

The Consent of Husband for Khul' in Islamic Law and Pakistani Legal System: A Comparative Study with Specific Reference to Case Law

Dr. Hafiz Siddique¹

1. Assistant Professor, Faculty of Shari'ah & Law, International Islamic University Islamabad.

Email: hafiz.siddique@iiu.edu.pk.

Received: Aug 21, 2022 | Revised: Dec 07, 2022 | Accepted: Dec 21, 2022 | Available Online: Jan 11, 2023

ABSTRACT

The issue of the husband's consent for khul' is debatable among classical and contemporary Muslim jurists. The judiciary of Pakistan has played its role to decide the controversy between husband and wife in the cases of khul'. It is evident in Islamic law that a husband can dissolve the marriage and divorce his wife by denoting the word talaq. There is no need for justification of divorce from the husband neither in Islamic law nor the Pakistani legal system. But the female initiative divorce is debatable and depends on the consent of the husband to some Muslim jurists while others oppose this view. The Pakistani judiciary is also not on the same page, various judgments and different interpretations by the judges. In Pakistani law, The Dissolution of Muslim Marriage Act 1939 in its section 2 mentions certain justified reasons for the dissolution of marriage by a woman but it's not easy to justify the reason in a court of law. This paper tries to find whether the consent of the husband is mandatory in khul' case or not. It denotes the opinions of classical and contemporary Muslim jurists. This research examines the grounds for the dissolution of marriage in Islamic law and the Pakistani legal system. The role of the Pakistani judiciary will be investigated and compared with the principles of Islamic law regarding the consent of the husband in khul'. This research concludes that the husband's approval and consent is neither required in Islamic law nor in the Pakistani legal system.

Keywords: Khul', Divorce, Family Law, Woman's Right, Islam, Judiciary, Pakistan.

Funding: This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

Correspondence Author: hafiz.siddique@iiu.edu.pk

1.1 Introduction

In Shariah, the primary purpose of marriage is to live in peace and harmony the whole life. The marriage bond is considered as a strong bond, and it is ever till worldly life. The Qur'an explicitly denotes the objective of marriage as love and mercy. It means, the relationship of husband and wife begins with mutual love and respect in their marital life. The core and main purpose of Muslim marriage is for the couple to live

together happily and continue their relationship. Islam dislikes ending the marriage bond without any valid and justifiable reason. Shariah encourages to the utilization of all arbitrations and mediations to resolve the disputes between husband and wife for the continuation of marriage. But permits in a situation where reconciliation has become impossible. A husband is given the right to divorce but a woman can initiate divorce as *khul'*. The literal meaning of *khul'* is "to take out or remove and put off something you have on you or to get rid of it."¹ In *fiqh*, it is defined as "eliminating the right to Nikah or marriage that is conditioned by the wife's consent after she pronounces the word *khul'* or anything of the same meaning."²

Islamic law guides us that terminating the marriage directly is not a solution in the true spirit of shariah. But it teaches us how to deal with the situations between husband and wife in case of controversies as the Qur'an directs that if a wife is disobedient then how to deal with the situation gradually as Allah states:

*"As for women of whom you fear rebellion, convince them, and leave them apart in beds, and beat them. Then, if they obey you, do not seek a way against them. Surely, Allah is the Highest, the Greatest."*³

With reference to this verse, Ibn Kathīr states:

*"When the husband notices that his wife starts to show some signs of disloyalty and hatred, he has to advise her and remind her of the punishment she may get from God in disobeying her husband. If this means of persuading her does not work, he should desert her in bed by turning his back to her when they are in bed together, and he should not make love to her, as this may be a severe punishment to her. If she still did not positively respond, he may beat her lightly, but when he beats her, he should make sure that she is not seriously hurt, so he should not cause fractures or serious injuries."*⁴

In this regard Al-Tabarī comments:

"Her husband should advise and warn her, if she did not accept, he should desert her, if she did not accept again, he should beat her, yet if she did not accept, he should leave it to the judge who will

¹ Ibrahim Mustafa, Ahmad Hassan Al-Ziyat, Hamid Abul Qadir, Muhammad Ali Al-Najar, *Al-Mu'jam Al-Wasit*, (Istanbul: Al-Maktabah Al-Islamiyyah, Turki, 2nd Edition), Root Word: *Khula'* (خ ل ج).

² Ibn 'Abidin, Muhammad Amin Ibn Umar, *Radd al-Muhtar 'ala al-Durr al-Mukhtar*, (Hshiyah Ibn 'Abidin), (Beirut: Dar Al-Fikr, 2nd Edition, 1992), vol. 3, pp. 439-441.

³ The Holy Qur'an, 4:34

⁴ Ibn Kathīr, *Tafsir Al-Qur'an al-'Azīm*, 1: 643.

send one arbitrator from each side (husband & wife). The arbitrator representing her counts the bad things that the husband did to his wife, and the arbitrator representing the husband, on the other hand, counts the bad things that the wife did to her husband. In other words, each arbitrator tries to make a point. Then, the judge will stop the husband if he finds him unjust with his wife and make him retreat from his wrongdoing, and if the judge finds the wife to be guilty of disobeying her husband, he will ask him to grant her Khul‘.’¹

The above discussion indicates that the husband has to deal with a wife in a way that their marital bond goes longer. If all these steps do not work, then he has a right to divorce. But if a wife has some serious concerns about her husband and she has reached the stage where no return then she can request the husband for the ending the marriage. The best way is to resolve the issue by mutual understanding as a divorce by the husband or *khul‘* by accepting the ransom of the amount given by the husband as a dower at the time of the marriage contract.

In Pakistan, the situation of a woman is not the same before or after partition with specific reference to *khul‘*. Islamic law was strictly interpreted by Muslim jurists with reference to the consent of the husband and the Pakistani judiciary also applied the strict interpretation of Hanafī law till 1959 when the case of *Balqis Fatima v. Najm-ul-Ikram Qureshi* was decided and the husband’s approval was not considered as mandatory in *khul‘*. This paper consists of two parts: Islamic law and the consent of the husband; secondly, the husband’s consent in the Pakistani legal system.

1.2 Islamic Law and Consent of Husband

In Islamic law, the issue of the husband’s consent is dealt with by the Muslim jurists into two groups. The first view is that it is recommended for the husband to accept the amount and grant *khul‘* to the wife but he is not forced to give consent as stated by Ibn Muflih that *khul‘* is permitted in a situation when there is no possibility for the husband and wife to live together as a couple, and it is preferred for the husband to accept dower and grant *khul‘*.² Ibn Hajar Al-‘Asqalānī and Al-Tabarī,³ joined the first group. They argued on the basis of a hadith of Thābit Ibn Qais in which the Holy Prophet (Peace Be Upon Him) commanded to Thābit Ibn Qais “take back the garden and divorce her once.”⁴ Their argument is that in this hadith, the commandment from

¹Al-Tabarī, *Jami‘ al-Bayān fi Ta’wil al-Qur’ān*, 8: 319.

² Ibn Muflih, Shams Al-Dīn, *Kitāb al-Furū‘*, 5: 343.

³Ibn Hajar Al-‘Asqalānī, *Fath al-Bari*, 9: 312. See also Al-Tabarī, Muhammad, *Jami‘ al-Bayān fi Ta’wil al-Qur’ān*, 4: 580.

⁴ Al-Nasa’i, *Al-Sunan*, Kitāb Al-Talaq, Bab Ma jaa fi Al-Khul‘.

the Holy Prophet (Peace Be Upon Him) is optional in accepting the garden and granting *khul'* and it is not decisive as obligatory.¹

The second group is of the view that the “take back the garden and divorce her once”² commandment is a commission of the act in a decisive manner and there is no option in it so, it has become obligatory for Thabit Bin Qais to accept the dower (garden) and grant *khul'* to the wife. This is the opinion of Imām Ibn Taimiyyah and Imām Al-Shawkānī³ who supported their argument on the basis of the same hadith that words, *Aqbil* (accept the garden) and *Talliḡha* (grant her *khul'*) explicitly indicate that a husband has to accept the dower and grant *khul'* to wife.⁴

To me, the second opinion is preferred due to the strong arguments, and the principle of Islamic jurisprudence strengthens my point of view that *Sighah -al-Amr* requires obligation and the words *Aqbil* (accept the garden) and *Talliḡha* (grant her *khul'*) are clearly mentioned in *Amr* form and they demanded obligation. Rationally, if we think that a husband can dissolve the marriage with or without any justification. In our societies, divorce is considered immorality and sin. Women try to stay in their marital life until their life becomes miserable except few exceptions. The woman has to live her life and the right to *khul'* is to be granted to her. How can anyone be forced to live a distressed life, so, the husband is to accept the dower and grant *khul'* to a wife? This is the true spirit of Islamic law and it is to be applied in our practices. The Qur'an evidently forbids us to mistreat or force wife to live with husband as Allah states:

*“Then either (husband or wife) to retain in all fairness, or to release nicely.”*⁵

This verse teaches us how to behave with the wives, they must be treated nicely in their marital lives, and if living together is not possible then release them nicely. How can we act upon the teaching of this verse if forcing a wife to spend a dismal life? This would be an obvious violation of the teaching of the Qur'an.

If a wife is not happy to live with a husband and ready to pay the dower to get rid of her husband and he is not accepting the amount of dower to release her. Then a wife can go to a court of law for the degree of *khul'*. The existing general trend in the courts

¹ Al-Nasa'i, *Al-Sunan*, Kitāb Al-Talaq, Bab Ma jaa fi Al-Khul'.

² Al-Nasa'i, *Al-Sunan*, Kitāb Al-Talaq, Bab Ma jaa fi Al-Khul'.

³ Al-Shawkānī, Muhammad, *Nayl al- Awtār*, (Beirut: Dār Al- Kutub Al- 'Ilmiyyah, 1999), 6: 261.

⁴ Al-Nasa'i, *Al-Sunan*, Kitāb Al-Talaq, Bab Ma jaa fi Al-Khul'.

⁵ The Holy Qur'an, 2:229

is that the judges are favouring the women and granting them relief in the shape of *khul‘*.¹

Before partition and even after that till Bilqis Fatima case, the judiciary has applied the strict principles of Hanafi law in *khul‘* by rejecting the cases of wives for *khul‘* without the consent of husbands. Current Pakistani judicial system is favouring and protecting a woman’s right to divorce as *khul‘* even with partial payment of dower amount to the husband.

Syed Abū al-A‘lā Mawdūdī considers *khul‘* as a unilateral and unconditional right of a woman as he states:

*“He considered Khul‘ as a unilateral right of a woman and it is unconditional not depending on the approval of the husband. But, he explained that woman’s right to Khul‘ is equivalent to the man’s right to divorce. It is certainly a ridicule of the Shariah that Khul‘ is to be granted to a woman by the judgment of a judge or approval of the husband. Islamic law is not to be made responsible for refusal of women’s marital rights.”*²

The best way for the couple is that the wife is to pay the dower back to her husband and get rid of it from him and the husband has to accept it and grant her *khul‘*. If the issue resolves by their mutual consent and agreement, then no need to go to a court of law. If the controversy remains and they are not separated nicely then the court has to play its role in granting her *khul‘*. None is to be given a right to force someone to live and spend a distressed life especially the spouses as the Qur’an evidently states, “then either (husband or wife) to retain in all fairness, or to release nicely.”³ The husband is not permitted to misuse the right to divorce by retaining her with him as the Qur’an 2:231 states, “Do not retain them with wrongful intent, resulting in cruelty on your part.”⁴

It is evident in the light of the above discussion that neither in the Qur’an nor in the ahadith of the Prophet (Peace Be Upon Him) anywhere demanded the consent of husband in granting *khul‘* is demanded or required. But there are diverse opinions among Muslim jurists on this issue. Shariah guides us to terminate the marriage tie when no hope is left for the continuation of marital life. This should be done between husband and wife with mutual consent and understanding. If the husband denies granting *khul‘* then the wife has to go to a court of law although it is not required by

¹ Case law regarding *Khul‘* will be discussed later.

² Syed Abū al-A‘lā Mawdūdī, *Huqūq-Al-Zawjāyn* (Lahore: 1964), 61, 71–79.

³ The Holy Qur’an, 2:229

⁴ The Holy Qur’an, 2:231 وَلَا تُمَسِّكُوهُنَّ ضِرَارًا لِّتَعْتَدُوا

Islamic law. In the Pakistani legal system, the courts are playing a vital role in promoting and protecting woman's right to *khul'*.

1.3 The Consent of Husband in Pakistani Legal System

The superior judiciary of Pakistan has also expressed different interpretations in its judgments as to the consent of the husband in *khul'*. The study of the legislature of Pakistan after independence shows that the opinions of Hanafi jurists of making the consent of husband obligatory were used to be considered in the earlier judgments. But in *Balqis Fatima vs Najam-ul-Ikram Qureshi*, 1959, the Lahore High Court held that the right of *Khul'* of the wife is independent from the consent of the husband, hence overruling all the earlier judgments. I investigated, during an analysis of the case laws, whether a woman has the unilateral right of *khul'* or the husband's consent is required.

The case laws study from the pre-partition indicated that women were quite stressed because of applying Hanafi Law strictly to the cases of *khul'*. The judiciary of the sub-continent was not favorable to the women who wanted to dissolve their marriage through *khul'*. The dissolution of marriage was assumed to be the right of the husband solely, whether through divorce or *khul'*. In *Munshi Buzul-ul-Raheem vs. Luteefutoon-Nissa*,¹ one of the earlier cases, court held that marriage can be dissolved through *khul'* only with husband's consent as per Hanafi Islamic law. Sadly, this case law had become a precedent in the post-independent Pakistani legal system and was applied by the judiciary. Some of the examples of the cases are *Umar Bibi vs. Mohammad Din*,² and *Sayeeda Khanam vs. Muhammad Sami*³ where the right of *khul'* to women was not granted and not recognized.

In the case of *Umar Bibi vs. Mohammad Din*,⁴ two women filed an appeal in the High Court against the decision of the lower courts where their right of *khul'* without the approval of their husbands was not recognized. The main cause of their wanting to dissolve the marriage was the misbehavior of their husbands. Nevertheless, the appeal was rejected. The two essential questions arose in the High Court, (i) whether the decree of *khul'* can be granted to the wife against the husband's approval, and (ii) does Islamic law recognize conflict of nature among spouses as a ground to dissolve the marriage? The court held that the incompatibility of spouses could not be considered

¹*Munshi Buzul-ul-Raheem vs. Luteefutoon-Nissa* (1861) 8 MIA 397

²*Umer Bibi vs. Mohammad Din*, ILR 1944 Lahore 542).AIR 1945 Lahore 51

³*Syeeda Khanam vs. Muhammad Sami*, PLD 1952 Lahore 113

⁴*Umer Bibi vs. Mohammad Din*, ILR 1944 Lahore 542).AIR 1945 Lahore 51

as a ground to dissolve the marriage. Hence, the court did not give relief to the women and also endorsed the approval of the husband obligatory for *khul‘*.¹

Similar approach was adopted by the Lahore High Court in *Sayeeda Khanam vs. Muhammad Sami*². It is the same court which had passed analogous judgment even after almost a decade after the independence. The two questions considered by the court were (i) whether incompatibility of temperament can be a ground for dissolution of marriage in Islamic law, and (ii) how in Islamic law the fault of husband would be considered as the ground for divorce? As per the court, the fault of husband was not to be considered as a reason for divorce. The answer to both the questions negated the right of women to *khul‘*. The court gave its analysis on the case of Jamīla³, and stated that the role of Prophet (Peace Be Upon Him) in the case was not of a judge, and He (Peace Be Upon Him) had not ordered the dissolution of marriage. In fact, the order given to Thabit Ibn Qays by the Prophet (Peace Be Upon Him) to divorce his wife was as a lawgiver. This interpretation and decision of the case by the court was in line with the Hanafi opinion. Asaf A. Fyzee pointed out while commenting on this case that:

*“The Full Bench decision in the Sayeeda Khanam case represents the classical view of the Hanafi jurists as understood in South Asia.”*⁴

Lucy Carroll states that “there is no precise indication as to how this separation might be effected, it clearly (in the view of full bench) could occur only as a result of the husband’s pronouncement of divorce, or a mutually agreed *Khul‘*, or a decree of the court on a justiciable cause pleaded by the wife.”⁵ The approach towards women rights to *khul‘* and divorce in Pakistan and Bangladesh is different now. However, Rulings in India are still the same. Gangrade, a contemporary writer, sheds light on the issue in India and argues that right of *khul‘* for women is uncertain and it has become difficult without husband’s approval.⁶

The historical reversal and acknowledgment of right of women’s right to *khul‘* as per Islamic law was made in the case in 1959. The Lahore High Court gave a thought on the same questions for the third time, after eight years from the decision in *Syeeda*

¹ Ibid.

² *Syeeda Khanam vs. Muhammad Sami*, PLD 1952 Lahore 113

³ Discussed above

⁴ *Outlines of Muhammadan Law*, 137.

⁵ Lucy Carroll, Qur’ān 2:229: “A Charter Granted to the Wife? Judicial *Khul‘* in Pakistan” (1996) 3(1) *Islamic Law and Society*, 100.

⁶ K. D. Gangrade, *Social Legislation in India* (New Delhi: Concept Publishing Co. 1974, reprint 2001), 26.

Khanam,¹ where the outcome was significantly changed. The case of *Mrs. Balqis Fatima vs. Najm-ul-Ikram Qureshi*,² is a milestone for Muslim women in Pakistan on their road towards liberation. It was the first decision which protected the women's rights. The court considered that 'whether *khul'* can be claimed by a woman as a right as given by the Islamic law?' While answering this question, the court recognized that "she is entitled for *khul'* as a right and marriage can be dissolved on the disliking of a woman, if she thinks that could not live with her husband within the limits prescribed by Almighty Allāh but she has to return the dower that is received by her in consideration of marriage contract."³

In the case of *Sayeeda Khanam vs. Muhammad Sami* ⁴, incompatibility of temperament was proved but the Court refused to accept it as a valid reason for divorce. The wife petitioned for divorce by justifying her husband's malice against her but the court was expressed dissatisfaction from these reasons as worthless and futile for dissolving the marriage as the comments of Justice Cornelius reveal the insignificance of the justifications provided by women:

*"Under Muslim law, such matters as incompatibility of temperaments, aversion or dislike cannot form a ground for a wife to seek dissolution of her marriage at the hands of a Qazi or a Court."*⁵

To this Justice Muhammad Jan further added as:

"If wives were allowed to dissolve their marriages, without the consent of their husbands, by merely giving up their dowers, paid or promised to be paid, the institution of marriage would be meaningless as there would be no stability attached to it." ⁶

In case of Balqis Fatima, the court probed the questions of women's right to *khul'* with reference to Sūrah Al-Baqarah, *āyah* 229 wherein Allah Almighty permits that a wife can terminate the marriage in return of dower to the husband. The discussion mainly dwelled on the argument that either a wife can claim to terminate the contract of marriage on the basis of *khul'* without the approval of husband or consent becomes obligatory to end the marriage tie.⁷ The court held that in this *āyah* the word "In

¹*Syeeda Khanam vs. Muhammad Sami*, PLD 1952 Lahore 113

²*Mst. Balqis Fatima vs. Najm-ul-Ikram Qureshi*, PLD1959 Lah.566

³ PLD1959 Lah.566

⁴*Sayeeda Khanam vs. Muhammad Sami*, PLD 1952 Lahore 113

⁵*Ibid.*

⁶*Ibid.*

⁷*Balqis Fatima vs. Najm-ul-Ikram Qureshi*, PLD1959 Lah.566

Khiftum (if you fear)” was addressed to the judge. The court further observed that this case was not creating equality among husband and wife regarding divorce but it required in depth study. The court emphasized upon the importance of the case by identifying the facts. The court stated that it established the court’s right to interpret the text of Qur’ān independently that was evident from the word “ *In Khiftum*”. Secondly, this case was granting a relief to a woman who wanted separation from her husband on the basis of *Khul'* that was not provided to her until this case under the doctrines of the Hanafi law.¹

As Asaf A. Fyzee also argued that the decision of Sayeeda Khanam case was taken in frame of Hanafi law while in Balqis Fatmia’s case Mālikī law was being applied when the decision was made by giving close reading of Holy Qur’ān where a judge or an arbitrator can dissolve a marriage after investigating the details impartially.² This case has provided considerable relief to despotic women who want to spend life in their own ways.

In *Ms. Khurshid Bibi vs. Muhammad Amin*,³ the court maintained the decision of *Balqis Fatima vs. Najm-ul-Ikram Qureshi*⁴. The facts of the case are that a man and woman got married and started their marital life happily. Due to the issue of infertility of the wife, the husband married again with another woman. After sometime of the husband’s second marriage, his relationship with the first infertile wife turned hostile which lead his first wife to apply *khul'*. The matter in discussion before the court was to investigate whether the wife has a unilateral right without the approval of the husband to get *Khul'*, if she justifies that she cannot fulfill the limits of marital life as prescribed by Allah Almighty. All the judges of the bench agreed collectively and upheld Balqis Fatima case by observing that a wife could be granted the right to dissolve the marriage as *Khul'* but this right is restricted with the satisfaction of the court and the court cannot through her in a detestable life after the her justification and court’s satisfaction.⁵

In fact, the court relied on the view of Syed Abū al-A‘lā Mawdūdī who has contrary opinion to the Muslim Jurists regarding the approval of husband in granting *Khul'* as he evidently states:

“Khul' is to be considered as a unilateral right of a woman and it is unconditional not depending on the approval of the husband. But, he explained that woman’s right to Khul' is equivalent to the man’s

¹Ibid.

²*Outlines of Muhammadan Law*, 137

³*Khurshid Bibi vs. Muhammad Amin*, PLD 1967 SC 97

⁴ PLD1959 Lah.566

⁵ Ibid.

right to divorce. It is certainly a ridicule of the Shari‘ah that Khul‘ is to be granted to a woman by the judgment of a judge or approval of the husband. Islamic law is not to be made responsible for refusal of women’s marital rights.”¹

Tahir Mahmood also states *Khul‘* as a right of woman:

“Khul is parallel to talāq. The former is a divorce desired by and effected at the instance of the wife whereas the latter is divorce desired by and affected at instance of the husband. To have a khul is, like a man’s right to talāq, an unconditional right of the wife.”²

Justice S.A. Rahman firstly rebutted the arguments of the Muslim Jurists by arguing that it has not been made obligatory on the Muslims to follow one law school absolutely. He also cited that Muslim Jurists did not claim conclusiveness for their opinions at all. He further denoted that the canon of *taqlid* was invented by the supporters owing to the varied historical reasons. He continued to state that according to this doctrine a Sunni Muslim has to follow his school of law despite of any reasonable comprehension of the opinion. He further asserted that there is no authenticity of this canon in the Holy Qur‘ān or authentic *Ahādīth*,³ Then he discussed the meaning of *āyah* 229 of Surah Al-Baqarah, and he agreed with other judges.⁴

As per his interpretation of *āyah* 2: 229, Kaikaus, J. argues that the phrase “*In Khiftum* (if you fear)” referred to the Qadi (judge). He elaborated that the *khul‘* taken place with mutual consent is called “*Mubarah*” where the judge’s role is unnecessary. The role of a judge only comes into play when there is a dispute in the process of dissolution of the marriage. As per his argument, any other connotation given to Quranic ayahs with respect to *khul‘* will cause the deprivation of women right of *khul‘*. It was also held by the court that a wife can dissolve the marriage through *khul‘* if spouses cannot fulfill their marital obligation. So, as further stated by the Court, a marriage can be dissolved by a judge despite the husband unwillingness to give divorce.⁵

The higher judiciary of Pakistan went beyond the practice of *taqlid* and exercised *ijtihad*, when required. In this case, the conclusion of the court was that the text of Quran and Sunnah should be interpreted and understood directly by the courts when

¹ Syed Abū al- A‘lā Mawdūdī, *Huqūq-Al-Zawjayn* (Lahore: 1964), 61, 71–79.

² Tahir Mahmood, *Muslim Law of India*, (Delhi: Butterworth, 2002), 98.

³ *Khurshid Bibi vs. Muhammad Amin*, PLD 1967 SC 97 at 113

⁴ *Ibid.*

⁵ *Ibid.*

it is already evident. And the courts are at liberty to take the guidance from the different sources of knowledge and different schools of thoughts to resolve the matter accordingly. The court declared the judgments of Privy Council not to be treated as precedents. Hence, it can be safely said that the higher courts interpret the text of Quran and Hadith by the mode of *Ijihad* and avoiding picking and choosing any opinion by using *Takhayyur* or *Talfiq*. However, the existing laws must also be given importance by the judge along with the reliance on Quran and Sunnah. His judgments would add the opinions of the prominent Muslim Jurists as a well-established source of law to be taken in consideration as section 2 of ESA, 1991 reads:

“While interpreting and explaining the Shari‘ah the recognized principles of interpretation and explanation of the Holy Qur‘ān and Sunnah shall be followed and the expositions and opinions of recognized jurists of Islam belonging to prevalent Islamic schools of jurisprudence may be taken into consideration.”¹

Lucy Carroll detailed this as:

“The ‘apprehension’ or ‘satisfaction’ of the judge is essentially a subjective evaluation [in granting Khul‘ to a wife]. But it has to be supported by something, there must be some material on the record to justify the conclusion that it is not possible for the spouses to live together within the limits of Allāh.”²

Justice Javed Iqbal, in his observation, clarified that:

“If the Judge Family Court arrives at the conclusion that no reconciliation was possible, that the wife was determined to get the marriage dissolved, and that not dissolving the marriage would amount to forcing or compelling her to live in a hateful union with the husband, then he must dissolve the marriage on the basis of Khul‘.”³

The amendment in 2002 by inserting section 10 (4) of FCA, 1964, was a step forward by the legislature. The amendment was challenged in Federal Shariat Court. In *Saleem*

¹ *Enforcement of Shari‘ah Act, 1991*, Section 2.

² Carroll, ‘Qur‘ān 2:229: “A Charter Granted to the Wife? Judicial Khul‘ in Pakistan” (1996) 3(1) *Islamic Law and Society*, 110.

³ *Muhammad Yasin v Rafia Bibi* PLD 1983 Lahore 377, 382. Justice Iqbal re-affirmed this principle in *Rashidan Bibi v Bashir Ahmad* PLD 1983 Lahore 549, 551. This principle was later approved by the Supreme Court in *Abdul Rahim v Shahida Khan* PLD 1984 SC 329, 332. See for more detail Muhammad Munir, *The Law of Khul‘ in Islam and Pakistani Law*, 56

Ahmad vs. The Government of Pakistan,¹ the Court observed that:

*“With great regard and utmost respect for the scholarship, Taqwā and deep insight of the eminent religious leaders and religious scholars this Court cannot declare any law or provision of law merely on the basis of views, verdicts and Fatawa issued by the honourable scholars whosoever they might be.”*²

The Federal Shariat Court did not find section 10 (4) of the FCA in contradiction with the commands of Shari‘ah.³ It was explained in the judgment that the resolution of dispute among parties in family matters is the function of courts. The decision reached by the courts are based on reasons and circumstances of each case. There is serious issue if the courts do not authorize *khul‘* where the husband is not agreed to divorce. Therefore, a woman would be forced to continue a life which she does not want to live. This will ultimately depress her and make her life miserable. So, the courts must play their role to protect her rights.⁴

Muhammad Munir, while referring to the Quran, Hadith and opinion of jurists, stated that there is nothing which explicitly prevents that judge to make a decision in the case of *khul‘* after trying all the avenues of reconciliation available to him.⁵ The section 10 (4) of FCA, 1964, emphasize and facilitates the depressed women and easing the process of dissolution of marriage through *khul‘*. The FSC played an important role by giving the judgment by protecting the section 10(4).

The Council of Islamic Ideology’s role regarding *Khul‘* is making recommendation to the legislature and then it is up to them to amend the laws if repugnancy is found⁶ or do legislation on a proposed law by the CII. Hence, these recommendations are not obligatory. The suggestions proposed by it are:

“In our opinion, a law should be enacted at the level of the state that, after a woman’s written request for divorce, the husband must have an obligation to divorce her within 90 days. If the husband refuses to divorce her, the marriage shall stand dissolved after the passage of this time [90 days] except if the wife revokes her request. The husband should have no right to revoke after this. The wife must

¹ *Saleem Ahmad vs. The Government of Pakistan*, PLD 2014 FSC 43.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ Muhammad Munir, “The Law of *Khul‘* in Islamic Law and the Legal System of Pakistan”, *LUMS Law Journal*, (Lahore: Shaikh Ahmad Hassan School of Law, LUMS, 2015), 2:1, 57.

⁶ *The Constitution of the Islamic Republic of Pakistan*, Articles 229, 230.

return assets and property given to her by the husband except dower and maintenance if demanded by the husband or else approach a court of law for the resolution of the conflict.”¹

When these recommendations were made, the chairman of CII was Dr. Khalid Masood in 2008 -2009. But afterwards, the new chairman, Mawlana Muhammad Khan Shirani, changed the recommendations. On 27 May 2015, he opined that courts need to seek the approval of the husband in *khul‘* cases and courts cannot dissolve marriage without it.

Muhammad Munir stated while commented on these recommendations of CII, that:

“There are several points to note. First, the Council’s Recommendation seems to be a deviation from the apparent words of verse 2:229 of the Qur’ān, according to which the wife pays something to free herself. Second, the Recommendation also seems to deviate from the precedent laid down by the Prophet in the Ḥabība’s case, discussed above, in which she was asked by the Prophet to return her dower to her husband in return for her freedom from marriage. Third, the Recommendation is in accord with Islamic law, especially the Qur’ān and the Sunnah, in cases when the husband is the cause of discord. Finally, the Recommendation overlaps with section 10(4) of the West Pakistan Family Court Act 1964 as amended in 2002, which governs the existing law on khul’.”²

It was further stated by him that:

“It is surprising that neither the Superior Courts, nor the Federal Shariat Court have dug deeper into the interpretation of verse 4:35 of the Qur’ān as understood by numerous Mālikī jurists and exegetes who do not give the husband any controlling power in Khul’. The CII has ignored verse 4:35, along with the Ḥabība /Jamīla precedent as well as the views of Mālikī jurists.”³

The main concern for the court in the cases of *khul‘* is the satisfaction of the court that the couple before cannot continue their marital life as justified by the wife.⁴ However, it is necessary for the judge to make sincere effort to make things work between them

¹ Council of Islamic Ideology’s meeting 171, *Annual Report, 2008- 2009* (Council of Islamic Ideology 2009), 170.

² Muhammad Munir, “The Law of *Khul‘* in Islamic Law and the Legal System of Pakistan”, *LUMS Law Journal*, 2:1, 61.

³ *Ibid.*, 62

⁴ *Muhammad Faisal Khan vs. Sadia and another*, PLD 2013 Peshawar 12, *Saleem Ahmed vs. Government of Pakistan*, PLD 2014 FSC 43, *Bibi Feroza vs. Abdul Hadi*, 2014 CLC 60

and reconcile the spouses.¹ If, after all the efforts, the reconciliation process does not work and *khul'* is not granted, then it would be highly prejudicial and unjust to the wife. She would not be able to escape a relationship which she cannot carry on merely because she could not get the approval of the husband.² Despite earlier cases and variety of arguments, the superior courts have also been of the view that no *āyah* in the Holy Qur'ān or a Hadīth of the Holy Prophet (Peace Be Upon Him) explicitly indicates that a judge cannot dissolve the marriage without husband's consent in case of *khul'*. If the reconciliation efforts have failed and there is no chance for the partners living together with peace and harmony as prescribed the limits of Allāh Almighty.³

1.4 Conclusion

Muslim jurists have two diverse opinions on the issue of the husband's consent in *khul'*; mandatory or optional. The reason for diverse opinions is that there is no conclusive evidence either in the Qur'an or in the *Hadith* of the Prophet Muhammad (Peace Be Upon Him). Pakistani family law is based on Islamic law principles and due to the strong pertinence of Hanafi law in the sub-continent; the strict interpretation of Hanafi law was applied by the courts of law in pre and post-partition eras. *Khul'* is a woman's unilateral and unconditional right and was accepted by the judiciary after Balqis Fatima case. The judiciary moved further in promoting and protecting woman's right to *khul'* for partial payment of dower and even in some cases non-payments of dower for *khul'*. After the insertion of section 10 (4) in the Family Court Act 1964, *khul'* has become very easy and the case of *khul'* is decided just in two hearings. In the current Pakistani legal system, the judiciary has played a vital role in protecting woman's right to *khul'*. The case is filed in a family court, if parties are not satisfied with the decision of the family court, then an appeal is made to the High Court and if the parties are not convinced with the judgments of the High Court, the appeal is to be filed to the Supreme Court of Pakistan. This paper has investigated the case law of the Pakistani judiciary by comparing it with the general principles of Muslim family law. It has been examined that the existing status of woman's right to *khul'* has been achieved with a strong and convincing argument from the Pakistani judiciary.

¹PLD 2013 Peshawar 12

² PLD 2014 FSC 43

³Ibid.