

## ***Husband's Consent for Khul' in Shari'ah and Pakistani Law: A Study of Superior Courts' Decisions***

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### **ABSTRACT**

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*In Islamic Law, a husband can divorce his wife without mentioning any reason which is considered his unilateral right. The wife can also dissolve her marriage through khul' nevertheless there is a contradiction in granting a woman right to dissolve her marriage as a unilateral right. This paper is divided into two parts; the first part highlights the contrary arguments of classical and contemporary Muslim Jurists in considering khul' as the unilateral right of a woman or it is dependent upon the consent of her husband, while in the second part I will examine how does this right is granted to a woman in light of the case law. It also explores how do the superior courts provide varied judgments in which the approval of the husband is considered mandatory for khul' while in others the consent is assumed irrelevant. The current paper investigates these contrary judgments in light of Islamic Law along with the opinions of the classical and contemporary jurists on the consent of a husband for khul'. It is also noteworthy to highlight that there are also some grounds provided by Pakistani law for the dissolution of marriage by the woman with certain justified causes as mentioned in section 2 of the Dissolution of Muslim Marriage Act 1939. Drawing over the scholarly arguments from Islamic and Pakistani Law this study claims that the approval of the husband is mandatory neither in Islamic Law nor in the legal system of Pakistan.*

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

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### 1.1 Introduction

In a family institution of a Muslim household, the husband and wife are usually directed to reconcile and restore harmony among themselves regardless of whether the problem or fault lies with any one of the spouses or with both. The reconciliation is commonly done through offering advice and appointing two arbitrators in an attempt to drive away the differences among the partners and bring them back into marriage. In fact, according to *Shari'ah*, the husband and wife have to try all possible solutions and mediations for a smooth and happy life. In case all the efforts have been made by the spouses for compromise and reconciliation but even after measuring all possibilities for continuing their marital life together, then they are allowed to dissolve their marriage. The Qur'an provides a solution to the husband if he detects his wife guilty or disobedient with reference to their life together. There is a clear indication in three ways in the Qur'an, as sates:

وَالَّذِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ وَاهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَاضْرِبُوهُنَّ ۚ فَإِنْ أَطَعْنَكُمْ فَلَا تَبِعُوا عَلَيْهِنَّ سَبِيلًا ۗ إِنَّ اللَّهَ كَانَ عَلِيمًا كَبِيرًا<sup>1</sup>

“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.”<sup>2</sup>

Imām Ibn Kathīr said that:

“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.”<sup>3</sup>

Imām Al-Tabarī comments on the verse above with reference to Said Ibn Jubair's statement about a wife who was seeking *Khul'* as:

“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 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 wrong doing, and if the judge finds the wife to be guilty of disobeying her husband, he will ask him to grant her *Khul'*.”<sup>4</sup>

In a case, where wife is not interested any more to live with the husband and he fails in convincing her to stay with him and if all means of reconciliation remain ineffective, then they are left with only two choices. The first is to divorce her while the second option is that the husband can accept the sum that she offers to dissolve the marriage. However, Muslim jurists have diverse opinions upon the acceptance of such compensation and the consent of husband in granting *Khul'*. The next section curates the opinions of different Muslim jurists to probe the role of husband in dissolution of marriage.

### **1.2 Opinion of Muslim Jurists**

The Muslim Jurists expressed their diverse opinions on the consent of husband in *Khul'* mainly in two ways. The majority of the Muslim jurists state that the husband may not be obliged to accept the wife's offer in compensation for *khul'* but it is preferred for him to do so. Ibn Muflih also said that *Khul'* is permitted if the husband and wife cannot live together longer, and it is preferable that the husband accepts it.<sup>5</sup> Imām Ibn Hajar Al-'Asqalānī and Imām Al-Tabarī,<sup>6</sup> also have similar points of view. They supported their viewpoint and argued that the order of the Prophet (peace be on him) to Thābit Ibn Qais to accept the garden in the form of compensation and divorce the wife once is only for the sake of advice and guidance, rather than an obligation.<sup>7</sup>

The second opinion is of Imām Ibn Taimiyyah and Imām Al-Shawkānī<sup>8</sup> who believe that the husband should be obliged to accept the compensation offered by his wife in *Khul'*. They illustrated their claim with the same reference used by the majority of the jurists, what the Prophet (peace be on him) said to Thabit Bin Qais when he asked him to accept the garden as a form of compensation and divorce her once. They argued that what the Prophet (peace be on him) said amounts to order and this makes it compulsory and obligatory for the husband to accept the compensation.<sup>9</sup>

I believe that the second point of view as inferred by Imām Ibn Taymiyyah and Imām Al-Shawkānī is preferable for its rational argumentation. The husband has to agree to his wife's desire to get *Khul'* because it is her right that should be protected by the teaching of Islamic Law. He should not be persistent to deprive her of this right after he gets compensated for this by the wife. He should be prevented from not complying with the rules of Islamic Law.

This is also a violation of the *āyah* of the Qur'ān and the rules of Islamic Law for the husband to hold his wife from *Khul'* as states:

فَأَمْسَاكَ، بِمَعْرُوفٍ أَوْ تَسْرِيحٍ، بِإِحْسَانٍ<sup>10</sup>

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

In the light of this *āyah*, the husband is not allowed to prevent his wife from getting *Khul'*, if the life has become miserable for them and there is no hope for reconciliation. The separation between husband and wife will be with kindness and if it is not so, this is a clear violation of the injunctions of the Qur'ān.

In the case where the husband refuses to give his wife *Khul'*, the wife has the choice of filing a case in the court of law against him in which she asks for *Khul'* from him. The verdict from the court will be in wife's favour and generally the decisions of the courts are favouring wife.<sup>11</sup> The courts of law also held similar practices for protecting wife's right to divorce in accordance with the principles of Islamic law. Syed Abū al-A'lā Mawdūdī opposes the opinions of the Muslim Jurists regarding the approval of husband in granting *Khul'* 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.”<sup>12</sup>

The argument that it is necessary to have the husband's approval and consent for *Khul'* does not clash with the role that the court of law may play in this matter. Because the court controls and observes how each side enjoys their rights by mutual consent so that the husband does not turn into an obnoxious person and misuses his right for the sake of deceiving and expressing his nasty feelings towards his wife. In such circumstances, there are possibilities of ignominy and humiliation for both individuals. When one misuses his or her right and causes any damage to the other, it is the judge, who should consider the situation and not the husband. It is clear that the husband is prohibited from harming his wife as mentioned in Sūrah Al-Baqarah, verse 231, “Do not retain them with wrongful intent, resulting in cruelty on your part.”<sup>13</sup> It shows that Islamic Law legitimizes *Khul'* for the wife when requirements are fulfilled and no hope is left for their marital union.

In light of the above discussion, Allah Almighty has evidently instructed about the fairness of the husband in the marriage dissolution and respect for her decision

for departing. Nonetheless, his consensus is not mentioned clearly in Qur'an and in the sayings of the Prophet (peace be on him). It is therefore argued that the husband's consent is not required for *khul'*, however, if he hinders in granting this right to his wife then courts of law can play their role for providing her right to divorce. In the next section, I investigate the law on *khul'* with specific reference to case laws in the Pakistani legal system.

### **1.3 Approval of Husband in Pakistani Law**

Pakistani superior judiciary also has a heterogeneous version of its judgments regarding approval of husband in *khul'*. The study of the post-dependent Pakistani legislature indicates that earlier judgments used to consider the opinions of Hanafi jurists and make the husband's consent compulsory. But in 1959 through the case of *Balqis Fatima vs. Najam-ul-Ikram Qureshi* the Lahore High court overruled the earlier judgments and held that wife is entitled to *Khul'* and this right is not dependent upon the consent of husband. While analyzing the case laws I investigate whether *Khul'* is a unilateral right of a woman or it requires the consent of her husband.

The study of pre-partition case laws reveals that Muslim woman experienced serious distress due to the strict application of Hanafi Law in the case of *khul'*. The superior courts of the subcontinent did not favour the women if they want to dissolve their marriage through *khul'*. The dissolution was entirely assumed to be the right of the husband whether he divorce her or she wanted *khul'*. As the case law of *Munshi Buzul-ul-Raheem vs. Luteefutoon-Nissa*,<sup>14</sup> is one of the earlier cases in which the court held that the possibility of *khul'* to dissolve the marriage is with the approval of the husband's consent in Islamic Law under the aegis of Hanafi jurists' opinion. Unfortunately, this case became a precedent to be implemented in post-independent Pakistani Law and practiced by the superior judiciary as well. As it can be observed in case of *Umar Bibi vs. Mohammad Din*,<sup>15</sup> and *Sayeeda Khanam vs. Muhammad Sami*<sup>16</sup> when women were dispossessed from the right to *khul'*.

The details of *Umar Bibi vs. Mohammad Din*,<sup>17</sup> case show that the case was filed by two women for appealing *Khul'* without the approval of their husbands in the High Court, when they could not get the decree from the lower courts. Their plea reported the misbehavior of their husbands as the main cause of dissolving their marriage. Nonetheless, their appeal was rejected by the superior court. The two basic questions were considered by the High Court (i) could the decree of *Khul'* be granted to the wife against the approval of husband's consent, and (ii) was Islamic Law considered a conflict of attitude and nature among spouses as a ground to dissolve the marriage? The court did not provide any relief to both women by asserting that incompatibility of temperament could not be considered as the

ground for dissolution of marriage and also reinstating that husband's consent is a prerequisite for *khul'*.<sup>18</sup>

The similar decision could also be seen in case of *Sayeeda Khanam vs. Muhammad Sami*<sup>19</sup>, when the Lahore High court; the same high court after gaining independence passed an analogous judgment almost a decade later. There were two main questions for discussion in the court: a) whether in Islamic Law, incompatibility of temperament could become the ground to dissolve the marriage; and b) How would a discard or fault of the husband be considered the ground for divorce in Islamic Law? The Court did not consider the inappropriateness of behavior and fault of the husband as a reason for divorce. Both questions were addressed rather aggressively by negating the right of women for *khul'*. It was held by the Court that Prophet's role in the case of Jamīla<sup>20</sup> was not as a judge and even the Prophet (peace be on him) did not order himself for dissolution of marriage but He (peace be on him) ordered Thabit Ibn Qays to divorce her wife as a lawgiver. The court interpreted and decided the case in accordance with the opinion of the Hanafi Jurists. Asaf A. Fyzee comments on this case and points out that:

“The Full Bench decision in the Sayeeda Khanam case represents the classical view of the Hanafi jurists as understood in South Asia.”<sup>21</sup>

Lucy Carroll says 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.”<sup>22</sup> In recent era, the situation of a woman regarding *khul'* and divorce in Pakistan and Bangladesh is different but India has not changed the rulings even till today. A contemporary writer Gangrade highlighted the issue in India by arguing that a woman's status regarding *khul'* is uncertain and has become difficult without the approval of the husband.<sup>23</sup>

In 1959 a case brought historical reversal to acknowledge women's right to *khul'* as granted by Islamic Law. After eight years of the decision of *Syeeda Khanam*<sup>24</sup> the Lahore High Court considered the same questions for the third time. On this occasion however, the result was dramatically different. The case of *Mrs. Balqis Fatima vs. Najm-ul-Ikram Qureshi*,<sup>25</sup> represents an important milestone on the road toward liberation of Muslim women in Pakistan. This was the first landmark decision on *Khul'* in the protection of women's rights. The question raised in this case was that “Whether a woman could claim *Khul'* as a right as entitled in Islamic Law?” The answer of the Court was 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.<sup>26</sup> In the case of *Sayeeda Khanam vs. Muhammad Sami*<sup>27</sup>, 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 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.”<sup>28</sup>

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.”<sup>29</sup>

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.<sup>30</sup> The court held that in this *āyah* the word “*In 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.<sup>31</sup>

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 Qur'ān where a judge or an arbitrator can dissolve a marriage after investigating the details impartially.<sup>32</sup> 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*,<sup>33</sup> the court maintained the decision of *Balqis Fatima vs. Najm-ul-Ikram Qureshi*<sup>34</sup>. 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.<sup>35</sup>

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 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."<sup>36</sup>

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."<sup>37</sup>

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 Qur'ān or authentic *Ahādīth*,<sup>38</sup> He then discusses the meaning of *āyah* 229 of Surah Al-Baqarah and agrees with the view taken by other judges.<sup>39</sup>



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In his understanding of *āyah* 2: 229, Kaikaus, J. argues that the phrase “*In Khiftum* (if you fear)” refers to the *qadi* (judge) he elaborates that when *Khul'* takes place with mutual consent of the couple is called “*Mubarah*” for which role of *qadi* is not necessary. However, when the dispute arises among the spouses to dissolve their marriage through *Khul'*, the judge needs to play his role to resolve the matter. He argues that any other connotation of the Qur'ānic *āyah* with respect to *Khul'* would deprive a depressed woman to get a right of *Khul'*. The court also held that a wife can claim *Khul'* as a right, if the couple is unable to fulfill their marital obligations as prescribed by shari'ah. The Court further stated that a judge can dissolve the marriage contract though the husband is not willing to divorce.<sup>40</sup>

The Pakistani higher judiciary has not bound itself to follow the canon of *taqlīd* but the judiciary exercised *ijtihād*, when needed. Regarding this case, the court concluded that Qur'ān and Sunnah is to be interpreted and understood by the courts directly when the text is evident. The court also stated that the court is free to take guidance from the knowledge system of different of schools of law to resolve the matter accordingly. It was further declared that the Privy Council's judgments would not be considered as precedents especially with respect to the current case. It can be argued that the general practice of the higher judiciary is that the texts of Qur'ān and Ahadith of the Prophet (peace be on him) to be interpreted by exercising the mode of *Ijtihād* and avoiding picking and choosing any opinion by using *Takhayyur* or *Talfiq*. However, the judge must also consider the existing laws on the matter along with his reliance on the Qur'ān and Sunnah. His judgments would add the opinions of the 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 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.”<sup>41</sup>

Lucy Carroll also elaborates 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.”<sup>42</sup>

Justice Javed Iqbal tried to clarify the law for the lower courts, when he observed:

“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'*.”<sup>43</sup>

In 2002, the amendment enacted by the legislature regarding *Khul'* and inserted in section 10 (4) of FCA, 1964. This section was challenged in Federal Shariat Court and in *Saleem Ahmad vs. The Government of Pakistan*,<sup>44</sup> 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.”<sup>45</sup>

The Federal Shariat Court stated that section 10 (4) of the FCA is not found repugnant to the commands of Shari'ah.<sup>46</sup> The Court further explained that the function of the courts is to resolve the disputes arise among parties including family matters. These courts decide the disputes on basis of the reasons of each case. The problem is, if courts do not authorize the case of *Khul'*, when husband refuses to divorce his wife without any possibility for continuation of marriage. Consequently, the woman would be forced to continue a depressed and undesirable life therefore the courts must play their role to protect her rights.<sup>47</sup>

While discussing Islamic injunctions and opinions of Muslim jurists, Muhammad Munir stated that he did not find any āyah of Qur'ān and an authentic hadīth of the Prophet (peace be on him) which explicitly prohibits the judge to decide the case of *Khul'* after making all efforts of reconciliation.<sup>48</sup> It is also reinstated in section 10 (4) of FCA, 1964 to facilitate depressed women and ease the process of getting the decree of *khul'*. The FSC also played its role by giving a bold judgment regarding the repugnancy of the same section of *khul'*. The efforts of FSC must be acknowledged for granting woman to get a decree of *Khul'* by referring section 10 (4) of FCA, 1964.

The Role of Council of Islamic Ideology regarding *Khul'* is that it makes recommendations to the Government of Pakistan and it's up to the Government to amend the laws if repugnancy found<sup>49</sup> or do legislation on a proposed law by the CII. The Council can provide an advice only to the legislative authorities and its recommendation would not be considered obligatory. The Council proposed some suggestions regarding *Khul'* to the legislative bodies as it is stated:

“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 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.”<sup>50</sup>

These recommendations were made in the era of the former chairman of CII, Dr. Khalid Masood in 2008 -2009 but CII changed these recommendations with the change of its Chairman. New Chairman of CII, Mawlana Muhammad Khan Shirani, opined on 27 May 2015, that the courts have to seek the approval of the husband in case of *Khul'* and these courts are not allowed to dissolve the marriage without the husband's consent.

Muhammad Munir comments on the recommendations of CII as:

“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'an, 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'an 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'*.”<sup>51</sup>

He further states that:

“It is surprising that neither the Superior Courts, nor the Federal Shariat Court has dug deeper into the interpretation of verse 4:35 of the Qur'an 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.”<sup>52</sup>

The main reason for *Khul'* is the satisfaction of the court that spouses could not continue their marriage due to some certain reasons as justified by the wife.<sup>53</sup> It is, however, necessary for a judge to make genuine attempt for reconciliation between spouses.<sup>54</sup> But if such reconciliation attempt fails, and still *Khul'* is not granted to a wife, it would be highly unjust towards the latter that she is not being

released from the marital bond merely on account of failing to obtain the consent of her husband.<sup>55</sup> In spite of some earlier cases and diverse arguments, the superior courts have also been of the view that no *āyah* in the Qur'ān or a Hadīth of the Prophet (peace be on 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.<sup>56</sup>

#### 1.4 Conclusion

It is concluded that Muslim jurists are not unanimously agreed on the issue of approval of husband in *khul'*. As Muslim family law is based on Hanafi jurisprudence in pre-partition and post-partition Pakistan dispossessed women from claiming *khul'* as their unilateral right while contemporary scholars like Syed Abu Al-A'la Mawdudi considered *khul'* as a unilateral and unconditional right of a woman for dissolution of marriage through *khul'*. In light of the Qur'an and Sunnah of the Prophet (peace be on him), this study finds that approval of the husband in granting *khul'* is not mandatory. In the exploration of case laws, it has been argued that a gradual shift from the husband's consent for dissolution of marriage to a woman's unilateral right to divorce. It has been observed that superior courts were applying the Hanafi law strictly in pre and post-partition. After the amendment made in 2002 in Family Court Act 1964, section 10 (4) is added and after this amendment it has become very easy for a woman to get *khul'* in just first two hearings if reconciliation failed among spouses. Currently, most of the cases are decided by the lower courts on the basis of *khul'* and it is noteworthy to highlight that in legal system of Pakistan, now it is a well-established law and become a precedent that a woman can dissolve her marriage on the basis of *khul'* without mentioning any significant cause. This paper has examined that how does this present status has been achieved with continuous and meticulous efforts of the superior judiciary in promoting women's right to *khul'*.



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**References & Notes:**

- <sup>1</sup> Al Qur'ān, 4:34.
- <sup>2</sup> Al Qur'ān, 4:34. The translation of all verses is from *The Noble Qur'ān* by Muṭī Taqī Usmānī, (Karachi: Maktabah Ma'ārif al-Qur'ān, Qur'ānic Studies Publishers, 2010).
- <sup>3</sup> Abu Al-Fidā Muhammad Ibn Ismā'īl Ibn Kathīr, *Tafsir Al-Qur'ān al-'Azīm*, (Beirut: Mu'assasah Al-Rayyān, 1999), 1: 643. See the commentary of Al Qur'ān, 4:34.
- <sup>4</sup> Abū Ja'fir Muhammad Ibn Jarīr Al-Tabarī, *Jami' al-Bayān fi Ta'wil al-Qur'ān*, (Beirut: Mu'assasah Al-Risālah, 1994), 8: 319. See the commentary of Al Qur'ān, 4:34.
- <sup>5</sup> Muhammad Shams Al-Dīn Ibn Muflih, *Kitāb al Furū'*, (Beirut: Mu'assasah Al-Risālah, 2003), 5: 343.
- <sup>6</sup> Ahmad ibn Hajar Al-'Asqalānī, *Fath al-Barī*, (Cairo: Dār Al-Rayyān, 1987), 9: 312.
- <sup>7</sup> Abū 'Abd Al-Rahmān Ahmad Ibn Shu'aib Al-Nasa'ī, *Al-Sunan*, (Cairo: Dār Al-Tāsīl, 2012), Kitāb Al-Talāq, Bāb Mā Jāa fi Al-Khul', Hadīth No: 3463.
- <sup>8</sup> Muhammad Al-Shawkānī, *Nayl al-Awtār*, (Beirut: Dār Al-Kutub Al-'Ilmiyyah, 1999), 6: 261.
- <sup>9</sup> Al-Nasa'ī, *Al-Sunan*, Kitāb Al-Talāq, Bāb Mā Jāa fi Al-Khul', Hadīth No: 3463.
- <sup>10</sup> Al Qur'ān, 2:229.
- <sup>11</sup> Case law regarding *Khul'* will be discussed later.
- <sup>12</sup> Syed Abū al- A'lā Mawdūdī, *Huqūq-Al-Zawjain*, (Lahore: Idarah Tarjaman Al Qur'ān, 1964), 61, 71–79.
- <sup>13</sup> Al Qur'ān, 2:231.
- <sup>14</sup> *Munshi Buzul-ul-Raheem vs. Luteefutoon-Nissa* (1861) 8 MIA 397.
- <sup>15</sup> *Umer Bibi vs. Mohammad Din*, ILR 1944 Lahore 542) AIR 1945 Lahore 51.
- <sup>16</sup> *Syeeda Khanam vs. Muhammad Sami*, PLD 1952 Lahore 113.
- <sup>17</sup> *Umer Bibi vs. Mohammad Din*, ILR 1944 Lahore 542) AIR 1945 Lahore 51.
- <sup>18</sup> *Ibid.*
- <sup>19</sup> *Syeeda Khanam vs. Muhammad Sami*, PLD 1952 Lahore 113.
- <sup>20</sup> Discussd above.
- <sup>21</sup> Asaf A. Fyzee, *Outlines of Muhammadan Law*, (Delhi: Oxford University Press, 2008), 137.
- <sup>22</sup> Lucy Carroll, Qur'ān 2:229: "A Charter Granted to the Wife? Judicial *Khul'* in Pakistan" (1996) 3 (1) *Islamic Law and Society*, 100.
- <sup>23</sup> K. D. Gangrade, *Social Legislation in India*, (New Delhi: Concept Publishing Co. 1974, reprint 2001), 26.
- <sup>24</sup> *Syeeda Khanam vs. Muhammad Sami*, PLD 1952 Lahore 113.
- <sup>25</sup> *Balqis Fatima vs. Najm-ul-Ikram Qureshi*, PLD 1959 Lahore 566.
- <sup>26</sup> *Ibid.*
- <sup>27</sup> *Sayeeda Khanam vs. Muhammad Sami*, PLD 1952 Lahore 113.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> *Balqis Fatima vs. Najm-ul-Ikram Qureshi*, PLD1959 Lahore 566.

<sup>31</sup> Ibid.

<sup>32</sup> Fyzee, *Outlines of Muhammadan Law*, 137.

<sup>33</sup> *Khurshid Bibi vs. Muhammad Amin*, PLD 1967 SC 97.

<sup>34</sup> PLD1959 Lahore 566.

<sup>35</sup> Ibid.

<sup>36</sup> Mawdūdī, *Huqūq-Al-Zawjayn*, 61, 71–79.

<sup>37</sup> Tahir Mahmood, *Muslim Law of India*, (Delhi: Butterworth, 2002), 98.

<sup>38</sup> *Khurshid Bibi vs. Muhammad Amin*, PLD 1967 SC 97 at 113

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> *Enforcement of Shari'ah Act, 1991*, Section 2.

<sup>42</sup> Carroll, 'Qur'ān 2:229: "A Charter Granted to the Wife? Judicial *Khul'* in Pakistan", 110.

<sup>43</sup> *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.

<sup>44</sup> *Saleem Ahmad vs. The Government of Pakistan*, PLD 2014 FSC 43.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> 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.

<sup>49</sup> *The Constitution of the Islamic Republic of Pakistan*, Articles 229, 230.

<sup>50</sup> Council of Islamic Ideology's meeting 171, *Annual Report, 2008- 2009*, (Council of Islamic Ideology 2009), 170.

<sup>51</sup> Muhammad Munir, "The Law of *Khul'* in Islamic Law and the Legal System of Pakistan", *LUMS Law Journal*, 2:1, 61.

<sup>52</sup> Ibid., 62

<sup>53</sup> *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.

<sup>54</sup> PLD 2013 Peshawar 12.

<sup>55</sup> PLD 2014 FSC 43.

<sup>56</sup> Ibid.