

Judicial Separation at the Wife's Initiative: A Study of Redemption (*Khul'*) in Islamic Law and Contemporary Legislation in Pakistan and Malaysia

Muhammad Ifzaal Mehmood*

International Islamic University Malaysia, Malaysia

Abstract

Under Islamic Law it is the general perception that the right of Divorce belongs only to the husband. This concept has been administered in Islamic countries due to the opinion that there is no such kind of right for a woman to get divorced from her spouse. Muslim women living in British India before the independence of Pakistan had no legal right to divorce. When Pakistan became an independent state in 1947, it retained the law. For a woman who suffers and has an unhappy life, the Dissolution of Muslim Marriages Act 1939 (DMMA) was initiated where by the law of Redemption (*khul'*) was introduced in section 2(ix) of Dissolution of Marriage (*fasakh-e-nikah*). This enactment created confusion over whether Redemption (*khul'*) is Dissolution of Marriage (*fasakh-e-nikah*) or Divorce (*talaq*), that is, whether the court can grant Redemption (*khul'*) to a married woman without the consent of her husband. While in Malaysia the law of Redemption is administered under section 49 of the Islamic Family Law (Federal Territories) 1984, Dissolution of Marriage (*fasakh-e-nikah*) is put in a separate section, section 52 of the Islamic Family Law (Federal territories)1984. This paper discusses the Islamic perspective of Redemption (*khul'*) and the relevance of the Malaysian enactment for Muslim Family Law in Pakistan is recommended, where separate sections for Dissolution of Marriages and Redemption (*khul'*) should be demarcated.

Keywords: Redemption (*khul'*); Divorce (*talaq*); Islamic jurists (*fuqaha*); Dissolution (*fasakh*)

Introduction

Islam provides numerous remedies to a Muslim woman in cases where harm (*darar*) to her has been established to the satisfaction of a judge. In the subcontinent, under section 2 of the Dissolution of Muslim Marriages Act, 1939 (DMMA), a Muslim women can obtain a divorce in case of her husband's disappearance for four years, non-maintenance of the wife for two years, his imprisonment for seven years or more, failure of a husband to perform his marital obligations for a period of three years, impotency, his insanity or his systematic maltreatment of the wife¹, or any other ground which is recognized as valid for the dissolution of marriage under Muslim Law. The law of Redemption (*khul'*) is conducted under section 2(ix) that is general in nature, which states that any other ground can be recognized as valid under the DMMA 1939 and there is no clear wording for Redemption (*khul'*), which has created confusion. The question: Does a Muslim woman have the right to obtain Redemption (*khul'*) without the consent of her husband or can it be granted by the court on the wife's request without his consent? What is the meaning of the *Qur'anic* verse 2:229²? What is the nature of *khul'*? i.e., is it dissolution of marriage (*fasakh al-nikah*) or divorce (*talaq*)? What is the position of jurists from different schools of thought in Islam regarding *khul'*? Is the ruling in the *hadith*

of Habibah bint Sahl,³ an independent situation which stands on its own, or has it been overruled by the *Qur'an*? Did the Islamic Jurists (*fuqaha*) follow the ruling of the *hadith* or did they ignore it?

In Malaysia Redemption (*khul'*) is conducted under section 49 of the Islamic Family Law Act (Federal Territories), 1984, which states that if the husband does not agree to voluntarily pronounce a divorce (*talaq*), but the parties agree to a divorce by redemption (*khul'*), the court shall, after the amount of the payment is agreed upon by the parties, cause the husband to pronounce a divorce by *khul'* (redemption) and such divorce is irrevocable (*ba'in sughra*). This provision expressly states that an agreement be reached before a redemption (*khul'*) divorce can be granted by the *Shari'ah* Court⁴. In Malaysia, in the case of redemption (*khul'*), the Islamic Family Law Act/Enactments do not

³According to Ahmad b. Ali b. Hajr, the woman who obtained *khul'* from Thabit b. Qays, was Habibah bt Sahl. However, it is said that her name was Jamila bt. Ub' b. Salul. Ibn Hajr mentions that according to some scholars it is possible that both of them obtained *khul'* from Thabit. See, Ahmad b. Ali b. Hajr, *Tahzib al-Tahzib* (Beirut: Dar al-fikr, 1984), 12:437. Superior Courts in Pakistan have always accepted the latter view, i.e., Thabit had two different wives – Habibah and Jamilah, and both of them obtained *khul'* from him.

⁴The current practice in Malaysia shows that the husband's consent remains an essential requirement for *khul'* divorce. In the case of *Rokiah v Abu Bakar*, Journal of Malayan Branch [Vol. XXI, Pt II, 1948] it was decided that the consent of the husband is necessary and he cannot be forced to give his consent. It has been observed that the judge inclined towards adopting a stricter procedure despite that fact that the applicant was more than qualified to be granted *khul'*. See Journal of Malayan Branch [Vol. XXI, Pt II, 1948.

¹For details of all the grounds available to a Muslim woman to dissolve her marriage, see, section 2 of DMMA, 1939. There are two additional grounds available to a Muslim woman in Pakistan, i.e., that the husband has taken an additional wife in contravention of the Provisions of the Muslim Family Laws Ordinance, 1961. This ground is also available to such a woman in Bangladesh. Another ground available to women in Pakistan only, is *li'an*, i.e., when a husband accuses his wife of *zina* (adultery) the marriage is terminated by the court through a special procedure.

²and it is lawful for you that ye take from women aught of that which ye have given them; except (in the case) when both fear that they may not be able to keep the limits (imposed by) Allah. And if ye fear that they may not be able to keep the limits of Allah, in that case it is no sin for either of them if the women ransom herself. See Al-Qur'an, 2:229. Yousaf ali trans.

*Corresponding author: Muhammad Ifzaal Mehmood, Ph.D Candidate, International Islamic University Malaysia, Malaysia, Tel: (+603) 6196 4000; E-mail: ifzaalmehmood@gmail.com

Received September 09, 2016; Accepted September 19, 2016; Published September 26, 2016

Citation: Mehmood MI (2016) Judicial Separation at the Wife's Initiative: A Study of Redemption (*Khul'*) in Islamic Law and Contemporary Legislation in Pakistan and Malaysia. J Civil Legal Sci 5: 212. doi: 10.4172/2169-0170.1000212

Copyright: © 2016 Mehmood MI. This is an open-access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

expressly state that redemption (*khul'*) without the consent of the husband will be effected, however, it may take place after the couple have gone through a lengthy and elaborate procedure at the *Shari'ah* Court⁵. But Redemption (*khul'*) is conducted under separate section of Islamic Family Law Act (Federal Territories) from dissolution of marriage. This research recommends a separate section in the DMMA, 1939, for the law of redemption (*khul'*) in the legal system of Pakistan. Another part of the research discusses the legal position of redemption (*khul'*) under Islamic law and the laws of Pakistan and Malaysia.

Khul' and the Qur'an

The crucial question to be answered in this section pertains to the meaning of the *Qur'anic* verse 2:229. However, before discussing that verse it is imperative to know the meaning of the term redemption (*khul'*) itself. The term redemption (*khul'*), literally, means "extracting oneself"⁶. According to, Alauddin Masu'd al-Kasani, "The redemption (*khul'*) is lexically, "*al-naz'*" and "*al-naz'*" means to pull out/extract something from something"⁷. Thus "*khala'ha* means that he has removed her from his marriage"⁸. In the technical sense redemption (*khul'*) is used for marital "extraction"⁹, and is the act of accepting compensation from the wife in exchange for her relief from the marital tie. Ibn Hajr defines it as "Separation of the husband from his wife for a money consideration to be given to the husband"¹⁰. According to Ibn Rushd, "The terms *khul'*, *fidya*, *sulh* and *mubara'a* all refer to the same meaning, which is a transaction in which compensation is paid by the wife for obtaining her divorce"¹¹.

⁵Nora Abdul Hak, Right of Women to Obtain Divorce under *Shari'ah* and Islamic Family Law of Malaysia: With special reference to *Ta'liq* and *Khulu'*, *Australian Journal of Basic and Applied Sciences*, 6 (2012), pp 286-293.

⁶According to Ibn Manzur, the root of *khul'* is *khal'*. The verbal noun *khal'* refers to the act of extraction, removal, detaching or tearing out. In its real sense, *khal'* is generally associated with things or object, such as garments. See, Ibn Manzur Muhammad b. Mukarram, *Lisan al-Arab* (Beirut: Dar Sadir, 1955-56), 8:76-79. Jurjani defines it as "dissolution of marriage through taking money [by the husband]." See, Ali b. Muhammad al-Jurjani, *Kitab al-T'arif* (Beirut: Daral-Surur, n.d.), 45.

⁷Kasani gives two *Qur'anic* verses, i.e., 7:43, 108, to explain the lexical meaning of *khul'*. The meanings of these verses are: "We shall have removed all ill feeling from their hearts", and "then he pulled out his hand." See Alauddin Masu'd al-Kasani, *Bada'i' al-sana'i' fi tartib al-shara'i'*, ed. Muhammad Yasin Darvish (Beirut: DarEhya al-turath al-arabi, 2000), 3:227.

⁸*Ibid*. The controlling role of the husband is clear from the lexical and technical words used by Kasani.

⁹Badruddin Mahmud al-Ayni, *al-Binayah*, ed. Muhammad 'Umar (Beirut: Dar al-Fikr, 1990), 5: 291.

¹⁰Ahmad b. Ali b. Hajr al-Asqalani, *Fath al-Bari*, ed. „Abdul „Aziz b. Baz & Muhibuddin al-Khatib (Beirut: Dar al-Fikr, n.d.), 9: 396. Kamal b. Al-Humam (d. 861) has defined *khul'* as "putting an end to marriage for compensation by using the word *khul'*, (*izalat milk al-nikah bi badal in bi lafz al-khul'*)." See Kamaluddin b. Al-Humam, *Sharh Fath al-Qadir*, ed. Ghalib Al-Mahdi (Beirut: Dar al-kutub al-Ilmiyah, 2003), 4:188. Jurjani shortened Ibn al-Humam's definition, when he stated "putting an end to marriage (*izalat milk al-nikah*)." See, Ali b. Muhammad al-Jurjani, *Kitab al-T'arif* (Beirut: Daral-Surur, n.d.), 45. Haskafi has attributed this definition, i.e., "*izalat milk al-nikah*" to Ibn Nujaym. See, Muhammad 'Allauddin al-Haskafi, *Al-durr almukhtar sharh Tanvir al-absar* (Beirut: Dar al-Fikr Press, n.d.), 3:383. But Ibn Nujaym has himself attributed it to Kamal b. Al-Humam. See, Sirajuddin Ibn Nujaym, *Al-Nahar al-fa'iq*, commentary on 'Abdullah b. Ahmad Al-Nasafi's *Kanzal-daqa'iq*, ed. Ahmad 'Izzu 'Inayat (Beirut: Dar al-kutub al-Ilmiyah, 2002), 2:435. According to Al-Nasafi (d. 710 A.H.), "It is to separate from marriage (*huwa al-fasl min al-nikah*)." Ibn Nujaym adds to this by saying that although "Separation [in this definition] is absolute whether compensation was paid or not but it is necessary to use the word *khul'* [for this transaction]." At 2:434.

¹¹See Muhammad b. Ahmad Ibn Rushd, *Bidayat Al-Mujtahid (The Distinguished Jurist's Primer)*, translation: Imran A. K. Nyazee (Reading: Centre for Muslim Contribution to Civilization, 1996), 2: 79. Ibn Rushd mentions that "the term *khul'*", however, in the opinion of jurists is confined to her paying him all that he spent on her, the term *sulh* to paying a part of it, *fidya* to paying more than it, and *mubara'a* to her writing off a claim that she had against him." At p. 79. Ibn al-Arabi mentions that according to Imam Malik, "*al-mubari'at* is *khul'*" before consummation of marriage, and "*al-mukhli'atu*" is when she obtains *khul'* after consummation of marriage, and "*al-muftadiyatu*" is to redeem herself by paying some of her money, however, these terms are used interchangeably." See Abu Bakr Muhammad Ibn al-Arabi, *Ahkam al-Qur'an*, ed. 'Emad Zaki al-Baroudi (Cairo: Al-Tawfikia, n.d.), 1: 251.

Khul' is legalized by verses of *Qur'an* and events of the *Sunnah* of the Prophet (peace be on him). *Qur'an* expressly sanctioned redemption (*khul'*) as a form of repudiating marriage in the following words:

"and it is lawful for you that ye take from women anything of that which ye have given them; except (in the case)when both fear that they may not be able to keep the limits(imposed by)Allah. And if ye fear that they may not be able to keep the limits of Allah, in that case it is no sin for either of them if the women ransom herself."¹²

The crucial question, on which exegetes differ, concerns the one addressed in the verse, if 'you fear' (*fa in khiftum*), which, naturally, raises the question: Is it addressed to the judge (*hukkam*), which is represented by the courts, or is it addressed to both the partners? In other words, who will determine whether the two partners can, or cannot, live within the bounds set by Allah? Should the determination of that important point be the responsibility of a court, acting on behalf of the state, or should it be determined by the partners themselves? Moreover, what constitutes "*khawf*" (fear), mentioned in the verse?¹³ According to Shafi, "when one of them cannot keep within the bounds set by God, so both [are considered] unable to keep within the bounds of Allah"¹⁴. According to Abu Bakr al-Jassas, "*illa un yakafa*" means "if both of them thought"¹⁵. The fear that the 'two may not be able to keep within the bounds set by God', arises when either of them violates his/her marital duties and/or transgresses upon mutual rights, or the rights of one or both of the partners are denied. The *Qur'an* says, "Women have the same rights against their men as men have against them"¹⁶. This would imply that women can also make a declaration of divorce.

According to Qurtubi, the addressees in the word you (*tum*) [in 2:229] are the *hukkām* and "those conciliators who perform this task in case there is no *Hakim* (Judge)"¹⁷. Ibn Ashur argues that "if the spouses would be addressed [by *tum*], then the wording would be: "*fa in khiftumā ullā tuqimu aw ullā tuqima*" (if you feared that you cannot keep or you [two partners] cannot keep"¹⁸. Abu Zahra argues that the addressees are either "the group of Muslims because they cooperate with each other, as they got discord between the spouses, or it is to the group of women and men", and his preference is for the first meaning¹⁹.

Jurists differ on the issue of whether redemption (*khul'*) should be adjudicated or not, a topic which will be discussed later when the various schools of thought come under discussion. The Maliki school of thought discuss redemption (*khul'*) under verse 4:35²⁰ as well. For

¹²Qur'an, 2:229.

¹³Muhammad Munir, The law of Khul in Islamic Law and the Legal Aystem of Pakistan: The Sunnah of the prophet or Judicial Ijtihad?, *Social Science Research Network*, (2014), last accessed 14 August 2015 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441564&rec=1&srcabs=2470734&alg=1&pos=1 [last accessed 13 August 2015].

¹⁴Muhammad b. Idrees al-Shafi'i, *Kitab al-Umm*, ed. Ahmad Badruddin hasun (Beirut/Damascus: Dar Kotaiba, 2003), 11: 178.

¹⁵See, Abu Bakr Ahmad al-Jassas, *Ahkamal-Qur'an*, ed. Sidqi Muhammad Jamil (Beirut: Darelfikr, 2001), 1:533.

¹⁶Qur'an 2:228.

¹⁷Muhammad Munir, The law of Khul in Islamic Law and the Legal Aystem of Pakistan: The Sunnah of the prophet or Judicial Ijtihad?, *Social Science Research Network*, (2014), last accessed 14 August 2015 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441564&rec=1&srcabs=2470734&alg=1&pos=1 [last accessed 13 August 2015].

¹⁸Muhammad al-Tahir b. 'Ashur, *Tafseer Al-Tahrirwa Al-Tanveer* (Tunis: Dar Sahnun, 1997), 2:408.

¹⁹See, Abu Zahra, *Zahrat al-Tafasir*, 2:779. According to the *Zahiriyyah* school, *khul'* can only be affected if discord is from the wife, because when discord is from the husband taking of compensation is prohibited. See, Abu Zahra, *Zahrat*, 2:781.

²⁰Qur'an 4:35.

example, while commenting on this verse which says, "If you fear a breach between the two, appoint an arbitrator from his people and an arbitrator from her people". If they both want to set things right, Allah will bring about reconciliation between them. Allah knows all, is well aware of everything, Qurtubi argues that "the arbitrators chosen by the judge should see who is the cause of discord and once this is established they should dissolve the marriage through redemption (*khul'*) if the cause is husband"²¹. He further asserts that one arbitrator should be from the man's side and one from the woman's side because they know their problems better. However, "if there is no one from the spouses' people who could be appointed as arbitrators, other suitable persons may be appointed by the judge"²². He argues that the arbitrators should remind them about union and if they agree to remain together as husband and wife, then there will be no separation. But if they refused to stay as husband and wife and "the arbitrators considered it appropriate to decree separation they may decree separation. And a decree of separation by them [arbitrators] is binding for the spouses. And this is so whether it [the decree] coincided with or was against the decree of the local court and whether the spouses delegated them [the arbitrators] the authority to do so or not"²³.

In a nutshell, the *Qur'anic* concept of redemption (*khul'*) is: First, either of the partners may initiate redemption if he or she thinks that marital rights cannot be upheld in his/her marriage. Secondly, according to the preferred opinion of the majority of exegetes, the court has to determine the extent of discord, harm, aversion, coercion, etc.²⁴. Thirdly, and this is very crucial, is it within the *Qur'anic* concept that the court can grant redemption (*khul'*), especially when the discord or harm is attributed to the woman and she is ready to pay compensation to her husband without the husband's consent or is *khul'* conditional upon the consent of the husband? In other words, is redemption (*khul'*) a consensual act or can the court put an end to the marriage by *khul'* without the husband's consent? The answer is not clear from the wording of the *Qur'an* in verse 2:229 and this is why exegetes had to resort to *ahadith* regarding *khul'*, and the Islamic Jurists (*fuqaha*) differed amongst themselves, which will be discussed below. Finally, there is no sin on the part of the husband to receive compensation when his wife wants to divorce him. The apparent language of the verse 2:229 indicates that it is the wife who has to pay compensation to free herself, "*fima fdat behi*" (what the wife may give up [to her husband])²⁵. To be able to analyse the remaining answers we have to resort to the *ahadith* of the Prophet (peace be on him).

Khul' and Sunnah of the Prophet (P.B.U.H)

As far as the events from the Islamic legal history are concerned, two events happened in the time of the prophet (peace be on him), which are important to quote and elaborate. One such leading case is

²¹Qurtubi, *Ahkam al-Qur'an*, 3:115.

²²*Ibid*.

²³*Ibid*, 3:115-116.

²⁴Muhammad Munir, The law of Khul in Islamic Law and the Legal Aystem of Pakistan: The Sunnah of the prophet or Judicial Ijihad?, *Social Science Research Network*, (2014), last accessed 14 August 2015 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441564&rec=1&srcabs=2470734&alg=1&pos=1 [last accessed 13 August 2015].

²⁵This has been interpreted by Oussama Arabi that the "woman to ransom (*taftadi*) herself from her husband by means of a negotiated settlement", thereby meaning that the consent of the husband is essential for *khul'*. See, Oussama Arabi, "The Dawning of the Third Millennium on Shari'a: Egypt's Law no. 1 of 2000, or Women May Divorce at Will", *Arab Law Quarterly*, 16:1 (2001), pp. 17-8. This interpretation seems to be against the Habibah's episode described in the text above in which the consent of the husband Thabit b. Qays was not sought by the Prophet (peace be on him).

that of Thabit Ibn Qais. The facts which lead to the case are discussed in different *ahadith*. Jamila bint Uba ibin Salool hated the physical ugliness of her husband. She presented her case to the Messenger of Allah (peace be on him) in the following words:

"O Messenger of Allah! Nothing can ever unite his head with mine. When I raised my veil I saw him coming in the company of a few men and he was the darkest, shortest and ugliest of them. By God I do not dislike him because of any defect in his faith or morality. I just hate his ugly looks. By God! If I did not fear Allah, I would have spat on his face when he came near me."²⁶

Bukhari and Nasai state that "I do not find any fault in his faith or morality". It denotes that she was satisfied regarding his piousness but she doesn't like his physical appearance. The Prophet (peace be on him) heard that complaint and observed; "will you return him the garden which he has given to you". She answered; "O' yes, Messenger of Allah! I shall give even more if he wants". "No, not more. Just return him his garden", observed the messenger of Allah (peace be on him). He (Prophet) then ordered: Thabit, accept the garden and give her a divorce²⁷.

In the second and third versions of the same incident, the Prophet (peace be upon him) is reported to have ordered Thabit ('*amarahu*) to divorce her in return for his garden²⁸. In the first version in Al-Bukhari, the words "*iqbal*" (accept) and "*talliqa*" (divorce her) are used in the *imperative* form by the Prophet but in the second one the indirect speech is very clear that Thabit's approval was not sought but the Prophet had ordered him, instead.

Maudodi on the basis of the above case recommends the following grounds for *khul'*: The Prophet (peace be upon him) held that the complaint of the women that her husband was physically ugly and loathsome was adequate ground for granting *khul'*. When it is manifest that a man hates his wife or the wife hates her husband, divorce and *khul'* are perfectly justified and valid measures, for the consequences to religion, morality and civilization of keeping a man and women forcibly yoked together are far worse than the consequences of Divorce and *Khul'*²⁹.

According to the collection of Abi Dawud, in which Habibah's case is reported:

"Aisha (the Prophet's wife) relates that Habibah bint Sahl was married to Thabit b. Qays b. Shamas, who hit her and broke a limb of hers. She approached the Prophet (peace be upon him) after dawn, and he summoned Thabit and told him: "Take (*khudh*) some of her money and separate from her." Thabit said: "Is this permissible, Prophet of Allah?" The Prophet said: "Yes". Thabit said: "I gave her two gardens

²⁶Muhammad Isma'il al-Bukhari, *al-Jami' al-Sahih* (Cairo: People's Edition, n.d.), *hadith* no. 4971. The *hadith* is also available at <http://www.sunnipath.com/library/Hadith/H0002P0071.aspx> (last accessed 20/06/2011); also available at <http://hadith.al-islam.com/Page.aspx?pageid=192&BookID=24&TOCID=2943> (last accessed 15 August 2015)

²⁷Abu 'l-Aala Mawdoodi, *Huqooq-al-Zavjain* (Lahore: Idara Tarjumanul Quran, 2010), 68. (hereinafter Maudodi, *Huqooq-al-Zavjain*)

²⁸*Ibid*. *hadith* no. 4972 and *hadith* no. 4973 available at <http://www.sunnipath.com/library/Hadith/H0002P0071.aspx> (last accessed 18 August 2015). In these two narrations the reporter is, 'Ikramah, who described her name as Jamila but in all the versions in Al-Bukhari she is simply Thabit's wife.

²⁹Maudodi, *Huqooq-al-Zavjain*, 67. He further argues that The women right of *khul'* is parallel to man's right of divorce. When man's right of divorce is not subject to the use should not be motivated by lust. In purely legal sense, the woman's right to is *khul'* cannot be subjected to any moral restraint. If the women is genuine need of *khul'* it would be cruel to deny to her. If she is lecherous denial of *khul'* will defeat most important object of sharia for it is better for a woman to take a score of men as husbands than an illicit lovers.

as dower and they are her property." The Prophet (peace be upon him) said: "Take them and separate from her (*fariqha*)", which he did"³⁰.

In the report of Abi Dawud, Thabit – the husband – does not play any decisive role (as assigned to him by the legists) as the Prophet never asked for his consent to the separation. The crux of the matter is that according to the above reports, which are different versions of the same incident, *khul'* is not consensual and the consent of the husband is not essential.

Khul' and Jurist's Point of View

On the basis of the above mentioned verses of the holy *Qur'an* and *Sunnah* of the prophet (peace be on him), all jurists are of the opinion that redemption (*khul'*) is permissible in Islam, although they differ about the conditions of *khul'*. Abu Hanifa declares *khul'* in circumstances when there is variance between the spouses to the extent that the limits prescribed by Allah are not followed. He says that *khul'* can be conducted in the court and outside the court³¹.

On the other hand Shafi writes in his book *Kitab ul um* 'if a husband says that he will not divorce his wife and will not provide her rights'. Then in that situation the court will bound the man and she will be insured from her husband about her rights and the man will be bound to give her rights. But there will be no compulsion on the male for the separation of his wife³². *Khul'* is concluded to be the same as divorce (*talaq*) and no any other person can pronounce *talaq* other than a husband³³.

According to Malik when there is a dispute between the parties in a marriage, a judge should appoint two arbitrators from the family of each, as is laid down by the holy *Qur'an* and if these arbitrators fail to bring about a compromise the judge has the power to dissolve the marriage on such terms as he considers just and fair³⁴. Malik states in another place that the female should be compelled to go along with her husband³⁵. Ahmad bin Hambal considers redemption (*khul'*) like other contracts and it should be settled on mutual understanding³⁶.

Khul' is Talaq or Faskh-e-Nikah

Talaq is the unilateral repudiation of a wife by her husband, while *Faskh-e-Nikah* is the dissolution of marriage by judicial decree³⁷. An important question is whether *khul'* is *Talaq* or *Faskh-e-Nikah*. There are different opinions from jurists. These views of the Jurists are discussed in what follows:

Abu Hanifa is of the opinion that *khul'* is *talaq*. *Umer* (r.a) and *Usman* (r.a) are of the same opinion. If the spouses remarry after conducting *khul'* the husband will have two chances of divorce. After *khul'* if the husband pronounces his intension to divorce two times it will be considered irrevocable divorce (*talaq-e-mualaz*)³⁸. In *Fitwa*

*Alamgiriya*³⁹ it is stated that *khul'* is like *talaq* and it will be lawful on condition it is fulfilled like *talaq*. The conditions and requirements of *khul'* are like those for *talaq*⁴⁰.

The *Sarakhsi* writes in *Mabsut* that *khul'* can be conducted by the *qazi* and is also permissible without judge (*qazi*). The basic requirement for *Khul'* is the consent of both parties and compensation from the wife but the husband has the power to pronounce *talaq*. *Burhanudin Marghanani* in his book *Hidaya* states that *khul'* is considered *Talaq-e-Bayin* and the wife will be bound to give compensation⁴¹. So like husband pay compensation in *talaq*, in *khul'* wife pay reparation for the pronouncement of divorce (*talaq*). It shows that *Khul'* is like divorce (*talaq*). It cannot be conducted like dissolution of marriage (*faskh-e-nikah*)⁴².

Shafi interprets that *khul'* is *talaq* and in another place he views *khul'* as *Faskh-e-Nikah*. In his last saying he says that *khul'* is *talaq*. In his book *Kitab ul Um*, he says that it is clear from the saying of Allah that *talaq* is pronounced by the husband and it is also clear that *khul'* cannot be conducted without the approval of the husband⁴³. His second opinion is that *khul'* is *faskh-e-nikah*, he further say that it comes in the category of *talaq-e-bayin*. *Tavos* and *Dare Qutni* are also of shafi's opinion. *Abdul Razaq* says that if a person pronounces two *talaq* and after that dissolves his marriage by *khul'*, that person can remarry the women without *halala*. According to their opinion *khul'* is not like *talaq* and the male has the third option of *talaq*. *Ibn Qayim* writes in his book '*Zad-ul-miad*' that *Usman* and *Ibn-e-Umar* are on the finding that *khul'* is not in the category of divorce (*talaq*) but that it is dissolution (*faskh*). *Ahmad Bin Hanbal* says that *khul'* is not considered *talaq* but it comes in the category of dissolution of marriage (*faskh-e-nikah*). So from this conclusion about *khul'* the man's right of three divorce (*talaq*) will not be affected⁴⁴.

It is concluded from the above statements that legally *khul'* falls in to the category of irrevocable divorce (*talaq-e-bayin*). In revocable divorce (*talaq-e-raji*) the wife will be in the bond of marriage contract (*nikah*) up to the *iddat* but in *khul'* there is complete separation of spouses after the husband's compensation from the wife. The complete separation will be considered if there is irrevocable divorce (*talaq-e-bayin*). The wife gives compensation to be completely rid of the matrimonial relation and this will only be possible if she decides that there is no possibility of the return of the husband⁴⁵. The most appropriate example is that of *Jamila* as the Prophet said '*khal sabeelaha*' to leave her path, it denotes *talaq-e-bayin*⁴⁶.

Husband Consent in Khul'

It is not essential for dissolving a marriage under *khul'* that the husband should be at fault. The case of *Jamila* fully establishes this view. The wife may not be able to live happily in such a case. Does Islam force her to live a miserable life and provide no relief for her? Can it be said that the unhappiness of the wife is of no concern to the Islamic

³⁰Abu 'Abdur Rahman al-Nasa'i, *al-Sunan*, *hadith* no. 3497, available at <http://hadith.alislam.com/Page.aspx?pageid=192&BookID=27&TOCID=1774> (last accessed 18 August 2015).

³¹Al Sarakhsi, *Al Mabsot* (Egypt: Matbat ul saada, 1324 h), 173, 6.

³²Tanzil Urahman, *Majmoa Qavaneen-e-Islam* (Islamabad: Idara Tahqeeq Islami, 1984), 586. (later on Tanzil Urahman, *Majmoa Qavaneen Islam*)

³³Al Imam Shafi, *Kitab-ul-um Sharh Muta* (Azhar: Maktaba tul Kulyaat, 1381 h), 200, 5.

³⁴*Balqis Fatima vs. Najm-ul-Ikram Quraishi* (PLD 1959 Lahore 566).

³⁵Abul Waleed, *AIMuntaqa* (Egypt: Matbat ul saada, 1324 h), 61, 7.

³⁶Ibn Qudama, *Al Mughni* (Egypt: Darul Manar, 1367 h), 52, 8.

³⁷Hodkinson, *Muslim Family Law*, 224.

³⁸Habib urahman, *Ahkam-e-Talaq* (Islamabad: IRI, 2004), 110.

³⁹Fatawa-e-Alamgiri (also known as Fatawa-i-Hindiya and Fatawa-i-Hindiyya) is a compilation of law created at instance of the Mughal Emperor Aurangzeb (who was also known as *Alamgir*). This compilation is based on Sunni Hanafi Islam's Shari'ah law, and was the work of many scholars, principally from the Hanafi school

⁴⁰Muhammad Taqi Usmani, 167.

⁴¹Tanzil Urahman, *Majmoa Qavaneen Islam*, 599.

⁴²Al Sarakhsi, *Al Mabsut* (Egypt: Matbogha Al Saghada, 1324 h), 173.

⁴³Muhammad Taq Usmani, 163.

⁴⁴Tanzil U-rahman, *Majmoa QavaneenIslam*, 599.

⁴⁵*Ibid*, 600.

⁴⁶*Ibid*, 601.

law and that it would rather let the wife adopt an undesirable code of conduct than to dissolve the marriage. The *Qur'anic* duty to keep the couple together with kindness requires that if mutual love cannot work, the husband should release the wife from the bond of marriage⁴⁷.

The *Qur'an* declares: "Women have rights against men, similar to those that the men have against them, according to the well-known rules of equity". It would, therefore, be surprising if the *Qur'an* did not provide for the separation of the spouses at the insistence of the wife, in any circumstances. The *Qur'an* expressly says that the husband should either retain the wife, according to well-recognized custom (*imsak-un-bil-ma'roof*) or release her with grace (*tasree-hun-bi-ihsan*). The word of Allah enjoined the husband not to cling to the woman, in order to cause her injury. Another *hadith* declares about Islam. "Let no harm be done, nor harm be suffered in Islam". In certain circumstances, therefore, if the husband proves recalcitrant and does not agree to release the woman from the marital bond, the *qazi* may well intervene to give redress and enforce the *Qur'anic* injunctions⁴⁸.

All schools of Muslim law allow the wife to approach the judge (*qazi*) for a judicial termination of the marriage (*faskh*). There is, however, a considerable divergence of opinion among the schools concerning precisely what grounds afford the court jurisdiction to dissolve the marriage. It is an important question whether a wife has got an absolute right to the dissolution of her marriage on restoring to the husband the consideration paid to him by her, or does the dissolution of marriage depend on the decision of the judge (*qazi*).

Abu Hanifa is the most restrictive of the jurists. According to *Abu Hanifa* a wife cannot get her *khul'* without consent from her husband. *Abu Bakar Jasas*, a *Hanafi* Jurist, commented on the *Hadith* of *Jamila* as follows:

'If there were permission for the *qazi* to pronounce *talaq* without the consent of the spouses then Muhammad (peace be upon him) would have dissolved the Marriage of *Jamila* and *Thabit* without any consultation with him. But he consulted *Thabit* and advised him to offer *talaq* and get the garden in response'.

In this analysis by *Abubaker Jasas* it is clearly mentioned that the *qazi* has no authority to announce *talaq* without the consent of the spouses even when there is fear that the limits ordained by Allah will not be obeyed. He further elaborates that when there is confusion in any matter, Jurist can give their opinion, but in the case of *khul'* it is clear that *khul'* is like *talaq* that *talaq* is a matter for the husband. *Khul'* will be granted by the husband to the wife. And no other authority can separate the partners⁴⁹.

*Sarakhsi*⁵⁰ elaborates on *Khul'* in *Mabsut*, it is permissible in *khul'* to consult the court and also permissible to terminate *nikah* by mutual consent in home. In *khul'* it is necessary that the two parties will agree on separation. The requirement in *khul'* is that the husband will announce *talaq* and the wife will give compensation⁵¹.

Al Suyoti in *Dar-ul Manshor* cited the saying of *Umar* (r.a): 'Males

⁴⁷K.N.Ahmad, *The Muslim Law of Divorce* (Islamabad: Islamic Research Institute, 1972), 232.

⁴⁸*Khurshid Bibi vs. Baboo Mohammad Amin* (PLD 1967 SC 97).

⁴⁹Muhammad Taqi Usmani, 164.

⁵⁰Muhammad b. Ahmad b. Abi Sahl Abu Bakr al-Sarakhsi was an important jurist, or Islamic scholar of the Hanafi school. He was traditionally known as Shams al-A'imma ("the sun of the leaders")

⁵¹*Ibid.*

should not give *talaq* if their partners want *khul'*. It is proved from this saying of *Umar*(r.a) that *khul'* is not conducted without the consent of the husband. *Umar* (r.a) advised the husbands in society to pronounce *talaq* if their wives demanded *khul'*. *Umar* (r.a) as judge (*qazi*), advised husbands to give *khul'*, since if the authority be with the *qazi* to terminate the Marriage, he (*umar*) would himself dissolve the marriage without consulting the husband⁵².

A verse of the *Qur'an* states that: 'if you divorce them before you have touched them, and you have appointed into them the dower (*mahar*), then pay half of that (*Mahar*), unless they (the women) agree to forgo it, or he the (husband), in whose hands is the marriage tie, agrees to forego and give her full appointed *Mahar*. And to forgive and give (her full *mahar*) is nearer to pious (*taqwa*). And do not forget liberality between yourselves. Truly, Allah is all-Seer of what you do'⁵³. In this verse 'in whose hand is the marriage tie' denotes that the husband has all authority of divorce and separation. No one can interfere in his right of *talaq*. It is clear from the above discussion that *Abu Hanifa* is of the opinion that for *khul'*, mutual consideration is necessary and it is not possible that the court or *qazi* grant *khul'* without the consent of the husband.

There is another verse about the arbitrary council. Does the council have authority to dissolve a marriage without the consent of the husband? 'If you fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation for Allah hath full knowledge, and is acquainted with all things'⁵⁴.

Malik is considered as the most lenient of the Jurists on behalf of *khul'*. Malik is of the opinion that no arbitrators are required and nor (further) permission of spouses. The *qazi* has the authority to pronounce *khul'* on behalf of the husband. *Kufis*, *Shafi* and *Ahmad* have said that the permission of the husband is necessary, as the right to divorce is in the hands of the husband. If he permits, well and good; otherwise the Court will decree divorce on his behalf⁵⁵.

Husbands are ordered by Allah in the Holy *Qur'an* 'to treat (the) wives with kindnesses⁵⁶. Even in the case of disagreement between spouses it is stated, 'so if they obey you pursue, not a way against them'⁵⁷. This shows clearly that the husband is under a solemn obligation to keep his wife with kindness⁵⁸. In 'Islamic Law' by *Aziz Ahmad*, the *Malki* Law relating to *Khul'* is explained as follows. According to Malik when there is a dispute between the parties to a marriage, the judge should appoint two *Hakims* or arbitrators from the family of each, as is laid down in the Holy *Qur'an*, and if these *Hakims* fail to bring about a compromise, the Judge has the power to dissolve the marriage on such terms as he considers just and fair⁵⁹.

Malik has transferred the authority of the husband to the arbitrators (*hukama*), who will decide the case of the controversy between the spouses. *Malik* gives this opinion from a verse of the *Qur'an*: 'If you fear a breach between them twain (the man and wife), appoint an arbitrator, one from his family and the other from her's. If they both wish for

⁵²*Ibid.*

⁵³Al-Qur'an 2:237.

⁵⁴Al-Qur'an, 4:35.

⁵⁵*Khurshid Bibi vs. Baboo Mohammad Amin* (PLD 1967 SC 97).

⁵⁶Al-Qur'an, 4:19.

⁵⁷*Ibid.*, 34.

⁵⁸K.N.Ahmad, *The Muslim Law of Divorce* (Islamabad: Islamic Research Institute, 1972), 232.

⁵⁹*Balqis Fatima vs. Najm-ul-Ikram Quraishi* (PLD 1959 Lahore 566).

peace' Allah will cause their reconciliation. Indeed Allah is ever All-knower, Well-Acquainted with all things⁶⁰.

It is accepted by the Jurists and Commentators that "you" in the words "if you fear" in the relevant verse refers to the people who have authority to decide (*ulil-amr*), and includes the *qazi*, who represents the community for adjudication of disputes between the parties. This has reference to the verse of the *Qur'an*, which requires that arbitrators representing spouses be appointed in case of *shiqaq* (breach between them), for the purpose of effecting reconciliation if possible and for ordering separation if that be necessary⁶¹. Some of the legalists have described *Hakim* as merely attorneys or arbitrators and not Judges, but others have said that they have full powers to decide as they think fit. Some have held that the arbitrators' opinion is to be submitted to the *qazi* who will decide, in accordance with their opinion. There is also a difference of opinion among the legalists as to whether reference to the Sultan (sovereign) or *qazi* is necessary at all, or not⁶².

Another verse of the Holy *Qur'an* states that "Then if you fear that they will not keep the limits ordained by Allah, then there is no sin on either of them if she gives back (the *mahar* or part of it) for her *Khul'*"⁶³. The word 'if you fear' being addressed to the state or judge, they can only mean that the judge is entitled to pass an order even though the husband does not agree⁶⁴. It means in other words that a judge may come to the conclusion that they cannot perform the duties and fulfil the obligations obligatory on them on account of marriage⁶⁵.

There are two *ahadiths* of the Prophet (peace be upon him) regarding *khul'* as the right of a woman and to get divorce without the consent of her husband. These *ahadiths* are mentioned by *Maudodi* in his book '*Huqooq-u-zavjain*'. One *Jamila bint Ubi bin Salool*⁶⁶ hated the physical ugliness of her husband⁶⁷. There was an order by the Prophet (peace be upon him) to *Thabit* to take back what he had given to the wife and to divorce her. He did not blame *Thabit* in any way, and so far as *Jamila* is concerned, she had expressly said that she had found no fault in him with regard to his behaviour and that the sole reason she wanted a release was that he was ugly and she could not bear the sight of him, she being herself a handsome woman. In neither case did the Prophet (peace be upon him) make any pronouncement as to the reasonableness of the attitude of the wife. He was just satisfied that the husband and wife could not amicably live together⁶⁸. He never asked for the consent of the husband⁶⁹.

⁶⁰Al-Qur'an, 4:35

⁶¹Imam Abu Hanifa and Imam Shafi is of the opinion that if the husband handover the authority of *Talaq*, then the Hakams can dissolve the marriage without the prior permission of her Husband. Otherwise they don't have authority to pronounce *Talaq* on behalf of her Husband. See Muhammad Usmani, 170.

⁶²*Ibid*.

⁶³Al-Qur'an, 2:229.

⁶⁴*Balqis Fatima vs. Najm-ul-Ikram Quraishi* (PLD 1959 Lahore 566).

⁶⁵K.N.Ahmad, *The Muslim Law of Divorce* (Islamabad: Islamic Research Institute, 1972), 231

⁶⁶She presented her case to the Messenger of Allah (peace be upon him) in the following words: "O Messenger of Allah! Nothing can ever unite his head with mine. When I raised my veil I saw him coming in the company of a few men and he was the darkest, shortest and ugliest of them, by God I do not dislike him because of any defect in his faith or morality. I just hate his ugly looks. By God! If I did not fear Allah, I would have spat on his face when he came near me." (Ibn jarir)

⁶⁷Maudodi, *Huqooq -al-Zavjain*, 58

⁶⁸*Balqis Fatima vs. Najm-ul-Ikram Quraishi* (PLD 1959 Lahore 566).

⁶⁹If Qazi have authority to dissolve the Marriage without the consent of her Husband, Our Prophet (P.B.U.H) will not consult Hazrat *Thabit*. He should have hand over the Garden to *Jamila* without his consultation with *Thabit*. Contrary to that Prophet (P.B.U.H) consulted *Thabit* about *talaq*. It shows that the dissolution of Marriage is not possible without mutual consent. Qazi or court have no authority to dissolve the marriage without the will of husband. See Muhammad Taqi Usmani, 166.

Another story from the time of *Umar* (r.a) is that a woman wanted to take *Khul'* from her husband as she was not pleased with him. *Umar* (r.a) ordered her husband to give her *khul'*⁷⁰. The action of *Umar* (r.a) shows that the judge can adopt a suitable method to ascertain the level of hate and aversion in the heart of women so that the matter is put beyond a shadow of doubt. *Umar* (r.a) also confirms that it is not necessary to go into the cause of hate and aversion. There may be some causes which when described will not strike the listener as sufficient to warrant hatred, but which are sufficient to cause hatred for one who has to suffer them day and night. The only duty of the judge is therefore to ascertain the existence of antipathy in the heart of the women⁷¹. *Ibn Rushid* writes in *bidayat ul mujtahid* that if the husband does not like his wife, he has the right of *talaq*, likewise if his wife does not like him, she is given the right of *Khul'*⁷². So it is clear that in *talaq* the consent of the female is not essential and in *Khul'* the consent of male is not necessary⁷³.

Shafi's opinion about the consent of the husband is that *khul'* is like *talaq* and no other person has the right to pronounce *talaq*. The right of *talaq* cannot be used by a person other than a woman's husband. The *qazi* cannot divorce a wife from her husband without his consent. *Shafi* in his book *Kitab ul Um* writes that *khul'* is *talaq* and no person other than a woman's husband can grant her divorce. He further mentions in his book that a woman's father, a *Hakim* and a *qazi* cannot divorce a wife on behalf of the husband⁷⁴. *Abu Ishaq Shirazi Shafi* writes in his book *Al-Muhazab* that *khul'* is conducted through the consent of both the parties. The purpose of the *khul'* is to resolve the issue of hatred and that is possible with mutual consent. Therefore if the *khul'* is conducted the responsibility is upon the husband and wife to resolve the matter⁷⁵.

Ahmad Bin Hanbal also supports the views of *Shafi* that the *khul'* is a contract like *talaq* and there is no need for *qazi* to interfere⁷⁶. The absolute right of *khul'* is with the spouses and the *qazi* cannot dissociate the husband and wife without the consent of the husband⁷⁷. *Maufiquddin Ibn Qadama Hanbali* in *Mughni* writes *khul'* is the dissolution of a contract with compensation; therefore there is no need of a *qazi*. It is like *talaq* and there is no need for a *qazi* in *talaq*. So if otherwise the dissolution of marriage is conducted between the spouses therefore there is no need of *qazi*⁷⁸.

Legislation of *Khul'* in Pakistan

The first landmark decision based on judicial reinterpretation in Pakistan was that of *Balqis Fatima*⁷⁹ a case dealing with the law of *khul'*. The question was whether termination of a marriage can be effected

⁷⁰Maudodi, *Huqooq -al-Zavjain*, 66.

⁷¹*Ibid*, 68.

⁷²Muhammad Taqi Usmani, 179.

⁷³On which conditions *Khul'* is lawful and on which conditions is unlawful, all jurist are agreed that *Khul'* is valid if both the parties agree on it. See Ibn Rushd, *Bidayat ul Mujtahid* jald 2 (Mustafa al babi, 1379), 68.

⁷⁴Muhammad Taqi Usmani, 184.

⁷⁵*Ibid*., 186.

⁷⁶The women right of *Khul'* is parallel to the man right of divorce. Lust may be the motivating force of both *Khul'* and Divorce. When man's right of divorce is not subject to the restrained that its use should not be motivated by lust. In a purely legal sense, the women right to *Khul'* cannot be subjected to any moral restraint. If the women are in guanine need of *Khul'* it would be cruel to deny to her. If she is lecherous, denial of *Khul'* will defeat the most important object of sharia that it is better for women to take a score of men as husbands than as illicit lovers. See Maudodi, *Huqooq -al-Zavjain*, 69.

⁷⁷*Ibid*., 188.

⁷⁸Ibn Qadama, *Al Mughni* (Egypt: Darul Manar, 1367 h), 52.

⁷⁹*Balqis Fatima VS. Najm-ul-akram Quraishi* (PLD 1959 Lahore 566)

only by agreement between the husband and the wife as ordained by the Hanafi School, or whether the wife can claim it even if the husband does not agree. A Muslim wife has the right to demand the dissolution of her marriage if she dislikes her husband. This was relied on by Maudodi⁸⁰; he developed his view from an interpretation of a *Hadith* (saying of Prophet) concerning Jamila and her husband Thabit. The words "if you fear" in the verse of the *Qur'an*, the court held, are addressed to the judge. The reference to the judge can only mean that he is to determine if the circumstances are such as to make harmonious married life impossible and that if he so determines, he can pass an order dissolving the marriage even if the husband does not agree [1-5]⁸¹.

An important limitation is imposed such that if the judge apprehends that the limits of Allah will not be observed, that is, in their relation towards one another the spouses will not obey Allah, and that therefore a harmonious married state as envisaged by Islam will not be possible, the he will grant dissolution. The judge (*qazi*) will consider whether the rift between the parties is a serious one though he may not consider the reasons for the rift [6-8]. Is it open to a present-day court to adopt a course different from that laid down by the classical jurists, in this case the Hanafi, and grant, in the words of the court, "to the wife for the first time a right of release from the marital tie", which she did not have under the traditional Hanafi law? The opinion of the full bench, written by Kaikaus J, is categorical. On the facts of the case, the Court came to the conclusion that the parties could not live together as a husband and wife should, and accordingly dissolved the marriage on restoration of the benefit received by the wife⁸².

The decision in the case of Balqis Fatima⁸³ does not establish equality of divorce rights of husband and wife but it goes a long way towards it. Its significance lies in the facts that (i) it establishes the right of the courts to independently interpret the original sources of Muslim law including the *Qur'anic* texts, and (ii) it grants to the wife for the first time a right of release from the marital tie which she did not have under Hanafi law until this case. Fyze points out that the full bench decision in the Sayeeda Khanam⁸⁴ case represents the classical view of the Hanafi jurist as understood in South Asia [9-12]. In the Balqis Fatima⁸⁵ case the full bench adopted the Maliki view, that in fit cases arbitrators have the powers to dissolve the marriage, as being closer to the *Qur'anic* teachings and more conducive to ameliorating the lot of women at the present time. But he doubts if the decision can be considered satisfactory unless legislative authority exists for the application of Maliki law to the Hanafi, even though the end to be achieved is a worthy one⁸⁶. However in the leading case of Khushid Bibi⁸⁷ the Supreme Court of Pakistan affirmed the Balqis Fatima⁸⁸ judgment.

Most of the Jurists (*fuqaha*) allow the permissibility of *khul'* on the basis of *Qur'anic* verse (2:229). In the verse the Arabic word '*tum*' is addressed to the *Hakam* (the judge) and not to the husband and wife. Some Islamic Scholars such as Taqi Usmani interpret in a different way

that the Prophet in the *Hadith* of Thabit merely gives his opinion as a social leader to Thabit and Jamila which was not binding, and that he was not acting in his judicial capacity⁸⁹.

It is to be remembered that the majority of the Muslim Jurists do not agree that a judge can grant *khul'*. However Al-Hasan and Ibn Siren argue that *khul'* is not permitted except with the permission of the Sultan. The legislation and case law in Pakistan, as discussed above, seems to follow the view of Al-Hassan and Ibn Sirin regarding *khul'* as they call it judicial *khul'*. It may be argued that, although *khul'* is valid without judicial pronouncement, the procedural requirement of judicial pronouncement is required to make it effective and this is only to sanction the separation. In the absence of such pronouncement uncertainty will exist as to the matrimonial relationship and this would cause the women who given her vulnerable social position to be in difficult position. This view is supported both by the above stated *Hadith* and Javid Iqbal's decision in Naseem Akhtar [13-17]⁹⁰.

Although the right of *khul'* can be granted without a husband's consent in Pakistan, there is a need to separate the law of *Khul'* from the provision of *Fasakh*. A majority of *Fuqaha* (Islamic jurists) is of the opinion that redemption (*khul'*) is divorce (*talaq*) and not dissolution of marriage (*fasakh-e-nikah*). In Malaysia dissolution of marriage (*fasakh-e-nikah*) and redemption (*khul'*) are put in separate sections of the Islamic Family Law. Pakistan and Bangladesh administer this law of *khul'* under the Dissolution of Muslim Marriages Act, which is against the opinion of the majority of Islamic Jurists (*fuqaha*).

Legislation of *Khul'* in Malaysia

In Malaysia Section 49 of the Islamic Family Law Act (Federal Territories) 1984 provides that where the husband does not agree to voluntarily pronounce a *talaq*, but the parties agree to a divorce by *khul'*, the court shall, after the amount of the payment is agreed upon by the parties, cause the husband to pronounce a divorce by redemption (*khul'*), and such divorce is *ba'in* *sughra* or irrevocable. This provision expressly states the need for an agreement be reached before a *khul'* divorce can be granted in the *Shari'ah* Court. Unlike Pakistan, in Malaysia the husband's consent remains an essential requirement for *khul'*.

In the case of *Rokiah*⁹¹ it was decided that the consent of the husband is necessary and he cannot be forced to give his consent. Previously, the practice in Malaysia was that the application for *khul'* would only take effect if the husband agreed to divorce the wife with the payment of compensation for her release. If the husband still disagrees with the option, two arbitrators (*hakam*) will be appointed to handle the case that is either to effect reconciliation or dissolve the marriage [18-22]. The cases discussed below indicate that where *khul'* has been sought by the wife, the judge has insisted on the appointment of *hakam* who have the power to pronounce a divorce if so authorised by the husband. In the case of *Che Pah*⁹², the plaintiff had applied for an order that his wife, the defendant, should return and cohabit with him. The defendant refused to do so, as she claimed the husband was a gambler and a drunkard and did not pray. She asked for a divorce from him and offered to pay compensation for a *khul'*. The court after hearing the parties ordered the wife to return to the husband and ordered the husband to pay her maintenance and provide a dwelling house for her. The wife refused to go back to her husband and the husband

⁸⁰Maudodi, *Huqooq –al-Zavjain*.

⁸¹Alamgir Muhammad Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia* (Oxford: University Press), 121.

⁸²*Ibid*, 122

⁸³*Balqis Fatima VS. Najm-ul-akram Quraishi (PLD 1959 Lahore 566)*

⁸⁴*Syed Khanam VS. Muhammad Sami (PLD 1952 Lahore 113)*

⁸⁵*Balqis Fatima VS. Najm-ul-akram Quraishi (PLD 1959 Lahore 566)*

⁸⁶Asif A.A. Fayzee, *Outlines of Muhammadan Law* (India: Oxford University Press, 1999), 170

⁸⁷*Khurshid Bibi VS. Muhammad Shafi (PLD 1967 SC 97)*

⁸⁸*Balqis Fatima VS. Najm-ul-akram Quraishi (PLD 1959 Lahore 566)*

⁸⁹Muhammad Taqi Usmani, 175.

⁹⁰*Naseem Akhtar VS. Muhammad Rafiq (PLJ 2005 SC 1325)*

⁹¹*Rokiah vs. Abu Bakar, (JMB 948)*

⁹²*Che pah v. siti rahmah, (1974) 2 JH 244*

too did not give the maintenance as ordered. The judge thereupon ordered that two *hakim* to be appointed under Section 90A (1) of the Administration of Muslim Law Enactment 1963. Section 90A (1) of the Enactment states: "Whenever any misunderstanding arises from any decision of the court, as for example, where the husband is asked to divorce his wife but refuses to do so, the court has the power to order both parties to appoint their representatives to find ways of solving the misunderstanding"⁹³.

In this case the court on 6 February 1975 confirmed the appointment of two *hakam* one for each of the parties. The court then briefed the two *hakam* as to the conduct of the reconciliation process and reminded them that they should try to effect reconciliation between the parties. On 9 July 1975, both *hakam* reported to the court that they were not able to solve the case. The court, therefore, on 11 January 1976 appointed another *hakam* under s 90 A (2) of the Enactment [23,24]. In this case, the *hakams* finally were able to get the agreement of the parties for a *khul'*. This case shows that the court has the power to remove the *hakam* if the couple are unable to agree, or if the court is not satisfied with their conduct of the arbitration. The decision of the newly appointed *hakam* will be enforceable by the court⁹⁴.

Another case where *hakam* were appointed is *Nerat bt. Musa*⁹⁵ v. *Ahmad bin Kancil*. (1965) 3JH 101. In this case there was a dispute between the husband and the wife. The wife applied for *khul'* divorce but the husband refused to accept. The court decided based on s 90 (1) and (2) of the Administration of the *Shari'ah* Enactment (Perlis) (No. 3) of 1964 to appoint arbitrators for each of the parties to settle the matter. The *hakim* for the husband agreed that there should be a *khul'* divorce on the wife paying RM150 and when the wife paid this amount to the husband, he pronounced *talaq* on her. The above provision is in line with the opinion of Islamic jurists that *hakam* have the authority to order separation of the parties either through *talaq* divorce or *khul'*. This provision is important as it gives authority to *hakam* to order a divorce in a case where the husband is reluctant to pronounce it whereas the state of *shiqaq* (marital discord) is persisting⁹⁶. In Pakistan, the courts have decided in several cases that the wife may obtain *khul'* even if the husband does not agree to it. For example, in *Balqis Fatima*,⁹⁷ the High Court of Lahore held that if the court arrived at the conclusion that the couple would not be able to maintain the limits ordained by Allah, it could get *khul'* effected even without the consent of the husband.

Conclusion

In Islamic law it is the legal right of the women to take divorce from her spouse in the form of *khul'*. But if the husband does not pronounce divorce (*talaq*) then Islam has made provision for dissolution of a marriage by way of the court. If there are any grounds such as the husband's being impotent or being absent for a long time etc., the court will dissolve their marriage in the form of dissolution (*fasakh*); while if the case is of dislike as in the case of Jamila, it will be settled in the form of redemption (*khul'*). There is a great debate as to whether a judge (*qazi*) has authority to pronounce divorce (*talaq*) on a wife in opposition to a husband, in which the majority of Islamic jurists are of

the opinion that a *qazi* has no authority. Malik is of the opinion that a *qazi* has authority to pronounce *talaq* even when a husband is against it. Pakistani courts have taken the opinion of Malik, which is elaborated by Maudodi in *Huqooq zawjain* and the right of *talaq* is with the *qazi*. In Malaysia the *qazi* has no authority to pronounce *talaq* in opposition to the husband. Another issue is whether redemption (*khul'*) is divorce (*talaq*) or dissolution of marriage (*fasakh-e-nikah*)? A majority of Islamic Jurists are of the opinion that redemption (*khul'*) is divorce (*talaq*) not dissolution of marriage (*fasakh-e-nikah*). In Malaysia *khul'* and *fasakh* are put in separate sections of the Islamic Family Law Act (sections 49 and 52) (Federal Territories) 1984. In Pakistan the law of *khul'* is added in section 2(ix) of the Dissolution of Muslim Marriages Act 1939, which is concerned with *fasakh nikah*. It is recommended that *khul'* should be put in a separate section of the act.

References

1. Afridah A (2012) Dissolution of Marriage on the Ground of Cruelty: A Comprehensive Overview of Fasakh and Irretrievable Breakdown of Marriage Principles. Australian J Basic & Appl Sci 37: 160-165.
2. Muhammad A (1985) Divorce in Islam, England: Woking Muslim Mission and Literary Trust.
3. Al-Sarakhsi (1987) Al-Mabsut. Egypt: Makhtaba-Tu-Saghada.
4. Shafqat CM (1955) The Muslim Marriage, Dower and Divorce. Lahore: The Law Book Company.
5. Lucy C (1996) Judicial Khul' in Pakistan, A Charter Granted to the Wife. Journal from the Indian Law Institute.
6. Coulson NJ (1964) A History of Islamic Law. Edinburgh: Edinburgh University Press.
7. Gerber H (1999) Islamic Law and Culture. Leiden: Brill.
8. Haider N (2000) Islamic Legal Reform: The Case of Pakistan and Family Law. Yale Journal of Law and Feminism 12: 339.
9. Marginani A, Hamilton C, Grady SG (1957) The Hedaya. Lahore: Premiere Book House.
10. Hodgkinson K (1984) Muslim Family Law. Australia: Crime Helm.
11. Humam I (1999) Fath Al-Qadir. Lahore: Maktab Urasheed.
12. Husain I (1989) Law and Custom. Kashmir: Srinagar Law Publication.
13. Ahmad KN (1972) The Muslim Law of Divorce. Islamabad: Islamic Research Institute.
14. Khan IA (2012) Outlines of Muslim Personal Law. Lahore: Federal Law House.
15. Nyazee AK (2012) Outlines of Muslim Personal Law. Lahore: Federal Law House.
16. Tehseen UK (1994) Women's Rights in Islam. Peshawar: National Research and Development Foundation.
17. Mahmood T (1982) The Muslim Law of India. Allahabad: The Law Book Company.
18. Maman M (1995) Mullah of Principles of Muhamadan Law. Lahore: PLD Publisher.
19. Mansoor T (1999) From Patriarchy to Gender Equility. Family Law and its Impact on Women.
20. Mansoori T (2009) Family Law in Islam. Islamabad: IRI Press.
21. Menski D, Pearl W (1998) Muslim Family Law. London: Sweet & Maxwell.
22. Munir M (2009) The Rights of Women and Role of Superior Judiciary in Pakistan. Pakistan Journal of Islamic Research.
23. Nasir JJ (1990) Islamic Law of Personal Status. London: Graham & Trotman.
24. Nora AH (2012) Right of Women to Obtain Divorce Under Shari'Ah and Islamic Family Law of Malaysia: with Special Reference to Ta'liq And Khulu'. Australian J Basic & Appl Sci.

⁹³Nora Abdul Hak, Right of Women to Obtain Divorce under *Shari'ah* and Islamic Family Law of Malaysia: With special reference to *Ta'liq* and *Khulu'*, *Australian Journal of Basic and Applied Sciences*, 6 (2012), pp 286-293.

⁹⁴*Ibid*

⁹⁵*Nerat bt. Musa v. Ahmad bin Kancil*. (1965) 3JH 101

⁹⁶Nora Abdul Hak, Right of Women to Obtain Divorce under *Shari'ah* and Islamic Family Law of Malaysia: With special reference to *Ta'liq* and *Khulu'*, *Australian Journal of Basic and Applied Sciences*, 6 (2012), pp 286-293.

⁹⁷*Balqis Fatima VS. Najm-ul-akram Quraishi (PLD 1959 Lahore 566)*