it would be unfair of her to then later go to court and request that she be granted a divorce (and her *mahr*) on the basis of his mental condition. Thānawī points out however that it is possible she may have known of his condition of mental illness, as long as his illness had not reached the level where it would be "unbearable" or dangerous for her to stay with him. If he had minor signs of mental illness before the marriage and after, it would be fine for her to marry him and even have sexual relations and intercourse with him. However, once his mental illness reached the level where she could no longer bear to remain married to him, she must not have initiated any more sexual contact with him nor

expressed in some other way her desire or acceptance of remaining in her marital situation. But if he had forced her to have relations with him, this would not preclude her right to ask for divorce based on his insanity.

Thānawi again revisits Imam Muḥammad's opinion and says that within the Imam's statements there is only mention of the woman's right to a divorce in the case where the man's insanity had developed before their marriage. There is no mention of what happens in case the husband became insane afterwards. For this latter situation, Thānawi borrows from the Mālikis (the first of only two borrowings from the Māliki *madhhab* in the insanity rulings section, aside from the general need of a *jamā'at al-muslimīn*), and says that their school allows for a woman to seek a divorce even when he develops his severe mental condition after they had already been married. As long as she did not initiate sex or express her contentment with the marriage, even in this case she could appeal for divorce. The rulings for *mahr* and the waiting period would be the same here regardless of when he became insane: if they were separated before the *khalwa ṣaḥīḥa*, she would have no *mahr* and no *'iddah*, and if they were separated after the *khalwa ṣaḥīḥa* she would be entitled to the full *mahr* and would have to observe the *'iddah*.

Finally, Thānawi once again brings up the issue of the level of the husband's mental illness. The minor Ḥanafī opinion of Imam Muḥammad was that the husband must be dangerous and completely unbearable to live with in order for the woman to be granted a divorce. Thānawi says however that if the husband's mental illness is not at this level, there is still one option for the woman, if she really needs to get out. The rulings for the insane husband may not be helpful in the latter case, but the Māliki permission for the

woman to seek divorce based on the husband's inability to provide for her may be used (see section on the "Miserly Husband"). If it can be shown that he does not support her monetarily, this can be the basis for her asking for a divorce. As long as she had not known of his indigence and homelessness before marrying him, this could be a valid means of escape.

The Case of the Missing Husband

The case of the missing husband comprises one of the more infamous set of rulings of the Ḥanafī school. The common impression among those who have heard of this ruling (even among some who are trained in Ḥanafī *fiqh*), is that the woman must wait to remarry until her missing husband reaches such an age that everyone can be sure that he is no longer alive. Estimates for this are anywhere between seventy to ninety years (based on what is usual for the people of the particular locale); only when he reaches this age can he be assumed to be dead.

As can be seen from Thānawī's section on the missing husband, the Ḥanafī rule is not as strict as this. Provisions are made for cases where his death can be assumed due to other reasons. And as Thānawī will point out, though the above-mentioned rule about seventy years is the known opinion of the Ḥanafī school, the Mālikī ruling of giving the woman a four-year waiting period before she can remarry is one that has been borrowed by Ḥanafīs for centuries.

Thānawī begins the chapter by pointing out that the focus of the original Ḥanafī opinion is not necessarily the issue of the man's marriage and the wife's ability to

remarry. In fact, he begins the discussion by saying that the majority of jurists (*jumhur al-fuqahā*), including Imam Shāfi‘i, Imam Mālik, and Imam Abu Ḥanīfa, all hold that a missing person cannot be pronounced dead for the purposes of his wealth until all of his contemporaries in his region pass away. Once every person of his age dies, only then can he be pronounced to also be dead by the courts, and have his wealth distributed to his inheritors, etc.

It is this rule that Imam Abu Ḥanīfa, as well as Imam Shāfi‘i and some others, extrapolated to the missing male’s marriage.¹⁵⁸ As long as it is possible that he is still alive, his marriage to his wife will be considered as still standing, and it would be impermissible for her to marry someone else. However, Thānawi points out that in certain circumstances a Ḥanafī judge can permit a woman to remarry before the passing of her husband’s contemporaries:

...when, based on his general condition [at the time he went missing] it is most likely that he is dead or has been killed, such as if the man went missing while in the field of battle; or at the time when he went missing he had been afflicted with such a state of illness that his death is now likely; or he had traveled by sea (and there are no reports that he reached the shore). In such cases his death will not be pronounced until the judge is sure that the man must have passed away. After the judge rules for death the woman must observe the *‘iddah* for his death and then it will be permissible for her to remarry.¹⁵⁹

From the above passage it becomes clear that even within the Ḥanafī *madhhab*, its famous rule for “death of the contemporaries” is not a hard and fast one. The primary objective in assigning that rule is simply to determine beyond reasonable doubt that the man is in fact dead. The goal is to ascertain this fact with as much certainty as possible; if other factors lead one to conclude that he must have died earlier, there is no bar within the Ḥanafī *madhhab* (aside from needing a Muslim judge to rule on his death) for the wife to remarry.

¹⁵⁸ In case of a missing woman, her husband could always legally take a second wife.

¹⁵⁹ Thānawi, *al-Hīla al-Nājjiza*, 59.

The problem of course comes in when the woman is in need of remarriage (whether in order to procure financial support, or due to fear of *zina*), and her husband has gone missing at a relatively young age and in relatively good health. For such a situation, the Ḥanafī *madhhab* provides the woman with no alternative. It is for these cases that the Mālīki ruling has been borrowed, and as Thānawī points out through a citation from ibn ‘Abidīn’s text, there is evidence that Ḥanafī judges (in particular, the Ḥanafī jurist Qahastānī) have been resorting to the Mālīki rule on this issue from as early as the 4th/9th century (or 5th/10th?). Thānawī describes how widespread the use of this Mālīki *rukḥṣa* is, but still advises caution as to its use:

And for a long while now, almost all the muftis in India as well as outside India have adopted giving ruling according to this statement. Basically it is as if this ruling has now become part of the Ḥanafī body of rulings itself. However, it is best that the original Ḥanafī ruling be adhered to as long as the woman has the ability to bear it. Certainly, in the case of serious need, when the woman cannot arrange for her material needs, or she fears temptation, it will not be appropriate (*munāsib*) for her to wait. In such a situation there is no problem in following the Mālīki rule; in fact, this fatwa was constructed for these very types of circumstances. However, when taking the ruling of a different imam all of the conditions of that Imam for that particular issue must be followed.¹⁶⁰

To further stress his concern on needing to be cautious, Thānawī states that, while the Ḥanafīs may have been using the Mālīki opinion on this matter, their texts only cover the issue in a cursory manner. In order to determine the true Mālīki position and its various details and technicalities, Thānawī wrote back and forth three times to the Medinan Mālīki ‘*ulamā*, each time following-up with questions for further clarification. The bulk of this chapter then is dedicated to the way in which the Mālīki position on the missing husband was explained by the contemporary Mālīkis of Thānawī’s time.

The questions sent to the Mālīkis that are included in this chapter are the following:

¹⁶⁰ Ibid., 60.

- 1) As for the man who is missing and despite all searching and research there is no word of whether he is dead or alive, does his wife have any right to have herself removed from her state of marriage to him and remarry [someone else]? If she does have this right, does she have to wait for a period or can she take this right without any delay?
- 2) If she must wait for a period, when does this time period begin: from when she raises the issue to court, from when he went missing, or from when the judge gives the ruling in her favor?
- 3) In the case of the missing husband, does the wife have the right to separate herself from the marriage, or is it required that she get a ruling from a judge? And what will the conditions for the *faskh* be?
- 4) If the judge's ruling is required, must the judge seek out and search for the missing man himself, and once he fails to find anything then must he give the woman the waiting period, or can the judge simply rely on the search and inquiry of the woman and her *awliyā* (caretakers, which would most often be her male family members)?
- 5) Is the ruling for the missing person the same in *Dār al-Ḥarb* as in *Dār al-Islām*? If it is different, then will a place such as India, where there are millions of Muslims, be considered *Dār al-Ḥarb* or *Dār al-Islām*?

Granting a Divorce: The Process

As can perhaps be guessed from examining the questions asked by Thānawi of the Māliki *‘ulamā*, the process for granting a divorce to the wife of a missing person is

somewhat different from the procedures followed in the cases of the impotent and the insane husbands. The general process for the missing husband is that a) the woman must bring her case to court, b) she must prove that she was indeed his wife, c) she must prove that he is missing, and d) she must wait the prescribed period, as determined by the judge. Only after all of these steps can she begin her waiting period (of *wafāt*) and then remarry.

As in the other cases already covered, the woman cannot simply assume on her own that enough time has passed and remarry. She must bring her case to court, and it must go through the proper court procedure. She must first establish in court via witnesses that she was in fact married to her missing husband. This can be done through the original witnesses at their wedding. It can also be proven by witnesses who had general knowledge of the fact that the couple was married (i.e. it was known in the community; *tasāmu* '). This step is important most likely in order to prevent any possible conflict in the future. If for instance the missing husband returned, and she now wanted to claim her *mahr* from him, she may possibly face legal trouble if he denied ever being married to her in the first place.

Once this is proven, she would then have to present witnesses testifying that the man was indeed considered to be missing with no trace. Upon having this established through the witnesses provided by her, the judge would have to conduct his own search and inquiry after the missing person, separate from the search that she and her family may have already conducted. The judge would be expected to send someone (and not just send correspondence) to the regions in which the missing person may be thought to be currently; as for those places where there is not a strong likelihood but only a possibility that he may be there, the judge should send letters and even have an announcement

published in the newspapers of those areas, if such an action is expected to help in the search.¹⁶¹ (In the case where there is no Muslim judge and the woman is having her case reviewed by an informal council (*jamā‘at al-muslimīn*), the council would also be expected to conduct such a search.)

When finally losing hope of tracing the man down, the judge must order the woman to begin a waiting period of four years. This waiting period begins at the end of the judge’s search; the time she may have already been waiting for her husband’s return, as well as the date on which she initially brought her case to court, will both be of no consequence. Only after waiting for this judicially applied four-year waiting period will it possible for the woman to consider her husband deceased. She will begin the widow’s waiting period (which is different from the *‘iddah* of divorce and lasts four months and 10 days for every woman, whether pregnant or not, etc.). Only after this much time, four years, four months and ten days from the completion of the judge’s search for her husband, will the woman be able to marry again.

Dār al-Ḥarb vs. Dār al-Islām

The literal meanings of these two phrases seem to be straightforward: *Dār al-Islām* (“Abode of Peace”) include those regions where Muslims reside in peace, and *Dār al-Ḥarb* (“Abode of War”) are those regions whose people are at war with or are hostile

¹⁶¹ Thānawi says there is a difference of opinion among the Mālikis as to who should fund this search. Some said the woman must finance it, others said the funds should be taken from the public treasury (Bayt al-māl), and still others said that if there is access to any of the husband’s money, it should be taken from here. Thānawi mentions that a number of jurists held the latter to be the most just option, and this was his opinion about the matter as well. He further explains that in places such as India where there is no Muslim public treasury, if the government offers to conduct such a search, this search would be acceptable. And if no other means are available, Thānawi recommends that a fundraising drive be held in the community to help the woman’s situation and have this search conducted. Thānawi, *al-Hīla al-Nājjiza*, 64.

toward the Muslims. Oftentimes the terms are used to differentiate between regions that are governed by Muslims and Islamic law, as opposed to regions that are under the control of non-Muslims and where Islamic law is not applied. But the terms are ambiguous and not always clearly defined within the Islamic corpus. As can be seen from the way the terms end up being used in this section of *al-Ḥīla al-Nājiza*, *Dār al-Islām* and *Dār al-Ḥarb* do not comprise a clear-cut dichotomy between “Muslim-ruled” and “*Kāfir*-ruled” land.

The process described above for granting a woman a divorce, with the four-year waiting period as its main Māliki contribution, is only valid in regions considered to be *Dār al-Islām*. The Mālikis hold that in *Dār al-Ḥarb*, the same rule as that endorsed by the Ḥanafis will apply: the woman will have to wait until all of her husband’s contemporaries pass away (or, in another opinion, wait till his “natural lifespan” is complete), before being allowed to remarry. One major Māliki, al-Ashhab, who was a top student of Imam Mālik, held that the rule for *Dār al-Ḥarb* would be the same as that in *Dār al-Islām*. But his was not the known and relied upon opinion within the Māliki school.¹⁶²

What then of Thānawi’s particular situation: which procedure should be applied in India, where the Muslims were no longer in control, but they were also not oppressed and were allowed to practice their religion? The Māliki scholars of Medina whom he had written to had addressed this issue as well. Thānawi summarizes their argument as follows:

The ruling for the missing person in *Dār al-Islām* is different from the ruling in *Dār al-Ḥarb*... However, from the *fatāwa* of the Māliki scholars we see that in lands such as India and Egypt and Syria, where there are non-Muslim (*kāfir*) governments but there are still the signs (*sha‘ā’ir*) of Islam present, in all such areas the ruling will be the same as it is for *Dār al-Islām*. In fact, even in those lands where there are no *sha‘ār-i Islam* but the Muslims are given freedom and allowed to live a peaceful existence (*sulḥ*), if in these lands Muslims are

¹⁶² Thānawi, *al-Ḥīla al-Nājiza*, 63.

free to come and go and a search can be conducted, then in this type of *Dār al-Ḥarb* the ruling will be the same as it is in *Dār al-Islām*. So the real basis [of the ruling] is on the possibility of search. For this reason, the debate that the *‘ulamā* currently have on whether Hindustan should be considered *Dār al-Ḥarb* or *Dār al-Islām* has no bearing on the ruling of the missing person. In these lands, the woman who has completed the waiting period of four years, and then her *‘iddat-i wafāt* should be given the option to remarry someone else.¹⁶³

In the colonial period, starting as early as the 18th century with the fatwa of Shāh ‘Abdul ‘Azīz, Muslim scholars had debated the question of *Dār al-Ḥarb* vs. *Dār al-Islām*. As late as the end of the 19th century, the *‘ulamā* had not come to agreement on this issue, with figures as prominent as Maulāna Rashīd Aḥmad Gangohi (d. 1905), founding member of the Deoband madrasa, refusing to take a public stance.¹⁶⁴ As far as the application of *fiqh* went, however, these debates would have no bearing at all, at least not for Thānawi in this legal text. Political emotion and rhetoric had to be left aside to determine the meat of the matter. In this case, the Mālikis of modern-day Medina made it clear that the differentiation related only to issues of safe passage, and nothing more. Since a search for a missing husband could be conducted just as easily in pre-Partition India as in Muslim lands, women in India who faced such problems would definitely be allowed to benefit from the Māliki rule of the four-year waiting period.

The question arises however: what if a woman cannot even wait for the prescribed four years? Thānawi does not address this issue anywhere in this section. He does however sneak in a treatment of even this issue, but only at the end of the following chapter.

The Case of the Return of the Missing Husband

¹⁶³ Ibid., 66.

¹⁶⁴ Hardy, *Muslims of British India*, 115.

The following *istifta* begins the chapter on the return of the missing husband:

- 1) If the missing person returns after he has been pronounced dead [but she has not yet remarried], or after her second *nikāḥ*, or after she has already consummated the marriage with the second husband, will the missing husband get his woman back or not, and do all of these cases have the same ruling or different ones?
- 2) In case the missing husband gets his wife back when she has done a new *nikāḥ* or has consummated a new marriage, there are a few follow-up questions:
 - a) Will the first husband have to do a new *nikāḥ* contract with his wife, or will the original *nikāḥ* be considered to still stand?
 - b) If a new *nikāḥ* has to be done, does a new *mahr* also have to be given?
 - c) In this case, will she have to undergo an *'iddah* for the second husband? If so, for how long will it last, and will she have to do the *'iddah* in the second husband's home or the first husband's?
 - d) Will the second husband still have to fulfill his *mahr*?
 - e) If she has already borne children from the second husband, or if she has children after the *tafrīq* has taken place [from the first, missing husband] during the period of her *'iddah*, then these children will be attributed to whom, the first husband or the second?

Obviously, the return of the missing husband after he has already been pronounced dead by the courts would pose some complications, particularly if the woman had remarried. As Thānawī lays out, for the Mālikis the issue ends up revolving around whether the wife had had *khalwa ṣaḥīḥa* with the second husband, regardless of when

this *khalwa* or seclusion occurred (even if it occurred during her *'iddah* for the first, still-missing husband, or before her *nikāḥ* to the second husband had taken place!). The Ḥanafis hold that in all cases, no matter what the circumstances, the wife would have to return to the first husband. But the Mālikis held that if *khalwa* had occurred with the second husband, she would remain with him. And if no *khalwa* had yet occurred, the marriage to the second husband would become void and she would be required to return to the first husband. Thānawī mentions both sets of opinions, the Māliki and the Ḥanafī, but then says that since there is no pressing reason here to go out of one's own *madhhab*, it is the Ḥanafī ruling that should be followed, and the woman should return to the first husband no matter the circumstances.

Thānawī mentions the Ḥanafī and Māliki opinions in a simple and straightforward manner, but for those reading his text with carefully, a number of complications are thrown in. Firstly, while he does not mention it in the body of the chapter itself, he has a long discussion in the footnotes about the Māliki opinion of the woman staying with the second husband after *khalwa*. He says in the footnotes that after studying some of the most relied-upon texts of the Māliki school, he has found an important qualification to this Māliki ruling that every one of the Medinan jurists mysteriously left out. According to the Māliki texts, the woman only stays with the second husband *if he had no knowledge of her first husband's missing status*. "Thus," he says, "the only place where the Mālikis differ [from the Ḥanafis on this issue] is when the second husband had no knowledge of her status as the wife of a missing person, and this would be [a] very rare [situation]."

What is so interesting about this issue is the way in which Thānawī lays it out. The language he uses in the footnote is firm—except for in very rare cases, the woman should always return to her first husband, even when attempting to follow the Mālikī school. But despite this firmness, the fact is that he includes this contention of his as a mere footnote, and does not give any impression of this qualm of his in the body of the chapter itself. By structuring this part of the argument thus, he shows that despite strong textual evidence, it is the interpretation of living *‘ulamā* themselves that is of most consequence. Even though the qualification is clearly stated within the Mālikī texts that he studies, Thānawī is not willing to challenge the authority of his fellow *‘ulamā* when they state their opinions.

Even more interestingly, Thānawī includes in yet another footnote an argument that softens the Ḥanafī position on the issue. He cites, in Arabic, from the *Fatāwa ‘Alamgīrīyya* on the authority of another Ḥanafī text the *Tatārkhāniyya* a seemingly obscure Ḥanafī opinion that states that if the missing husband returns after a long period of time, and she has remarried, then he would have no right to take her back. He immediately counters this citation by saying that it cannot be relied upon due to the clear statement in the Ḥanafī text the *Mabsūṭ*, which denies any right to remain with the second husband. Still, it is important to note that Thānawī does include this reference. Even though he clearly wishes to endorse the going opinion of the Ḥanafī school, he still feels obliged to be intellectually honest and include this minor Ḥanafī opinion. Thānawī’s desire to maintain the authority of the *‘ulamā*, and his commitment to intellectual honesty, both end up trumping his strict loyalty to the Ḥanafī school.

Thānawi then goes on to further elucidate the rulings that would apply if the woman had remarried and had to go back to the first husband upon his return. Upon the return of the missing husband, Thānawi says that (according to the Ḥanafī school), the second marriage would automatically become void, and she would be considered married to the first husband. Since it would be as if she and her first husband had never separated at all, there would be no need for a new contract or a new *mahr*. She would however be expected to observe a waiting period because of her relationship with the second husband, and the first husband would have to strictly avoid any sexual contact with her until after her waiting period would be over (even though this waiting period would have to be spent at the home of the first husband). If *khalwa ṣaḥīḥa* had taken place with the second husband, she would be entitled to the full *mahr*, despite their marriage now being considered completely void. If no *khalwa* had taken place, Thānawi interprets the sources to indicate that she would not be entitled to any *mahr*. Lastly, any children she may have had from the second husband would be legally ascribed to him.¹⁶⁵

An Important Addendum

This set of chapters, the one on the missing husband and the one about his return, include some important examples of how much leeway for difference of opinion is

¹⁶⁵ The rulings on the woman being entitled to a full *mahr*, being required to observe an *'iddah*, and the fact that the children would still be legitimately ascribed to the second husband despite the void status of their marital contract, are all in line with the legal rulings given for the case of *waṭ' bi'sh-shubḥa*, or mistaken intercourse. In such a case, where someone has intercourse with another under the honest impression that the other person is their spouse (e.g., if one approaches one's spouse in the dark, or in a case of a dual wedding where the brides accidentally get switched, etc.), then these very same rules apply. The original spouses would remain together, but the woman would be required to observe an *'iddah* for her relations with the second man. She would be entitled to a *mahr* and any children born from that brief sexual interlude would not be considered illegitimate.

present within each school and also when borrowing between legal schools. The relied-upon opinions within each school are important and are held up to be the standard, but precedent is important, and even obscure rulings are considered important enough to be mentioned. Thānawi includes one such legal precedent all the way at the end of both of these sections. Only after covering the rulings for the missing husband's spouse and the requirement for her to wait a minimum of four years, and then those rulings that describe what happens if after this whole process he happens to return, does Thānawi bring up the question of whether even four years is just too long to wait.

The default position is definitely that she must wait four years, Thānawi says. There is no doubt about this. But if in the case where she can bear to wait no longer, particularly if she had already attempted to wait as long as possible and only brought her case to court out of pure desperation, then Thānawi mentions that there is the possibility within the Māliki school of shortening even the four-year waiting period. Instead of requiring her to wait four years, the judge can rule that she wait for only one. The Medinan *fatāwa* and other Māliki texts do not indicate when this one-year period begins, whether it starts from the time of the court case, or from when the husband went missing. Thānawi says the more precautionary route would be to count it from the time of the court case, but does not push this rule harder than that. He only states that she must have waited a long period ("long" being left up to the subjective judgment of the judge), and if she has reached a level where she really fears she may fall into *zina*, the judge may rule for the one-year waiting period and then permit her to remarry. If the ruling is based on this one-year waiting period, the Mālikis hold that the ruling here would not be a *faskh* but in fact would take the ruling of a revocable divorce (*talāq raj'i*). If the missing

husband returns within her *'iddah*, he would have the right to take her back. But once her *'iddah* for him would be complete, the divorce between her and the missing husband would become irrevocable, and upon his return it would be up to her whether or not she wanted to sign a new contract of marriage and remarry the first husband.

Despite this allowance for a one-year waiting period within the Māliki school, the Ḥanafī *muftis* of Saharanpur with whom Thānawī consulted during the compilation of *al-Ḥīla al-Nājiza*, were unwilling to allow for more concession beyond the four-year waiting period. “Still,” Thānawī says, “when there is strong evidence that there is the risk of *zina* then the judge has the option to rule for the one-year waiting period.”¹⁶⁶ In effect then, Thānawī is saying that in cases of severe need, a woman may be granted an immediate divorce when presenting her case in court, as long as she has waited at least a year since her husband went missing and she is desperate to be freed from her state of marriage to him. Thānawī warns that the matter is with Allah and that excuses must not be sought in order to take the easy route out. But he does provide the details of the route nonetheless.

What this ruling shows is that while *madhhab* allegiance was of extreme importance, in Thānawī’s eyes there were other concerns that could trump this allegiance. Along with supporting the broader authority of the *'ulamā*, as well as the need to be intellectually honest within the tradition, Thānawī also shows that other broader social concerns may end up being more important than the need to stick faithfully to one’s legal school. Women’s need for sexual fulfillment is something rarely if ever directly addressed within the body of Islamic legal literature. But it is obviously given importance

¹⁶⁶ Thānawī, *al-Ḥīla al-Nājiza*, 71.

by Thānawi, enough importance that he is willing to highlight a *minor* opinion within *another* school to have this right upheld.

The Case of the Miserly Husband

The Ḥanafī school provides no route of escape for a woman whose husband neglects his financial responsibilities and simultaneously refuses to divorce. Therefore, this chapter, like those on the missing husband, is comprised primarily of rulings taken from the Mālikī school. The miserly husband (*al-muta‘annit*) is defined as one who, despite having the ability to provide, refuses to support his wife financially. Thānawi says that “such abused women” may utilize the rulings of the Mālikī school on this issue in order to “escape” their marriages.

The following questions are included at the start of this chapter:

- 1) If a man, despite having the ability to do so, does not fulfill his wife’s financial rights, is there any way for her to get out of this marriage? If there is, how is this done?
- 2) If the judge separates the couple because of his lack of fulfillment of her financial rights, and if later on the husband changes his ways and promises to fulfill his obligations in this regard, does he get his wife back? If he can get her back, does it make a difference if this occurs before the completion of her ‘iddah or afterwards, and before her second marriage or after?

The first route of action that Thānawi recommends for such a woman is one that is accepted in all of the four schools. He suggests that the woman try her best to procure a *khul'* from her husband, in order to be free of him in the most legally uncomplicated and undisputed way. However, if “despite all effort” she cannot achieve this goal, then in the case of severe need she may appeal to a court to grant her a *ṭalāq* based on the Māliki opinion. Severe need is defined as one of the following two conditions: 1) she can find no way to meet her financial needs, i.e. there is no one else to take care of her needs nor is she able to find a way to support herself in a dignified manner, or 2) she is able to meet her financial needs, with difficulty or with ease, but she must move away from her husband in order to support herself, and she fears that she may fall into sin by being away from him [and not having her sexual needs met].¹⁶⁷

Granting a Divorce: The Process

Upon bringing her case before the court (or legal council), the judge (or council) would have to find a way to ascertain her claim. Once the judge finds her complaint to be a legitimate one, he must approach the miserly husband and order him to begin supporting his wife, or else grant her a *ṭalāq*. If the husband continues to shirk his responsibilities, the judge may then pronounce a *ṭalāq* himself. In this case, the Mālikis do not require any type of waiting period before the judge can take this action.

¹⁶⁷ Thānawi points out in an Arabic footnote to this section that, according to the Māliki school, the “*muta ‘annit*” or stingy one can be deemed so based on his withholding of either the monetary or sexual rights of the wife. Thānawi says that while the Mālikis may allow for a divorce from the stingy one based on the sexual needs of the wife, as Ḥanafis “we do not take unrestrictedly from their *madhḥab*, rather we adopt things when we find an overwhelming, legitimating need to leave our own *madhḥab*.” Thānawi makes this point, but in the very same section says that a woman may seek a *faskh* from a *muta ‘annit* husband if she has to live apart from her husband to support herself, and fears for her sexual chastity due to this separation. Thānawi, *al-Ḥīla al-Nājiza*, 73.

If the husband decides to change his ways and begins fulfilling his financial responsibilities to his wife after she has been granted the *ṭalāq* by the judge, the completion of the *‘iddah* will be the determining factor for whether he can automatically take her back. According to the “more correct” opinion¹⁶⁸ in the Māliki school, the *ṭalāq* will be a revocable and not an irrevocable one. If she is still observing her *‘iddah* when he amends his ways, then he may definitely take her back.¹⁶⁹ However, if she has already completed her *‘iddah*, the man “no longer has any right over her at all.”¹⁷⁰ He may only come back together with his wife if she agrees to remarry him by signing a new contract with a new *mahr*.

Of all the various cases covered by Thānawi in *al-Ḥīla al-Nājiza*, the case of the stingy husband seems to be the most simple in both spirit and procedure. Though the Ḥanafis make no provision for this, the Mālikis are very clear: if the man cannot meet this most basic requirement of his within marriage, his wife is free to go.

The Case of the Absent, Though Not Missing, Husband

This case seems to be very similar to the previous one, except that here, not only is he not providing for her, but he is also residing physically apart from his spouse.

The *istifta* is as follows:

¹⁶⁸ This is the view of both ‘Allamah Salih at-Tunisi, one of the Medinan Mālikis whom Thānawi consults, as well as of Thānawi himself.

¹⁶⁹ Since there is a second opinion within the Māliki school that this judicially granted *ṭalāq* would be irrevocable, it would be more precautionary, though not necessary, for the husband and wife to sign a new marriage contract after his *raj‘ah*.

¹⁷⁰ Thānawi, *al-Ḥīla al-Nājiza*, 74.

- 1) If there is a man who is absent but it is known where he is, and he does not come nor does he send for his wife to join him, nor does he arrange for her financial needs nor give her a *ṭalāq*, in this case the woman, being hard-pressed and desperate, is there any way for her to separate herself from her marriage to him, and be permitted to marry someone else?
- 2) Assuming that a divorce is possible, if after the divorce she remarries or even if she does not remarry, and her first husband returns and now makes arrangements for her financial needs, will the first husband get his wife back, and if he does, under what conditions and circumstances?

Again, just as in the previous chapter, Thānawī says here that the first and preferred course of action would be for the woman to try to convince her husband to grant her a *khul'*. But if her “stonehearted” husband refuses to do so, she should see if she can somehow remain in her state while maintaining her chastity. If she fears that she will not be able to bear remaining alone, or she can find no way for her financial needs to be met, then she has the option to take her case to court.

Granting a Divorce: The Process

If she were to take her case to court, the procedure would be as follows. She would first be required to demonstrate witnesses that she had indeed been married to the absent man. After this has been established, she must prove that he did not give her money for her spending needs before leaving, nor did he send money from where he is, nor did he make arrangements for her before leaving. She should also show that she had

never absolved him from his duty of providing for her. All of this would be to show that he had been liable of providing for her, and has been remiss in this responsibility. After presenting her proofs for all this, she would also be asked to swear an oath as to the truthfulness of her claims.

Now while making her case someone (a family member or even a stranger) could possibly offer to support her financially. But if nothing like this occurs, then the judge will be obliged to send the husband an order, demanding that he either begin meeting his financial responsibilities, or else grant her a *ṭalāq*. The judge should mention that if you do not comply with either of these two requests, then he himself will pronounce divorce.

The order that the judge sends to the absent husband must be sent with great care. It is not enough to simply send the order through the mail. Instead, the judge must read out the order to two reliable men, hand them a written copy of the order, and send them to the man to get his response. Thānawi says that in the case where the husband is residing in a distant land where it would be too difficult to send the messengers, then with all other proper precautions the case could still go forward. Still, the sending of the messengers is the recommended course of action in both the Ḥanafī and Mālikī schools. Once the men return, they can testify on the response of the absent husband before the judge.

If the absent husband, after receiving the order, still refuses to comply with either of the requests, then the judge will order a waiting period of one more month.¹⁷¹ At the end of this month if the woman still wants the divorce (and has not changed her mind say

¹⁷¹ From Thānawi's footnote: "It is clear from the Mālikī *fatāwa* that this one month's wait happens after the case has been proven before the judge, but the texts do not indicate whether this month starts from before the messengers are sent to the man or after. We feel that the more cautious route to take is from after the dispatch [of the two men]..." Thānawi, *al-Ḥīla al-Nājiza*, 78.

due to receiving some sort of response from the husband), then the judge may order the divorce to occur.

The divorce will take the ruling of a revocable divorce. If he returns during her *'iddah* and decides to finally start meeting his financial responsibilities, he may take her back without needing to renew a marriage contract. On the other hand, if he returns during this time but does not take her back, at the completion of her *'iddah* the divorce will become irrevocable and he will have no right to her any more. They could only remarry with the consent of both parties, through a new marriage contract.

The divorce would also be irrevocable, and he would have no right to take her back, if he returns after her *'iddah* is completed. However, if the man can find a way to somehow prove that her original claim was false, by showing for example that he had already given her money in advance before leaving, or by proving that she had waived his duty to support her financially, then it would be as if the divorce were void and he would again have the right to take her back. In such a case where her original claim would be disproved, any second marriage of hers, even if it had already resulted in children, etc., would be considered completely void. As in the previous chapter, if *khalwa ṣaḥīḥa* had taken place between her and the second husband, she would receive the full *mahr* from him and would have to observe an *'iddah* at her first husband's home and avoid sexual relations for the duration of the waiting period.

This set of rulings, on the absent and negligent husband, comprise the final set of legal precepts included in *al-Ḥīla al-Nājiza*. Thānawī would later write a much shorter tract on certain other relevant cases that he had left out of the original treatise. In the shorter piece he would include the rulings explaining the Ḥanafī positions on *hurmat-i*

musahirat (the voiding of a marriage due to sexually approaching one's spouse's ascendant or descendant), *khiyār-i bulūgh* (the option to opt out of a marriage upon reaching puberty), and *khiyār-i kafā'ah* (the option to opt out of a marriage upon learning of a spouse's "unsuitability"). Thānawī wrote up this tract as an appendix to *al-Ḥīla al-Nājiza*, because he felt that the three issues covered in here were also important and of relevance. However, the rulings applied in these cases are taken straight from the Ḥanafī school with no borrowing at all. Thānawī writes them up and appends them as a separate tract at the end of the *Ḥīla* only so that those in "Hindustan" who would have to rule on the dissolution of marriages using the Mālīkī council would have a single reference where all the major cases of *faskh* are included. However, over the course of the next some decades, new issues would arise that would push Ḥanafī jurists to delve again into the Mālīkī corpus of law and borrow once again. As we shall see in the chapter on the contemporary relevance of *al-Ḥīla al-Nājiza*, Thānawī set an important precedent for the work of modern-day Ḥanafī jurists. His meticulous research and careful reliance on the *extra-madhhab* resources would provide an important source of justification for the future work of South Asian *'ulamā* on issues relating to women's right to divorce.

CHAPTER IV

Tafwīd al-Ṭalāq: Transferring the Right to Divorce to the Wife

The opening section of *al-Ḥīla al-Nājiza* is the most striking part of the entire document. It is a short section, comprised of just eight pages. The section precedes the bulk of the rulings included in the *Ḥīla* (on how to actually grant a woman a divorce, as covered in Chapter III). This opening section, titled “Transferring the Right to Divorce at the Time of Contracting the Marriage According to the Ḥanafī School” (“*Tafwīd-i ṭalāq ba waqt-i nikāḥ az fiqh-i Ḥanafī*”), advises women to have the right to divorce written into their contracts either at the time of the *nikāḥ*, or else have it agreed to contractually before or after the *nikāḥ*. Such an action is countenanced by the Ḥanafī school itself (as well as the other legal schools), which would make it the preferred route, since no borrowing between *madhhabs* would be required. It would also bypass altogether the need to appeal to any court or *jama‘āt al-muslimīn*. Thānawī does ask that certain provisions be put into the contract so that the woman is not granted an unconditional unilateral right to divorce, but he appends this to the chapter as “Important Advice” (“*Zarurī Mashwara*”), thereby still making it clear that if desired, even the woman’s unilateral right to divorce can be written into the contract according to the *Sharī‘ah*.

Historical Presence of *Tafwīd al-Talāq*

Granting women the right to divorce was not unknown to legal scholars in the pre-modern period. References for the transference of the right to divorce to someone other than the husband (known as *tafwīd al-ṭalāq* or *tawkīl al-ṭalāq*) are included in the major texts of the legal schools, and the fact that the husband may transfer the right to divorce to his wife is mentioned explicitly in these texts. The Shāfi‘i legal text *‘Umdat as-Salik* for instance is explicit about the fact that a man may delegate his right to *ṭalāq* to a third party. The text states:

The person conducting the divorce may effect it himself or commission another to do so [*yuwakkil*, i.e. make *wakīl*], even if the person commissioned is a woman.

The person commissioned may effect the divorce at any time, though when a husband tells his wife, “Divorce yourself,” then if she immediately says, “I divorce myself,” she is divorced, but if she delays, she is not divorced unless the husband has said, “Divorce yourself whenever you wish.”¹⁷²

In this text, the action of *tawkīl* and *tafwīd* are described as being essentially the same, but in other legal texts, a clear distinction is drawn between them. The celebrated Ḥanafi jurist of the early modern period, ibn ‘Abidīn (referred to as ‘Allama Shāmi by Thānawi throughout the text of *al-Ḥīla al-Nājiza*), cites past commentaries when describing the distinction. He describes *tafwīd* as akin to ownership (*tamlīk*). The owner, as one who has *tamlīk*, is one who acts according to his own opinion and interests, as opposed to the *wakīl* (one commissioned), who is expected to act according to the opinion and interests of the one who has commissioned him.¹⁷³ In general then, when someone other than the wife is commissioned with the right to effect a divorce on behalf of the husband, this right is called *tawkīl al-ṭalāq*. But when it is the wife who is given the right to divorce, a right that is essentially the husband’s, then it is referred to as *tafwīd al-ṭalāq*.

¹⁷² Keller, *Reliance of the Traveler*, 557.

¹⁷³ Ibn ‘Abidīn, *Radd al-Muḥtār*, vol. 4, 552.

However, notwithstanding the historical presence of this theoretical possibility, it seems that in some cultural contexts it was a rare occurrence for women to *actually* be given this right.¹⁷⁴ Even in periods where it might not have been rare for women to initiate the divorce, usually such divorces had to be procured through the courts, and were not simply pronounced and effected by women of their own accord via *tafwīd*. When the courts did grant her the desired divorce, it would often be because of the man's inability to fulfill some aspect of the rights legally due to the woman (such as maintenance or the marital gift [*mahr*]).

In her study of eighteenth century Ottoman Syria and Palestine, Judith Tucker lays out an excellent summation of the ways in which Ḥanafī law was traditionally applied in marriage and divorce cases. She provides a detailed exposition of the ways in which divorce was granted by Ottoman courts, and she describes the various reasons for which women could be granted either a *ṭalāq*, a *khul'*, or *faskh* of the marital contract. However, nowhere in this study does Tucker even mention the option of *tafwīd*; the

¹⁷⁴ This is certainly true in modern-day South Asia and other parts of the Muslim world, where I have found (anecdotally) that many women and men have never even heard of such an option. One would think that more women in Pakistan would avail themselves of this right, especially since, due to the recommendations in *al-Ḥīla al-Nājiza*, Pakistani *nikāḥ* contracts include a stipulation for *tafwīd al-talāq*: “Regarding the ‘Tafwīd-e-Talāq’ clause mentioned in Pakistani marriage contracts, there does seem to be a relation with the ‘Hilah’. The reason for this is that after Pakistan was established in 1947, the Muslim Personal Law of India was brought over to Pakistan from India. Subsequently, a few amendments were made. However, it would be correct to say that the basis was the Muslim Personal Law of India, upon which the ‘Hilah’ had had a definite affect [sic]... This does seem to suggest that the ‘Tafwīd-e-Talāq’ clause in Pakistani marriage contracts has its roots in the ‘Hilah’”. (Answer to personal communication submitted by Shakir Siddiq Jakhura of the Darul Ifta, Darul Uloom Karachi, April 2008, and verified by Mufti Muḥammad Taqī ‘Uthmāni.)

In most cases, however, local imams strike out this clause from the contract before the *nikāḥ* takes place (and apparently do not even make the parties aware of the liberties taken) “Beware ladies: Clerics do omit seven paragraphs in nikkah namas,” *Daily Times*, http://www.dailytimes.com.pk/default.asp?page=2006%5C05%5C02%5Cstory_2-5-2006_pg7_19

option to effect a divorce herself seems one that was often not granted to women in Ottoman lands.¹⁷⁵

Yossef Rapoport's study of medieval Cairo is another good example of such a study, in which he demonstrates that women in pre-modern Muslim societies were often able to obtain divorces through their own initiative. But as Rapoport says, "Unlike men, wives who wanted a divorce had either to pay for it or go to court."¹⁷⁶ Having her case reviewed in court was often the only way a woman could hope to achieve a desired divorce: "As the weaker party, it was women who needed the assistance of the courts, and it is not surprising that appeals to the *qāḍīs* were made by wives rather than by husbands. Wives came to the courts to demand payments due to them, the fulfillment of favorable clauses inserted into their marriage contracts and the upholding of their rights within marriage."¹⁷⁷ Most often, women would obtain divorces by complaining to the *qāḍīs* about such things as the husband's refusal to provide maintenance or the *mahr*.

Rapoport points out that there were cases of *tafwīḍ* where women would have conditional divorce clauses placed in their marriage contracts, which would provide them with a limited right to automatic divorce. As he says:

A wife who wanted to secure her rights in marriage could insert clauses in the marriage contract that allowed her to opt for a divorce under certain conditions, most commonly if her husband took another wife or a concubine. Stipulations in the wife's favor have been added to Muslim marriage contracts since the early Islamic period, and are found in several eighth- and ninth-century marriage contracts from Egyptian provincial towns, as well in [sic] Jewish marriage contracts from the Geniza.¹⁷⁸

As we see above, often the woman would ask for an automatic right to divorce if the man were to take another wife. Sometimes the bride's family would require the husband to

¹⁷⁵ Tucker, *In the House of the Law*.

¹⁷⁶ Rapoport, *Marriage, Money and Divorce*, 74.

¹⁷⁷ *Ibid.*, 74.

¹⁷⁸ *Ibid.*, 74.

abstain from drinking wine or gambling, under pain of divorce. As we will see later in this chapter, Thānawī recommends that if *tafwīd al-ṭalāq* is granted in a marriage contract, it should be done in such a conditional manner.

Like Ottoman Syria and Mamluk Egypt, there are also accounts from Mughal Indian history that indicate the use of *tafwīd al-ṭalāq* in places like Surat. As Farhat Hasan has noted about this port town in western India in the 17th century, women would often have a set of four conditions written into their marriage contracts:

- (1) The man was not to take a second wife.
- (2) He would not beat his wife with sticks so severely as to leave bruises on her body. In one document, however, the husband is allowed to suspend this condition, in case she was found stealing his money.
- (3) He was not to leave his spouse for more than the stipulated period, varying from six to twelve months, without providing her with adequate maintenance during his absence.
- (4) He would not keep a slave girl (*kanizak*) as a concubine (*surya*).

These four conditions were apparently so well-known that sometimes they would not even be listed explicitly, only referred to as “the four conditions, approved by the *shari‘a*, that are well known among the *ulema*”. Some women would stipulate the right to pronounce *ṭalāq* if any of these conditions were broken; others simply stated that the marriage would break automatically on violation of any of the conditions.¹⁷⁹

However, as a general rule, it seems that transferring of the right to divorce in a South Asian context has been much more problematic, particularly in modern times.¹⁸⁰

One way to surmise a particular society’s views on divorce is to look at how easily a

¹⁷⁹ Hasan, *State and Locality*, 81.

¹⁸⁰ One thing that should be noted: if divorce was more common and remarriage a real possibility in certain historical Arab settings, it cannot be said that the same situation continues in the present day. The call for “companionate marriage,” where the ideal unit for the formation of the nation was a one-man and one-woman marriage, seems to have complicated modern cultural sensibilities in regards to divorce. If the basic and most fundamental unit for the formation of the ideal nation is a “modern,” perfectly matched and complementary couple, then the breakdown of such a family unit would certainly be socially looked down upon. Rapoport’s Egypt of Mamluk times may have been more forgiving of divorce and less stringent about the subsequent stigma than the Egypt of the twentieth century. On companionate marriage becoming the blueprint for the modern Middle Eastern family, see Abu-Lughod, *Remaking Women*, in particular the essays by Abu-Lughod and Kandiyoti.

woman could remarry. If a woman is considered eligible for remarriage after a previous marriage has failed, the taboo against her divorce must not be very strong in the first place. And the inverse would also seem to be true: if a divorced woman is stigmatized and not worthy of reconsideration for marriage, then divorce itself must be an act which carries shame and disrespect. In South Asia, the remarriage of widowed women has historically been a major point of contention, which eventually resulted in the passing of an act in 1856 making widow remarriage legal in India. While there are not many studies about divorce as social taboo in a South Asian context, we can gather much from the taboo on widow remarriage.

Barbara Metcalf points out that “By Brahmanical custom, a widow did not remarry but was regarded as an embodiment of misfortune, implicated in her husband’s untimely death, her moral corruption made manifest by her unhappy fate.”¹⁸¹ If she was a younger woman of childbearing age, her presence was seen as even more a threat to society, since her sexuality was now uncontrolled by marriage. Metcalf continues, “With shaven head and mourning garments, a [Hindu] widow was expected to live on scraps and serve others. Wellborn Muslims emulated this custom.”¹⁸² The remarriage of a widow was seen as a shameful and indecent act. The reformist tracts of Deoband often speak against the stigmatization of widow remarriage, and some of the prominent scholars of Deoband purposely made a statement by marrying widows themselves.

Thānawi addresses this issue of widow remarriage in the *Bihishti Zewar*. He says:

Among current nonsensical customs is the idea that marriage of widows is evil and disgraceful. The wellborn are especially ensnared in this error. By the *shari‘at* and by sense, the second marriage is like the first, and to consider them different is baseless and foolish. This idea has become fixed only through association with Hindus, and it has been reinforced by greed for property...To consider remarriage a fault is a great sin, nothing less than risking

¹⁸¹ Metcalf, *Perfecting Women*, 319.

¹⁸² *Ibid.*, 319.

infidelity. It is after all infidelity to consider the order of the *shari'at* a fault and to degrade and denigrate those who follow it.

It is worth considering that all the wives of our Apostle, the Messenger of God—Hazrat ‘A’isha aside—had been married before. Indeed, each had been married once or twice previously. Then what?... Will you call these women evil? Repent, repent! Has your respectability (*sharafat*) risen above theirs, so that your honor (*'izzat*) is spoiled by doing what they did and what God and the Messenger ordered?¹⁸³

If South Asian society looked with such contempt at a woman who had lost her spouse simply by chance and not of “her own doing” or of her own desire, it is obvious that a divorcee would not be looked upon favorably at all. What is interesting is that remarriage after divorce is taboo for men as well, though the stigma is not nearly as great as it is for women. It is almost as if by admitting one’s need for sexual companionship, one has almost cheapened the sanctity and dignity of the marital institution. Despite the urging and condemnation of reform-minded thinkers like Thānawī, this attitude of stigmatization continues till the present day, with scholars calling for reform on certain aspects of Islamic Law solely on the basis of the fact that remarriage is not a possibility or a reality for most South Asian Muslim women, as it might have been for Muslim women in other times and places where the law had originally been formulated.

An example of such a call for reform can be seen in the famous Imrana case of 2005. The woman had been raped by her father-in-law, and according to Ḥanafī law, if there are relations between a person and his/her spouse’s ascendants or descendants, the original marriage contract is automatically annulled, and the couple may never remarry.¹⁸⁴ A Deobandī fatwa stated that Imrana could no longer remain married to her husband, according to religious law. But reformist thinkers such as Dr. Tahir Mahmood

¹⁸³ Ibid., 144.

¹⁸⁴ This rule is known as *ḥurmah al-muṣāhara* in the legal texts. The specifics of this legal ruling differ somewhat across the legal schools. Whereas some of the other schools require actual intercourse to take place, in the Ḥanafī school *ḥurma al-muṣāhara* can occur simply on the basis of touching with desire. Thānawī, *Imdād al-Fatāwa*, v. 2, 307-13.

called for a rethinking of this law, based on the fact that remarriage for women is nearly an impossibility in most South Asian contexts: “In his view, a *fatwa* arguing in favor of severing a marriage on the grounds that a husband’s ‘ascendants or descendants’ had committed a sexual indignity might only be applied where remarriage was widely acceptable. In India, where Islamic law was ‘only selectively applicable under the authority of its own law,’ the rule need not be strictly imposed. He went on to explain that in the context of Arabia, for example, women outraged by the sexual misbehavior of their male relatives [by marriage] would by this ruling be enabled to walk out of their marital bonds and seek a new life elsewhere since divorced women routinely remarried. In India, because of the force of customary (not Islamic) norms of respectability, divorced women typically did not have that option and they should not be advised to sever their marital tie.”¹⁸⁵

Dr. Tahir Mahmood’s observations on the difficulties faced by South Asian Muslim women are important. They demonstrate the real hardship a Muslim woman faces when having to choose between living in an undignified or unbearable marriage, or else leaving for an unstable economic future and stigmatization of both her own character and the social reputation of her children. In pre-modern Arabia, remarriage would not have been difficult (e.g. as is mentioned above when quoting Thānawī, none of the Prophet’s wives were virgins at the time of their marriage to him save Aisha), and so the rule of *ḥurmat al-muṣaharah* would in many ways make sense in that context. According to Dr. Mahmood, even a woman who is being molested by her male in-laws must think twice before looking for escape through divorce; what about a woman who seeks divorce for issues not as clearly obnoxious?

¹⁸⁵ Metcalf, “Imrana,” 401.

While the practical examples cited by authors such as Rapoport show that *tafwīd* was often only granted with certain restrictions upon the woman, the *fiqh* texts that discuss *tafwīd al-ṭalāq* do not make such conditions a requirement for the *tafwīd* to take effect. Technically, no conditions are required when transferring the right to divorce to the wife.

Tafwīd al-Talāq in al-Hīla al-Nājiza: the Istifta

The first section of *al-Hīla al-Nājiza* begins with the text of the *istifta* (the original request for the fatwa). It is not clear whether someone actually wrote this to Thānawī for him to answer, or if he wrote this *istifta* himself, to then answer in detail. The text of the *istifta* is telling, since it brings to light the contemporary social concerns that warranted the need for this section of the text. Since *al-Hīla al-Nājiza* is an example of legal writing, Thānawī could not make emotional (extra-legal) appeals to justify the writing of his treatise, as this would not be considered appropriate for such a text. Yet he manages to still bring out the real need for his fatwa by including in the *istifta* why the right to divorce is so important and necessary for the women of his day.

The text of the *istifta* is as follows:

There is no need to state that today's women face severe difficulties after marriage, [since this is obvious to all]. Sometimes the man is cruel and negligent, and he does not provide for the woman's maintenance, nor does he grant her a divorce. Sometimes ignoring the needs of his wife and children, he travels to foreign lands and leaves no trace or means of contact. Sometimes he turns out to be impotent (lit. "not a man", "*na-mard*"). In some cases an orphan girl is married off by her paternal uncle or some other such relation to a man who is not befitting her, and the girl is unhappy in such a marriage. And in some cases, the man is inflicted with the disease of madness...

If judges familiar with Islamic Law were present in Hindustan, then the solution to such difficulties would be easy. Unfortunately, since no such judges exist, women are having to face severe problems. When a woman goes to court and poses her case trying to have her marriage contract nullified (*faskh*), she is often assigned to a non-Muslim judge who rules in her favor but whose decision is not legally binding according to the *Sharī'ah*. In other cases,

the woman is assigned a Muslim judge, but due to his lack of familiarity with *Sharī'ah* rulings, he gives a ruling that is not in accordance with the *Sharī'ah*, and so his ruling is also an unsatisfactory one. In light of all of the above, the following questions are posed to our respected *'ulamā'*:

- 1) It has been suggested in some sources that to alleviate such difficulties, at the time of contracting the marriage the man should be asked to put in writing certain provisions that will allow the woman in times of need to pronounce divorce (*ṭalāq*) upon herself. Is this suggestion correct according to the *Sharī'ah*, and is it binding [*mu'tabar*]? And if it is permissible, then what is needed to make these provisions binding within the marriage contract?
- 2) Is there any difference between having this contract written before the marriage (*nikāḥ*) or after; or if one were to simply have these conditions agreed upon verbally at the time of the marriage?

It is interesting to note that, even though the *mustafti* (the one requesting the fatwa) is asking about serious social issues being faced by women of his day, the assumption is that the solution to these problems must be a legal, and not social, one. As he says, “If judges familiar with Islamic Law were present in Hindustan, then the solution to such difficulties would be easy,” and he does not acknowledge the fact that the occurrence of these social ills is in itself a problem that needs to be dealt with so that they can be prevented, and not merely alleviated through divorce after the fact. Again, because this is one of Thānawi's legal tracts and not a reformist (*iṣlāḥi*) one, the framework of discussion is purely legal. Thānawi would be very comfortable denouncing the actions of these negligent husbands in other works of his which constitute religious counsel, but in a work of religious law, only legal language is used to continue the discussion.

In this *istifta*, the questioner lists a number of the most common reasons for why a woman may seek a divorce. Spousal neglect and abuse is the top reason, followed by others such as the husband's impotence or insanity. The second reason listed, that of the husband leaving home to travel to foreign lands, is a surprisingly pertinent one, especially for South Asian women in the modern period. Though it may not have been as common at the time that Thānawi was writing, more and more South Asian Muslim men were

starting to leave home to work or study in either Europe, America, or the Arab gulf states. Attracted by the opportunities available in these countries, and compelled to leave due to the dearth of opportunities at home, it was not uncommon to hear of Muslim men who would leave to work elsewhere, and this phenomenon continues till the present day.

In the *istifta*, the questioner points out that problems such as missing or impotent or insane husbands could be taken care of by Muslim judges well-familiar with Islamic law, if only such judges were present in India. What he does not point out here is that according to strict Ḥanafī law, the woman would still have no direct recourse to divorce even in the presence of a Muslim judge, if this judge were to apply strict Ḥanafī doctrine. Technically, the Ḥanafī school does not allow for women to become divorced from their husbands without the husband's consent, except in proven cases of impotence or in a few other rare situations (see Chapter III). In all other cases, the man's right to retain his wife would remain, no matter how severely he might be neglecting or abusing her.

This does not mean, however, that Muslim women in Ḥanafī lands had no way out. Often Ḥanafī courts would refer women facing such hardships to non-Ḥanafī Islamic courts, if such were available. Otherwise, they would find alternative ways to help the woman escape, such as imprisoning the husband until he agreed to divorce her. Other muftis would allow for certain uniquely Ḥanafī loopholes: according to the Ḥanafī school, if a man is compelled by threat of death to divorce his wife, his pronouncement of divorce stands, even though he had no real choice in the matter.¹⁸⁶ Some Ḥanafī scholars viewed this as a legitimate way for a woman or her family to procure a divorce for the woman if her husband would not agree to let her go. And in practice, though strict Ḥanafī

¹⁸⁶ The examples of imprisonment and forcing the man to divorce through other means are taken from personal interviews conducted with the Ḥanafī scholar Faraz Fareed Rabbani, in Amman, Jordan, January 2006.

law did not allow much room to maneuver when wanting to grant a woman a divorce, often Ḥanafī judges would cite opinions from other schools to make exceptions and still rule in favor of the woman. The Ḥanafī jurists cited by Judith Tucker in her study on gender and Islamic Law in Ottoman lands allow for divorce due to reasons such as the husband’s insanity or serious communicable disease, even though the Ḥanafī texts do not actually allow this.¹⁸⁷

As the later sections of *al-Ḥīla al-Nājjiza* will show, Thānawī acknowledges some of these legal tactics when discussing the Ḥanafī rulings on these issues, while denying or leaving out others. But the main point in both this first *istiftā* (on *tafwīḍ al-ṭalāq*), as well as the latter portions of the book, is that the need for properly trained Muslim judges is paramount. If knowledgeable men were present within the system who could rule properly according to Islamic law, the need for this book would never have arisen.

To bypass the difficulties inherent in needing to either 1) establish Muslim courts and Muslim judges once more in India, or 2) to thoroughly learn the rulings according to the Mālikī school and to then borrow these rulings as a “permission” (*rukḥṣa*) for the Ḥanafīs in India, Thānawī places the chapter on *tafwīḍ al-ṭalāq* right at the start of the book, with the hope that it will be this first suggestion of his that will be the primary route of action when dealing with the issue of women’s right to divorce. Though the ideas in this chapter are socially the most radical, Thānawī feels that it is better for a woman to be legally granted the right to divorce according to the Ḥanafī school, then for the Ḥanafīs of India to have to resort to other un-Islamic or even non-Ḥanafī legal rulings. Thānawī admits that the options available to already married women are limited within the Ḥanafī school, and so for them, borrowing between *madhhabs* only makes sense. But

¹⁸⁷ Tucker, *In the House of the Law*, 81–87.

for unmarried women, the first and preferred route of action is to simply have some option to divorce written into their marriage contracts from the start.¹⁸⁸

Thānawī answers the two questions at the end of the *istifta* briefly, then expands on his answer through the rest of the chapter on *tafwīd al-ṭalāq*. His answers to the two questions are clear and to-the-point, and leave no ambiguity about the actual legal rulings. Thānawī has his own personal beliefs, backed up by those of other past scholars, which require him to lay out certain qualifications and conditions on the woman's option to divorce. But he does not mention these qualifications in the straight legal answers to the two questions of the *mustafti*. For these basic questions, Thānawī provides basic answers, answers that lay out the pure legal rulings which apply. He states:

- 1) Having such a marriage contract written, in which the woman is given the authority to pronounce divorce upon herself, as well as the use of this right in times of need, are both legally permissible. The transferal of this right is called *tafwīd al-ṭalāq*, and the conditions for its validity can be found in number 2 below.
- 2) All three cases are permissible, whether 1) it is written down before the *nikāḥ*, 2) it is stated verbally at the moment of the *nikāḥ* itself, or 3) it is written down after the *nikāḥ*. However, [it should be noted that] in order for the first and second situations to be considered valid and binding (*ṣaḥīḥ wa mu'tabar*), there are specific requirements that must be met.¹⁸⁹

Thānawī then goes on to describe what the requirements are for the *tafwīd al-ṭalāq* to be valid and binding in the various situations. In the first situation, for instance, where the *tafwīd* is taking place before the *nikāḥ*, it is a requirement that the *tafwīd* be clearly linked to the *nikāḥ* itself, otherwise it would be invalid. So the man should state for instance that “If I were to marry so-and-so, and if I were to violate any of the following conditions [e.g. withholding maintenance, abuse, etc.], then the aforementioned lady would have the right at that moment, or else at any other moment she wishes, to pronounce upon herself one binding *ṭalāq* [*ṭalāq bā'in*] and divorce herself from this

¹⁸⁸ Thānawī, *al-Ḥīla al-Nājiza*, 14.

¹⁸⁹ *Ibid.*, 20.

marriage.”¹⁹⁰ The man would have to state the *tafwīd* in this way, with the *tafwīd* tied directly to *nikāh*, because if that were not the case, the *tafwīd* would hold no value. Simply stating that the woman would have the right to divorce from him, without even mentioning the pre-existing state of marriage, would render his transferal of the right to be void. If he agreed to grant the woman *tafwīd al-ṭalāq* with no mention of the *nikāh*, then she would have no right to pronounce *ṭalāq* at all.

After explaining this aspect of the pre-*nikāh tafwīd*, Thānawī includes a number of references in Arabic that mention examples of the conditions that could be included. He mentions here that a woman could include the following as reasons for why she should be granted the right to divorce herself: if he does not provide her with the amount of marital gift (*mahr*, here *ṣidāq*) by the date he had promised, or he is found to indulge in gambling and drink, or he strikes her in a manner that causes pain and leaves a mark of any kind on her body. Interestingly, each of these actions would be considered sinful on the part of the man, but if strict Ḥanafī law were to be followed, the woman would not be able to use these actions as a basis for obtaining a divorce. These are contractual conditions that are mentioned in various Ḥanafī texts, and it seems by their inclusion that they must have been the more common conditions put in place by women asking for *tafwīd*.

In the second situation, where the *tafwīd* is done right at the time of the *nikāh* ceremony when the “offer and acceptance” (*ījāb wa qabūl*) of marriage take place, the requirement is that the offer of marriage be done on the part of the woman, and not the other way around. So she or her father or other representative would begin the offer by saying, “If you agree to the following then I offer myself in marriage to you,” after which she would state the *tafwīd* in a manner similar to the statement quoted above in the first

¹⁹⁰ Ibid., 20.

situation when the transferal was written (and not verbal). She would have to make the offer in this way to circumvent the possibility that the man could agree to the marriage without accepting the *tafwīd*. So for example, if she were to begin, “I offer myself to you in marriage on condition that...” and the groom would pronounce “I accept” right after the initial part of her statement (“I offer myself to you in marriage”) without waiting until she finished her complete statement, then the marriage would already have occurred and now it would be up to him to grant her the right to divorce. She would have no choice in it. Similarly, if the offer of marriage were to come from the man, where he would say “I offer myself in marriage to you” and the woman says “I accept on condition that...”, the marriage would have taken place at the moment of her saying “I accept”, and her specifying the extra condition of *tafwīd* would be considered a new offer which the groom would now be free to accept or decline. Therefore, when asking for the *tafwīd* at the time of the *nikāh*, Thānawī points out that it is critical one pay attention to the wording, such that the right to *tafwīd* is not inadvertently lost. This is because the woman obviously has more leverage before the marriage has taken place, since she can refuse to marry until her conditions are met. After the *nikāh* is complete and they are married, she is at the mercy of her new husband in terms of her right to *tafwīd*. “Therefore,” Thānawī states, “for the woman who wishes to be granted the option to divorce, it is not enough that [she rely on the man to accept her offer of *tafwīd* after the fact]. Rather, it is necessary that she place the condition of *tafwīd* in the offer of marriage itself, so that there is no chance that the man could accept the offer without accepting the condition.”¹⁹¹ Obviously, since the *nikāh* is a contract and has specific technicalities and language upon

¹⁹¹ Ibid., 22.

which it is built, it is important that these are kept in mind when asking for the *tafwīd* at the moment of the *nikāh* itself.

The third situation is very straightforward: as long as the husband writes down his agreement to the *tafwīd al-ṭalāq*, that is all that is needed, and his action would be completely valid and binding. However, Thānawi adds an important note of “counsel” (*mashwara*) at this point. He warns that this third situation is meant mainly for the woman who is already married; as for a woman who is as yet unmarried, if she desires to be careful and handle her marriage with circumspection, she should make sure that she avail herself of either of the first two options. It is necessary for him to repeat his previous warning (from the second situation), because women must realize that by not being careful at the moment of contracting their marriages, they may lose out on this right completely. “Once the marriage has been contracted, then the ability to coerce her husband into agreeing [to *tafwīd al-ṭalāq*] no longer remains in the hands of the woman. Rather, the matter becomes completely the prerogative of the husband.”¹⁹² He then stresses once more that for the *‘awām*, or general public, it is best that they proceed only according to the first option, of writing down the option to *tafwīd* before the *nikāh* itself, in order to minimize any possibility of mistakes. With this situation, the only thing the contracting parties must be careful of is to make sure they tie the *tafwīd* clearly to the occurrence of the marriage itself.

By repeating such warnings throughout this section, Thānawi demonstrates his concern for women, in that he wants it to be very clear what their rights are, and in what way they can legitimately avail of them according to the *Sharī‘ah*. He wants that they properly attain the right to divorce, so that no legal confusion could possibly arise at

¹⁹² Ibid., 22.

some later critical point in the marriage. With these warnings, Thānawi also makes it clear that the input of the *‘ulamā* is critical. Without their expertise and ability to analyze and interpret the law, even something as seemingly “simple” as granting a woman permission to divorce becomes a complicated and potentially messy legal (and religious) situation.

Thānawi follows the *mashwara* with another legal clarification. He mentions that some individuals have caused confusion by saying that a marriage contract that contains conditions falls under the category of “*nikāḥ mu‘allaq*,” a marriage that has not yet been fully realized, one that is pending some condition to be fulfilled before it may be considered effected. Thānawi says that the conditions thus far discussed under *tafwīd al-talāq* do not fall under this category. A marriage contract that contains conditions for *tafwīd* would entail a fully realized marriage (*nikāḥ munjiz*). A *nikāḥ mu‘allaq* would be a marriage that has not occurred yet at all. It would include situations where the woman states “I give myself in marriage to you if my father approves” or if the man were to say “I accept on condition that my father approves.”¹⁹³ Such a *nikāḥ* would be incomplete until the time that the condition stated (the father’s approval) is met. In contrast, the examples of contractual conditions Thānawi has been discussing in this chapter entail a marriage that is effected right at the time of the contracting of the *nikāḥ*; it only includes certain extra conditions that are procured via the man’s permission.¹⁹⁴

Important Counsel: Women’s Intellectual Deficiency

¹⁹³ Ibid., 23.

¹⁹⁴ Ibid., 23.

Following this Thānawi includes another important piece of counsel (“*daruri mashwara*”), as follows:

Since women are deficient in intellect (“*nāqiṣ al-‘aql*”), for this reason it is not without danger that a unilateral right to divorce be granted to her. Thus, it would be more appropriate that certain restrictions be placed upon her so that such danger can be avoided. For instance, at the time of the *nikāḥ* the woman or her guardian (*walī*) or agent (*wakīl*) says “I give myself in marriage to you...on condition that if she suffers any serious harm from you, and if any two of the following individuals agree that she has indeed suffered serious harm..., then it will remain in her hands (or my hands [in the case of the guardian or agent]) that one *ṭalāq bā’in* be pronounced such that she can remove herself from this marriage.” In this way, the right of divorce will only come to her hands once at least two of the named individuals give their assent that she has indeed suffered great harm.¹⁹⁵

It is clear from this *mashwara* of Thānawi’s that this entire section on *tafwīd al-ṭalāq* has nothing to do with a modern secular call for “equal rights.” Gender differentiation has always been inherent within religious law, and Thānawi is no modernist reformer, trying to do away with notions of women’s differing (or “inferior”) nature. The term “*nāqiṣ al-‘aql*” is taken from a tradition of the Prophet himself, where women are warned of their intellectual deficiency, and are instructed on how best they can avoid the religious and spiritual harm this may incur.¹⁹⁶ Thānawi makes it clear that he is well aware of this tradition, and is ready to abide by its broader recommendations.

The concept of women’s intellectual deficiency has been discussed in numerous contexts, and is an important topic of discussion, especially among progressive Muslim thinkers of the modern era. It is important to note that even Thānawi’s notion of women’s weakness in *‘aql* is a nuanced one; he may uphold that they are indeed deficient

¹⁹⁵ Ibid., 23.

¹⁹⁶ Narrated Abu Said Al-Khudri: Once Allah's Apostle went out to the Musalla (to offer the prayer) on 'Id-al-Adha or Al-Fitr prayer. Then he passed by the women and said, "O women! Give alms, as I have seen that the majority of the dwellers of Hell-fire were you (women)." They asked, "Why is it so, O Allah's Apostle?" He replied, "You curse frequently and are ungrateful to your husbands. I have not seen anyone more deficient in intelligence and religion than you. A cautious sensible man could be led astray by some of you." The women asked, "O Allah's Apostle! What is deficient in our intelligence and religion?" He said, "Is not the evidence of two women equal to the witness of one man?" They replied in the affirmative. He said, "This is the deficiency in her intelligence. Isn't it true that a woman can neither pray nor fast during her menses?" The women replied in the affirmative. He said, "This is the deficiency in her religion." (*Ṣaḥīḥ al-Bukhārī*, Book #6, Ḥadīth #301).

intellectually, but the reasons for this are not clear-cut. Barbara Metcalf, in the introduction to her English translation of the *Bihishti Zewar*, offers an important perspective on the struggle between “intelligence or sense, *‘aql*, on the one hand, and the undisciplined impulses of the lower soul, *nafs*, on the other”:

Looking around him, Thānawī believes that women are more likely than men to be troubled by *nafs*, but, to use modern language, he finds this situation culturally, not genetically, determined. This is clear from his emphasis... on the centrality of knowledge and on the ability of women to adhere to the standard being set for all, if only they are adequately informed. There can never be a *prima facie* case that women are morally inferior to men...

The conclusive evidence that Thānawī enjoined a single standard of behavior for women and men was his response when he was asked to write a companion guide, directed to men, to the *Bihishti Zewar*. He replied that the existing book served perfectly well.¹⁹⁷

Even if Thānawī, like other traditional scholars before him, did not hold that women were in any way inherently *morally* inferior to men, or that women were only intellectually deficient because of their social reality, it is still striking to see that, amidst his discussion of granting women the right to divorce, Thānawī feels compelled to highlight this issue of intellectual deficiency. Two points are striking when considering his inclusion of the controversial “*nāqis al-‘aql*” issue here.

First, it is noteworthy that Thānawī clearly strives hard to make sure women procure the right to *tafwīd*, even making it clear, despite what seems to be his discomfort with the notion, that technically according to Ḥanafī law, a woman could be granted the unilateral right to divorce from her husband, with absolutely no conditions attached. He provides numerous warnings and repetitive clarifications just so that the woman may not lose her right to *tafwīd* by some legal trick of her spouse, and all this despite what some may see as his “low” opinion of women and their intellectual capacity.

Second, it almost seems as if Thānawī feels compelled to mention the *naqis al-‘aql* issue here, because he knows for a fact that someone will counter his call for granting

¹⁹⁷ Metcalf, *Perfecting Women*, 8-9.

women *tafwīd al-ṭalāq* with this very *ḥadīth* of the Prophet. Indeed, one of the main reasons cited by religious scholars for why Islamic Law does not grant the woman a right to *ṭalāq* is that she is known by such sacred texts to be incapable of handling such a responsibility. By deliberately highlighting the *nāqiṣ al-‘aql* issue in this way, Thānawī in effect serves to neutralize any opposition he may face, which, given the material at hand, was inevitable.

To conclude this *ḍarūri mashwara*, Thānawī advises that, even after two men assent to the woman’s desire to effect a divorce, she should still proceed with caution. He offers women in this situation the general advice given by spiritual guides to any Muslim facing a hard decision: 1) she should avoid acting impulsively, and instead wait a good amount of time, at least a week, before pronouncing the divorce, 2) she should take counsel with other trustworthy individuals, and 3) she should perform the Guidance Prayer (*ṣalāt al-istikhāra*), place her trust in God, and in the end see which way her heart directs her.¹⁹⁸ This is the closest that this chapter comes to imparting spiritual, rather than legal counsel, and again it is noteworthy that he places it in this particular section. Women may be impulsive and quick to act on emotion, but they too can be counseled in the way that men are, to perfect their handling of worldly dealings, and to improve their spiritual presence before God.

Finally, Thānawī includes another note of warning that seems to go along with the caution that must be taken when granting women the right to divorce. This time it is a note to the men: “Once *tafwīd al-ṭalāq* has been granted, the husband has no right to take it back. In fact, after *tafwīd al-ṭalāq* the woman becomes owner (*mālik*) of [the right to] divorce. For this reason, the man must take great care and consideration in the matter of

¹⁹⁸ Thānawī, *al-Hīla al-Nājiya*, 24.

the restrictions [that can be placed on the right to divorce], and he should also consult with the *'ulamā* on this issue. Otherwise he will face worry and remorse in the future.”¹⁹⁹ Here, Thānawī warns the men not go easy on what restrictions can be included, but that rather, they should take care and understand the full ramifications for the agency to divorce that they are imparting to the wife. This note again seems favorable to men, and seems to hint at the cunning or at least irrationality that may accompany a woman’s decision to issue divorce. What is noteworthy, however, is that within this seemingly pro-husband addendum, Thānawī lays out the important legal ruling that once given, the right to divorce if given to the wife *can never be taken back*.

The Importance of Language

At this closing part of the chapter on *tafwīd al-ṭalāq*, Thānawī mentions two more legal clarifications. Firstly, he notes that when the *tafwīd al-ṭalāq* is being granted to the woman, the words “if you wish” must not be stated, otherwise the right to *tafwīd* will become restricted to that session (*majlis*) alone. That is, the woman’s goal is to achieve a granting of *tafwīd* which states that if certain conditions are met, the woman may pronounce one *ṭalāq* upon herself at any time. If certain phrases or words (such as “if you wish”) are used during this process of *tafwīd*, legally her right to *tafwīd* would become restricted to that session, and she would not retain the right once that meeting would break up.

The second clarification is that the words “whenever you wish” should also not be used in the context of granting her *tafwīd al-ṭalāq*, because then the woman would have

¹⁹⁹ Ibid., 26.

the right to an unlimited number of *talaqs*. This would in effect mean that she could pronounce three divorces, which would deem her husband irrevocably divorced from her.²⁰⁰ “Granting such [broad] agency to a woman is overmuch and unwise (*maṣleḥat ke khilāf*),” Thānawī says. “Instead, such words should be utilized that neither restrict the matter to the session of *tafwīd* alone, nor grant so broad agency that a woman may effect three divorces upon herself.” It is for this very reason, to preserve moderation and to avoid mistakes and misunderstandings, that Thānawī included the exact statements to be used at the time of the granting of *tafwīd al-ṭalāq*.²⁰¹ Thānawī even appends sample marriage contracts (*kābīn-* or *nikāḥ-namehs*) to the end of this chapter, in order to circumvent any possibility of error.

Thānawī’s emphasis on language, and the *interpretation* of language, is clear throughout the section, and particularly at this concluding stage of the chapter. He now puts in a disclaimer stating that the particularities of Urdu and its common usage have prevented him from describing all the possibilities of legal maneuvering that are encompassed within the Arabic source material. For this reason, Thānawī says he feels compelled to include the specific statements in Arabic that may be used to issue a *tafwīd al-ṭalāq*. In this way, “At a time of need, the religious scholars (*ahl-i ‘ilm*) will be able to cover the fine points of the contract and express them in the current usage [of the

²⁰⁰ An unconditioned pronouncement of *ṭalāq* usually counts as a “revocable divorce” (*ṭalāq raj’i*), in which a man can take back his wife without a new contract (and without her consent). If he specifies a *ṭalāq bā’in*, however, he would effect a “lesser irrevocable divorce” (*baynūna suhḥra*), which would require the husband and wife to enter into a new contract, with a new *mahr*, etc., for the man and woman to get back together. If three of these divorces, whether *raj’i* or *bā’in*, are pronounced, then the couple has entered the state of a “greater irrevocable divorce” (*baynūna kubra*). For the couple to get back together at this point, the woman must marry another individual, consummate the marriage, and then become divorced or widowed from this second husband. Only then would her first husband become lawful for her to remarry. For a simplified treatment of these issues according to the Ḥanafī school, see Salah Muḥammad Abu al-Ḥaaj’s *Subul al-wifāq fi aḥkām az-zawāj wa al-ṭalāq*.

²⁰¹ Thānawī, *al-Hīla al-Nājjiza*, 25.

language of those involved] by following these rulings closely.” It will be the responsibility of the ‘*awam* to follow the literal recommendations of Thānawi closely, and if any linguistic questions arise, they must consult with the people of knowledge and not try to determine the correct meanings based on their own linguistic capabilities (*zabān dāni*).²⁰²

This entire section on *tafwīd al-ṭalāq* is written primarily in Urdu: the *istifta*, the initial answers to the questions within the *istifta*, as well as the explanation of the three situations. However, Thānawi inserts large quotations in Arabic throughout this section, particularly to clarify those parts that may seem particularly confusing or controversial. The Arabic texts Thānawi quotes from are among the most well-known Ḥanafī texts. He uses a number of works from within the Subcontinent as well as from other parts of the Muslim world to either support or clarify his own statements. Among the most common references he cites from are the *Fatāwa ‘Alamgīrīyya* (known as *al-Fatāwa al-Hindiyya* outside South Asia), a 17th century text written for the Emperor Aurangzeb and the *Durr al-Mukhtār*, an 11th century text by al-Haskafi. The most cited scholar though is Muḥammad ibn ‘Abidīn, referred to as ‘Allama Shami by South Asian ‘*ulamā*. His text, *ar-Radd al-Muḥtār ‘ala al-Durr al-Mukhtār*, is one of the most trusted and well-known Ḥanafī texts. The *Radd al-Muḥtār* is a modern text, written in the 19th century, and ibn ‘Abidīn is often said to be one of the few men who reached the level of *mujtahid (fi-l-madhhab)* in the modern period.

This is the format followed throughout *al-Ḥīla al-Nājiza*, with Thānawi’s own main ideas written in Urdu, and his proofs or citations in Arabic. Formatting the text in this way allowed for relatively easy access to those who may not know Arabic, or those

²⁰² Ibid., 25.

Indian scholars who may be more comfortable with Urdu. But the presence of the Arabic not only provides direct citations to the sources within the tradition that Thānawī is relying on to make his bold and innovative statements; leaving the citations in Arabic makes sure to remind the reader that this is an issue of serious religious import, that cannot just be reevaluated or reinterpreted by the untrained. With the warning about the importance of linguistic usage, and about the inability of the layman to really understand the intricacies of legal discourse, Thānawī highlights the continuing vitality and importance of the functions of the *'ulamā*. His point about the Urdu language's inability to capture the nuances of Arabic is also significant: Arabic is the key to bringing together religious knowledge within the Islamic tradition. It not only ties the *'ulamā* together geographically, but also across time, since he implies in his statements that the Arabic of the scholars contained in books is untouched by the evolving tides of "current usage." Linguistic command of Arabic, and that too, a very particular kind of Arabic, is in itself a requirement if one wishes to delve into such critical *shar'ī* issues as *tafwīd al-ṭalāq*.

CHAPTER V

The Place of Women in Thānawi's Ethical Conception of the Sharī'ah

On December 2, 1918, Ashraf 'Ali Thānawi delivered an address to a few hundred women and men gathered in the women's quarters at the home of one of his close students in Panipati. Sitting on a simple stool, Thānawi addressed his audience for two hours into the late morning on the dangers of trivializing the good work and spiritual endeavors of women. Early on in the lecture, Thānawi condemns the fire-and-brimstone sermons that are often directed at women. He says:

If women are constantly labeled as individuals destined for Hell (“*dozakhi, dozakhi*”), then there can be two outcomes from such treatment. Either she will leave her prayers and fasts altogether, or she will continue to perform them, but with a heavy heart. She will begin to despair of God's mercy. Now, you must be aware that despairing of God's mercy is *kufr*. How strange! Preacher-Sahib sits on the pulpit to teach piety (*taqwa*), and yet his mode of address is such that it turns a believer into a disbeliever, or brings her close to such a state! Or else he breaks her heart such that she considers herself cut off from the mercy of God! What I do not understand is, why at every turn are women told that they are destined for Hell? Do they not make their prayers? Do they not keep fast? ... Meaning, just as men perform religious works, in the same way so do women. But it is the women's works which are labeled unacceptable (*be-kār*), while the men's are said to be accepted (*ba-kār*)? ... Dear ladies, do not lose heart! Pay no mind to the sayings of such preachers!²⁰³

In this talk, Thānawi is lamenting the treatment women receive on the hands of religious figures. They are never praised for the good qualities that they possess, and instead are constantly reminded of a select set of *ḥadīths* that condemn specific behaviors among women. Instead of providing hope for women on the spiritual path to God, such preachers only serve to turn women away out of disheartenment.

²⁰³ Thānawi, “*Kasā' al-Nisā'*,” 211–12.

By condemning the approach of such preachers, Thānawi is setting himself up to represent the opposite: he is someone who respects the moral achievements of Muslim women, who is worried about their well-being, and who hopes for their salvation. Such a portrayal of Thānawi, I will argue, is not inaccurate. Through his work on his most famous text, the *Bihishti Zewar*, and lesser known (and yet still influential) works like *al-Ḥīla al-Nājiza*, it is apparent that Thānawi is concerned about the spiritual and social needs of Muslim women, and is willing to challenge even deeply engrained cultural (and, as we shall see, even Islamically-justified) mores, in order to better their position in society.

When examining Thānawi's writings on women, it may be tempting to try to read his efforts as a radical break from traditional ideas on women's role and nature. His proposing *tafwīd al-ṭalāq* to be granted to all women at the time of *nikāḥ* is indeed a radical suggestion for his time, but such suggestions on his part should not be misconstrued. Thānawi is thoroughly "traditional", or rather "traditionalist" in his views on women's rights, in marriage and her place in the family. In fact, a common opinion among Western educated South Asians is that his most famous work, the *Bihishti Zewar*, represents the most conservative, repressive, and unenlightened attitudes toward women, and this, they believe, is all that can be expected from the Deobandi "mullahs" of South Asia. Most are thoroughly surprised to learn that the same figure as the author of the *Bihishti Zewar* was also interested in granting women expanded rights to divorce.²⁰⁴

Thānawi was someone willing to reexamine commonly held opinions and practices in relation to women. His ideas on family structure, on the dynamics of the

²⁰⁴ One such well-known figure in Chicago, a graduate of Aligarh with a Ph.D. in Islamic Studies from an American university, and well familiar with the *Bihishti Zewar*, was shocked to hear that Maulana Thānawi would ever care to write a text like *al-Ḥīla al-Nājiza*. Personal conversation, Chicago, 2006.

marital relationship within the broader context of the extended family, on women's leadership, and on the ontological sameness of men and women, all point to his interest in issues that relate to women, but also to the creativity with which he is willing to tackle these questions. In the end, it seems that his very utilization of a traditionalist framework aids him in his reconsideration of religious and social assumptions about gender roles, since he establishes that one may hold to a traditionalist worldview and still legitimately call for some degree of expansion of women's rights.

Thānawi the Traditionalist

It might first be helpful to elucidate Thānawi's understanding of gender roles. A major goal of Thānawi's project for the *iṣlāḥ* of women was to clarify what he took to be the growing confusion about women's place in South Asian Muslim society. The *Bihishti Zewar* was written precisely with this goal in mind: women were just as religiously responsible as men before God, and the only way for them to actualize their religious and moral potential was if they could be taught the necessary knowledge needed to fulfill their obligations to God and to society. For them to know how to live a godly life, they had to be taught not just the basics of ritual and belief, but also the proper way to fulfill their obligations as wives, mothers, daughters, and responsible individuals.

For this to happen, both men and women needed to be taught their respective roles and duties. Thānawi takes the *ḥadīth* prohibiting imitation of the opposite sex very seriously, and condemns both masculine women and effeminate men. As marital partners, for example, each must know the duties and requirements that are owed to the other.

Examining how Thānawi lays out the marital “rights” of each party helps lay out his views on the role of each gender in a marriage.

Thānawi has a brief fatwa²⁰⁵ on this topic, in which the questioner asks him to explain what rights the husband has over the wife, and what rights the wife has over the husband. Thānawi begins by mentioning the rights of the wife over the husband in terms of the husband’s actions. He lists the following thirteen, while indicating that these are not exhaustive: 1) He must show her good treatment and a mild manner (*husn khuluq*); 2) he must put up with any harm or difficulty (*īdhā’*) caused by her, but in moderation (F: not to a degree where he or the marital relationship may be harmed); 3) he must be balanced in his sense of honor and jealousy (*ghayrat*), so that he is neither overly suspicious nor completely heedless as to her activities; 4) he must be balanced in his spending, so that he is neither tightfisted nor does he give permission for wasteful spending; 5) he must learn the legal rulings on menstruation and related matters and teach these to her,²⁰⁶ and he must remain firm on the performance of prayer and religious duties in general, and must prevent her from indulging in innovations (*bid’at*) and prohibited matters; 6) if he has multiple wives, he must treat them equally; 7) he must meet her need for sexual intercourse (*waṭ’*); 8) he must not practice *‘azl* (withdrawal: a form of birth control) without her permission; 9) he must not issue a *ṭalāq* unnecessarily; 10) he must provide her a home according to her standards (*kafā’at*); 11) he must allow her to meet with her

²⁰⁵ Thānawi, *Imdād al-Fatāwa*, vol. 2, 185–86.

²⁰⁶ Men are religiously required to know the rulings related to menstruation and childbirth bleeding because of the prohibition of sexual relations during these times. They are not excused for having intercourse during prohibited times due to ignorance of the legal rulings. (However, if she lies and does not disclose her condition, then he is not considered accountable before God.) See Hartford and Muneeb, *Birgivi’s Manual Interpreted*.

close male kin (*mahārim*) and relatives (*aqārib*); 12) he must not disclose their private, bedroom matters; and 13) he must not strike her in a way that exceeds (F: legal) bounds.

After mentioning the rights of the wife, Thānawi then lists the following thirteen rights of the husband: 1) she must obey him in every matter, on condition that it is not something sinful; 2) she must not demand material provision that exceeds his capability; 3) she must not let anyone enter the home without his permission; 4) she must not leave the home without his permission; 5) she must not give anyone something from his wealth without his permission; 6) she must not perform voluntary prayers or fasts without his permission;²⁰⁷ 7) if he calls her for sexual relations, as long as there is no legal bar,²⁰⁸ she must not refuse; 8) she must not consider her husband low (*ḥaqīr*) due to his poverty or ugliness; 9) if she finds something in his actions that contradicts the *Sharī‘ah*, she must prohibit him in a respectful manner; 10) she must not call him by his name;²⁰⁹ 11) she must not complain about him in front of anyone; 12) she must not verbally abuse or harangue him; 13) she must not quarrel with his relatives.

From this list of spousal rights, which are “taken from *Ihyā al-‘ulūm* [of al-Ghazali] and other” texts, one gets a sense of Thānawi’s idea of gender roles, particularly within the context of marriage. The husband is required to take care of her needs with the attitude of a benevolent authority figure, and the wife is to conform to his desires and

²⁰⁷ There are specific Prophetic traditions that bar such worship, the reason being that she must be available for sex according to his needs. Fasting in particular is cited as something that requires the permission of the husband, since relations are forbidden during the fast.

²⁰⁸ That is, obligatory (Ramadan) fasts, menstruation, etc.

²⁰⁹ It is not clear where Thānawi gets this rule from. He mentions it numerous times in other texts, like the *Bihishti Zewar*, as well. Perhaps it is informed through north Indian *sharif* culture, where addressing the husband by his name and not indirectly or through some honorific would be considered highly impudent and improper. But I have not been able to locate any textual basis (e.g., from primary and secondary Islamic sources) that outlines this rule as well. If there is in fact no textual basis for this ruling, Thānawi’s use of *‘urf* (local custom) as a way of informing legal rulings is here apparent. One wonders how he might modify these rulings so that they could better match the Western Muslim experience.

directives. These spousal rights are to be taken very seriously, because it is not only marital bliss that depends on the proper upholding of these rights, but salvation itself. He says elsewhere: “In some cases women demean (*dhalīl karti*) their men and in some cases it is...men who are oppressive, since they utterly demean their women, and in still other cases, this is the treatment given from both sides. On the Day of Reckoning (*qiyāmat*), all of their deeds will be tallied, and from whosoever neglected the rights of another, revenge will be taken (*intiqām*). Thus, men should keep regard for the rights due to women, and women should honor men—they should make sure to obey them.”²¹⁰

Here Thānawi makes mention of women’s rights, but does not mention the “rights” of men as in above. Instead, he reminds women to be mindful of their subordinate position, and to not become heedless of the authority of their husbands. He does not frame obedience to the husband as the man’s *right*, as he does in the first part of the fatwa cited above. In a sense, it seems fitting that the rights of women are mentioned here but not those of the men, even though he is speaking of spousal negligence on the part of both, since it is more common even in contemporary human rights discourse to bring up the notion of “rights” (or “*ḥuqūq*”) in regards to the weaker or neglected party.

The fatwa on spousal rights is also interesting because it highlights particular aspects of the character or comportment of men and women. Often when reading a list of wifely duties such as that laid out above, it is easy to conclude that it is women who are being controlled, since it is implied that they have impulses and unruliness that must be governed and reigned in by the (more rational) head of the household. As Barbara Metcalf sums up Thānawi’s treatment of women in the *Bihishti Zewar*, “women must struggle more than men to attain...discipline and self-control;” they are “always on the

²¹⁰ Thānawi, “Al-Kamāl fī al-dīn li-n-nisā’,” 110–11.

verge of moving out of control, of displaying excess, of spilling over.”²¹¹ In the *Bihishti Zewar* Thānawi was addressing women directly, urging them toward improved religious practice. But when laying out the rights and duties of both husband and wife as in the fatwa above, where the primary address may very well be toward a predominantly male readership, the emphasis shifts. It is the men who are constantly warned to stay in control and maintain a balance (*i’tidāl*) in their treatment toward their wives. In matters of jealousy, spending, and discipline, the men are told that they have specific rights in this regard, but that they can only indulge in them to *a limit*. From this discussion of each spouse’s rights, it is clear that Thānawi is concerned about the excessive control of and domination over women.

Challenging Ideas on the Wife’s Proper Place in the (Traditional Indian) Home

Thānawi’s breakdown of spousal rights is a useful indicator of how very conservative he is on issues of family structure and gender roles. But in a different tract on familial rights, titled “Balancing Parental Rights” (“*Ta’dīl ḥuqūq al-wālidayn*”), Thānawi demonstrates that he is not one to whole-heartedly accept the status quo.

A common theme in Islamic thought on family relations has been the obligation to take care of, and to obey, one’s parents, an aspect of religiously-oriented social practice that can in no way be rightly ignored. Indeed, disobedience to one’s parents is considered to be one of the most serious of enormities. For a Muslim from the Subcontinent, this emphasis on filial piety is further enforced by South Asian cultural norms that foster precedence to the extended family over the nuclear. Given this context,

²¹¹ Metcalf, *Perfecting Women*, 14.

a religious scholar discussing parental rights might be expected to encourage obedience and responsibility of adult children toward their parents even at the expense of the interests of the son's wife or children.

For this reason, Maulana Ashraf 'Ali Thānawi's treatise on "Balancing Parental Rights" ("*Ta'dīl Ḥuqūq al-Wālidayn*") may come as a surprise to many pious Muslims.²¹² In this treatise, Thānawi places spousal rights as well as one's own individual rights at the same level as the rights owed parents, and recognizes the possibility that the former could take precedence over the latter under some circumstances.

The following passage from the treatise helps explain why Thānawi chose to write it:

The reason for this study is that after having faced innumerable such incidents, we know that there are some people who commit gross negligence in fulfilling the rights of their parents, who ignore the sacred texts that state that the fulfillment of these rights is a religious obligation, and thereby bring upon themselves the divine wrath that results from disobedience to one's parents. [Conversely,] there are also certain pious folk who are excessive in the fulfillment of their parents' rights, such that the rights of another, like the wife or the children, are thereby neglected. These people ignore yet another set of sacred texts, those that necessitate care and protection (of one's wife and children), and so bring upon themselves the divine wrath that results from the violation of another's rights.

And then there is a third group. They do not neglect any other individual's rights, but they believe that certain non-obligatory rights are in fact obligatory, and they go about attempting to fulfill these rights with such a mindset. But since at times they cannot bear all of this responsibility, they soon become distressed. They begin experiencing religious misgivings such as, "The *Sharī'ah* has some rulings that are simply unbearable and too strict!" In this way these poor souls harm their own religious faith.

In this last category of people there is [in actuality] still one whose obligatory rights are being neglected, and that is the man's own self, since the self also has certain obligatory rights. The Prophet, peace and blessings of God be upon him, said: "Your self has rights over you!" And of the obligatory rights [which your self/soul possesses], the most important is the protection of religious belief. Thus, having the mindset that the non-obligatory rights of one's parents are in fact obligatory leads one toward the sin mentioned above [that of becoming overwhelmed and experiencing religious misgivings]. For this reason, the knowledge of which rights are obligatory is in itself obligatory. Once one understands the distinction between obligatory and non-obligatory rights, then if one decides to still fulfill the non-obligatory ones, knowing that they are not obligatory, the danger mentioned above will not occur. He will interpret any difficulty entailed as something he has brought upon himself and however long he will tolerate it, it will be because of his own high intentions. In fact, by

²¹² For a full translation of this treatise, Khan, "Maulana Thānawi's Fatwa," forthcoming.

perceiving the situation in this way, he will in fact derive some pleasure from it. Such a person will think to himself, “Despite the fact that I am not responsible for this, I am still taking on this [important] task.” And he will know that he can fulfill this task according to his own will.

From this we see that in possessing the knowledge of the religious rulings there is only great benefit, while in being ignorant of them there is only compounded harm. Thus I write these few lines with the goal of conveying a specific kind of discernment. Following this introduction, I will gather together the important *ḥadīth* (Prophetic narrations or Traditions) as well as legal rulings that are relevant to this topic. I will then expound on the legal rulings that can be derived from the gathered citations. My intention in writing this short treatise is that an accurate perception of parental rights can be gained.²¹³

“Balancing Parental Rights” is an interesting example of reform-minded legal literature, since it is attempting to correct the practice of *already religiously-minded* Muslims. There are enough *fatāwa* and legal tracts that reprimand individuals who neglect the needs of their parents: Thānawi’s concern is that there are also those on the opposite end of the spectrum who take parental obedience to an extreme, thereby neglecting their families and their own selves. By questioning the notion of absolute obedience to one’s parents, Thānawi is critiquing deeply engrained cultural mores that had come to be accepted as not only socially, but also religiously, mandated modes of behavior.

Thānawi cites heavily from traditional legal texts as support for his distinctive rulings on “parental rights.” It is important to note first off that the notion of “rights” within Islamic legal discourse is very different from the conception of rights in Western intellectual and legal thought. The word *ḥaqq* (pl. *ḥuqūq*) in the Arabic language translates as “right” or “what one is due,” but this is more in the sense of duties and responsibilities that others owe one, rather than an intrinsic right that each individual possesses. So, for example, we read in works of *fiqh* that prayer is a *ḥaqq* of Allah, a

²¹³ Khan, “Maulana Thānawi’s Fatwa,” forthcoming.

duty that one owes God. Similarly, we hear that a good name is the *ḥaqq* of a child, so that it is the duty of parents to bestow upon their children names which are dignified and of virtuous meaning. The sense of ‘right’ in Islamic sources is of what is due to one or befitting. In this piece, it is the man who is the addressee, since it is primarily men who are being called to fulfill the “rights” or duties they owe to the people under their charge.

Though he is challenging the customary treatment of the topic, Thānawī is able to keep within the tradition by engaging in commentary upon well-established religious texts and pre-existing commentaries. The treatise is written with both lay Muslim and religious scholar (*‘ālim*) in mind. Thānawī divides the treatise into three sections: the first is a discussion on the need for his treatise; the second section comprises all the legal evidences and commentary with which he will back up his arguments; and the third lays out in clear terms the legal rulings relating to parental rights. The first and third sections are written in easy-to-understand Urdu, and so are accessible to even the average literate South Asian Muslim. The second section, however, the one that contains the legal “proofs” and is completely in Arabic and immensely dense and complex. It is obviously restricted to the purview of trained *‘ulamā* familiar with the sources from which he is quoting. Many times in this section Thānawī does not even provide a full citation; he will mention just the first few words of a *ḥadīth* or even of a legal opinion, and the reader is expected to know exactly which statement of the Prophet is being referred to, or at the very least know how to easily track down these statements as well as the statements of the jurists.

There are five major categories in Islamic law that describe the legal status of any given action. Obedience to one’s parents, though often wrongly assumed to be

unquestionably *wājib* (legally incumbent), is described by Thānawi as fitting into every one of these categories, depending on the situation. Thus, at times it can be *wājib*, at times *mustahabb* (preferred), at times *mubaḥ* (a neutral category that can be translated as “permissible”), at times *makrūh* (offensive), and sometimes even *ḥarām* (unlawful). The ascription of parental obedience to these various categories is not simply based on what the parents are commanding. It is obvious, for instance, to even the most devoutly obedient son that if his parents command him to drink wine or murder another individual, he is not obliged to obey them. Instead, one must gauge the requirement to honor one’s parents’ wishes on the basis of whether or not their desires will come into conflict with the rights of others.

Thānawi lays out three separate parties whose rights must all be somehow balanced: 1) one’s parents, 2) one’s spouse and children, and 3) one’s own self. Thānawi says that each of these three parties has certain *wājib* or religiously incumbent rights, and one must be careful that when trying to fulfill the incumbent rights of one party, not to neglect those of another. He elucidates how the balance must be determined by breaking up the legal ruling to obey one’s parents as follows:

1) If parents forbid one from carrying out a religiously incumbent (*wājib*) duty, it would not be permissible for one to follow their order, let alone it being incumbent to follow their command...2) If parents command one to do something that is religiously prohibited, then in this case it would also be impermissible to obey them...3) In the case of an act that is neither incumbent nor prohibited, say it is simply something permissible (*mubaḥ*) or even preferred (*mustahabb*) in the sacred law, for such a case it is necessary that further details be examined...²¹⁴

²¹⁴ Ibid.

Thānawi mentions a number of examples that illustrate each of the above situations. He provides the most numerous and nuanced examples for the latter case, since it is the one that needs the most explanation.

Thānawi starts off explaining the third case by giving the example of a man who wishes to leave his parents' town to find work elsewhere. If he is in severe need of leaving town to find work, such that he will suffer harm if he does not do so, Thānawi says that the man would not be required to obey his parents if they require him to remain with them. However, if his need for leaving town for work is not so great, then he would have to take into account other factors. As long as leaving town would not bring him harm (due to the nature of the work or of the travel required), and it would not bring his parents harm (if they would have no one left to look after them, for example), then it would be up to the man to decide whether he wanted to stay in town or not. While it would be religiously recommended for him to stay, it would not be religiously required (despite the fact that he could, in theory, make a living in his parents' town).

It must be emphasized again that such treatment of the Islamic concept of *birr al-wāliḍayn*, or obedience to one's parents, is unusual. Leeway would be given for circumstances where the man himself would suffer harm, but it is highly unusual for a religious scholar to allow a man to disobey his parents simply on the grounds that they have no overwhelming reason to make their demands. He is clearly using his knowledge of the tradition, through his appeals to various primary and secondary religious texts, to make a legal argument that is critically formulated. He is using the tradition, working within it, but he is definitely using his knowledge of it to justify a new, or at the least a rarely articulated, position about parental rights within Islamic law.

The most striking feature of the treatise is Thānawi’s treatment of the rights of the wife. Thānawi is very aware that his equating of parental and spousal rights is the most controversial aspect of his tract; it is probably for this reason that he deliberately discusses the famous *ḥadīth* of ‘Umar right at the start of his commentary section. The tradition of ‘Umar’s disagreement with his son is widely known, and is commonly the only one cited within a discussion of differences between one’s parents and one’s wife. In the *ḥadīth*, the famous companion of the Prophet, ‘Umar ibn al-Khaṭṭāb, commands his son to divorce his wife. The son is reluctant to do so, but the Prophet backs up the opinion of ‘Umar and requires the son to obey his father.

It is easy to draw the conclusion from this *ḥadīth* that one must unconditionally prefer one’s father over one’s wife. In fact, most of the primary texts he cites seem to indicate that parental rights always take precedence. But Thānawi firmly insists that this is not the case. Like other Muslim legal scholars before him, using past commentaries, as well as his own reasoning, to show that obedience to one’s parents is in fact a highly nuanced aspect of Islamic law.²¹⁵

After citing the *ḥadīth* of ‘Umar, Thānawi mentions yet another *ḥadīth* that requires a man to divorce his wife if the parents so desire: “Do not disobey your parents, even if they command you to leave your wife or your wealth.” He then cites a major *ḥadīth* commentator who explained the language of this *ḥadīth* as a type of exaggeration,

²¹⁵ In the fall of 2006, one of the more dynamic and well-respected US Deobandi scholars cited this very *ḥadīth* as proof that obedience to parents must not be taken lightly, since one is even required to divorce one’s wife if asked by one’s parents to do so. I asked him about his use of the *ḥadīth*, and mentioned Thānawi’s opinion (that a man is not required to divorce his wife if his parents command him to, unless there is some other overriding reason for him to obey). The scholar did not address Thānawi’s opinion at all, and instead only said “I realize that there is a difference of opinion on this issue.” This incident reinforced to me the fact that Thānawi was being pretty radical in his fatwa, not just socially but also on a religious level.

only meant to indicate “the extreme limit” of one’s obedience to one’s parents. He goes on to explain:

“As far as the actual legal [obligation] is concerned, he would not be required to divorce his wife...”, even if his remaining married to her would cause them great trouble. This is because the man himself would suffer harm by [such a divorce], and so he would not be required to do this for their sake. Had the parents realized that such harm would come to their son, out of natural compassion they would not have commanded him to divorce in the first place. Now if they insisted [on the divorce] despite the harm it would cause their son, this would be foolishness on their part, and the son would not be required to pay heed to their instruction. This same reasoning applies as well to abandoning one’s wealth.²¹⁶

This passage is an example of Thānawi’s own use of legal reasoning to justify the opinion he gives on divorcing one’s wife at the parent’s insistence. It is worth noting that in this example, Thānawi makes divorcing the wife a conflict between the man’s rights and those of his parents, and there is no mention here of the wife’s right to remain with her husband. There is a careful legal distinction contained in this line of reasoning: were he to argue that the wife’s right takes precedence, Thānawi’s opinion could have easily been challenged by other scholars, since the idea of *ṭalāq*, or unilateral right to divorce, necessarily entails that the husband may give a divorce with or without the wife’s desire or approval. By making it a conflict between the husband’s and his parents’ interests, Thānawi is still upholding a patriarchal view of divorce, while simultaneously bolstering the social and religious status of the wife in comparison to that of the parents.

Later on in the treatise, Thānawi has another example where he upholds the wife’s rights over those of her in-laws’. He cites a major eleventh century Ḥanafī text that mentions the wife’s right to a separate residence. Thānawi then cites the celebrated 19th century Damascene jurist ibn ‘Abidīn’s commentary on this ruling:

²¹⁶ Khan, “Maulana Thānawi’s Fatwa,” forthcoming.

Legally a wealthy wife must be provided for with a moderate room of her own. It would be sufficient that she have a room [or section; *bayt wāḥid min dār*] of her own in a larger abode... The people of our city Damascus do not live in homes in which strangers reside, and this I mean with respect to the middle-class folk, so obviously it applies to a greater degree for the noble and wealthy. An exception to this rule would be if brothers for example were to inherit and share a house, but each would reside [with his immediate family] in a separate section of the house, with the general amenities [such as kitchen, bathroom, etc.] being shared among all of them.

Of course, the customary practice of people changes with time and place, so it is upon the jurist (*mufiti*) that he take into account the state of the people of his own time and place. Without such consideration, a balanced society will not be attainable.²¹⁷

Thānawi cites this quote in his Arabic section of citations. He again mentions it (in Urdu) under the legal category where the parents demand that someone neglect a religiously incumbent duty. Thānawi cites from well-known Ḥanafī text to support his argument for the wife's right to a separate place of residence than that of her in-laws, and he basically repeats the same opinion of ibn 'Abidīn and his eleventh century predecessor. At the same time, however, it must be kept in mind here that the *social* context in which Thānawi is advocating this does not allow for a woman to make such demands at all. Even in religious families, wife and in-laws usually occupied a shared space. The social pressure in many South Asian communities to accept such arrangement continues to be such that she would not be able to even make such a request from her husband, let alone expect that her request might be fulfilled. In fact, the requirement for the wife to stay in the home of the in-laws was so strong in Thānawi's north Indian Muslim social context, that she was expected to stay on in that house even after the death of her husband (another issue that Thānawi takes up and condemns in a separate tract).²¹⁸

Thānawi's emphasis on this issue shows that he was willing to challenge even deeply engrained social mores if this was necessary to fulfill his vision of religious reform. Interestingly, while he cites ibn 'Abidīn's closing line in Arabic (on the need for

²¹⁷ Ibid.

²¹⁸ Thānawi, *Huqūq al-Zawjāyn*, 81.

the jurist to take into account the customary practice in his own region), Thānawi makes no mention of this in the Urdu parts of the fatwa. This may of course be because such appeal to legal methodology (*uṣūl*) is usually never made the business of lay Muslims, and he reserves such methodological references for the scholarly Arabic-speaking elite. At the same time, however, he avoids having to face the question of whether, culturally, in India it would make more sense to tweak this legal ruling to say that the wife should in fact *not* protest when she is asked to live with her husband's parents, since it is something that is so widely accepted and practiced in India (as opposed to ibn 'Abidīn's Damascus). Again, this reinforces the fact that Thānawi has a particular concern for women's rights, and perhaps even a slight acknowledgment of contemporary reformers' calls for companionate marriage and strengthening the nuclear family. This was a time when traditional notions of communal family structure were being hotly debated. These discourses surely played into his broader vision of religious reform.

Again, Thānawi's willingness to revisit the rights of women may stem from the changing conception of family in the nineteenth century, particularly on the part of Indian reformers both Muslim and non-Muslim who emphasized the mother's role in the foundation of a solid community. Thānawi's ideas on spousal rights are certainly not revolutionary: his call for the provision of a woman's own separate residence, or his insistence that the wife's rights not be neglected, draws on pre-modern sources that he himself quotes. The *'ulamā* had always discussed spousal rights, just as they discussed parental ones. What is distinctive however about Thānawi's treatise is that he seeks to reconcile the two issues together within one tract. As a religious advisor to many

thousands of spiritual disciples, it must be that Thānawi would have seen conflicts between parental and spousal obligations first hand.

Another hint at Thānawi's awareness of contemporary concerns can perhaps be subtly gained from his noteworthy emphasis on the rights of one's own self, or soul (*nafs*). In the longer passage cited above on the reason for writing the treatise, Thānawi warns that even one's own self has rights over one, and that to expend too much effort in trying to please one's parents may not only be mentally and spiritually daunting, but also damaging to one's religious faith. Thānawi here writes as a spiritual guide concerned with inner attitudes. Thus he encourages a person to acquire sufficient learning to know what is required and what is not. If, after doing so, a person decides to carry out duties that are not religiously required, that action should be a matter of conscious choice and performed with a positive, not negative, mindset, thereby taking much less toll on the individual's emotional and psychological well-being. Thānawi thus bolsters the importance of Islamic guidance by demonstrating its this-worldly benefit as well as next-worldly benefit for those who wish to follow its guidance.

Just as with the issue of spousal rights, Thānawi's championing of "individual rights" finds precedent, not least in a tradition of the Prophet: "Your self has rights over you!" His instruction to avoid overburdening one's soul with doing too much good reverberates with what is found in sacred texts and pre-modern commentaries (and particularly with what is found in Sufi works, including those of Thānawi himself). At the same time, Thānawi's tract is relevant and new, addressing contemporary formulations of the tension between individual and communal responsibility. His real accomplishment,

then, is that he has successfully translated the traditional ideas on parental rights of the past into what can be seen to be a fully authentic present-day application.

On Women's Leadership

In his writings, especially those addressed towards women, Thānawī consistently mentions that a woman's place is in the home. This theme (the importance of “*pardah*”) is reiterated throughout the *Bihishti Zewar* and in his spiritual discourses directed toward his women disciples. In his encouragement for women to stay hidden and at home, he discourages women from studying in Western-style academic institutions (since this type of education is only useful for purposes of working outside the home), and he even goes so far as to say that women should not publish their names when they write in their opinions for newspaper publication!²¹⁹ Of course, he does urge the education of women, as is obvious from texts like the *Bihishti Zewar*, but the emphasis is on those topics that will aid the woman in her role as caretaker of the home.

Within this broader context of Thānawī's ideas on the public role of women, one is surprised to find a fatwa²²⁰ of his in which he seems to condone the leadership of women, as long as the form of leadership is not an autocratic one, where her power would be absolute and unchecked. His opinion on this subject again brings out Thānawī's willingness to engage with modern developments that somehow touched upon gender roles.

²¹⁹ See Thānawī, “*Kasā' al-Nisā'*,” 234 and 239.

²²⁰ The fatwa is included in Thānawī's collection of *fatāwa*. See Thānawī, *Imdād al-Fatāwa*, vol. 5, 91–93.

An unnamed *mustafti* poses to Thānawi the following question: “[The *Ṣaḥīḥ* of] Bukhari contains the *ḥadīth* ‘No people (*qawm*) will succeed who entrust their affairs to a woman.’ From it we learn that the sovereignty of a woman is cause for the lack of success. Those governments that have women as leaders, are they also included under the purview of this *ḥadīth*?” This exchange between Thānawi and the questioner takes place in 1912. Since this is all the information included in the question posed, there is no way to know exactly what states the questioner had in mind. However, one would think that Bhopal would be an obvious inference here, since the Begum of Bhopal (Sultan Jahān [d. 1926]) and her predecessors were prominent Muslim women leaders of the time.

Given Thānawi’s stance on *purdah*, along with the broad consensus among Muslim scholars that the head of state could not be a woman,²²¹ one would expect the obvious answer to be in the negative. However, Thānawi has a long and surprisingly nuanced reply for the question posed. He starts off by stating that there are three types of government: the first is where authority of the leader is complete (*tāmm*), such that he is not required to ask a superior for approval on any matter, and is also general and widespread (*‘amm*), and not limited to a small group of people. The second is where authority of the leader is complete but not widespread. And the third is where the ruler’s authority is widespread but not complete. He says that an example of the first would be where the woman is considered the sole sovereign; an example of the second would be that the woman has full control over her jurisdiction, but it is only over a small group; and an example of the third type of rule is a woman being elected as head of a democracy, in which real (*ḥaqīqi*) power is invested in the Parliament or broader

²²¹ Khaled Abou El Fadl has a long discussion of the *ḥadīth*, in which he questions its widely-accepted verity. See Abou El Fadl, *Speaking in God’s Name*, 111–15.

democratic body, and not in the ruler herself, since she would in reality only be one piece of the broader democratic system, and her authority in effect would only be symbolic (*ṣūri*).

Thānawi clarifies these various types of government in order to establish which type of government is being alluded to in the *ḥadīth*. He does an analysis of the wording of the *ḥadīth*, and the context in which the Prophet had made this statement,²²² and comes to the conclusion that only the first type of government is being referred to. The Prophet was only condemning the absolute governmental rule of a woman, and not the ruling position of a woman who would be required to consult with others on matters related to governance.

Thānawi further backs up his analysis of the *ḥadīth* with other examples. The first one he examines is the story of the Queen of Sheba in the Quran. The Queen, while still an unbeliever, ruled over her land in what Thānawi calls a *jumḥūri*—a democratic or parliamentary—form of government. He proves this by citing the Quranic verse in which the Queen of Sheba is addressing the notables of her land (*mala'u*): “She said: ‘O chieftains! Pronounce (*advise*) for me in my case. I decide no case till you are present with me.’” From this verse Thānawi concludes that this ruler, either due to political pressures or else out of her own acquired habits, was really the head of a *jumḥūri* state. Thānawi goes on to explain that once she accepted a monotheistic belief in the God of Solomon, there is no indication that she was forced to abdicate her rule, “as is established clearly in historical accounts.” He then quotes the legal principle “When God or His Messenger relate a matter to us without any condemnation, it becomes a proof for us,”

²²² The Prophet is said to have made this statement on the occasion when the Persians had designated the daughter of Kisra (Khosrau) as their leader.

and says that since no condemnation of the Queen of Sheba's rule is ever related either in the Quran or in the *ḥadīth*, we know that according to the *Sharī'ah* there is no problem with her rule. He says, "Thus it has been clearly established on the basis of the Quran that democratic rule can be acquired by a woman, which is of the third type."²²³

Thānawī's statement is unequivocal in his conclusion about the permission for parliamentary/democratic rule, simply on the basis of this Quranic example (he specifically mentions that given his analysis of the *ḥadīth*, a woman's leadership of contemporary "parliamentary" governments would be permissible). He does explain this idea further though, by again clarifying that the third type of government which he describes is democratic, or based on a concept of *shura*. For this reason, there should be no problem with a woman taking (symbolic) lead of such a government, since according to Islamic law women are fit to take counsel (*shūra*) from (in Thānawī's words, "*'awrat hay ahl shūra ki*"). Thānawī mentions yet another example to further illustrate this point. He cites the incident at Hudaibiyah, where the Prophet was in a quandary as to how to proceed, since the Muslims were unwilling to return back to Medina without performing the Hajj. The Prophet went to his tent and consulted his wife Umm Salamah, and thereafter followed her advice. Thānawī cites this as an example that there is no legal bar in consulting women and following their advice. Therefore, if a woman is head of a type of government in which her role is checked by some sort of consultative body, there is no legal principle that would bar her from such a role. The stories of the Queen of Sheba and Umm Salamah back up Thānawī's permission for the third type of rule (parliamentary), which he spends the most time discussing, probably because it is the most relevant or

²²³ "*Pas Quran se zāhīran thābit ho gaya ke salṭanat jumhūri 'awrat ki ho sakti hay jo qism thalith hay.*" See Thānawī, *Imdād al-Fatāwa*, vol. 5, 92.

controversial. He cites one *ḥadīth* to back up the second type of rule, the one that is absolute but not widespread. The *ḥadīth* he uses is: “The woman is leader (*rā’i’*) over the house of her husband and [over] his children, and she is in charge (*mas’ūlah*) of them.” Thānawi uses the woman’s control over the home to be proof that women can, in some instances, have absolute control over a group of people,²²⁴ as long as that group is limited in number.

Thānawi goes on to explain that while there are certain posts that are known by consensus to be barred for women—these being the caliphate and judgeships over criminal cases (*qaḍa*)—*dhukūra*, or “maleness,” is not a condition for other public roles such as participating in governmental administration and witnessing in court. Only in passing does Thānawi give any indication as to the legal cause (*‘illah*) behind why a woman should be barred from the two roles of caliph and judge: it of course relates back to the “deficiency of intellect” (*nuqṣān al-‘aql*) that is said to be the biological consequence of being a woman.²²⁵ Despite this fact, however, even Thānawi acknowledges that other forms of public service are perfectly appropriate and *befitting* for women to undertake, and all of the roles he mentions in this context, whether it be administrative duties or leadership of democratic government, are not compromised by this supposed deficiency of intellect.

The remaining section of the fatwa discusses the duties of such a leader, and mentions for example that she would still not be able to make decisions about criminal cases that concern the *Sharī‘ah* laws on *ḥudūd* and *qiṣās* (since judgeship over these matters are not allowed for women). But if she were to have male judges make decisions

²²⁴ It is worth noting that Thānawi considers the woman’s authority over the private realm of the home and children to be absolute.

²²⁵ See below for further discussion of Thānawi’s ideas on this topic.

on these cases and then as leader make sure that these judicial decisions are carried out, her application of the judge's decisions would be legally binding, just as the application of a non-Muslim ruler who is putting into effect the judicial rulings of Muslim judges would also be binding. Thānawi closes the fatwa by stating that governmental systems where such a judicial set-up is present are exempt from or innocent of (*barī*) the *ḥadīth*'s condemnation of woman-led nations.

Within the volumes of *fatāwa* that are available of Maulana Thānawi, this three-page fatwa, on the leadership of women in contemporary governments, is buried among all of his other legal ideas and opinions. Given his other writing on women, their role in the home, the need for them to be observe purdah, and his mention in numerous places that positions like the caliphate (or possessing *al-imāmah al-kubra*, “the greater imamate”²²⁶) are impermissible for women to hold, have allowed the approach he takes in this fatwa to be sidelined. However, there have been times in more recent discussions that this fatwa has again been given attention. One notable example is in the late 1980's, when Benazir Bhutto took control of political leadership in Pakistan.²²⁷

At the time of Benazir Bhutto's election, the question of whether a woman could take lead of a Muslim nation was being hotly debated, and this fatwa of Thānawi's was brought up as a way to back up the argument in favor of Bhutto's rule (which could

²²⁶ *Al-Imamah al-kubra* is the “greater imamate,” or political leadership over the Muslims, while *al-imāmah al-sughra* (the “lesser imamate”) is defined as the leadership of the congregational prayer.

²²⁷ Another more recent example is a heated debate that ensued when a young South Asian-American man used Thānawi's fatwa to support the idea of women's leadership in local Muslim organizations, such as in “MSA's” (Muslim Student Associations) and “ISNA's” (the Islamic Society of North America, a large umbrella organization of Sunni Muslims that recently elected a woman as its president). He posted his ideas on a UK-based internet forum, and received severe criticism from not only British Barelwis who routinely dissent from the opinions of Thānawi and the Deobandis, but also from other Western Deobandi scholars, who (probably themselves initially unfamiliar with the fatwa itself) believed he was quoting Thānawi completely out of context, and cited 'Uthmāni's follow-up fatwa as proof that Thānawi never meant what the young man had understood from the fatwa. See the archives for a discussion on “women leaders” at www.dīnport.com. The discussion seems to have been taken up on other forums as well.

potentially be immensely helpful for their position, given Thānawi’s continuing authoritative reputation). But the general opinion of the Deobandi scholars of the time was that her rule was contrary to the *Sharī‘ah*. Mufti Rafī‘ ‘Uthmāni, the son of one of Thānawi’s most famous students, and a major present-day Deobandi figure, wrote a fatwa of his own on the issue of women’s leadership. Through a detailed and well-researched discussion, ‘Uthmāni presents an incisive opinion on why, on a textual and legal basis, the governmental leadership of a woman is impermissible. In general, throughout this treatise, he does not bring up any discussion of types of government.

The only time this issue comes up is toward the end of the 42-page fatwa, when ‘Uthmāni directly addresses Thānawi’s fatwa. He points out at the start of this discussion that Thānawi himself had stated the Greater Imamate to be impermissible for a woman to hold. What is interesting though in this case is that ‘Uthmāni makes no distinction between the Greater Imamate and other forms of leadership (he translates *imamat-i kubra* as “*ḥukūmat ki sar barāhi*,” “governmental leadership”).²²⁸ As ‘Uthmāni continues with his elucidation of Thānawi’s fatwa, it becomes more and more apparent that he is rewriting the opinion of Thānawi in order to back up his own argument.

‘Uthmāni states that Thānawi’s fatwa only makes sense if the type of government being discussed is truly a *shūra*-based one, in which the leader is really only one component of the broader governing council. In his fatwa, Thānawi had repeatedly stated that if any element of consultation was present in the government, even if it were only voluntarily undertaken by the woman leader, this would exempt such a nation from the condemnation of the *ḥadīth* “No nation will ever be successful...” But ‘Uthmāni elevates the concept of consultation to a much stricter standard that Thānawi does in his own

²²⁸ ‘Uthmāni, “*Awrat ki sar bara’i ka mas’alah*,” 152–94.

fatwa; according to ‘Uthmāni, if the leader is allowed to make any type of decision without consulting an advisory council or Parliament, then such a female leader would in actuality be an absolute leader, and would be of those condemned by the *ḥadīth* (and therefore, such a leadership position would be impermissible to hold). Thānawi does not lay out such a strict definition of a *jumḥūri* republic, but ‘Uthmāni interprets Thānawi’s fatwa to be as stringent as his own opinion on this issue.

‘Uthmāni in fact says that the core issue at the heart of Thānawi’s fatwa is not really women’s leadership, but whether or not democratic/parliamentary government leaders are really not autocratic rulers. Thānawi’s argument, he says, “rests entirely on the question of whether a parliamentary government is really a government or simply a type of consultative body.” ‘Uthmāni says this question is not asking about a religious matter. Rather, it concerns practical worldly realities.²²⁹ According to ‘Uthmāni, Thānawi believed that the leader of a parliamentary type of government was no leader at all, but only one member of the broader parliamentary structure, whereas the reality of present-day government is that even in a parliamentary or democratic system, the leader is actually in charge and may act according to his will by vetoing anyone who contradicts his opinion. And even if he must acquire the permission of Parliament on matters, this still is of no real consequence for ‘Uthmāni. Since Parliament is controlled by the leader’s own party, and he is unofficially considered the leader of the party, in effect Parliament will always rule in favor of the leader’s opinion. ‘Uthmāni forcefully states that had Maulana Thānawi known the details of such forms of government, he too would feel the need to reconsider his fatwa on the issue. Thānawi had only been giving a

²²⁹ Ibid., 190.

religious opinion (that was more theoretical in nature). He was not ruling on present-day political realities.²³⁰

Reading ‘Uthmāni’s treatment of Thānawi’s fatwa, one would almost believe that Thānawi never meant to address women’s leadership at all, but only sought in his fatwa to clarify the concept of government. ‘Uthmāni makes no mention of Thānawi’s strong proofs for the permissibility of women leading actual democratic governments, and instead goes straight to the question of whether present-day governments can really be said to be consultative bodies, “of the people” in any true sense of the phrase. ‘Uthmāni’s skepticism of democratic rule, and of the leader being subject to the will of the people, is perhaps understandable, given the fact that his political reality is that of modern-day Pakistan. But what is striking in his treatment of Thānawi is that he seems to not be able to imagine any other type of political reality.

For ‘Uthmāni, government is always in some sense autocratic, whether it is an Islamic caliphate or a parliamentary state, which explains the wording of his summation of Thānawi’s argument ([it] “rests entirely on the question of whether a parliamentary government is really a *government* or simply a *type of consultative body*?” [emphasis added]). ‘Uthmāni bifurcates the discussion in a completely different way: Thānawi could accept that other forms of governments were possible, but for ‘Uthmāni, government is government, and a *shura* is wholly something else. Not only that, but it is apparent when comparing the two *fatāwa* that Thānawi could envision a Muslim government that did not fit the description of the Greater Imamate, but ‘Uthmāni can only see the leadership of Bhutto as a violation of the rules of this Imamate. Nationhood of a Muslim majority state

²³⁰ Ibid., 193.

is equated by ‘Uthmāni to be an Islamic state, and therefore, there could be no room for a Muslim woman to lead such a populace, under any condition.

It is obvious that the political realities of both Thānawi and ‘Uthmāni informed each of their respective *fatāwa*, especially in the case of ‘Uthmāni. Thānawi was undoubtedly familiar with the rule of the Begum of Bhopal, and the person who posed the question for his fatwa most likely had her in mind as well (since his question, “Those governments that have women as leaders, are they also included under the purview of this *ḥadīth?*,” seems to be asking about actual woman-led Muslim states of the time). Thānawi never mentions any particular individual or government, but ‘Uthmāni does, since in the preface to his piece he makes it very clear that he is writing in response to the questions on women’s leadership raised in the 1988 elections.²³¹ While they are both addressing the issue of women leaders, and are both using the tradition to form and legitimate their arguments, their approaches to the issue are very different. Thānawi is able to step away from his own political realities to some degree and write with a dispassionate style about the issue. ‘Uthmāni in contrast seems very close to S.V.R. Nasr’s description of Islamist thinkers: “‘True Islam,’ for them, “was predicated on a different relation between mankind and God, one that was not private and inward-looking but externalized and engaged. The relationship between mankind and God became increasingly a tool for achieving success in the world—a template that could provide meaning to the confusion that reigned in Muslim lives.”²³² Even if Thānawi’s work was informed by his worldly realities, as would be the case for all scholars modern and pre-modern, he still manages to maintain a sense of disengagement, of the “private and

²³¹ Ibid., 152.

²³² Nasr, *Mawdudi and the Making of Islamic Revivalism*, 63.

inward-looking,” a sense that is nowhere to be found in the fatwa of Mufti Rafi‘
‘Uthmāni. For ‘Uthmāni there is no such thing as indulging in legal exercises for the sake
of simply thinking through a possible legal scenario. It can probably be safely argued that
Thānawi himself did not think a woman’s leadership to be the preferable state of affairs.
Still, he could maintain enough intellectual distance to consider an idea that for ‘Uthmāni
is simply anathema, as understood through his own political situation.

For this reason, it is interesting to note how ‘Uthmāni draws a line between the
religious and the political in order to justify Thānawi’s fatwa (thus making it seem like a
purely theoretical exercise), since it is for ‘Uthmāni, a religious figure in 20th century
Pakistan, that the line between politics and religion is most blurry. While Thānawi was
speaking about the religious permissibility of a woman’s leadership in certain types of
government, ‘Uthmāni can only imagine government as something that had to necessarily
conform to the guidelines of the caliphate as set by the *Shari‘ah* (which was originally, in
Thānawi’s view, a very particular type of Islamic government). ‘Uthmāni never
challenges Thānawi’s opinion that a woman could lead a government where her position
was more consultative in nature; he just never addresses this issue at all, since he does not
believe such a government could ever exist, or at least not in the modern-day.

Even if Thānawi’s fatwa was purely an intellectual pursuit, since they seem to be
more caught up in the religious and identity politics of the 20-21st centuries, it is hard to
imagine present-day Deobandi scholars engaging with issues of women’s leadership, and
gender as a whole, in the same way that Thānawi did. For the early Deobandi scholars
like Thānawi, *iṣlāḥ* of the Muslims was of paramount concern, but this objective could
still be met by them with a type of openness to interpretations of the received tradition, an

approach not commonly found in the work of Deobandi scholars of the present-day. Thānawi had strong belief in the authenticity of the tradition, and its credibility, such that he was willing to entertain ideas on women’s leadership, or other ideas like *tafwīd al-talāq* in *al-Ḥīla al-Nājiza* (another idea that is basically rejected or given no “air time” by present-day Deobandis). It seems as if the *islāhi* imperative of today’s Deobandis has trumped the weight of the tradition, so that even the creative (and yet, traditionalist) ideas of their own Deobandi predecessors have to be rewritten in order to fit a particular view of gender and the world.²³³

Gender Differentiation and the Essential Sameness of Women and Men

In the lecture cited at the start of this chapter, Thānawi makes it a point to highlight the insensitive treatment that women receive on the part of Muslim preachers. They are scolded for trivial things, are threatened with the fear of terrible punishment at every turn, and are constantly reminded of the *aḥadīth* of the Prophet that warn women of their particular weaknesses, without any counter-balancing words of hope and good tidings. Thānawi fears the effect of such rhetoric on the religious practice and spirituality of the women of his day, and addresses what he feels should be the approach to preaching women, and how best their *islāh* can be accomplished.

Thānawi’s spiritual discourses, or *mawā’iz*, often consist of an extended commentary on one particular verse. In this talk, he focuses on the following verse: “And their Lord accepted (their prayers): ‘Never will I suffer to be lost the work of any of you,

²³³ For more on present-day Deobandis and the “*islāhi* imperative,” see Khan, “Gender, Tradition, and Change,” forthcoming.

whether male or female, you are (the offspring) of one another. So those who emigrated, and were expelled from their homes, and suffered harm in My cause, and fought and were slain, assuredly, I will remit from them their sins, and admit them into gardens beneath which rivers flow; a reward from Allah, and with Allah is the best of rewards”²³⁴ (3:195). This verse was revealed when the women of the Prophet’s time complained of not being able to achieve the reward that men do for their religious works. Specifically, it was the Prophet’s wife Umm Salamah (the same one from the story of Hdaybiyah, above), who voiced to the Prophet her concern that while men had been promised much reward by God in the Quran for their migration to Medina, there had been made no such mention of the women’s reward. It was in response to this query that the above verse had been revealed, promising that both the works of men and women are rewarded by God, and that none of their effort goes wasted.

Thānawi says that women should take heart from this verse. While it is important to be aware of the things God expects from them, and to know that He may punish one for one’s sins, or not reward one for good deeds because of the corrupt intention behind them, women should still be careful to recognize the difference between having a humble approach to religious practice and one that is full of despair. It is from the characteristics of the Sufis and true people of God that one does not think much of one’s own good deeds, Thānawi says, but one must be careful to maintain such a view of one’s works and not go to an extreme and lose hope in God’s mercy and His acceptance. It is good to not

²³⁴ I have made use of the following translation: *The Holy Quran with English Translation*, edited by Ali Ozek, et.al.

be arrogant about one's own spiritual works, but one should be careful to avoid having a dangerously low sense of one's spiritual worth as well. The key is in the balance.²³⁵

Thānawi says that by not maintaining such a balance, the danger for such a person is that she may begin to despair of the mercy of God, and then might turn away from religious works altogether. When it comes to religious preaching, “There should not be so much narrowness that the person will think it to be unbearably difficult.”²³⁶ Thānawi says that he is careful when addressing even his own friends. He will not remind them about supererogatory religious works, for fear that by being tough on them in these matters, he may end up turning them off from even the more important things. “For this reason I say that there is a severe need for one to take into consideration the time, the situation, and the particular state of the addressee”²³⁷ when seeking to remind them about God and their religious duties.

Thānawi's manner of addressing this topic is sensitively done, and shows his concern for the spiritual success of women. One anecdote in particular demonstrates how conscious he is of women being spiritually worn down from the way their place in the context of religious life is most often described. He says that no one can appreciate what it means for someone to be addressed in a positive manner after they have been ignored or castigated for a long time, except for that very person. As an example, he tells the following story:

There is a lover who is able to reach his Beloved's court (*darbār*), but the Beloved never pays him any attention, and instead only chats with others. The thought eats away at [the lover] that [the Beloved's lack of concern for me is such that] “Even my name never escapes from the tongue!” He mentions his anguish to a close associate of the court, who then goes

²³⁵ Thānawi, “Kasa' al-Nisa',” 200–203.

²³⁶ Ibid., 209.

²³⁷ Ibid.

and relays this to the Beloved. At the next occasion of gathering in the court the Beloved begins to distribute something, say some betel leaf, to those who are gathered, saying to the servant, "Distribute these to everyone, and make sure that you give one to so-and-so," even taking the lover's name. So now try to imagine, what state do you think that lover was in at this moment? He would definitely be in a state of ecstasy (*wajd*), and would be dancing everywhere with joy, while for the others present in the gathering, this incident would not even be worth noting. This is because he received this wealth after a long bout of longing, whereas the others were used to receiving this without even any desire.²³⁸

Thānawi uses this anecdote to drive home to the men present how much they take God's address to them in the Quran for granted. Men have no appreciation for the wisdom contained in the Quran, he says, "but ask Umm Salamah or the other ladies of that time, what their condition was upon hearing this verse!" Then, addressing the women present at his lecture, Thānawi says "Ladies! Is it a small thing that God the Exalted addressed you directly, and not just this, he addressed you in such a way as to put you in an equal position with men? Since as far as the matters mentioned in the verse are concerned, He did not differentiate between men and women, it is correct to say that He placed men and women at a position of equality."²³⁹ Both the anecdote and his explanation afterwards convey how deeply Thānawi pondered the spiritual states of women, such that, most likely in particular due to his role as spiritual guide, he attempted to empathetically understand women's frustration with the religious establishment.

Thānawi lays this out as the basic problem: women are not given a proper idea of their role in religious life and their standing before God, and instead are constantly disparaged, and so they have no idea how to properly view their position in the world and their relationship with God. For Thānawi, especially Maulana Thānawi the spiritual guide, the key to knowing one's relationship with God, and learning how to improve it, entails knowing one's relationship to others in the broader context of family and society.

²³⁸ Ibid., 253.

²³⁹ Ibid., 254.

From this long sermon of Thānawī's, one can see that he believes the solution for women's improved spiritual practice lies to a great degree in their knowing their role in society and within the marital home. According to Thānawī, knowing one's true place in the world will act as a defense against both those who try to oppress women with unnecessary and overbearing admonition and mistreatment, and those who try to beguile women into thinking that their equal participation with men in the public realm is necessary for them to feel truly respected.

Much of the treatise then is spent outlining various aspects of the marital relationship, and women's responsibilities in general. Women must realize that they are responsible for abiding by the rules set by their husbands, but they should also know the rights that husbands owe them, since "men only tell women this much, that our rights over you are to immense, without ever letting them hear that there are also certain rights women possess over men. And why would any ordinary man even let such matters reach the ears of women, since they are in fact against [the interests of the man]?"²⁴⁰ Thānawī points out, for instance, that the only thing women are told is that they are entitled to "nān-o-nafaqah" (their material needs), but they are never told that, based on an explicit *ḥadīth* of the Prophet, they are also entitled to kind and pleasing treatment (*diljo'i*). "Pleasing treatment" means do not say something that will hurt her feelings, that will make her feel bad (*dil ko taklīf ho*). Ladies! What more leeway can you desire? The rules for your material rights [over your husbands] are well-known, and their legal parameters are clearly defined (*maḥdūd*). But 'pleasing treatment' is such a concept that cannot be

²⁴⁰ Ibid., 267.

limited [to a particular definition]. It simply means that anything that causes women trouble should not be done. How can any limit be placed on that?”²⁴¹

Thānawī’s mention of laws that can be defined and those that cannot be defined hints at his understanding of the difference between prescriptive and ethical laws within the broader legal outlines of the *Sharī‘ah*. Here, the right to kind treatment is equated with the rights to monetary support by Thānawī, and it almost seems as if he is giving the right to kind treatment even greater importance. But the latter right is not one that is ever mentioned in legal (*fiqh*) manuals of prescriptive law. As we saw in the chapter on the rulings of *al-Ḥīla al-Nājiza*, for instance, a woman is not entitled to a *faskh* simply on the basis of “lack of kind treatment” within the Ḥanafī school. This does not mean though that Ḥanafīs do not consider kind treatment to be a right of the wife. Thānawī’s differentiation of the two types of laws (those that are *mahdud* and those that aren’t) clarifies the legal understanding that there are a set of divinely-prescribed laws, laws that are just as stringent in their *ḥalāl* or *ḥarām*-ness, that have nothing to do with the precepts of the *Sharī‘ah* that are quantifiable and able to be applied in court. Ḥanafī legal texts do talk about the differentiation between those laws of the *Sharī‘ah* that have judicial consequences and those that are simply ethical in nature. The terms used for these are *qaḍa* and *diyāna* rulings, respectively. Religiously, or ethically (*diyānatan*), something such as kind treatment may be absolutely obligatory (*farḍ*), but may not have any relevance in a court of law. This does not mean, however, that a man’s negligence of this right will not be considered sinful.

Thānawī plays on the word “*mahdūd*” so that it means both “defined” as well as “limited.” Through this word he alludes to the concept of ethical obligations, but he also

²⁴¹ Ibid., 268–69.

manages to make an argument for the “unlimited” (*ghayr maḥdūd*) rights of the woman, in order to counter the accusation that women have so few rights within an Islamic marriage. Upon laying out his argument about kind treatment, he says, “Now it can be said that women’s rights are unlimited,” and not trivial in any way. Thānawi’s consciousness of modernist and Western accusations against the traditional Islamic treatment of women is further highlighted by the way he articulates this point on the unquantifiable nature of women’s rights in the *Sharī‘ah*.

Thānawi’s consciousness of Western critique of “Islam’s treatment of women” is also apparent in how he explicates his point on the “equal standing” of men and women. Yes, in this particular verse, women and men are placed at the same level, Thānawi says, but this should in no way be interpreted as perfect equality in all situations. He reminds his audience that God does speak of the “degree” or *darajah* that men have been given over women, and the Qur’anic verse that mentions this pinpoints its reason to the extra *faḍīlah* (virtue, advantage) that men possess. In classical commentaries of the Qur’an, the *faḍīlah* of men over women is usually interpreted as the monetary support that he must provide, which in turn allows him to claim the position of leader or caretaker (*qawwām*) of the household. The contemporary Shāfi‘ī scholar Nuh Ha Mim Keller has a commentary on a different verse of the Qur’an that also mentions the *faḍīlah* of men as the reason for their leadership role within the family. The verse reads as follows, “Men are caretakers (*qawwāmūna*) of women, because of that through which Allah has favored one over another, and because of what they spend of their property” (Qur’an 4:34). Keller explains the meaning of “caretaker” as well as the phrase “because of that through which

Allah has favored one over another” (*faddala Allah*) using classical exegetical sources such as those of al-Tabari and al-Razi.

Keller outlines three main definitions that can be gleaned from the classical sources of the concept of *faḍīlah* in this verse. 1) According to al-Tabari and others, this “favor” refers to the fact “men must give [women] their marriage payment (*mahr*) and spend of their wealth to support them,” in order to save women the “pains and effort” of earning a livelihood. It is due to this “favoring” that they have become caretakers of women. 2) The *faḍīlah* refers to God’s “favoring some men over others, this man having been given more sustenance (*rizq*) than that man, this man being better off than that one.” Here the *faḍīlah* is not even a comparison between men and women, but is instead between men and men. 3) Exegetes such as Fakhr al-dīn al-Rāzi said the verse was revealed in order to clarify the uneven distribution of inheritance money. “[S]ome women made remarks about Allah’s favoring men over them in estate division inheritance... So Allah mentions in this verse that He only favored men over women in estate division because men are the caretakers of women. For although both spouses enjoy the usufruct of each other’s person, Allah has ordered men to pay women their marriage portion, and to daily provide them with their support, so that the increase on one side is met with an increase on the other--and so it is as though there is no favoring at all.” Keller points out that it is because of such interpretations of the term “*faḍīlah*” that all the four schools hold the man’s financial support of the wife to be the condition upon which she would be required to abide by his rules in the home. If he cannot provide for her, or refuses to do

so, he no longer can be called the *qawwam* or caretaker, and she would no longer be required to obey him.²⁴²

Keller's summation of the classical exegetical positions establishes that there was a rich and nuanced discussion of the concept of men's *faḍīlah* over women, but Thānawī, even though he must have been familiar with this discussion, makes no mention of such interpretations. Instead, the way he refers to men's *faḍīlah* in this sermon shows that he does not mean material advantage by this term at all. He uses the term to indicate men's physical and intellectual virtue over women, such that even the most "beautiful and intelligent noblewoman" cannot match a man's biologically superior traits of "perfection of reason, courage, strength, and the ability to administer affairs" (!).²⁴³ Thānawī holds to not just the physical weakness but also the intellectual weakness of women to be a truth that cannot be denied, and in fact says that women should not even try to achieve equality with men on these issues, since it is impossible and will only make them frustrated in the end. Thānawī then ends up reading into this term meanings that are gleaned more from certain *ḥadīth*, *ḥadīth* that mention women's gentle and easily-bruised nature, for example, or the deficiency in their intellect (*'aql*). While it may be that he is not disclosing the nuances of the exegetical discussion on the term *faḍīlah*, his definition is still one that works within the broader tradition. It seems to be the best definition for him to use in order to achieve his goal of holding up gender differentiation as a given within the Islamic worldview.

Looking at these statements of Thānawī, it is easy to see misogyny in his ideas. What is interesting however is how he also highlights a number of *faḍīlahs* that women

²⁴² Keller, "What is the meaning of *qawwamuna* as used in Surat al-Nisa', verse 34?" <http://www.masud.co.uk/ISLAM/nuh/qawwamuna.htm>.

²⁴³ Thānawī, "Kasa' al-Nisa'," 281.

possess over men. He does not always use the same term for the virtues that he describes in women, but he does feel that women have an advantage in some areas where men do not. For example, he highlights the extreme selflessness and generosity that women possess, traits that can often help women to achieve high spiritual states.²⁴⁴ And he mentions their chastity in comparison to that of men, so that “while only one man in a hundred protects his chastity, only one woman in a hundred *does not*.”²⁴⁵ The sermon itself is a warning to men to not discourage women as they progress on the spiritual path. It also has long sections on the rights of women over their spouses, and on how men should positively interpret the softer and more emotion-based character of women, instead of holding them in contempt for it.²⁴⁶ It seems that the general thrust of the sermon is not so much a misogynistic aim of putting women “in their place,” but it is more an attempt to explain how Muslim women can still feel valued and see themselves to be dynamic participants in religious life in the face of the Western critique that decries the lack of any justice or balance in the Islamic view of women.

Thānawī’s teachings in this sermon are not simply a detailed set of apologetics. He of course is not saying anything revolutionary in his talk; he holds up gender differentiation as a concept that is intrinsic to the Islamic worldview, and is not ashamed to say that the *Sharī‘ah* does recognize differences in men and women, distinctive traits that help define each of their respective roles within society. At the same time, however, Thānawī is very open about the fact that gender differentiation is purely on the biological plane and concerns only those aspects of physical strength or rational outlook that he feels men and women have been naturally, through creation, been endowed. However, he

²⁴⁴ Ibid., 229.

²⁴⁵ Ibid., 228.

²⁴⁶ See, for example, *ibid.*, 276–78.

is adamant throughout this speech that this does not mean that women are in any way spiritually, religiously, or ontologically different from or inferior to men. In fact, Thānawi clarifies toward the end of his sermon that there are in fact three types of *faḍīlahs*: 1) those that are based on biological traits (*khalqiyyah*); 2) those that are acquired through one's own effort (*muktasab*); and 3) those that are granted by God's Will (*idāfiyyah*). Men may have been granted a biological advantage, but in terms of what good works any human being can perform, and what works will actually be accepted by God, in these two planes, men and women are perfectly equal. As far as these aspects are concerned, "men cannot be said to be superior in this regard, neither women. In fact, whoever strives more and works to acquire virtuous traits, he/she will be the one who will come out superior. If a man works for this, he will end up superior, and if a woman works for this, she will end up superior."²⁴⁷

As mentioned earlier, this sermon of Thānawi's is not necessarily calling for any type of major reform of women's rights, nor is it calling into question widely-accepted notions of patriarchal social control. Still, this sermon is striking perhaps only for one reason: that despite the fact that he subscribes to a very patriarchal view of Muslim society, he still manages to communicate a tenderness towards women, and a real concern for their religious and spiritual (and psycho-social) well-being. As one Islamic philosopher describes it, the crisis of the Muslim world lies in a lack of acting with wisdom, wisdom being defined as a profound understanding of the proper place of each element of society.²⁴⁸ Thānawi seems to subscribe to this view, and wishes to clarify for both men and women their proper place in the world, so that they can go about living

²⁴⁷ Ibid., 281.

²⁴⁸ See the work of Sayyid Naquib al-'Attas.

their social, spiritual, and religious lives without a profound sense of confusion and loss. His sensitivity to the frustration and confusion that Muslim women were experiencing in his time is obvious from the tone and content of his sermon. “God accepts even the most trivial work of those who are helpless and desperate and broken-hearted,” he says at the end of the sermon, “and he raises such people in spiritual rank.” “How strange it is that those women whom you think of as despicable because of their helplessness are actually in the eyes of God much more valued (*maqbul*) [than yourselves]. Therefore, I say that men must fear God in matters concerning their women, and women must obey their husbands and not be disrespectful towards them.”²⁴⁹ Thānawi’s call for women’s rights and for their good treatment may be tempered with/qualified by his admonitions for them to recognize the authority of their husbands, but he believes this must be the case so that the proper social balance can be achieved where each individual receives the rights they are due.

Women and Ethics in the Broader Conception of *Sharī‘ah*

Maulana Thānawi’s opinion on *pardah*, or the segregation of women from the sight of men, is well-known. The above-mentioned sermon has many references to its importance; *Bihishti Zewar* is replete with admonitions against those women who violate the dictates of *pardah*; and, in general, Deobandi works of reform directed toward women focus on this issue a great deal. Given this context, it is surprising to find an anecdote of Maulana Thānawi’s in which he gives his endorsement for the non-observance of *pardah*.

²⁴⁹ Thānawi, “Kasa’ al-Nisa’,” 296.

It is related in one of the biographies on Thānawi that a certain Babu Ḥabīb Aḥmad Ṣaḥīb Thānawi (also from the town of Thana Bhawan), had traveled to Europe for some business. While there he made acquaintance with a number of British men and women. He shared with them some ideas on the teachings of Islam, and soon found that a number of them expressed the desire to become Muslim. Some of the converts hailed from prominent British families. They began corresponding with Maulana Thānawi about religious matters, and soon a sort of disciple-spiritual guide relationship developed between him and them. At one point he received a letter from one of the men, on behalf of their group. The man wrote, “We have the desire to come to your presence, but we fear that our women are not used to the idea of *purdah*. They will not be regular in the practice of it, and perhaps you respected folks will become annoyed.” Taking their circumstances into consideration, Thānawi wrote back: “The covering of face and hands is not in itself obligatory. Rather it is commanded due to the fear of temptation (*fitnah*). Due to the respectful awe (*ru‘b*) your women inspire in the people here, it is hard to imagine them bringing about any arousing thoughts (*nafsāni khayāl*). Due to the absence of the legal cause [for *purdah*], permission may be given [for your women to not observe *purdah*].”²⁵⁰

Anyone familiar with Thānawi’s writings on *purdah* can only be shocked when reading his response to his British disciples. It almost seems beyond comprehension that the same person who constantly reprimands Indian Muslim women for their lapses on this issue, and who deems the root cause for a number of social ills to be the misobservance of *purdah*, could allow for relaxation of *purdah* rules. However, if viewed in

²⁵⁰ Majdhub, *Ashraf al-Sāwanih*, vol. 3, 234–35.

the light of the ethical-legal framework that informs Thānawi's work, and his broader conception of the *Sharī'ah* in general, his response is not surprising.

Within the legal works of the Islamic tradition, it is difficult to find a field of ethical discourse that is comparable to the notion of ethics in the Western philosophical tradition. There is treatment of the *maqāsid al-Sharī'ah*, or the broader goals of Islamic law, which aim to protect life, religion, intellect, property, and genealogy. As mentioned earlier in the chapter, there is also a diffuse understanding in legal texts of what is religiously entailed *diyānatan*, ethically, in contrast to that which can be quantifiable and therefore protected *qaḍā'an*, in court. Aside from this, much of ethical discourse appears in the form of religious sermons and Sufi teachings, in talks such as the one given by Thānawi to his male and female disciples, which make liberal use of citations from the Qur'an and Sunnah. Ethical norms are also highlighted and tweaked in the *fatāwa* of legal scholars, who take the particular situation of the *mufti* into account before giving their legal opinion on matters. There is a diffuse sense of morality and ethics that pervades Islamic thought, but discussion of the ethical nature of specific acts only comes about with respect to each specific issue and its context. It seems appropriate then to call the Islamic tradition "case-oriented" and "corporatist," an entity that, while looking at present circumstances, "does not see itself as severed from the ethical heritage of the premodern period."²⁵¹

Thānawi's work, when taken as a whole, is infused with a deep concern for women, and the ethical treatment of their religious, legal, and spiritual needs. There is a strong impetus within his work to adhere to tradition, and to tie his own legal and religious thought to the Islamic tradition's "ethical heritage." At the same time, he is

²⁵¹ Reinhart, "The Past in the Future of Islamic Ethics," 219.

cognizant of the need to look at his own contemporary situation with careful consideration. *Al-Ḥīla al-Nājiza* is a testament to the ethical awareness of Thānawi: in order for Islam to be preserved with dignity and relevancy, it was important to remain within the confines of tradition, while making sure that the broader *Sharī'ah* goals of justice and mercy are not forgotten, especially in the case of the women, who in his opinion were *be-bas*, helpless.

Thānawi is thoroughly “traditional” in his outlook on gender roles. Nevertheless, he is willing to engage creatively, within the framework of the tradition, with issues that are affecting women negatively. His ethical treatment of women’s issues lies in his willingness to treat each situation on a case-by-case basis in such a way as to maximize the true religious potential of any given legal ruling or spiritual teaching. True, he is not willing to question the accepted norms of man as provider and leader, and woman as submissive wife and steward of the private realm, and upholds these values in a way that seems informed both by his religious beliefs as well as his recognition of the social and cultural mores of North Indian Muslim culture. However, if we can move beyond liberal condemnation of such a worldview, we can find in his work a profound ethical sense of justice at work. Keeping in mind the case-by-case basis under which the Islamic tradition treats ethical issues, it is not surprising to see Thānawi’s seemingly contradictory views on particular matters: he will maintain that the woman’s role is defined by her management of the private realm of the home, but will also say that women can be leaders of parliamentary governments, a most public role; he will require Indian women to observe strict *pardah*, and deem this to be the divine decree on the matter, but will say

pardah is not necessary for British women, since their specific cultural reality cancels the original legal cause for the observance of *pardah*.

From the ideas and opinions of Thānawi that have been discussed in this chapter, it can be concluded that he employed a nuanced ethical treatment of gender issues. Often some of his statements, and statements of other scholars like him, are deemed “authoritarian” or misogynistic, such as those found in legal rulings discussion in Chapter III. But, as we can surmise from this chapter’s brief treatment of Thānawi’s work on women’s issues, his treatment of women, particularly in the non-legal realm, is often very consciously formulated to apply to a particular situation. As a subjugated, Muslim subject of colonial India, it is remarkable that Thānawi still managed to be able to engage with contemporary issues with a level of honesty and creativity, carefully balancing the need to bolster *‘ulamā* authority by not “selling out” to the new Western calls for women’s reform and by remaining committed to the broader Islamic legal tradition, but also simultaneously avoiding falling into reactionary apologetics. Thānawi’s sense of ethical engagement with women’s issues within the Islamic tradition sheds further light on why he was willing to openly state that British Muslim women do not need to observe *pardah*, that Muslim women could (if only theoretically) lead democratic governments, and that Muslim women should never feel spiritually or religiously threatened by the patriarchal control of men. And, particularly given the historical moment in which he was writing, it highlights the fact that there was more nuance to his aims in writing *al-Ḥīla al-Nājjiza* then solely a desire to reclaim the authority of the *‘ulamā*.

CONCLUSION

Understanding Sharī‘ah Application in Minority Muslim Contexts through the Lens of al-Ḥīla al-Nājiza

In many ways, *al-Ḥīla al-Nājiza* was a successful effort on the part of the ‘*ulamā* in rearticulating their exclusive claim to authority over the Islamic legal tradition.

Thānawī was able to skillfully engage in *ijtihād* on the issue of women’s access to divorce within the Ḥanafī *madhhab*. He took a new approach by adopting the concept of the *jamā‘at al-muslimīn*, and by utilizing the characteristically liberal Mālikī approach to divorce law, thereby opening the door to further expansion of the occasions on which a woman would be entitled to a divorce.

Thānawī could possibly have actively promoted other options. He could have opted to borrow from the Shāfi‘ī school for instance, which provides for an option similar to the Mālikī *jamā‘at al-muslimīn*.²⁵² In this way he would still have made a strong case for the continued legal involvement and authority of the ‘*ulamā*. However, taking this idea from the Shāfi‘īs instead of the Mālikīs would have made his borrowing of other Mālikī rulings (relating to when a woman is actually entitled to divorce) more difficult to make a case for, because then he would be appealing to not just one but two of the other legal schools. Going to the Mālikī school directly made for a much neater appeal to an authority outside the Ḥanafī school, an important precaution since in the ‘*ulamā* circles of

²⁵² The Shāfi‘īs have a concept called *wilayat al-‘ulamā*, in which “The ‘*ulamā* in each community were selected to act as judges who implemented Islamic law in cases in which the two parties were Muslim.” Khir, “Who Applies Islamic Law in Non-Muslim Countries?,” 1.

his time the act of abandoning *taqlīd* of one's own school was already so ideologically fraught.

Thānawi could also have made a campaign out of the earlier recommendation in *al-Ḥīla al-Nājiza*: simply delegate the right to *ṭalāq*, even conditionally, to the woman, and the problem will be solved. But doing this would not have met his broader goal of bolstering the authority of the *'ulamā*. Instead, he decided to make the main thrust of his legal effort the establishment of legal councils that were formed of *'ulamā* or else dependent on consultation with the *'ulamā*. Thus a way was found for a more just legal treatment of Indian Muslim women's predicament, one that simultaneously brought the *'ulamā* back to the center of legal decision-making in an important way.

Thānawi's work on *al-Ḥīla al-Nājiza* served to articulate in a powerful way the ongoing relevance and legal authority of the *'ulamā*. With numerous parties jostling for the position of spokesman for the Muslim community, Thānawi's demonstration of legal acumen and high scholarship served to strengthen the idea that it was the *'ulamā* alone who could best interpret and promote the *Sharī'ah*. Taking ownership of the "woman question" was itself a major step; his undeniable concern for women's well-being notwithstanding, Thānawi's proactive move with regards to women's right to divorce reinforced the idea that the *'ulamā* could and would take charge of the important issues threatening the religious and spiritual well-being of the Indian Muslims.

Aside from the strong claims to authority made by the very publication of the text, Thānawi's careful efforts in *al-Ḥīla al-Nājiza* also had far-reaching on-the-ground effects. The first concrete result came in the form of the Dissolution of Muslim Marriages Act of 1939 (DMMA). Initially Thānawi's work did not have any legal weight in the

British courts; even four years after *al-Ḥīla al-Nājiza* was written, a woman still was able to win a divorce based on apostasy, even though Thānawi's work had been cited in the case by the opposing party. The *Jam 'iyyat al-'ulamā al-Hind*, a broad umbrella organization of Indian 'ulamā formed at the end of World War I to defend against the breakup of Ottoman lands,²⁵³ took up the issue and began an organized effort to promote Thānawi's approach. Qāḍī Muḥammad Aḥmad Kāzimi led the committee that worked on this issue, bringing together an ideologically-diverse set of Muslims such as the British-trained Bohri-Shī'ī lawyer Asaf A.A. Fyzee.²⁵⁴ The committee eventually submitted a proposal that asked the British to appoint Muslim judges to handle divorce cases, to halt the use of the apostasy stratagem as advised at the end of *al-Ḥīla al-Nājiza* by no longer considering it a valid application of Ḥanafī law, and to increase the types of situations in which women could be afforded the option of divorce. The proposal eventually took the form of the Dissolution of Muslim Marriages Act. All of the recommendations were adopted by the British courts via this Act, except for perhaps the main one: that of the appointment of Muslim judges (see below for further discussion on this issue).

Interestingly, already in 1939, only eight years after the composition of *al-Ḥīla al-Nājiza*, the DMMA expanded the number of situations where a woman would be entitled to divorce far beyond what Thānawi had ever recommended. Not only were women entitled to a *faskh* in the case of the husband's impotence, financial negligence, or prolonged absence, for example, but they were also allowed to petition for *faskh* in cases such as when the husband "habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment;" or he

²⁵³ Zaman, *The Ulama in Contemporary Islam*, 32.

²⁵⁴ Minault, "Women, Legal Reform and Muslim Identity in South Asia," 8.

“associates with women of evil repute or leads an infamous life;” or, in the case that “he has more wives than one, [he] does not treat her equitably in accordance with the injunctions of the Qur’an.”²⁵⁵ All of these provisions could be justified under Māliki law (though a few of the provisions in the DMMA seem not to conform to the law of any *madhhab*²⁵⁶), and they show how far Thānawī’s efforts to use Māliki rulings were taken, even at such an early date.

Indian *‘ulamā* have continued on this path and have basically adopted the provisions of the Māliki school as their own. Along with the rulings in *al-Ḥīla al-Nājiza*, other Māliki allowances are now readily promoted by Indian Ḥanafī scholars, such as in the case of physical or emotional abuse, something that Thānawī never even touched upon in his own text. This is a testament to the fact that Thānawī’s work was truly an example of *ijtihād fil-masā’il*, as his reworking of the issue and his adoption of Māliki precepts has basically become the Ḥanafī opinion on the matter, at least when it comes to Indian Ḥanafī *‘ulamā* (Ḥanafīs of the Arab lands by and large continue to cite traditional Ḥanafī opinions on these issues). Legal councils established at Deoband and in other institutions implement Thānawī’s use of the *jamā‘at al-muslimīn* in order to replace the authority of the secular courts in matters of personal law, though they are resorted to on a voluntary basis, since the Indian government to this day has rejected every proposal to establish a separate jurisdiction for Muslim personal law cases.²⁵⁷

²⁵⁵ Masud, *Iqbal’s Reconstruction of Ijtihād*. 172-3.

²⁵⁶ One example is the following: “that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years, provided that the marriage had not been consummated” (ibid.). The legal schools specify puberty as the cut off date, and make no mention of age fifteen or eighteen.

²⁵⁷ Raḥmānī, Khālīd Saifullah. “*Hindustan awr nizām-i qaḍa*,” 137-42. Later in the article, Rahmani mentions the presence of “*dār al-qaḍas*” (also known as “Imārat-i Shari‘at, as mentioned in Chapter I) in the provinces of Bihar and Orissa, but these *Sharī‘ah* courts do not have the backing of the provincial government, and instead operate on an extra-judicial basis. Rahmani says that these courts ably compete

One interesting example of how *al-Hīla al-Nājiza* has been received in postcolonial India can be seen in the work of the All India Muslim Personal Law Board (AIMPLB).²⁵⁸ This organization was formed in 1973, in response to the proposed “Adoption Bill” that threatened to violate communal sensitivities (since it would have allowed orphans to be adopted by families regardless of either party’s religious affiliation). According to the AIMPLB’s website, “Ulema, leaders and various Muslim organisations successfully convinced the Indian Muslim community that the risk of losing applicability of *Shari‘ah* laws was real and concerted move by the community was needed to defeat the conspiracy.”²⁵⁹ The Board’s first president was Qāri Muḥammad Ṭayyib, then principal of the Deoband madrasa and “one of Thānawi’s most prominent ‘spiritual successors’”.²⁶⁰ Though similar organizations have been formed by other sectarian groups such as the Barelwis and the Shi‘a in competition with this Deobandi personal law board, the professed aim of the AIMPLB has been to promote a centralized ‘*ulamā* authority that will be seen as the primary source to be consulted about the religious and legal affairs of Indian Muslims. The AIMPLB has published numerous tracts dealing with contemporary fiqh issues, such as those concerning family law and economic practices.

The AIMPLB has handled divorce cases and has convened its own “dar al-qadas” or *Shari‘ah* “courts” in order to give legal verdicts in cases of woman-initiated divorce.

While its use of such extra-judicial entities to adjudicate cases of faskh, and even the very

with the secular courts of the region in terms of Muslim utilization, and they have already passed decisions on “ten thousand cases” (143).

²⁵⁸ Other competing “Muslim Personal Law Boards” exist in India alongside this one, such as one for Barelwis and one for the Shi‘a. The AIMPLB mentioned here is probably the most prominent. It is considered a “Deobandi” organization.

²⁵⁹ <http://www.aimplboard.org/introduction.html>

²⁶⁰ Zaman, *Ashraf ‘Ali Thānawi*, 106.

fact that they act as a composite board and not simply on the authority of a single scholar, are both aspects of the Board that directly follow the precedent set by Thānawi in his collaborative work on *al-Ḥīla al-Nājiza*, some present-day members of the AIMPLB call into question Thānawi's efforts, and in fact refute his recommendations altogether.

Maulana Khālid Saifullah Raḥmāni, head of the Dār al-'Ulūm Sabīl al-Salām madrasa in Hyderabad and member of the AIMPLB's Committee on Darul Qaza, sees the spearheading of efforts toward extra-judicial adjudication within India as a product of the efforts of a different line of Deobandi scholars.²⁶¹ According to Raḥmāni, individuals like Sayyid Aḥmad Shahīd (d. 1831), Ḥāji Imdād Allāh Makki (d. 1899, the Sufi mentor of a number of the founders and prominent scholars of Deoband, including Thānawi), and Rashīd Aḥmad Gangohi (d. 1905) were the ones who had begun the real work toward the establishment of "*qaḍa*" in colonial India. According to him, they had called not for informal councils like the *jamā'at al-muslimīn*, but for the establishment of actual *Sharī'ah* courts that would run parallel to (and remain unconnected with) the secular governmental courts. Raḥmāni believes that the most important work in this regard was done by Abul Maḥāsīn Muḥammad Sajjād, whose efforts to set up *Sharī'ah* courts were discussed in Chapter I. The *Imarāt-i Sharī'at* set up by Sajjād are still functioning today in Bihar, and apparently continue to have a strong influence over Bihari Muslims.²⁶² Raḥmāni feels that it is these types of centralized *dār al-qaḍas* that are the only way to affect a real application of the *Sharī'ah* within present-day India.

²⁶¹ This discussion is based on the following article: Raḥmāni. "*Hindustan awr niẓām-i qaḍa*," 137-42.

²⁶² Ghosh, "*Muttahidah qawmiyat in aqalliat Bihar*," 4.

In Raḥmāni’s opinion, Maulana Thānawi’s entire idea of promoting informally constituted councils was off the mark.²⁶³ In a surprising reinterpretation of both Ḥanafī and Mālīki legal texts, Raḥmāni says that while *qāḍīs* are needed for the adjudication of certain matters such as woman-initiated divorce, the role of *qāḍī* is not contingent on governmental sanction or the power of “*tanfīdh*” or enforcement of the legal rulings. The job of the *qāḍī* is only to give the legal ruling, not to make sure that this ruling gets enforced. What this ultimately translates to is the idea that the Muslims of any given region must take the initiative to establish centralized courts, or *dār al-qaḍas*, which will act as the Islamic judicial body of the land. Given this view, Raḥmāni says that Thānawi’s work was basically unnecessary: Thānawi should not have promoted a decentralized and potentially haphazard use of *jamā‘at al-muslimīn*. Instead, he should have worked to reestablish Muslim *qāḍīs* in colonial India, with or without the backing of the colonial officials, as Maulana Sajjād had done in Bihar.

Raḥmāni’s ideas are not surprising given the broader agenda of the AIMPLB. One of the board’s main goals is to promote a single legal body to which the Muslims of India

²⁶³ One of the Ḥanafī “proofs” Raḥmāni cites for the ability to set up *dār al-qaḍas* is the following statement from a Ḥanafī text that would have been available to Thānawi and his colleagues: “When there is no *sulṭān* or authorized acting person in his place, as it is the case now in some Muslim lands, such as Cordoba, Valencia and Abyssinia where the reigns of power are now in the hands of non-Muslims, the Muslims, who have resided there under a pact to pay a tax, are responsible to choose a person to lead them. The chosen person is to carry out the responsibility of a governor (*wālī*). He should either act as a judge or appoint another person to be a judge in order to settle the legal disputes among the Muslims.” As cited in Khir, “Who Applies Islamic Law in Non-Muslim Countries?,” 83-4. The text he cites from, *al-Faṭḥ al-Qadīr*, was written by the Egyptian ibn al-Humam (d. 861/1456), a major Ḥanafī authority. Neither Thānawi nor any of the top *muftīs* of his day mention this citation of ibn al-Humam’s text, and all were in agreement, as we have seen, to adopt the permission (*rukḥṣa*) from the Mālīkis for the *jamā‘at al-muslimīn* as a way to have their legal disputes resolved under non-Muslim, British rule. The likely reason for why none of the scholars of Thānawi’s generation brought up this rule back in 1931 is that ibn al-Humam’s statement is a fatwa, a personal legal opinion of his own, and not one that has any basis in the earlier rulings of the Ḥanafī school. It is not an opinion that has been mass-transmitted as a Ḥanafī *ḥukm*. According to Ḥanafī *uṣūl*, it is not permissible to pass a fatwa on the basis of another mere fatwa; it must have a stronger basis to support its rationale. Ibn al-Humam could have been basing his own fatwa on a *ḥukm* from the Shāfi‘ī school, very much in the same way that Thānawi built his own case for such a fatwa in *al-Hīla al-Nājjiza*.

should collectively look to for their religious/legal needs. Raḥmāni is basically differentiating his own work from Thānawi's on a technicality, since despite the terminology used (“*dār al-qaḍa*”, “*panchāyat*”, or “*jamā‘at al-muslimīn*”) the structures being discussed by both of them are essentially the same. The only difference is that Thānawi did not take the *ijtihādi* leap of calling the work of these informal councils “*qaḍa*”, nor did he block the possibility of locally organized councils in the case where a more centralized, “all-India” type of organization could not be formed.

As we have seen from the work of Thānawi, Sajjād, and even the current AIMPLB, the one goal of *al-Ḥīla al-Nājiza* that has consistently failed to be met is the establishment of Muslim judges in India. This had been Thānawi's first and foremost recommendation in *al-Ḥīla al-Nājiza*. Before even mentioning the options of *tafwīḍ al-talāq* and the detailed divorce rulings, Thānawi reiterated once again, as he had been doing so for decades in previous *fatāwa*, the need for reinstatement of Muslim judges in every district and town. The fact that he mentions this goal only in the introduction, and also the fact that the rest of the text basically supports efforts to completely circumvent the need for the secular Indian courts, thereby reducing the urgency for appointing Muslim judges, show that he does not have any expectation of such judicial positions to be granted to Muslims, at least not in the near future. However, he still holds out hope in 1933 that some day such a compromise could be reached within the secular court system of India.

It seems that his false hopes rested perhaps on a fundamental misunderstanding of the very function of the nation-state. It is in fact the formation of the nation-state that has most seriously disrupted the practice of Islamic Law as it had been envisioned and

practiced in the pre-modern period. While the authority of the *qāḍīs* in the pre-modern period was derivative, in that it was upheld through the support and authorization of the state, Muslim jurists had carved out enough space that their decision-making process took place independent of the dictates of the governing body. In the present day, however, legal authority is the exclusive right of the state. In the current situation that is dominated by liberal calls for equal and consistent application of the law, Muslim requests for a separate legal sphere backed up by the state (even if only by way of recognition of the *dār al-qaḍas*' decisions) will continue to fall on deaf ears in the secular Indian government, and will perhaps even continue to exacerbate suspicions on the part of fellow non-Muslim Indians as to the true loyalty of present-day Muslim citizens of India.

Pakistani *'ulamā* continue to carry on Thānawi's hopeful outlook on the marriage of *Sharī'ah* and judicial law in the modern nation-state. They in fact have no qualms about codification, an undertaking seemingly antithetical to pre-modern formulations of Islamic Law as an "ongoing, discursive tradition," and by accepting codification they seem to be taking a "pragmatic" approach to the application of *Sharī'ah* in a nation such as Pakistan.²⁶⁴ Unfortunately for them, however, Pakistani *'ulamā* do not pose a check on the state as Muslim jurists did in the pre-modern period. They cannot occupy the position of "go-betweens" between the state and the Muslim populace that they wish to obtain. Instead, given the Pakistani state's full jurisdiction over the application and enforcement of the law, the *'ulamā*'s calls for the implementation of *Sharī'ah* are simply seen as a thorn in the side of Pakistan's secular governmental institutions.

Interestingly, an unexpected use of the recommendations in *al-Ḥīla al-Nājiza* can be seen in minority Muslim communities in the Western world. In the UK and the US,

²⁶⁴ Zaman. *Ashraf 'Ali Thānawi*, 116.

Deobandi *Sharī'ah* councils have been in existence already for some decades. The situation of the Muslims in these countries is very similar to that of the Muslims in Thānawi's time: they are a minority Muslim population living under the rule of a non-Muslim state, and therefore must find alternative means of applying the *Sharī'ah* rulings that require Muslim *qāḍīs*. A majority of British Muslims are South Asian and therefore Ḥanafī, and so many of them directly benefit from the process started by Thānawi in *al-Ḥīla al-Nājiza*.²⁶⁵ One well-known UK-based Deobandi mufti has an internet fatwa that reflects much of the spirit of *al-Ḥīla al-Nājiza*. In it he states that a woman has various options for *tafwīḍ al-ṭalāq* that she can avail herself of, in order to avoid the problem of having no Islamic courts to adjudicate her case. He then states a version of Thānawi's use of the Māliki *jamā'at*:

- 1) The following are the grounds on which the wife may seek a divorce from her husband [despite his refusal] at a court of an Islamic country or in the absence of an Islamic Court (as in western countries) from a committee of a few religious people that consists of at least one scholar of Islamic law:
 - a) Inability or refusal of the husband to financially support his wife (even if she happens to be rich, it is still the full responsibility of the husband to maintain her).
 - b) Abuse and mistreatment of the wife (which includes beating and swearing, cursing and attempting to force her to do wrong).
 - c) Impotence or any other illness that prevents the husband from fulfilling the wife's sexual needs (in recognition of the wife's legitimate instinctive needs).
 - d) Incurable, repulsive disease in the husband like leprosy (or aids according to the contemporary scholars).
 - e) Insanity in the husband
 - f) Extended absence or desertion of the husband
 - g) The husband deceiving and concealing information regarding himself at the time of marriage
 - h) The relationship becoming severely damaged in that there is a lot of hatred between the spouses and it is impossible for them to live a peaceful life

²⁶⁵ Not all South Asian Muslims of course abide by Thānawi's recommendations. Many of them resort to the secular courts instead of seeking out a resolution that conforms to the *Sharī'ah*. The Barelwis, an oppositional traditionalist group to the Deobandi approach, may promote adherence to the *Sharī'ah*, but they continue to abide by strict Ḥanafī law, and the only recourse for their women to obtain a divorce is to have community leaders place pressure on their husbands to grant a *ṭalāq* or *khul'*. (I am grateful for the latter point to Qazi Biabani of Chicago, personal conversation, March 22, 2008.)

We see in the formulation of this fatwa that legal opinion among contemporary British Deobandi scholars has continued to evolve since Thānawi's time. Like their Indian brethren, they too have taken more liberally from the Māliki positions on these issues, going beyond simply a use of the Māliki *jamā'at* structure to apply essentially Ḥanafī rulings on divorce, as Thānawi had done. The same situation exists in the United States, where one representative of the Deobandi *Sharī'ah* council in California's San Francisco Bay Area stated that in all of his years observing and serving on the decision-making body of this council, not a single woman's petition for divorce had ever been turned down. The procedural checks in place to meet the Māliki requirements may end up prolonging the process, but eventually the women are able to obtain the divorce that they desire.²⁶⁶

Still, even in these settings, the same issue continues to exist. There are no Muslim judges that can apply Islamic Law, and therefore the Muslims in these countries possess no ability to enforce the laws they deem to be sacred. As minority Muslims in a non-Muslim majority nation, their pleas for *Sharī'ah*-based courts of arbitration are met with hostility and resistance, since in this minority situation their desire for a separate legal authority calls into question their very allegiance to the state.

The recent controversy surrounding the Archbishop of Canterbury, Dr. Rowan Williams, illustrates this problem well. In his lecture on February 7, 2008 that he delivered before the Royal Courts of Justice, the Archbishop laid out a sophisticated argument in favor of legal pluralism.²⁶⁷ He argued his case with specific reference to the application of the *Sharī'ah* within the British legal system, but mentioned how other

²⁶⁶ Interview with Imam Tahir Anwar, San Jose, CA, February 16, 2007.

²⁶⁷ The text of the Archbishop of Canterbury's lecture can be found at: <http://www.archbishopofcanterbury.org/1575>

groups aside from the Muslims would benefit from such an accommodation, including orthodox Jews. Dr. Williams' arguments are worthy of some consideration here, as they offer the best case for why a nation-state such as the UK, or even that of India, might be better off providing some enforceable authority to the interpreters of the *Sharī'ah* for the Muslim communities of these respective countries.

In his highly insightful and well-thought out lecture, the Archbishop lists three major objections to legal pluralism and the allowance of *Sharī'ah* courts in the UK. The first objection highlights the difficulty in knowing when an exemption from state law is really being procured due to religious issues, or if it is simply being requested based on cultural biases or ignorance. Recent controversies in the UK concerning Muslims are given as examples: a woman refused to handle a book of Bible stories at her place of work; many Muslim advocates of "forced marriages" claim such marriages to be a religious right and duty, when in fact such marriages occur on the basis of cultural practice. Such "vexatious appeals to religious scruple" may be troublesome to deal with in the legal realm if pluralism was allowed for, because it could open up a dangerous level of indeterminacy in the application of the law. According to the Archbishop, it would be up to recognized bodies of religious scholars, such as the "Islamic Sharī'ah Council" in the UK, to help weed out the real issues from the nonessential ones.

The second objection is a very serious one, in which opponents of pluralistic application of the law worry about the oppressive elements contained within each religious tradition that is given some level of judicial authority. How can one concerned with the fair and just application of the law allow for such things as decreased inheritance shares for women, or at the most extreme end, the punishments for apostasy? Here the

Archbishop's answer is based on his argument that in a legal system that truly recognizes the right to practice one's religion, enough space should be given so that "groups of serious and profound conviction are not systematically faced with the stark alternatives of cultural loyalty or state loyalty." If they are allowed the space to choose between one way of adjudicating their affairs over another, both legal bodies will be compelled to "compete" for the loyalty of the individual, thereby giving her a real choice as to how she would like to live as a citizen *and* a member of her faith tradition. And if one were to ask how the universally available legal rights of any individual could be allowed to be violated (say in the case of one who opts for application of religious law and receives less inheritance or more restricted right to divorce), he answers that as long as adherence to the non-secular legal system is purely done on a voluntary basis, "clearly the refusal of a religious believer to act upon the legal recognition of a right is not, given the plural character of society, a denial to anyone inside or outside the community of access to that right."

The third and final objection reaches to the very heart of the theoretical problem: how is it possible, in the context of the nation state, to even allow for a system that favours legal pluralism? "So much of our thinking in the modern world, dominated by European assumptions about universal rights, rests, surely, on the basis that the law is the law; that everyone stands before the public tribunal on exactly equal terms, so that recognition of corporate identities or, more seriously, of supplementary jurisdictions is simply incoherent if we want to preserve the great political and social advances of Western legality." This observation directly addresses why it is so hard for British lawmakers and citizens, and in our case above, the colonial and now Indian legal

authorities (who have inherited the legal system of their colonizers), cannot fathom the enforceable application of Islamic Law within their borders. “The great protest of the Enlightenment was against authority that appealed only to tradition and refused to justify itself by other criteria”—how then could the inheritors of the Enlightenment ever allow for a regression back to these very appeals to religious tradition?

To this objection the Archbishop offers a subtle yet compelling response:

...it is not enough to say that citizenship as an abstract form of equal access and equal accountability is either the basis or the entirety of social identity and personal motivation...Societies that are in fact ethnically, culturally and religiously diverse are societies in which identity is formed, as we have noted by different modes and contexts of belonging, 'multiple affiliation'. The danger is in acting as if the authority that managed the abstract level of equal citizenship represented a sovereign order which then *allowed* other levels to exist. But if the reality of society is plural – as many political theorists have pointed out – this is a damagingly inadequate account of common life, in which certain kinds of affiliation are marginalised or privatised to the extent that what is produced is a ghettoised pattern of social life, in which particular sorts of interest and of reasoning are tolerated as private matters but never granted legitimacy in public as part of a continuing debate about shared goods and priorities.

According to the Archbishop, disallowing the existence of a pluralistic approach to law, in which one’s religious convictions can never be honoured or upheld in the public sphere, is a way to deny the basic human dignity of the individual, and to force him into uncomfortable positions on his own identity vis-à-vis the state as well as his religion.

The cultural and political price of such a denial of legal authority in the realm of application of *Shari‘ah* by Muslim minorities in India and the UK is slowly becoming apparent. Many Muslims in these countries are not concerned with the dictates of the *Shari‘ah*, and are content with resorting to the secular law of the lands in which they reside. However, a good number of Muslims are committed to their faith in ways such that denial of access to a *Shari‘ah*-based legal process is profoundly disturbing to their

very sense of citizenship. Thānawi probably never envisioned such an argument for why Muslim *qāda* should be allowed in colonial India—according to the Archbishop’s ideas, had some level of judicial authority been allowed to the Muslims of India, they may have become *more* and not less comfortable with their identities as citizens of colonial India. This argument may be one that could be useful if promoted by advocates of Muslim judicial authority in India and the UK. Given the perception of Indian and British citizens that Muslim attachment to *Sharī‘ah* is a sign of their disloyalty to the state, advocating the right to governmentally-sanctioned *Sharī‘ah* courts as a way to become *better, more loyal* citizens may be a way to quell fellow non-Muslim citizens’ fears.

Still, there are other major challenges that minority Muslim populations will have to consider if they desire a place for Islamic Law within their respective judicial systems. The first relates to the Archbishop’s reference to the “Islamic *Sharī‘ah* Council” above. According to him, the way to weed out “vexatious appeals to religious scruple” from “actual” Islamic Law is to have British authorities use the expertise of a centralized Muslim body in the UK. The *Sharī‘ah* council he references, however, is a Salafi one, whose ideological stances do not sit well at all with Deobandi South Asians in the UK, nor do they match the ideas of numerous other British Muslim groups. Whose “*Sharī‘ah*” exactly must the British government favour when looking to resolve such vexatious ambiguities? Muslim religious scholars in the UK, as in India, are themselves not agreed on what “Law” should be followed; how can they then expect a secular or non-Muslim government to know the proper procedure of applying *Sharī‘ah* in these contexts?

Secondly, advocates of *Sharī‘ah* application in minority Muslim situations must also be aware of the particular needs of “minority” populations within their own midst:

how will the racial, class and gender needs of the Muslim community be addressed by the *'ulamā* if the opportunity to apply Islamic Law will actually be granted to them by their non-Muslim governments? Specifically in regards to gender, the *'ulamā* must recognize that even if some observant Muslim women would like to commit to *Sharī'ah* rules out of pietistic feeling, they simply do not feel safe having their affairs being adjudicated by *Sharī'ah* law as interpreted by many scholars. If apostasy had only been a *hila*, a legal device or stratagem used by the women in colonial India to deal with the difficulties they faced when trying to abide by the *Sharī'ah*, in the UK and US the abandonment of Islam (or at least, more traditionalist interpretations of Islam) may end up being a permanent option used to assuage the psychological dissonance Muslim women face when trying to balance their dual identities as Muslims and as citizens of Western nations. I would argue, in light of Thānawi's ideas on gender and the way he addressed the concerns of women, that he was aware of this crucial fact even as far back as 1933. Thānawi's text *al-Ḥīla al-Nājiza* has left an important legacy for minority Muslim populations to consider, and to rework as circumstance requires, in order to find the best way for them to reconcile their dual identities as faithful Muslims and citizens of non-Muslim nation-states.

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