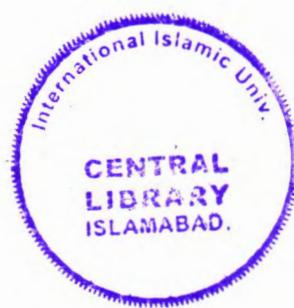


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APPROVAL SHEET
(Acceptance by the Viva Voce Committee)

**The National of Judicial Khula' in Pakistan
An Analytical Study in the Light of Classical Islamic Law**

By

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Accepted by the Faculty of Shariah & Law, International Islamic University, Islamabad, in partial fulfillment of the requirements for the LLM Degree in Muslim Family Law.

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Declaration

It is here by declared that the present thesis and dissertation is an original research work and that the secondary sources used during the research have been duly acknowledged.

Signature



Fatima Bi Bi

26-FSL/LLMMFL/F13

Dedication

The present research is proudly dedicated to my supportive and affectionate parents who gave the opportunity to study in an institution of international standard and were always around for me, and to my learned teacher Dr Naseem Razi who were kind enough to guide throughout the research work.

Acknowledgement

I am highly grateful to Allah Almighty, worthy of all Praise; for granting me the ability to complete the research and for all of His blessings. Nothing would have been ever possible without His guidance, mercy and help.

I am thankful to my supervisor, Dr. Naseem Razi, who has been very helping throughout the research work. I am also obliged to the library staffs at the Central library IIUI, the library of Shariah Academy, and Dr. Hamidullah Library, IRI for their cooperation.

I am very thankful to my parents, who gave me the opportunity to study in an institution of International standard and for their prayers; and to my siblings, friends and class fellows for being so supportive.

May Allah Almighty help us all and gather us all in Jannah.

(Ameen)

ABSTRACT

Membership of the family for marital life happiness and for children is necessary. Islamic Shariah provides for *Nikah* in order to keep the society morally healthy, bring to an end all that is evil and obscene, and let husband and wife live in peace and harmony. If a couple fails to reap these benefits from a *Nikah*-based wedlock, viz. the matrimonial relations do not remain pleasant and harmonious and in case that situation prevails, there arises the danger of spoiling the very purpose of *Nikah*, then it is desirable to annul such a *Nikah*. So other than men Islam also gives the right to women to dissolve the marriage tie by *khul'a*. When the wife fear that they cannot maintain the limits of Allah Almighty and she give consideration to husband and the husband accept the offer of wife and release herself from marriage tie, it is signifies as called *khul'a*. Before Islam the right of *khul'a* was not given to her. But some time the situation arises when the wife asks for *khul'a* and the husband refuse it then it will be granted by the intervention of the court. The woman right of judicial *khul'a* is supported by *Quran*, *Hadith* and Companions. But for asking of *khul'a* the existing of marriage, consent of wife, offer from the side of wife and giving compensation to husband in lieu of *khul'a* are essential. Judicial *khul'a* was introduced in Pakistan not by the statute law but by the judicial decision. After partition in many cases the courts refuse to give *khul'a* without the consent of husband but latter on the courts change its tradition. Islamic Ideology Council and Hanafi jurist are of the opinion that he courts have no power to give judicial *khul'a* without the consent of husband. According to the *Quran* and *Hadith* when the Court found that the husband and wife cannot maintain the limits of Allah Almighty then it can dissolve the marriage. The power and intervention of the courts to grant judicial *khul'a* is proved by *Quran* and *Hadith*. The topic is related to Muslim Family Law. The topic is very important as it is related

to the woman rights of judicial khul'a. In this research the woman right of judicial khul'a is discuss in detail. This research will explain the notion of judicial khul'a. And the point whether, the courts have the authority to give judicial khul'a without the consent of husband. For this research I have consulted many books, articles and original resources. This research concluded that according to *Quran* and *Hadith* the courts have power to terminate the marriage by judicial khul'a when the spouses cannot maintain the limits of Allah Almighty.

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Mukhtar Ahmad Vs Ume Kalsoom, PLJ 1975 Lahore 241.

Resham Bibi Vs Muhammad Shafi, P.L.D 1967 AJK&K 32.

Saddiq vs Mst Aisha, P.L.J 1974 Lahore 216.

Sadiq Vs st Sharfan, P.LD 1968 Lahore 411.

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Introduction to thesis:

Marriage is a sacred bond and it should be lasting and durable, but it can last only as long as both the spouses co-operate with each other. There are situations when a mutual understanding between a wife and her husband is not possible. In such circumstances the forces of law cannot be used to keep them attached to each other in the name of a conjugal bond. The contract of marriage with the exception of a Muta'ah or temporary marriage, permissible under the Shi'a law, is to last for the life-time of the husband and wife. But when relations between the spouses become so strained that a continuation of their union becomes undesirable, the spouses are allowed to terminate it. It can be dissolved either by husband on his own initiative or at the instance of the wife or by mutual agreement. In the first two cases there is breach of the implied contract that the marriage will subsist during the life-time of the parties. If it is the husband who is guilty of this breach, he is penalized by becoming liable for the immediate payment of his wife's deferred dower, while if it is the wife who wants the termination of the marriage, she has, as a rule, to compensate the husband. This termination of the marriage at the instance of the wife is called Khul'a. It is one of the ways for the dissolution of marriage and has been well recognized and followed from the early period of Islam. It is stated in Qura'an:

“And women have rights similar to those against them in a just manner, and men are a degree above them. And Allah is Mighty, Wise”.

This shows that men and women have similar rights. Man has been given the right of divorce but the woman has not been deprived of the right to separation in case of necessity. This right has been given to her by the doctrine of Khul'a. Most of the female in our society are totally unaware of their basic rights. This study will defiantly be a fruitful contribution in society about women right of khul'a, its legal and Islamic status and also the awareness for men about women role and

importance in the maintenance of marital life.

Statement of the Problem:

Wife right to khul'a is parallel to the men right of *talaq*. Khul'a is the right of wife and the husband has the right of *talaq* under no circumstances can the husband say; no" to wife's decision and compel her to continue in marriage. The court has no discretion in the matter and has to give effect to the khul'a if the wife demands it. Wife can only exercise the right of divorce if the same is granted to her in her marriage contract or *nikah nama*. If in the event the right of divorce is not granted to the wife then she has recourse of filing for khul'a before the family courts of law to obtain judicial khul'a. According to the practices of our Holy Prophet (Peace be upon Him) for khul'a the permission of husband is not necessary. This research will explain about the notion of judicial khul'a in Pakistan and what *Shariah* says about this and will also give the detail about the Pakistani decision on the topic by mentioning the different cases in this respect.

Hypothesis:

My Research will be based on the following hypothesis:

Is the judicial khul'a given in Pakistani courts are valid in case the wife is not willing to live with husband for any reason and she ask for khul'a from husband and he refused then in such case, can she go to the court for judicial khul'a and can the court separate the parties even against the wishes of the husband. What Islam said about the woman right of khul'a. And whether, the authority of the judge is proved in *Quran*.

Literature Review:

For a research, the researcher tried to do a thorough study of the topic and for this purpose the following books and data were consulted.

View of early time jurists about khul'a that;

Kanz ul Daqaiq by IMam Abd ullah Bin Ahmad a Nasafi this book contains tremendous treasure of *fiqh* information and family matters. Khul'a by Imam Abd Ullah signifies, when wife gives property or consideration to husband and consideration is essential in khul'a.

Sunan i Nisai by Imam Abu Abdur RehmanAhmad Bin Shoaib Al nisai This book is regarded as the Sunnis third most important six major *Hadith* collections. In this book *Hadith* relating to family matter are motioned. This book say about khul'a in such words, khul'a means that wife give up her dower and take *talaq* from husband in lieu of dower, it means that the husband is not giving *talaq* but due to certain reason the wife taking *talaq*, so it is batter that wife give up her dower or give some property

In Hidaya Vol II khul'a is define as taking out or taking off or extracting one thing from another thing. It is defined as "took off shoes "In *shariah* khul'a mean to put off the marital relationship when the husband takes consideration. It is stated when there is apprehension of the husband and the wife that they cannot live within the limits of Allah, and then it is allow to a wife to give consideration and release herself from marriage tie.

Fatawa i Allamgiriya khul'a is define as when the marriage is dissolved in lieu of consideration is khul'a. When the spouses fear that they cannot maintain the limits of Allah the wife can release herself in lieu of consideration.

Dr Arif ali khan define the Khul'a in Encyclopedia of Islamic law. In this book the writer elaborate in detail the Islamic laws. He defines the khul'a and talked about the consideration in khul'a. He defines that Khul'a means to take off, e.g. you take off your clothes or take off your boots. According to the *Shariah*, it consists in destroying the *Milk-i-Nikah*, or ownership of marriage, with the consent and acceptance of the wife by the use of the word Khul'a or what is tantamount to the word. In this book he states that divorce in consideration of property is tantamount to oath on behalf of the husband, the Khul'a divorce consists in making of a return or the payment of consideration on behalf of the wife. But I find that this book say nothing about the judicial khul'a in Pakistan.

K.N Ahmad book Muslim Law of Divorce is very informative and good book about the law of divorce and khul'a. In this book he give detail about khul'a ,essentials of khul'a ,basis of khul'a and traditions in support of khul'a .

“Family Law in Islam-Theory and Application” by Dr. Muhammad Tahir Mansoori, as the title itself explaining that he focused on the theory of family laws in Islam i.e. concept of marriage, rights and obligations of spouses, essentials of marriage, guardianship, dower, prohibited marriages, maintenance, *talaq*, khul'a. But this book did not mention any case related to the judicial khul'a in Pakistan.

Woman and Law in Pakistan by Rashida Ptel,in this book she gives very short detail about khul'a but the book is very informative. But the writer did not say how a wife should take a judicial khul'a from courts in Pakistan.

In Islamic Shariat on Family law by Maulana Muhammad Razi, in this book Maulana Muhammad Razi khan Afridi says`1 that the wife can take khul'a but she will give back her dower to husband,

He further stated that this kind of divorce is subject to the willingness of husband to grant her a divorce and say nothing whether the courts should give the judicial khul'a if the husband is not willing to do so.

Status of Women in Islam by Justice Aftab Hussain. This book deals with the question rights and liabilities of women as enjoined in Islam. He said in the book that the woman has the right to seek dissolution of marriage and khul'a. In this book he mentioned that the wife has an equal right of khul'a to that of male right of *talaq*. This book gives very little information about the notion of judicial khul'a in Pakistan. So further research is needed on the topic.

Sharia Law and Society by Alamgir Muhammad Serajuddin. This book is in very detail and informative on the subject of divorce, polygamy, MFLO1961, Maintenance and inheritance. This book is very informative but gives no information about khul'a in Pakistan.

Objectives of the Study:

- i. To know about the notion of judicial khul'a in Pakistan
- ii. The judicial decisions of Pakistan in regard to the judicial khul'a and to find out that whether decisions given by the Courts are according to injunction of Islam.

Research Methodology

The data for this study will be qualitative in nature. For this purpose books, magazines, journals, and internet will be approached. The study would be of historical type, since the topic is of a historical nature. It would be comparative in regard to the Islamic notions with modern concepts and practices in the issue. The methodology of the research would be socio-legal; the social aspect of women rights is linked with legal progress in this field.

Thesis statement

Thesis topic comprise of two portion i-e problem and its possible solution. Judicial khul'a may also be granted without the husband's permission if the wife is willing to forgo her financial rights. It is also widely believed that it can be obtained only through court since out-of-court khul'a settlements are not so common. According to majority of jurists, a khul'a agreement can be carried out without having to go an Islamic court. Merely, the consent of both is sufficient.

Statement of Research Problem

This research and writing will be carried out in three phases:

I: What are the meaning, Definition and origin of khul'a?

II: What are the essentials of khul'a?

Whether the khul'a is supported by Quran and Hadith?

III: Whether the court can separate the parties even against the wishes of the husband, when he is satisfied that the spouses cannot live "within the limits of Allah".

Is the wife can dissolve the marriage by khul'a ?

What are the Pakistani decisions on the wife right of khul'a ?

Proposed Outline:-

The present research would start with a formal introduction of the topic, followed by four chapters. The first chapter would explain the meaning of the terms khul'a. This chapter will deal about the origin and basic of khul'a. This chapter will elaborate the Quranic and Traditional view khul'a.

In Second chapter literature review will be discuss. In this chapter the essential of khul'a will be discuss and different opinion of jurist about khul'a will be discuss.

Third chapter will deal with the notion of judicial khul'a in Pakistan or the court can enforced it on the application of the wife and against the will of husband. In this chapter we will discuss in

detail the judicial khul'a in the light of *shariah* and will also discuss Pakistani decision on the issue .The forth and also the last chapter would be based on a few suggestions on the issue. The conclusions reached after the research on this issue would also be included in the chapter.

CHAPTER 1

INTRODUCTION AND HISTORY OF THE DEVELOPMENT TO KHUL'A PRACTICES

In Islam, marriage is a necessary component to start family life. It is a contract in which both parties have equal rights and duties.¹ It has been declared as a great blessing and a source to expand human kids by Allah Almighty Himself. Marriage is a contract that makes it lawful for a man to make love to a woman without there being a lawful prohibition to this marriage.² As in *Quran* Allah Almighty Says; “men are cloth for women and women are cloth for men.”³ However, some times the couple cannot continue to live together under the bond of marriage due to this and that reason. To resolve their issues, Islam suggests reconciling between them by way of reconciliation. Yet in case of extreme conflicts and fighting, Islam does not leave them at the mercy of circumstances or fate rather provides a solution by way of separation. To treat equally both husband and wife, Islam provides two types of separation i.e., separation by way of divorcee and separation by way of Khul'a.⁴ Divorce is a fore granted right of husband while khul'a is of wife. Judicial khul'a is a way of separation held by the judgment of the court on the application of wife. The first chapter thus deals with the definition and development of the practice of khul'a and judicial Khul'a.

¹ Jamila Husain, *Islam, its law and Society* (Sydney: Federation Press, 1999), 119

² Mulvi Khuram Ali Sahib, trans. Muhammad Amin Ibn Abidin *Dur rul Mukhtar. (Gayatul Aotar)* (Lahor : Qanoni Qutab Khana, Nd), 02:02.

³ Kn Ahmad, *Muslim Law of Divorce*, (New Dehli: kita bbhavan, 1978), 214- 219; Hadrat Maulana Muhammad Shafi, *Maarif ul Quran*, (Karachi: Iddara Maarif,1982), 01:552 ; *Al Quran* 2 /187

⁴ Arif Ali Khan, *Encyclopedia of Islamic Law*, (Delhi: Pentagon press, 2006), 05: 19.

1.1. Definition of Khul'a

Khul'a means separating one thing from another.⁵ Khul'a is defined in oxford dictionary as renunciation.⁶ Khul'a *al thawb* means "he took off the cloths".⁷ Literally, the word Khul'a means to put off or break up.⁸ It is also taken as to release from the ownership of marriage. Technically, the term Khul'a is used in the meaning of termination the contract of marriage, in lieu of compensation to be paid by the wife to her husband out of her property.⁹ Khul'a is also defined as take out and takes off and separating one thing from another thing as clothes is separated from body.¹⁰ In Islamic law it is describe as to dissolve the marriage in lieu of property. Khul'a happens when the husband says to his wife that to purchase a three divorce in lieu of dower and maintenance in *iddat* and the wife says I purchased it then the khul'a will happen. If the husband said to his wife that I grand you khul'a in lieu of property and the wife accept it, then it will be consider khul'a.¹¹

1.2. Definition of Judicial Khul'a

Judicial khul'a is regarded as "redemption" and in this divorce the wife release from her marriage when the husband refuses his consent to khul'a.¹² The judicial khul'a is granted by the family court. The Muslim Family Law Ordinance 1961 gives the power to the family courts to dissolve the marriage when the wife agrees to return financial rights to the husband.¹³ The judicial Khul'a signifies "removal," the removal of marital tie.

⁵ Tanzil Ur Rehman, *A Code of Muslim personal Law* (Karachi Pakistan: Islamic Publisher, 1978), 513.

⁶ [Https://www.oxforddictionaries.com](https://www.oxforddictionaries.com)

⁷ Rehman, *A Code of Muslim personal Law*, 513.

⁸ Sheikh Burhanudding Abi Al Hansan Ali Marghinani, *The Hidaya, Com mentary Islamic law*, (Karachi: Darul Ishaat, N.d), 01: 194.

⁹ Ibid

¹⁰ Muhammad Ala-ud-Din Haskafi, *The Durr-ul-Mukhtar* (Lahore: Law Publisher Company, N.d), 245.

¹¹ Muhammad Mazhar-ul-Haq Ansari, *Fatawa-i-Usmani* (Lahore: Qanoni Kutab Khana,N.d) , 181.

¹² Jamal J. A . Nasir, *The Status of Woman Under Islamic Law* (Netherland :Mritinus Nijhoff Publisher, 2009), 134.

¹³ [Https://Pakistanilaws.wordpress.com](https://Pakistanilaws.wordpress.com)

When the husband and wife cannot live together and the wife want to get rid of marital bound by giving some consideration this will call judicial khul'a.¹⁴ Khul'a means when wife gives property or consideration to husband and consideration is essential in khul'a.¹⁵ Judicial khul'a is define as when the wife gives up her dower and takes divorce from husband in lieu of dower, it signifies that the husband is not giving divorce but due to certain reason the wife taking divorce, so it is batter that wife give up her dower or give some property.¹⁶

1.3. History of the Practice of Khul'a

In old Arabic law a husband can divorce his wife for any reason. Dissolution of marriage by way of divorce by the husband was a common custom among the *Arabs*.¹⁷

In a few cases of Arabs and Jews a woman belonging to high family would reserve for herself a right of divorce their husband but this was not common and was among few families¹⁸

In pre-Islamic Arab man was free to end the contract of marriage any time. This kind of termination of contract of marriage was called *talaq*. There was no procedure to terminate the marriage. He can dissolve the marriage any time no formality and no procedure were adopted by him. He was free and arbitrary in his action to dissolve the marriage the men had all the power to end the contract of marriage it was also his power to dissolve the marriage permanently or set the women free to remarry or not. The men in the pre Islamic Arab had the power to get again the divorce wife and again divorce her and this was continued as long as he desired. The wife in pre Islamic Arab did not have the right to divorce. The male member could take separation from her by returning her

¹⁴ Syed Amir Ali, *Fatawa-i-Hindiya* translation of *Fatwa-i-Alamgiriyya* (Lahore: Qanoni, Kutab Khana, N.d), 509.

¹⁵ Imam Abd ullah Bin Ahmad a Nasafi, *Kanz ul Daqaiq* (Karachi: Makatab i Arabia, N, d), 136.

¹⁶ Imam Abu Abdur Rehman Ahmad Bin Shoaib Al nisai, *Sunan I Nisai* (Lahore:Maktabatul Ileem,N.d) ,558.

¹⁷ Ibid.

¹⁸ Ibid.

dower or remits the dower if it had not already been paid. The termination of marriage was called *khul'a* when the marriage was absolutely dissolved, the women had the choice to remarry or not. But she was unable to do so until she observed her period of *iddat* she was bound to observed the *iddat* to ascertained whether she is pregnant by the husband or not. The period of *iddat* was imposed upon her for a period of one year. Islam bring reform and shortened the period of *iddat* by making reformation in the family law, Islam make the family as the important unit of society and marriage is the basic building of Islamic society. So in *Quran* and *Sunnah* the termination of contract of marriage by divorce was made abhorreble. Divorce is permitted in Islam and is allowed where the spouses cannot live together.¹⁹

In the time of ignorance in some cases women had the choice to purchase the divorce from the husband. In Arabs woman of high society had the right to divorce their husband if they do not like him. This was stipulated at the time of contract of marriage while on the other hand the women of low society or ordinary women could not have such conditions.²⁰

In some Bedouins there was a custom to divorce by changing the direction of tents and this was among these who lived in tents so the woman who wanted to divorce her husband she would change the direction of entrance of her tents. For example she would change the direction from east to west and when her husband saw this he understood that his wife has divorced him then he would keep away from his wife.²¹ The women of Arab used caution divorcing their husband. They did not divorce their husband unless they had trouble in living with their husband.²²

¹⁹ Nisrine ,Abiad, *Sharia, Muslim States and International Human Rights treaty Obligation; A Comparative Study*, 13-15.

²⁰ Engineer, *The Rights of Women in Islam*, 30-32.

²¹ Ibid.

²² Ibid, 31.

The different historians have different view about the condition of woman in the Arab society. According some historians the condition of woman among the Arabs was worse and she was mere a chattel. In the marital tie the position of husband was like a lord and woman was just like a property for him and he was free in his right of disposal over her. According to some historians her position was high and she had the right of divorce which was known as *khul'a*.²³

Before the advent of Islam woman had no right of divorce, the woman had no right to demand the termination of marriage by way of *khul'a* but it was possible only when a special condition was made by husband in the *Nikahnama*.²⁴ But generally in Jews and *Mushrikin e Arab* there was no right by which she can claim a separation from her husband.²⁵ According to Abdur Rahim the woman in pre Islamic Arabs had no right to free herself from marriage contact but the parents of wife by friendly relation could get her *khul'a* by giving back a dower if paid and by way of forgoing the dower if not paid. Such kind of termination of marriage was called *khul'a* and by this the marriage was completely terminated. The marital tie absolutely dissolved by this settlement was called *khul'a*.²⁶ The right of divorce given to men is balanced by giving women right of seeking dissolution of marriage and *Khul'a*. These rights are denied by other religions. Islam gives both husband and wife their right of separation.

Islam changed the condition of women in many areas. The religious and social reforms instituted by Muhammad (peace be upon Him) effected a vast and clear improvement in the condition of women. Islam recognizes the important position of woman in society and gives them highest pride and respect and conferred them the equal with men and abolished inequity on the basis of sex. Allah has mentioned and conferred

²³ Muhammad Zaki, *History of the Muslim rule- The Prophet and the Early Rulers* (India: Becon Publishers, 2006), 13, 14.

²⁴ Zkia A Sadiqi, *Muslim woman Problem and Prospects* (New Delhi: M D Publication Pvt Ltd, 1993), 34- 35.

²⁵ Ali, *Ahkam ul Fiqha* (Lahore: Qanoni Kutab Khana, N.d), 246

²⁶ Abdur Rahim M.A , *Muhammadan Jurisprudence* (Lahore : Mansoor Book House, 1911) , 09.

the right of women in Holy *Quran* so that they could no more be subjected to those wrongs, injustices and oppressions which had been inflicted on them since the creation of human species. In Islam the rights and responsibilities of woman are equal to those of man. There is no ground to suppose that the woman is less important than man just because of her sex. But the fact is that the Islam has granted the same right and status and recognizes her independent position. In pre Islamic society woman used to bear from several social prejudice and those made their status low and poorer to men.²⁷ Mohammad (peace be upon Him) introduced new reform in the history of Eastern legislation. He restricted the husband power of divorcing wife and gives the women the right to dissolve their marriage on reasonable grounds.²⁸

The injunction of *Quran* regarding khul'a is to give relief to the female from high handedness of the men. It was a custom among the Arab before Islam and remained in custom during the early days of Islam that the husband would divorce his wife and after many years he would retract from it. He would do this for many times causing mental torture and neglecting his wife in this way. The wife was not in position to take any relief from her husband against his cruel attitude. This relief was granted to women by Islam in the shape of khul'a or dissolution of marriage and right of delegated divorce.²⁹

Islam gives the equal position to the women which was ignoring in time of ignorance and give her rights which had been refused to her before Islam. Now she has the right of divorce and she has the power to terminate her marriage³⁰

²⁷ Sekh Rahim Modal, *Rural Muslim Woman Role and Status* (New Delhi : University North Center, 2005) ,19-23.

²⁸ Ali, *Muhamadden Law*,02: 431-432.

²⁹ Engineer, *The Rights of Women in Islam*, 121.

³⁰ Naseem Ahmad, *Women in Islam*, (New Delhi : A. P. H. Publishing Corporation, 2011) ,1: 354.

CHAPTER 2

KHUL'A IN THE LIGHT OF *QURANIC PROVISIONS AND SUNNAH OF THE PROPHET* (Peace be upon Him)

Khul'a is a recognized practice from both *Quran* and *Hadith* and the detail of this is given below:

2.1. The Concept of Judicial Khul'a in Perspective of *Quranic Provisions*

When the husband and wife cannot live together or they fear that their marital union cannot continue, then they can dissolve their marriage contract. In *Quran* Allah Almighty Says; "No fault is ascribed to the wife or her husband respecting the matter in lieu of which she released herself."³¹

If the wife released herself from marriage tie she will give compensation to the husband in order to induce him and the husband can release his wife by taking consideration from her. As in *Quran* Allah Almighty Says; "There is no accusation in the husband accepting such compensation, nor in the wife give it."³² If the wife do not like her husband due to his ugliness, character or do not like him in matter of religion or he is elder in age or is weak or don't like him due to another reason and due to all these reason the wife fear that she cannot obey him and she cannot maintain the limit of Allah or she fears that she cannot fulfill his rights so in all these cases the wife can take khul'a from husband in lieu of compensation and separate herself from him.³³ As Allah Almighty says; "If you fear that you cannot maintain the limits of Allah then there is no sin to take khul'a."³⁴

³¹ Marghinani, *The Hidaya*, 1:194; Al *Quran* 2 /229.

³² Ahmad, *Muslim Law of Divorce*, 224; Al *Quran* 2 /229.

³³ Rehman, *A Code of Muslim Personal Law*, 1: 519.

³⁴ Hafiz Imran Ayub Lahori, *Fiqh ul Hadith Sharah Durr ul Bahiyata* (Lahore: Fiqh ul Hadith Publisher,2004), 175; Imam Ibn Kaseer, *Tafseer Ibn Kaseer* (Lahore: Maktab Tameer Insaniyat,1983), 321; Al *Quran* 2 /229.

However, Bakar Bin Abdullah does not consider good for husband to take something from wife in lieu of consideration and give reference from Sura Al Nisa that “don’t take anything from her whatever you has given”³⁵ but this opinion of Bakar Abdullah is not good because in same sura Al Nisa in another verse Allah says “There is nothing wrong in the husband’s taking of such compensation, nor in the wife a giving it, when the spouses are not living in harmony”³⁶”

If the women fear ill treatment or cruelly from husband then she can take khul'a from husband in another place Allah Almighty Says in *Quran*;

“If a women fear cruelty from her husband or desertion, it is no sin for them if they make terms of harmony between themselves. Peace is better and greed is met with in the minds (of men). If you do well (to the other) and keep your duty, lo! Surely Allah is known of what you do.”³⁷”

When the spouses have no reasonable ground to dissolve the marriage but they do not like each other or hate each other or the nature of both are change from each other due to which they have no sympathy for each other or they have any other reason due to which they are fed up or bored or the character of husband is immoral so the spouses can terminate the contract of marriage. If the husband does not fulfill the obligation which is imposed on him due to marriage contract or does not fulfill the condition which he accepted at the time of contract of marriage so in all these cases the wife can go to the court to take judicial khul'a from her husband. ³⁸

In Islam once the contract of marriage is held then it is not good to terminate it without any reason so like a *talak*, khul'a is also abominable in Islam. The Holy Prophet (peace be upon Him) said, the woman who seeks khul'a from husband without any reason she will not smell the odour of paradise but however, sometime the happiness of marital life depends on

³⁵ Maulana Mehmod Ul Hassan, Aksi *Quran* Majeed Mutarjam O Mahshi (Karachi :Dur ul Tasnif Limited 1975),104 ; Al *Quran* 4/20.

³⁶ Ibn Hassan Abasi, *Kashaf ul Bari Amafi Sahi Bukhari* (Karachi: Maktabah Farooqia), 429-471.

³⁷ Ahmad, *Muslim Law Of Divorce*, 224; Al *Quran* 4/128 ; Hassan, Aksi *Quran* Majeed Mutarjam O Mahshi, 127.

³⁸ Ali, *Ahkam ul Fiqha I Islami* (Lahore: Qanoni Kutab Khana, N.d), 679.

to dissolve the marriage. So therefore the Islam gives the permission in certain cases to dissolve the contract of marriage. If it is possible for the wife to live with husband and if there is no reason then it is not permissible to demand for khul'a. Khul'a is not permissible unless the parties fear that they will not maintain the limits of Allah. In *Hadith* without any reasons khul'a is harm but in matter of necessity and need khul'a is permitted.³⁹ Allah Almighty Says;

"A divorce is only twice, after that, the parties should either live together on fair terms or separate with humanity. It is not lawful for you (men) to take back any of your gifts (from your wives) except when both parties apprehend that they would not be able to maintain the bounds of Allah. If you (Judges) do in fact fear that they cannot keep the limits ordained by Allah Almighty; "there is no crime on either of them to give something with their free consent. These are the limits ordained by Allah, so do not violate them."⁴⁰

This *Quranic* verse means that if the husband and wife do not like each other and it's not possible for them to live with love and happiness, they can take khul'a on payment of some consideration to husband. So, it is clear that khul'a is permissible when there is no hope for happy marital life between the spouses. And there is possibility that due to their hateful union they shall not be able to live in accordance with the dictates of *Shariah*, but it is forbidden for husband to take compensation from his wife in *Shariah*, as for example when husband fail to fulfill the marital obligation. The concept of khul'a is clear from the verse of *Quran* that when spouses cannot live together they can dissolve their marriage in the form of khul'a. When the husband and wife fear that they cannot live in according to the limits of Allah, they can take khul'a. The verse of the holy *Quran* means that Allah made it illegal for the husband to take compensation in lieu of khul'a. The grounds for khul'a are that when the parties cannot maintain the limits of Allah. The verse demand that each of spouses check their hearts whether the wife is able to obey the duties which the marriage contract imposes

³⁹ Mulana Khalid Saif Ul Allah Rehmani, *Qamos Ul Fiqha*, (Karachi: Zam Publisher, N.d), 3: 362.

⁴⁰ Rehman, *A Code of Muslim Personal Law*, 524; Kaseer, *Tafseer Ibn Kaseer*, 321; *Al Quran* 2/229.

on them. If she cannot fulfill the obligation the husband can take compensation from her. The verse of *Quran* is for both husband and wife. The word “*khawf*” means “Knowledge” which means that the spouses should know that they cannot fulfill the injunctions ordained by Allah Almighty which gives them fear of happening some problems. Further the word fear means the sense of “supposition”. “The verse “*fa in Khiftum*” (then if you fear) its subjects have not been named to” so it means the rulers. In other words, the word of “*Khiftum*” means other than spouses who are in “fear” and it is clear from it that khul'a can be taken with the authority of sultan or the state by its courts or judge if the spouses are not willing to live with each other. According to the verse of *Quran*, pleasant relation between the spouses is incumbent. The verse of *Quran* tells about the officials and arbitrators who deal such affairs. If the spouses neglect the obligations that are made incumbent upon them through their marriage contract and if they (i.e. the officials) also judge that the couple shall not be able to keep the bonds set by Allah, then it should not be held sinful for the wife to get herself free by making payment of compensation to her husband, i.e. there is no sin for the husband in accepting the compensation that the wife pays to him for getting herself released from him by obtaining khul'a these are limits set by Allah Almighty. The word “*Hudud*” (limits) means to “Dictates” No one should go ahead of the bonds set by Allah Almighty. Those who go beyond those limits they are unkind (to themselves). Putting forward the horror of punishment to prevent breaking of the dictates is essential. It seems that, therefore, the verse proves the fact that khul'a without repulsiveness and distinction among the couple is not valid.⁴¹

2.2. Judicial Khul'a in the Light of *Sunnah*

There are well known traditions about khul'a. These traditions form the bases of legislation of khul'a and these traditions are reported from most of the tradionists. Imam

⁴¹ Ibid, 526

Bukhari has reported from Ibn Abbas that the wife of Thabit bin Qais came to the Holy Prophet (Peace be upon Him) and said that;

“O” prophet of Allah (saw) I do not discover any wrong with the good performance and faith of Thabit bin Qais. I saw him coming from the other side with some men. I saw he had the smallest height black and ugliest among them “I vow to Allah that I do not hate him on account of religious but I dislike him of his ugliness. “I vow to Allah” that I do not like him to coming to me. “O messenger of Allah (Peace be upon Him) you can see how beautiful I am while Thabit is an ugly person” I do not blame him for any religious matter but I fear that I may breach the order of Allah the Holy prophet (Peace be upon Him) asked her to return the orchard given by Thabit to her as a dower. She said that I will return the orchard and if he demanded more I would give him more than that. The Holy prophet (Peace be upon Him) said that no need to give him more then what he had given to you. The Holy Prophet (Peace be upon Him) then asked the Thabit to take the orchard and free her from the marriage contract which he did.”⁴²

There is another tradition which is related to Thabit’s another wife Habibah, daughter of Suhayl. One day Habibah was standing outside of the Holy Prophet’s (Peace be upon Him) house early in the morning and waiting for him. When the prophet came out he asked why she is standing there what is the problem she replied that she cannot live with Thabit. When Thabit came there the Holy Prophet (Peace be upon Him) said that the daughter of Suhayl is not happy with you. Habibah said I have still got what Thabit had given me for dower” The Holy prophet (Peace be upon Him) asked the Thabit to take it back and divorce her. Habibah also disliked Thabit due to his ugliness and Habibah too said the same things

⁴²Al Sheikh Muhammad Shakir, *AL Muhalla* (Barrot: Darul Afaq ul Jadidata, N, d), 238; Al Nisai, *Sunan i Nisai*, 559; Mualana Zahor ul Bari, *Sahi Bukhari* (Karachi: Dar ul Ishat, N.d), 133; Maulana Hafiz Hamid dur Rehman, *Jamiya Tirmazi* , (Karachi: Quran Mehla,1967), 1:550 ; Maulana Abdull. Hakim Khan, *Sunan Ibn Maja* (Lahore: Fareed Book Stal, 1403), 572.

which the Jamila said that I do not like him due to his ugliness and if there was no fear of Allah I will spit on his face when he came to me.⁴³

It is clear from those *Hadith* that the wife of Thabit had really not complained against his cruel conduct or ill treatment and neither of his character was immoral. But she said that Thabit is an ugly person and has short structure and she hates him. She said that she is more beautiful than Thabit so when Thabit had come to her at night she refused him and Thabit had beaten her and her hand got broken. Therefore, early in the morning she came to Holy prophet (Peace be upon Him) to complaint against him. So it appears that at night Thabit had beaten her that's why she came to Holy prophet (Peace be upon Him). So the wife of Thabit was not willing to live with Thabit and the Holy prophet (Peace be upon Him) knew that she had hated him. So if the khul'a is not granted to her they will not be able to maintain the limits of Allah.⁴⁴ So this is the situation which is prescribed in *Quran* Most of the commentators have of the opinion that the following verse of *Quran*. "Then if you (the adjudicators apprehend that they shall not keep the limits ordained by Allah Almighty.⁴⁵" This verse was revealed in context of this case because this was the first khul'a in Islam.⁴⁶

There is difference between Holy Prophet (Peace be upon Him) orders, recommendations and suggestions. Holy Prophet (Peace be upon Him) did not enforce his will on others. In another tradition Maghith loves Barirah so much but Barirah had not love for him. Maghith cried for her in the street of *Madinah*. Holy Prophet (Peace be upon Him) felt sorrow for him and asked her to return to him. She asked whether it was an order. The Holy Prophet (Peace be upon Him) replied he just wanted to talk on behalf of her husband. She refused to go back and the Holy Prophet (Peace be upon Him) did not order her. The Holy Prophet (peace be upon Him) ordered to Thabit in the case of Jamila and in the case of

⁴³ Rehman, *A Code of Muslim Personal Law*, 532.

⁴⁴ Ibid, 531.

⁴⁵ Al *Quran* 2/229 ; Shafi ,*Maarif ul Quran*, 1: 554; Kaseer, *Tafseer Ibn Kaseer* , 321.

⁴⁶ Rehman, *A Code of Muslim Personal Law*, 532.

Barirah his non-intervention shows that he did not interfere in the matter of other unless he was called as judge in the case. The non interference of Holy Prophet (peace be upon Him) in the case of Barirah and his interference in the case of Jamila made the law that in case of necessity the Qazi or judge can order the husband to divorce wife.⁴⁷

It is stated in Sanan Ibn i Maja that “the wife who obtains khul'a from her husband without any reason or compelling cause shall be deprived of the odour of paradise” so it is clear from this *Hadith* that the khul'a is granted under extreme circumstances and need⁴⁸

2.3. Juristic Opinion of Companions Regarding judicial Khul'a

In the time of Hadrat Umar (RA) a woman who wanted to get herself free from husband came to Hadrat Umar (RA) and he kept her in dirty place for three days and when he was satisfied that she really had hate for him he order the husband to divorce her. There was a possibility that the husband might deny the recommendation of Caliph if it was only a suggestion because the people were very frank with him. The Caliph knew that he could terminate the marriage if the husband refused to do so. Otherwise there was no necessity to keep the wife in imprisonment. In case the husband denied to give khul'a and the Caliph did not have the power to terminate the marriage then the imprisonment of the wife was not only useless but a violation of her freedom. Hadrat Umar was therefore knew that in case of husband refusal he as a judge or ruler could terminate the marriage. This also shows that the court in the case of necessity can terminate the marriage by khul'a.⁴⁹

A same case arose in the time of Hadrat Usman (RA) when a daughter of Rubayyi come to Hadrat Usman (RA) for khul'a and her husband did not want to give khul'a. Hadrat

⁴⁷ Ahmad, *Muslim Law Of Divorce*, 242.

⁴⁸ Imam Hafiz Abdullah Muhammad Bin Yazid Ibn Maja Tar Rabbi, *Sanan Ibn Maja* (Lahore: Urdu Bazaar, 1403), 571.

⁴⁹ Ahmad, *Muslim Law Of Divorce*, 243.

Usman (RA) ordered the husband to give khul'a and take all that she had. All these traditions show order for judicial khul'a.⁵⁰

Once a man presented the case of his ill-mannered wife to Hadrat Usman (RA) he ordered khul'a between them. Hadrat Abu Bakar did not like khul'a, once he said to a man to take each and every thing in Khul'a from his wife except the braids of his wife.⁵¹

It is narrated from Rubi Bin Mauz that she took khul'a in time of Holy Prophet. The Holy Prophet (peace be upon him) said her to complete iddat for a period of one menses period. The first khul'a in Islam was taken by Amir bin Tarib for his daughter. He contracted the marriage of his daughter with his nephew but after marriage both could not live together. The wife hated her husband and she complained to her father. Her father said to her husband that I will not lay down burden on you that you lose your wife and property so whatever you have given to her take it back and in lieu of that give her khul'a.⁵²

2.4. Juristic Opinion of Traditional Jurists Regarding Khul'a

When there is difference between husband and wife and they fear that they cannot maintain the limits of Allah they can take khul'a. But according to Imam Shafi doing so is not valid Imam Shafi in his "Kibtab al Umm" said that "if the husband says that he can be forced to do justice to her but will not be forced to be separated from her"⁵³

According to Imam Abu Hanifa, when the marriage dissolves with the consent of the wife and she gives consideration to husband it is called khul'a. Imam Malik Bin Anas says that every dissolution of marriage in which consideration is given by wife to husband, whether the word khul'a has not been used is called khul'a. According to Imam Malik there is no difference between khul'a and *Talaq bil mal*. Imam Shafi is of the opinion that every

⁵⁰ Justice Aftab Hussain, *Status of Women In Islam* (Lahore: Law Publishing Company, 1987), 647.

⁵¹ Hazrat Shah Wali Ullah Dehel , *Fiqh-i-Umar* ,(Lahore: Idara-i-Sakafat-i-Islamiya, 1987), 4: 199.

⁵² Ibn Hussan Abbasi, *Kashaf Ul Bari Ammani Sahi Bakhar* (Karachi: Maktabah Farooqia 1429), 471.

⁵³ Rehman, *A Code of Muslim personal Law*, 528.

termination of marriage in which there is separation between husband and wife for consideration is called khul'a.⁵⁴ Imam Ahmad Bin Hanbal has two statements with respect to khul'a. According to his one statement a separation in which consideration is taken by husband from his wife is called khul'a. According to his another statement it is a divorce.⁵⁵

According to Imam Abu Hanifa, khul'a is a conditional agreement between husband and wife in which the wife give consideration to husband but Imam Abu Yusuf and Imam Muhammad stated that khul'a is agreement from both of them.⁵⁶ In Islamic law it means when the husband and wife entered into agreement to dissolve the contract of marriage by giving compensation to the husband by wife out of her property. However in ordinary words it means release from the contract of marriage by giving consideration to the husband. If the husband offers his wife to pay compensation and take divorce and she give her consent and the wife is answerable for consideration, it is called khul'a.⁵⁷

According to some of the jurists such as Ibn Abbas, Malik Bin Anas that khul'a shall become valid when women who do not fulfill the obligation which is imposed on her by marriage contract so she is not obeying the husband. According to some other jurist that "when the wife tells to her husband that she will not abide by any of his orders or shall not obey any of his biddings, than judicial Khul'a shall become valid. "According to Imam Shafi that the verse of the *Quran* means there is hostility and disobedience between the spouses.⁵⁸

⁵⁴ Ibid.

⁵⁵ Ibid..

⁵⁶ Rehman, *A Code of Muslim Personal Law*, 526.

⁵⁷ Sircar, *Al-Sharia*, 424- 425.

⁵⁸ Ahmad, *Muslim Law of Divorce*, 256.

2.5. Juristic Opinion of Contemporary Jurists Regarding Judicial Khul'a

Imam Yousaf Qardawai said that the west consider that there is no justice in Islam and Islam confines the female in cage and handover the sword of *talaq* to man. He said that is not like that as they think. He further said that in *Shariah* the whole power of *talaq* is not in the hand of man and in *Shariah* the marital life cannot be windup so easily. In *Quran*, Allah Almighty says; "men are clothes for women and women are clothes for men."⁵⁹ In another place Allah says; "if you don't like something and may be Allah put some benefits for you in that thing". It will be a very miserable thing if a woman lives with her husband in hateful union.⁶⁰ The man right to give divorce is limited and conditional with time and number which limits its circle. But the woman right of khul'a is not limited so *talaq* during menses and the period when cohabitation cannot takes place is void and innovation. On the other hand khul'a is valid in both. The reason of prohibition of *talaq* during menses is that due to this the period of *iddat* will prolonged and khul'a is compensation of that pain which she suffers due to dislikes of her husband. The Holy Prophet (peace be upon him) did not ask from the woman, who asked for khul'a, about her menses. The life of wife is miserable and she don't like her husband and the husband did not give her *talaq* so she can ask for judicial khul'a and she will give back to her husband whatever she has taken from her husband and not more than that. According to some jurist the matter of judicial khul'a will be presented before the *Hakam* and according to some jurist it is not necessary. If the husband refused to give *talaq* and he does not like his wife then the Muslim judge will inquire the matter and will compel the husband to give judicial khul'a in lieu of consideration and both will be separated.⁶¹

If there is differences (Shiqaq) between spouse and the husband does not give *talaq* to wife then according to Surah Al Bakara verse no 229 two *Hakams* will be appointed either

⁵⁹ Yousaf Qardawi, *Manhadaya el Islam Fatawa i Muasirata* , (Daar ul Wafa Littaba'a Wa an Nashr Wattauzee Al Mansoorah, N.d), 3:361; Al *Quran* 2/187; Shafi ,*Maarif ul Quran*,1:554 ; *Kaseer, Tafseer Ibn Kaseer*, 321.

⁶⁰ Ibid, 362; *Kaseer, Tafseer Ibn Kaseer*, 321.

⁶¹ Ibid, 366.

they can be separated or can make reconciliation. If both the husband and wife cannot live happily then Islam has given the right of *talaq* to husband and the right of judicial khul'a to wife and in case of unhappy union separation is better.⁶² According to Imam Abi ul Hassan Taki ud Din Ali bin Abull Kafi Al Subki that it is necessary that the word khul'a should be used in khul'a, mentioning of consideration in it and the intention should be for khul'a and not for anything else. According to Imam Rafi, Imam Gazali and Imam Bazdawi it is *talaq*.⁶³ According to Abu Muhammad Ashraf bin Abdull Maksod that it is not recommended that the husband takes more then what he has given to his wife as a dower. If he takes more it is discouraged while khul'a will be valid because both parties agreed on this. This is the opinion of most of the jurists.⁶⁴ It is stated in *Minhaj ul Talibain* that Ibn Abbas has defined judicial khul'a as cancellation of marriage without divorce. Hazrat Usman Bin Afand and some other companions define khul'a in the meaning of *talaq i bain*.⁶⁵

⁶² Ibid, 368.

⁶³ Imam Abi ul Hassan Taki ud Din Ali bin Abull Kafi Al Subki, *Fatawa ul Subki*, (Labnan: Dar ul Marrufata, N.d), 3: 297.

⁶⁴ Abu Muhammad Ashraf bin Abdull Maksod, *Fatawa ul Maraatal Moslimata* (Kuwait: Jamiyatul Ahya al Taras al Islami, 1419), 3: 785.

⁶⁵ Khamas bin Saeed Bin Ali bin Masaud al Saksi Arraisnai, *Minhaj ul Talibain* (Oman: Wazarat i Taras ul Qawi Wal Sakafata, N.d), 7.

CHAPTER 3

ESSENTIALS OF JUDICIAL KHUL'A

The essential of judicial khul'a and *talaq* are same. Khul'a is like an oath on the part of husband. Because in this divorce, the husband takes the property from the wife and he cannot retract from it unless the wife has accepted it.⁶⁶

However there are certain essential which must be perform before a khul'a be affected.

The essential of the khul'a are following.

3.1. Existence of marriage

3. 2. Capacity of spouse

3.3. Offer and acceptance

3.4. Consent of wife in Khul'a

3. 4. Compensation in judicial khul'a⁶⁷

3. 1. Existence of Marriage

The marriage should exist between the parties and the parties should be husband and wife at the time taking of khul'a. The existence of marriage is essential but it is necessary that the marriage should be valid. In case of irregular or void marriage there is no khul'a because khul'a can take place between husband and wife. If in void marriage the husband take

⁶⁶ Muhammad Amin Ibn Abidin, *Rud-Ul-Mukhtar* (Barrut: DKI Publisher, 2011), 245.

⁶⁷ Ahmad, *Muslim Law Of Divorce*, 245.

compensation from wife and letter on it is prove that the marriage is void then husband would return the compensation he take from wife. There is no khul'a if the husband has given irrevocable divorce to wife or if one of them has become apostate.⁶⁸

3. 2. Capacity of the Spouses

According to Imam Abu Hanifa the guardian or the father of minor cannot divorce his wife as well as the minor and insane himself cannot divorce his wife. According to Imam Malik if the husband is minor or insane the guardian or father can grant khul'a to his wife and the minor and insane person cannot grant khul'a but the consideration in khul'a will be received by the husband. According to Imam Shafi, the minor and insane cannot grant khul'a and the same is for guardian or father of the minor both cannot grant khul'a to minor wife. According to Imam Ahmad bin Hambal, the minor and insane cannot grant khul'a. As regarding the authority of minor's guardian and father for granting khul'a there are two opinions reported from him. According to one opinion the guardian of an insane husband can agree on khul'a but according to the other opinion the guardian cannot agree or grant khul'a. According to Imam Abu Hanifa the wife should be sane and adult for seeking khul'a. The wife should possess such mental capacity to know the results and consequences of the khul'a. But if she does not possess these essential requirements and she lacks in one or both of these requirements then the payment of compensation shall not be imposed on her and nor will she be deprive of her dower, so revocable divorce shall be granted to her when the husband accepts the offer because she cannot understand the significances of khul'a. The guardian and father of insane and minor girl can take khul'a for her but the compensation will be provided by the guardian or father's property not from girl's property, the father or guardian is not personally responsible for payment of compensation in khul'a but if they personally take the responsibility then they will be liable for its payment. According to Maliki Law, the wife who

⁶⁸ Ibid.

seeks khul'a should be major, adult and should possess understanding. A father or guardian of minor girl, who is under the authority of her father or guardian and whose marriage is contracted, can take khul'a for her and can pay the amount of consideration from her property. No consent is required from the woman who is minor and the control and authority is with her guardian or father. According to Shafi law, a wife who is sane and adult can take khul'a. A minor and insane cannot take khul'a. But if insane girl asks for khul'a and her husband accepts the offer the khul'a shall be granted to her but no consideration will be given to husband. A revocable divorce will be granted to her. When the father or guardian agrees for the payment of consideration an irrevocable divorce will be given to her and the consideration will also be paid by them to the husband. The Hanbali and Hanafi law is same on the point. A minor wife cannot by herself take the khul'a but she can take khul'a with the consent of her father. The father or guardian of minor girl can take khul'a by the payment of consideration.⁶⁹

3. 3. Offer and Acceptance

Offer of the khul'a should be made by wife. It is necessary in khul'a that the offer and acceptance should be made between the parties. The offer to khul'a can be initiated from any party of the marriage, either by husband or by wife. The offer for khul'a can be made by guardian of infant. Some of the jurists are of the opinion that a third person or party may induce a husband to give khul'a on payment of some compensation. According to these jurists third person or party may ask the husband to give khul'a to his wife in lieu of money or house and when the husband accept it, the khul'a should be completed.⁷⁰ A husband can show his consent to khul'a both in express and implied term. It is implied as when he accepts the consideration to khul'a without expressly showing his consent and it is expressed when he clearly shows his consent to it. When he accepts the compensation, his marriage will be

⁶⁹ Ibid, 246.

⁷⁰ Ibn Abidin, *Rud-Ul-Mukhtar*, 572.

dissolved.⁷¹ In proposal there must be such words used as to show the idea of giving consideration. The word sale and exchange can also be used in it, so the wife may ask her husband to buy the right of divorce or get free from the marriage tie. She wants to sell or exchange her right of divorce for such consideration⁷². In Urdu language such words can be used as to convey the idea of compensation, so the wife can say that she hands over her claim for dowry if her husband releases her from marriage contract.⁷³

The acceptance of khul'a should not be such as to introduce new conditions or make changes in consideration. When the wife gives consideration, which is demanded in khul'a, silently and expresses no consent to husband's proposal then it is an implied consent on the part of wife. In the same way it is not necessary for the husband to give expressly consent to the wife's proposal. Acceptance to khul'a can be inferred from the conduct. Where wife wants to take khul'a on specific consideration and the husband accepts the proposal of wife the khul'a will be completed. It is necessary that the acceptance to khul'a by wife should be given in the same time when she receives the information of proposal. If she does not reply to husband proposal her right to khul'a acceptance will be lost. If the wife gives proposal to khul'a it is necessary for husband to accept in the same meeting if he does not, the proposal will be cancelled. The requirement that the proposal of khul'a should be accepted in the same meeting is based on the Muslim jurist concept of law of contract which is not followed in modern time. In the present law acceptance to khul'a can be given within reasonable time whether the consent or dissent given by wife or husband. When the wife gives proposal of khul'a to husband then the wife has the right to reserve for herself the right to revoke or cancel the proposal of khul'a within a specified time.⁷⁴ A husband has no right to keep for himself the right to revoke the proposal to khul'a within a specified time. If the husband makes proposal of khul'a with option the option will be invalid and khul'a will be affected if

⁷¹ Ahmad, *Muslim Law Of Divorce*, 247.

⁷² Ibn Abidin, *Rud-Ul-Mukhtar*, 573.

⁷³ Ahmad, *Muslim Law Of Divorce*, 247.

⁷⁴ ibid

the wife accepts it.⁷⁵ According to Imam Abu Hanifa, a husband can ask his wife to accept or reject khul'a proposal within certain time ⁷⁶ But Imam Abu Yousaf and Imam Muhammad said that the option to accept or reject khul'a proposal is invalid.⁷⁷ A khul'a will be affected if the husband gives proposal and the wife accepts it.⁷⁸ When the wife gives proposal to husband to release her from marriage in lieu of some consideration then she can cancel the proposal at any time before its acceptance by the husband. If the husband offers his wife to take khul'a by giving consideration specified by husband then the husband cannot cancel the offer unless they accept it or reject it.⁷⁹ According to Imam Shafi a husband can cancel his offer to khul'a at any time before its acceptance by the wife. The husband offer to khul'a is conditional offer and is a bilateral agreement because it's completeness is depends on the consent of wife and so he can cancel or withdraw his offer at any time before its acceptance by the wife.⁸⁰ As concerning the wife according to shafi law, if wife has made proposal to khul'a then she can retract from the offer at any time before its acceptance by the husband.⁸¹ According to Imam Hanbal the husband has the right to retract from khul'a offer at any time before its acceptance by the wife.⁸² Sometimes the spouses make their position safe and offer a khul'a with condition that the husband will be free from the liability to pay dower if he divorces her. In the same way the husband can demand an amount of consideration from his wife for dissolving the marriage. The effect of this is that the marriage can dissolve immediately on the acceptance of proposal irrespective of the payment of consideration.⁸³ On acceptance of proposal according to Imam Abu Hanifa, if the husband offers the khul'a and the wife accepts it a single *talaq* Bain will be affected. There is no need of particular

⁷⁵ Ali, *Fatawa-i-Hindiya*, 2:122.

⁷⁶ Marghinani, *Al Hidayah*, 1: 198.

⁷⁷ Ibid.

⁷⁸ Ahmad, *Muslim Law Of Divorce*, 249.

⁷⁹ Ibid.

⁸⁰ Muhammad b Abi, Al Abbas, *Niha, yat al Muhtaj*, (Lahore : Al- Makht Abatul Itmiya, 1357 AH), 6: 399.

⁸¹ Ahmad, *Muslim Law Of Divorce*, 249.

⁸² Ibid , 252.

⁸³ Ibid, 250.

formality for acceptance and proposal of khul'a.⁸⁴ When the wife asks husband to remit her dower or give her such and such consideration or give her back the property he gave and release her from marriage tie and if the husband accepts it the khul'a will be affected and single *talaq* bain will be affected.⁸⁵

3.4. Consent of wife in Judicial Khul'a

It is necessary for judicial khul'a that it taken by wife should be with her free consent. It is invalid for husband to compel his wife or beat or threaten his wife to take judicial khul'a so as husband takes some consideration from wife or release himself from the liability to pay dower to wife. If the husband makes such situation and force her then consideration by the wife shall not be valid⁸⁶

3.5. Compensation in Judicial Khul'a

The amount of compensation which is given in judicial khul'a as a consideration should be mentioned. But if the wife has taken the dower already then she will return it but if she has not taken already then she will have no right to it and it will cease. All other rights of the wife which she has due to marriage will be put out. It is essential that the amount of consideration should be specified.⁸⁷ It is not essential that consideration in khul'a should be property, money or jewellery etc. There are certain rights of a woman which she gives up in khul'a as compensation. These are such as dower, maintenance of wife, residence and maintenance of children.⁸⁸

⁸⁴ Asif A, A. Fayzee, *Outline of Muhammadan Law* (New Delhi: Oxford University Press, 1974), 124.

⁸⁵ Maulana Mujeeb Ullah Nadavi *Islami Fiqha* (Lahor: Progressive Book Urdu Bazab, 1991), 205.

⁸⁶ Ahmad, *Muslim Law Of Divorce*, 258.

⁸⁷ Abidin, *Al Radd al Mukhtar*, 2: 585.

⁸⁸ Bahadar, *Fatawa i Kazee Khan*, 256.

3.5 .1. Compensation in Judicial Khul'a in the Light of *Quran*

Allah in *Quran* says; "If you want to have wife and in the place of another and you have given a lot of gold, do not take anything from her." ⁸⁹ Because giving divorce is creating problem for wife, so asking for consideration is increasing her problem. This verse of *Quran* is for the Convenience of women because by divorce the woman becomes depressed and taking consideration from the woman increases her distress. This verse of *Quran* shows that the women should not face any financial loss so this verse of *Quran* forbids the men from taking any compensation from wife in lieu of khul'a, when he himself gives khul'a to wife so when the husband wants to separate from wife then it is forbidden for him. ⁹⁰

But if the dislike or hatred is from the sides of wife, it is not valid for the husband to take more then what he has given in dower. In judicial khul'a the hatred or dislike should be from the side of wife and not from the side of husband but if the aversion is from the side of husband then it would not be valid for him to take anything from her. ⁹¹

In another verse of *Quran* Allah says that; "If you fear that the spouses cannot live within the bounds of Allah there is no blame on them for what she give and get herself free." ⁹² So according to this verse of *Quran*, it is valid for the husband to take consideration from wife if the hatred or dislike is from the side of husband. ⁹³ Which means whatever given by husband to wife ⁹⁴. "But if they, (wives) of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm". ⁹⁵ This is another verse of *Surah-Al- Nisa*

⁸⁹ Al- *Quran* 4/20 ; Hafiz, *Badai-al Sanai*,3: 405; Hassan, Aksi *Quran* Majeed Mutarjam O Mahshi, 104.

⁹⁰ Ahmad, *Muslim Law Of Divorce*, 258.

⁹¹ Marghinani, *The Hidaya*, 1:194-195

⁹² Al *Quran* 2 /229; Shafi ,*Maarif ul Quran*, 1:554; Kaseer,*Tafseer Ibn Kaseer*, 321.

⁹³ Ahmad, *Muslim Law Of Divorce*, 256.

⁹⁴ Hafiz Abdul Hafiz, *Badal Al Sanai*, (Lahore: Malbual diyal Singh Trust 1997), 3:407.

⁹⁵ Al *Quran* 4/4; Hafiz, *Badai-al Sanai*, 3: 406; Kaseer,*Tafseer Ibn Kaseer* ,322.

which shows that if wife gives consideration with her consent then it is valid for husband to take.⁹⁶

In another verse of *Quran*, Allah Says; “Do not compel them to take any part from what you have given them unless they are disobedient.”⁹⁷ In this verse of *Quran* Allah Almighty prohibited the husband to take anything from wife but if the wife is on fault then the husband can take consideration, but if the husband has given something and the wife is not on fault then the husband is prohibited. But if the husband has taken some consideration then it will not be invalid and the wife will have no right to claim to take back the consideration because the ownership of husband over wife in lieu of consideration is extinguished. So consideration is valid for husband.⁹⁸ If in khul'a the fault is from the wife side then it is valid for husband to take consideration equivalent to the amount of dower. In *Quran* Allah Says, And neither shall you keep them under constraint with a view to taking away anything of what you may have given them unless it be that they have become guilty in a obvious manner of immoral conduct.⁹⁹ This verse of *Quran* shows exemption that when the wife is on fault then it is valid for husband to take consideration from her.¹⁰⁰

3.5.2. Compensation in judicial Khul'a as Recommend by Holy Prophet (Peace be upon Him)

The rule that the husband should not take more than what he has given to wife is supported by the practice of Holy Prophet (peace be upon Him) when the wife of Thabit came to Holy Prophet (peace be upon Him) and asked for khul'a from Thabit Holy Prophet (peace be upon Him) asked her to return the field given by Thabit then she asked I will give some more property as well but the Holy Prophet (peace be upon Him) said not more then

⁹⁶ Al *Quran* 4/20; Hassan, Aksi *Quran* Majeed Mutarjam O Mahshi, 104; Hafiz, *Bada'i-al Sanai*, 3:405.

⁹⁷ Imam Qazi Abu Walid Muhammad Bin Ahmad Bin Muhammad Bin AHam Bin Rushd AL Qurtabi undlasi, *Bidayat Al- Mujtahid*, (Lahore: Al Makataba tul Elmiya, 1404), 1: 51.

⁹⁸ Hafiz, *Bada'i-al Sanai*, 3: 404.

⁹⁹ Al *Quran* 4/ 19; Hassan, Aksi *Quran* Majeed Mutarjam O Mahshi,103.

¹⁰⁰Hafiz, *Bada'i-al Sanai*, 3:404.

what he has given to her.¹⁰¹ So it is clear that when the aversion is on the side of wife and she is seeking judicial khul'a from her husband she will pay the consideration to husband but not more than what has been given by husband.¹⁰²

5.3. 3. Compensation in judicial Khul'a during the Time of Companions

Taking consideration from wife in lieu of khul'a is valid according to one of the famous Tabains, but according, to Bakar Bin Abdullah, it is not valid.¹⁰³ According to Hadrat Usman (RA); take, everything in khul'a except Aikas. The word Aikas means "braid of hair", which a woman used for hair to half tighten hair, so according to Hadrat Usman (R.A) taking everything from wife in lieu of khul'a is valid except the braid of hair.¹⁰⁴ The slave of Safia bint i Abad took khul'a from her husband in lieu of her all property but Abdullah bin Umar did not consider it bad. He said if the woman releases herself from marriage tie in lieu of her property and latter on it is proved that the husband is guilty of cruel conduct and he compels his wife to take the khul'a and then the dissolution of marriage will be consider *talaq* and the property or consideration of wife will be retained. Abdullah bin Umar said I heard this and it is better in my opinion but if more is taken in khul'a what he has given them there is no badness in it.¹⁰⁵

Taking more than dower is abominable, the same is the opinion of Hadrat Ali (RA) that whatever the husband has given to wife, taking more than that is prohibited. According to the opinion of Hadrat usman (RA) taking more is not abominable, this is clear from the

¹⁰¹ Rehman, *A Code of Muslim personal Law*, 517.

¹⁰² Marghinani, *The Hidayah*, I:194-195.

¹⁰³ Al Quran 4/20; Hassan, Aksi *Quran Majeed Mutarjam O Mahshi*, 104; Hafiz, *Bada'i-al Sanai*, 3: 405.

¹⁰⁴ Ibn-ul- Hassan Abasi, *Kashaf ul Bari, Amafi, Sabih Ul Bukhari* (Karachi: Maktabah Farooqia 2008, 1429), 471- 427.

¹⁰⁵ Imam Malik Bin Anas (RA) *Al- Mawata*, (Translation in urdu by Farid Asar Allama Wahid Uz Zaman), (Karachi : Karakhana-i-Tejarat Kutab, N. d), 2: 58.

verse of *Quran*. Hasan Basri (R.A) Saeed bin Museeb, Saad bin Jabeer and Taus (R.A) forbade taking more than what husband has given to wife.¹⁰⁶

3.5.4. Opinion of the Traditional Jurists Regarding Compensation in Judicial Khul'a

In *Mawata*, Imam Malik said that if the wife wants to a separate from husband in lieu of her property but letter on it is disclosed that the husband was at fault and he compelled the wife for money or take it by force then in that case the wife will be divorced and the husband will return the consideration he took from wife. If however the wife with her free consent gave more than what he has given then it is valid.¹⁰⁷

According to Imam Abu Hanifa, the marriage has not been consummated and the entire amount of dower has been paid then the husband cannot claim any portion of dower but the husband can take consideration on which he agreed but according to Imam Yousaf and Imam Muhammad the husband can claim half of the dower and the wife can keep the half of dower.¹⁰⁸ It is stated in *Fatawa-i-Alamgiriya*, that if the consummation has not taken place and amount of dower has been given to wife then the husband will be entitled to consideration¹⁰⁹.

According to Imam Abu Hanifa, the wife will not be entitle to dower if the marriage has not been consummated and the dower has not been paid, the wife will pay consideration to her husband and she cannot claim any dower from husband. But according to the two disciples of Imam Abu Hanifa the wife can claim half of the dower from her husband and the husband will be entitled for the consideration on which he agreed upon. The case in which the cohabitation has taken place and the entire amount of dower has already been paid then in

¹⁰⁶ Hafiz, *Badai-al Sanai*, 3: 405.

¹⁰⁷ Anas (RA) *Al-Mawata*, 2: 58.

¹⁰⁸ Ahmad, *Muslim Law Of Divorce*, 267.

¹⁰⁹ Ali, *Fatawa i Alangiriya*, 508.

that case the husband can claim its return from wife. But if the husband has not been paid the dower to wife then he is free from liability to pay it.¹¹⁰

When the wife takes judicial khul'a her right to maintenance exit and does not lose on account of judicial khul'a because the right to maintenance arises when the judicial khul'a takes place. If the wife agrees to take judicial khul'a from husband in consideration of her all rights which the contract of marriage has given to her against him. But her right to maintenance exist and does not cease because the right to maintenance in *iddat* arise when judicial khul'a takes and not before it. If there is no agreement between the parties to give up right of maintenance then the wife will be entitled to judicial khul'a. But the spouses can make a condition in judicial khul'a that the wife will give up her right to maintenance during the period of *iddat*. The husband will maintain the children unless the wife has made agreement with the husband that she will not claim the maintenance of children. So an express agreement can be made with husband that she will give up the right to maintenance of minor children, the time period to give up the right to maintenance should be expressly mentioned in the agreement. But if it is not fixed then her right to maintenance shall not be ceased.¹¹¹

If there is no agreement then the wife's right to residence cannot be lost unless she made express agreement with husband, the wife's right to residence has expressly laid down in *Quran*, where as Allah says in *Quran*, 'Not sent away them from their houses and not let them go forward unless they perform open immorality'¹¹². So the women's right to residence cannot be lost. If the wife wants she can take the rent of a house which does not belong to husband¹¹³. Wife can give up some other right and debt. The wife can leave claim to debt or

¹¹⁰ Ahmad, *Muslim Law Of Divorce*, 267.

¹¹¹ *Ibid*, 269.

¹¹² *Ibid*, ; Al *Quran* 4/19; Hassan, Aksi *Quran Majeed Mutarjam* O Mahshi, 103.

¹¹³ Abidin, *Al Radd al Mukhtar*, 2: 582.

some liability which she has due to the husband. She can give up her right or can give some concession to her husband.¹¹⁴

3.5.5. Opinion of Contemporary Jurists Regarding Compensation in Judicial Khul'a

According to the jurists, the proper compensation for the husband when the wife asks for khul'a is the half amount of dower which he has given to her. But if the wife desires to take khul'a without any reason, then the full dower will be payable to husband. According to the all four Sunni Jurists, if the fault is from the wife's side then they should take those consideration what he has given to her but if the husband is at fault then he should not take from her.¹¹⁵

According to Ibn Rushd, when the woman wants to take khul'a from husband then it is valid for her to give more than what the husband has given to her or equivalent. According to some other jurist, the husband should not take then what he has given to her. They said this according to the meaning of Tabit tradition. But according to the literal meaning of Tabit tradition the consideration in excess is not permitted.¹¹⁶ It is stated in *Badai al sanai* that the fault will either be from wife's or from husband's side. So if the fault is from husband's side then it is not lawful for husband to take consideration from wife. In *Quran*, Allah says, "If you want to replace one wife with another and if you have given a treasure to her do not take anything from her." In this verse of *Quran* Allah prohibits the husband to take back whatever he has given.¹¹⁷

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According to Imam Ibn Abidin, if the husband ill-treats the wife due to which she takes judicial khul'a then it is not lawful for husband to take anything from wife. Because Allah in

¹¹⁴ Ahmad, *Muslim Law Of Divorce*, 270.

¹¹⁵ Ibid, 264.

¹¹⁶ Imam Qazi Abu Walid Muhammad Bin Ahmad Bin Muhammad Bin AHam Bin Rushd AL Qurtabi undlasi, *Bidayat Al- Mujtahid*, (Lahore: Al Makataba tul Elmiya, 1404), 1: 51.

¹¹⁷ Ibid

Quran, ordered the husband not to take anything from wives after separation, if he takes, then it will be considered as Makruh (abominable) property for him.¹¹⁸

According to Ibn Al Humam, that no consideration shall be paid by the wife if the husband is aggressor and consideration will be paid by the wife when the husband is not at fault.¹¹⁹

In the opinion of Imam Haskafiit, that it is unlawful to release himself from the "liability what he owes her. But if the aversion is from the side of wife then she will give consideration.¹²⁰ If the fault is from the side of husband then it is not valid for him to take consideration from her and if he takes then he shall return it to the wife and if the fault is from the side of wife then it is not valid to take more than what he has given and if the husband has taken more then he will return the excessive part.¹²¹

According to Hanafi law, the consideration in judicial khul'a paid by wife or to be given should not exceed the amount of dower or the property he gave to his wife. If the husband takes more than what he has given then it is not valid.¹²²

Anything which is lawful can be given in compensation of judicial khul'a so the wife can give up the dower in consideration when the spouses enter into such an agreement the marriage contract will be terminated and the wife's right to dower will be lost. However it should be mentioned in agreement whether whole dower has been given up or some part of it has been given up.¹²³

¹¹⁸ Ibn Abidin, *Al Radd al Mukhtar*, 2 : 575-576.

¹¹⁹ Ibn Al Humam., *Fath Al Qdair (Qowaita: Maktaba Rashidya, N, d)*, 203.

¹²⁰ Haskafi, *Dur-ul-Mukhtar*, 248.

¹²¹ Rehman, *A Code of Muslim Personal Law*, 523.

¹²² Ahmad, *Muslim Law Of Divorce.*, 262.

¹²³ Bahadar, *Fatawa i Kazee Khan*, 256.

It is stated in *Fatawa-i-Alamgiriya*, that if the consummation has been taken place and the wife has received her dower then she will pay some consideration in lieu of dower and she will not claim any dower from husband.¹²⁴

¹²⁴ Ali, *Fatawa i Alamgiriya*, 508.

CHAPTER 4

THE NOTION OF JUDICIAL KHUL'A IN PAKISTAN

Under the Hanafi law there is no provision for the woman to terminate her marriage if she did not want to live with her husband because her husband makes her life miserable. Due to this the Muslim women in British India were faced untold hardship.¹²⁵ The *Quranic* verse in which Allah Almighty says; “when there is breach between husband and wife then it is acquire to appoint a arbiters from each family,” and if the reconciliation is fail then divorce is affected.¹²⁶ But this verse of *Quran* was not recognized by the India courts and Indian Muslim. So in these circumstances the Muslim women in India got apostate to dissolve their marriage and the courts in India decide a number of cases in which it was held that the apostasy of married woman automatically dissolves their marriage this was challenge but the courts continue to follow this incorrect view of Muslim law. In India the Ullemas issued a Fatwas of non dissolution of marriage due to wife’s apostasy. But with the passage of time the woman difficulties were realized and the Dissolution of Muslim Marriages Act 1939 was passed.¹²⁷

In Pakistan the law tradition, custom and practices related to marriage and divorce is influenced by Islam. In pre partition the Dissolution of Muslim Marriages Act 1939 was enforced and it is still enforce in Pakistan. Dissolution of Muslim Marriages Act did not provide many grounds for woman to get divorce. The Act was amended by the Muslim Family Laws Ordinance of 1961 and this Act governs divorce in Pakistan. In Pakistan dissolution of marriage is allow to a woman to on certain grounds such as the husband is not

¹²⁵ Muhammad A Qureshi, *Marriage and Matrimonial Remedies: A Uniform Civil Code for India*, (Delhi: Concept Publisher Comnpy, 1978), 13 -14.

¹²⁶ Al- *Quran* 4/35.

¹²⁷ Ibid, 119 – 121.

providing maintenance for a period of two years or the where abuts of husband is not known for a period of four years or the husband is impotent. Judicial khul'a is the only way to get dissolve marriage if the husband refuses to dissolve the marriage. In 2002 the West Pakistan Family Courts Act 1964 was changed and it is make in the favor of woman. The West Pakistan Family Courts Act 1964 section 10 (4) was amended that if the reconciliation between the husband and wife is not possible then the marriage should be get dissolve within a specific time period and the courts must complete the proceeding within period of six months.¹²⁸

In Pakistan the Women terminates their marriage in the following headings:

- Woman can take divorce under the Dissolution OF Muslim Marriages Act 1939
- Khul'a and Judicial khul'a

Under the traditional Hanafi law if the wife wants to get khul'a she must get the consent of husband this was customary in Pakistan until judicial khul'a was introduced in Pakistan not by the statute law but by the judicial decision. In 1959 it was not possible for a woman to terminate her marriage without the consent of her husband and it could be difficult for her to get the consent of her husband for khul'a. In 1952 the court ratified the traditional Hanafi law and refused the wife to give her khul'a without the consent of husband. The court was of the opinion that the institution of marriage would be of meaningless if the woman were allowed to get their marriage terminating without the consent of their husband. But latter on the court in case of Balquis Fatima the court departed from the traditional Hanafi law allow the wife to get khul'a without the consent of husband but in this case the court imposed two condition on the wife that is she must prove that due to incapability the marriage

¹²⁸ Robert E. Emery, *Cultural Sociology of Divorce: An Encyclopedia* (London: University of Virginia, Nd), 926.

cannot continue and second that she must return the dower to husband. This decision brought a great change in woman right to judicial khul'a but both decisions make conflict.¹²⁹

4.1. Intervention of Judge and *Hakams* in the Light of *Shariah* in judicial Khul'a Case

In case of Jamila Holy Prophet (peace be upon Him) didn't appeal to Qaise Bin Sabith nor he take any suggestion from him rather Holy Prophet (peace be upon Him) order him to give khul'a so from this it is clear that judge is not bound to find the desire or consent of husband. If the judge find that separation is essential he will order to the husband for it and in case the husband refuses to do so the judge will dissolve the marriage. The second case in which the second wife of Sabith asked for khul'a from Holy Prophet (peace be upon Him) in this case also Holy Prophet (peace be upon Him) didn't appeal to Sabith nor asked for his permission but did what he felt better. Holy Prophet (peace be upon Him) ordered him to take back dower and give her khul'a.¹³⁰

The event of khul'a that happened in the time of Hadrat Usman (RA) in which he appointed Hadrat Abdulah Binl Abas and Amir Mawiya as arbiters. Hadrat Abdullah said I will separate them but Hadrat Amir Maawiya said he could not separate the family of Abad Manaf. This event shows that the *Hakams* has authority but it is necessary that they agree on one point. The next event that was happened in the time of Hadrat Ali (RA) in which he said *Hakams* that they know what is their function, their function is that if they wanted they could separate them. This shows that the *Hakams* have the power of separation. If the *Hakams* is Wakil or lawyer then the words of Hadrat Ali (RA) would be that you know why you are appointed as a wakil. In this event Hadrat Ali (RA) forced the husband that he would accept the order of *Hakams* if the consent of husband would have been essential then Hadrat Ali

¹²⁹ Rubiya Mehdi, *The Islamization of the Law of Pakistan*, (Canada: British Library, 1994), 173 -177.

¹³⁰ Rehmani, *Talaq ao Tafreek*, 98

(RA) would not force the husband. He would just appeal him to accept it. Therefore the opinion of Imam Malik is strong¹³¹

The jurists have different opinion on the issue. According to Imam Malik that in case of dispute between the parties the judge will appoint arbitration committee in which each arbiter will be appointed from each family who will be a prudent man and will be aware of *shahriah ahkam*. They will make reconciliation if it is possible and if no reconciliation is possible then they will separate them. So in this way the *Hakam* from husband's side will give divorce and the *Hakam* from wife's side will remit the dower or some other consideration and will make the wife liable for its payment and both will be separated. According to the Hanafi School of law, the right to divorce is totally in the hand of husband and khul'a is *talaq bil maal* according to them therefore the consent of husband is essential and according to them the job of *Hakams* is like a wakil or lawyer whose powers are limited. Their opinion is based on Istidlal on the event which was appear in time of Hadrat Ali when the spouses come to Hadrat Ali (RA) for settlement he appoint arbiters from each side and said them that you can remove discord and you may separate them the wife agree on this but the husband refuse the separation then Hadrat Ali (RA) replied that you will accept both the alternatives. Here the compulsion of Hadrat Ali (RA) on husband will be meaningless if the arbiters themselves have the power to divorce so if the arbiters have power of divorce then to take the consent of husband was not essential. So when discord between the spouses cannot be solved and the arbiters appointed by judge reached to the point that they cannot live together and they should be separate. Therefore for the purpose to keep them obey the injunction of Allah it is necessary that power to dissolve the marriage should be taken from husband and should be given in the hands of judge. And the *Hakam* or judges by themselves dissolve the marriage. According to Hanafi School of law if the judge had the power then Hadrat Ali did not enforce husband to accept it. In that case the acceptance and refusal of

¹³¹ Ibid, 95-101.

husband was of meaningless. But the fact is that the event was of the kind in which Hadrat Ali wanted the husband to give the divorce and in case of his refusal that power was to be used by the appointed *Hakams*.¹³²

According to Imam Malik, the arbiters appointed by judge have the power to order for living together or order for separation and he said this in the light of *Quranic* verse in which Allah says “if you fear a discord between them then appoint each *Hakams* from each family and if they will want harmony Allah will bring harmony between them, Allah is known and well aware of everything.” In fact the job of the *Hakams* is not to just advice the people but those who don’t agree to act on advice then the law of authority can be used for them. So if the *Hakams* appointed by judge have no legal authority then in *Quran* addressing the judge and the *Hakams* appointed by them is meaningless. So it is clear from this verse that the *Hakams* appointed by judge have certain values and that they have power and authority to give khul'a or bring reconciliation between them. Secondly, the *Quran* uses the word “*Hakams*” for the arbiters, appointed by judge, who give decision by themselves. Now if the job of *Hakams* is just like a wakil or lawyer then he will be bound by the instructions of parties so he is no more a *Hakam*. Therefore it is essential that the *Hakams* should have the authority. Thirdly *Quran* uses the word if they want to remove the discord which give indication about intention and desire. A person who is a wakil of someone he does not have intention and desire. He is in every situation bound the instruction of parties.¹³³

¹³² Ibid, 96-102.

¹³³ Ibid, 101-102.

4.2. Pakistani Cases Covering Judicial Khul'a

Has the court authority to dissolve the marriage against the desire of husband? That question acquired great importance in the court of indo-Pakistan- sub-continent. The courts in their early judgments decided that the judge did not have the power to do so¹³⁴. In the case of Mariyam bibi Vs Nor Mohammad it was held that to give divorce by khul'a is only act of the husband and to use such power is only depended his own consent and under the Muslim law it cannot be demanded as a matter of right by wife. It was held that a Muslim wife cannot compel her husband to give her judicial khul'a so the case is not maintainable.¹³⁵ The same decision was given by the Lahore High court in the case of Umar Bibi Vs Mohammad Din that only the husband or his agent can give a khul'a divorce. The Qazi or courts don't have authority to give judicial khul'a¹³⁶. In the case of Syeda Khanam Vs Muhammad Sami the same decision was given by Lahore court. It was held that according to Muslim law if the hate is on the side of wife she can terminate her marriage by khul'a. But if she wants to terminate her marriage by due process of law she can do so only on such grounds which are accepted by Muslim law. Few of them have been mentioned in clauses (i) to (viii) of section 2 of the Dissolution of Muslim Marriages Act 1939 and some other grounds which are recognized by Muslim law are illa and zihar. The court said that incompatibility of temperament ,dislike, aversion are sufficient grounds for judicial khul'a under Muslim law but on the other hand in the case of Mustafa Begam Vs Mirza Kazim Raza Khan (AIR 1935) the Smith JJ said that under Muslim law incompatibility of temperament cannot be a ground for termination of marriage by a decree of the court at the desire of wife without the consent of husband. So the court decided in the case of Syeda Khanam that incompatibility of temperament ,dislike, aversion on the side of wife are not sufficient grounds for judicial

¹³⁴Rehman, *A Code of Muslim Personal Law*, 1: 537.

¹³⁵PLD,1882 Allahabad High Court. 83.

¹³⁶AIR, 1945 Lahore. 51.

khul'a under Muslim law and the judicial khul'a cannot be given without the consent of husband.¹³⁷ But in the case of Balqis Fatima Vs Najm ul Ikhwam Qurashi the court decided that the court has the power to dissolve the marriage even without the consent of husband if it found that the spouses cannot live together. The court held that the wife is entitled to terminate her marriage on giving compensation to husband if the judges fear that the spouses cannot maintain the limits of Allah and the harmony as said by Islam is not possible between the parties so the consent of husband is not necessary the judges can terminate the marriage. The court further held that it does not mean that the wife can come any time to court for judicial kula on restoration of what she received from husband but there is important limitation on her right. This limitation is that if the judges fear that spouses cannot live within the limits of Allah and the harmonious relation between them is not possible and if the judicial khul'a is not granted the wife may go wrong. The court said that the verse of *Quran* in surah Al Bakara 229 permits the dissolution of marriage on payment of compensation. It was held that the word "if you fear that" means the state or judge and this mean that the judge can dissolve the marriage even if the husband does not agree to it. Islam does not force the husband and wife to live together if there is no harmony and happiness between the parties. If they cannot live then separation is permitted and if the wife wants judicial khul'a due to husband's fault then there is no need of giving compensation to the husband. But if there is no fault on the side of husband the amount of compensation will be decided by the court. The power of the court to dissolve the marriage in case of shiqaq is limited only by the words of *Quran* "if you fear a breach "and this means that there is discord between the spouses and in case of judicial khul'a the judge will fix the financial matters. The court said that the word *Hakam* means judge or arbiter. The person who only reconciles cannot be a judge or arbiter because if he fails to reconcile between the parties then there is nothing further to be done and the wife will be compelled to live with husband even if she is not happy with him and the

¹³⁷ PLD, 1952 Lahore. 113.

result will be that the spouses will not be able to maintain the limits of Allah.¹³⁸ Imam Maudoodi in his book *Haqq Uz Zaujain* said that judicial khul'a is the right of wife and he gives example from *Quran* to support his view "if you fear that they cannot live within the bounds of Allah there is no blame on them to give something to free herself." And then refers the well known *Hadith* of Holy Prophet (peace be upon Him) in case of Sabith Bin Qaise. This verse of the *Quran* is the basis of right judicial of khul'a. This verse admits the dissolution of marriage by giving compensation to husband but whether the marriage can be dissolved only by agreement between the parties or whether the wife can claim such termination if the husband does not agree to it. The first point is that "if you fear" is addressed to "ulil amr" mean the state or judge so the judge will determine whether there is fear of the spouses not keep the limits of Allah. In the case of Jamila and Habibah, Holy Prophet (peace be upon Him) was satisfied that the husband and the wife could not live together. He never asked for the consent of the husband.¹³⁹ According to Maulana Muhammad Ali in his book "The religion of Islam" that the verse of *Quran* not only gives the principle of divorce, which is shiqaq or differences to live together as husband and wife, but also explain the process which should be adopted when the marital relation is feared. A breach between them will mean that either of the party wants to break the agreement so they can ask for divorce if they no longer want to continue the agreement. In this process the husband and wife are equal and the judge will appoint arbiter from both side. Both these arbiters will try to remove the difference and if it is not possible then they can dissolve the marriage. In the case of Sogra Vs Muhammad Sayeed if the wife wants to get khul'a without any justifiable cause she has simply to abandon her right to the settlement in order to secure dissolution of marriage. Muslim law gives to the husband the right to divorce the wife when he cannot live with her and also given the right of khul'a to woman when she cannot live with him. There is the legal and moral side for the use of this right of judicial of khul'a and

¹³⁸ Ibid.

¹³⁹ Maudodo, *Haqq Uz Zaujain*, 75-76.

morally it is wrong for husband and wife as well to use the right of divorce or judicial khul'a just for the satisfaction of their animal passions but the law ignores this side and gives the right of divorce and judicial khul'a to spouses. Thus in case of need they can use their right and get a release from marriage tie and neither party can be forced to continue in marriage where there is hate in hearts and with this hateful union the purpose of marriage being failed and married life becomes torture.¹⁴⁰

In 1956 a commission was appointed by Government of Pakistan to report on marriage laws. The chairman of the commission said that some legislation may be undertaken to make a judicial khul'a a form of Talak more clear and certain. Judicial Khul'a is a divorce sought by wife and the jurists agree that it is the right of woman granted to her by Islam if she give up her dower if demanded by the husband. There is authentic *Hadith* about khul'a case in which the woman named Jamila asked for khul'a from her husband and the Holy Prophet (peace be upon Him) granted it on the bases of incompatibility of temperament. No other grounds were presented. The commission recommended that incompatibility of temperament give the wife a right to demand judicial khul'a.¹⁴¹

When the spouses cannot maintain the limits of Allah Almighty and cannot perform the duties and rights imposed on them by marriage contract, the woman can release herself by giving consideration to husband and the husband will give her khul'a. If the husband and wife cannot live together with peace, does Islam permit them to separate or it force them to live with hate.¹⁴² For the answer of this question Allah says in *Quran*;

“it is the sign of Allah that He created your pair so you may find comfort in their company and make between them love and kindness. It is Allah who makes you from a

¹⁴⁰ PLD, 1952 Lahore. 113.

¹⁴¹ PLD, 1959 Lahore. 566.

¹⁴² PLD, 1959 Lahore. 566.

single person and made your pair of like nature so that you find comfort in her.”¹⁴³

In Tarjuman ul *Quran* these verse of *Quran* is not mean that the marriage should be continue in all circumstances and not the wife is just the mean of satisfaction for husband. The purpose of marriage is the happy and peaceful life between spouses and such life is only possible when there is love between them and if due to some reason this mutual love is not possible then the object of marriage is fail and for this reason it is necessary that the door of change should be opened. If the marriage is fail and the separation is not permitted to spouses this would have a cruel restriction on the right of free choice and a society would have deprived of happy married life. So under these circumstances the court or judge can give judicial khul'a to wife if happy life of spouses is not possible. The authority of judge is accepted by majority. The judge can terminate the marriage on the grounds of impotency, leprosy, insanity, absent for a long time, not providing maintenance or fail to perform marital duties. Are all these grounds are mentioned in Quan or *Hadith*, no these are not mentioned in *Quran* or *Hadith*. But beside this the judges terminate the marriage on all these grounds because the judges know that now in these circumstances the marriage contract cannot continue. The limitation that is imposed on the power of judge is his own conscience that the marriage under the circumstances cannot continue. If the spouses cannot live jointly in direction of Islam then they should be separate. If the authority of the judge is limited to the verse of shiqaq then even in that case the only limitation on his authority will be a *shiqaq* or breach exist between the parties but in case of impotency, leprosy, insanity etc his power go beyond the *shiqaq* and his this power is base on the view that the marriage cannot be possibly continue even though the husband is cruel or not able to perform marital obligation. To the husband the law gives full power of divorce he can terminate the marriage at any time whether he has a ground or not. It would be blameworthy that he can divorce one wife and take another just for sexual pleasure but the law impose no limitations on his power of

¹⁴³ Al- *Quran* 21/21

divorce and leave the matter on his conscience. If such power is granted to a man why is it not granted to a woman? Why there is great difference between the rights of both. The reason is that the husband spent his money on wife in the shape of dower so the wife is not allowed to dissolve the marriage until she returns the benefits she has taken. It is also some time considered that a female is of changing minded and may at some time desire sudden separation. But in the case of judicial khul'a it is the judge who dissolves the marriage after satisfying himself that the wife really want to terminate the marriage and she have really hate for her husband. But it is not reasonable that one of the contracting parties of the marriage have the power to dissolve the marriage and no power should be given to other party and the wife must prove some grounds or misbehave on the part of husband for termination of marriage. The wife has the same right as the husband has ,the only condition is she will go to the judge who will try reconciliation between them but if the judge find that they cannot live together and cannot observe the limitations of Allah then she will only return the benefits which she already taken from husband .The only interpretation of the verse relating to judicial khul'a is that judicial khul'a depends on the order of the judge and not on the will of the husband .The words "if you fear" are addressed to the judge and head of the state. The authority of judge to terminate the marriage in case of *shiqaq* is limited only to the words of *Quran* "if you fear" which means that the judges will find whether there is really difference between the parties and they cannot live within the bounds of Allah and while giving judicial khul'a the judge will settle the consideration.¹⁴⁴

In the case of Khurshid Bibi vs Baboo Muhammad Amin the Supreme Court said that *Quran* declares that¹⁴⁵ "man has rights against woman and woman has rights against man according to the rule of equity "¹⁴⁶ Therefore it would be very astonishing if the *Quran* does not provide for the separation of spouses on the side of wife. *Quran* said that; "keep them

¹⁴⁴PLD, 1959 Lahore. 566.

¹⁴⁵ P.L.D 1967 Surem Court. 97.

¹⁴⁶ Al- Quran 2/228.

with kindness or free them with humanity”¹⁴⁷ .Allah says in *Quran* that; do not hang on the wife in order to tease her .In *Hadith* it is stated by Holy Prophet (peace be upon him) that “Let no harm be done, nor harm be suffered in Islam”. Therefore in certain time the husband does not want to free his wife from marriage tie, the judge in these circumstances has the power to intervene and give remedy to wife according to the injunction of *Quran*. So if the wife has hate for husband it is sufficient reason for judicial khul'a. If the wife takes judicial khul'a without any reason apart from personal dislike it is lawful but not approved. The reason is that the Holy Prophet (peace be upon Him) and Companions never investigated from wife about the reason of khul'a. According to Al Khafif, when the spouses have differences the wife has the right of judicial khul'a. The right of wife to judicial khul'a is not absolute right but it is controlled right because she cannot herself terminate the marriage by judicial khul'a but through court, when the court finds that they cannot maintain the limits of Allah.¹⁴⁸ The permission of husband is not essential for dissolution of marriage by judicial khul'a because the court can give effect to a judicial of khul'a when the court finds that the parties cannot maintain the limits of Allah.¹⁴⁹ In the case of Muhammad Akam vs Khadija Bibi the court decided that it is not unqualified and absolute but it becomes absolute when she demands the judicial khul'a through the court. The court has the authority to give the decree of dissolution of marriage on the demand of the wife even if the husband does not agree to judicial khul'a.¹⁵⁰ In the case of Muhammad Khan Vs Zarina Begam the wife can claim judicial khul'a even the husband is not willing to it and permission of the husband is not necessary. In course of sitting of Islamic law Committee set up by Azad Jmu Kashmir Government and ulema of different schools of Hanafi sect such as Deobandi, Barelvis and Ahl *Hadith* that permission of the husband is not necessary and the judge has the power to

¹⁴⁷ Al- *Quran* 2/231.

¹⁴⁸ P.L.D 1967 Surem Court. 97.

¹⁴⁹ Rehman, *A code of Muslim Personal Law*, 1: 541.

¹⁵⁰ P.L.J 1975 Lahore. 424.

dissolve the marriage by judicial khul'a.¹⁵¹ A full Bench of Lahore High Court in the case of Balqis Begam Vs Najmul Ikram gave the decision that if the parties cannot live within the bounds of Allah the court has the power to terminate the marriage.¹⁵² The decision of this case was disagreed by the court in the case of Mst Resham Bibi Vs Muhammad Shafi.¹⁵³ The court took the decision; judicial khul'a can be affected like other cases of Talak which pronounced by the husband which means that it depends on the permission of husband.¹⁵⁴

In the case of Mukhtiyar Ahmad Vs Umr Kalsoom the court decided that for judicial khul'a it is most necessary that the reason of hate must be shown. The behavior of parties in the past can be the bases of judicial khul'a. The parties are living separate for a long time so that they cannot live happily in future. Therefore the marriage must be dissolved on the basis of khul'a as the marriage is failed. Court held that permission of the husband in matter of judicial khul'a is not necessary.¹⁵⁵

In the case of Sadiq Vs st Sharfan the court held that the discord between the parties exists and the parties cannot maintain the bounds of Allah Almighty is not sufficient for dissolution of marriage on the principle of judicial khul'a .The court will find out what is the reason for this discord and if the fault is from the side of husband then the judge will decide that the spouses cannot live with harmony, than judge may dissolve the marriage. If the court finds out that no one is on fault but the situation is that the parties cannot live within the limits of Allah then in that condition the judge may dissolve the marriage.¹⁵⁶

In the case of Muhammad Saddiq vs Mst Aisha the court held that the relation between the parties had worse which could not be reconciled and that the hate is such kind

¹⁵¹ P.L.J 1975 A.J.K. 23.

¹⁵² P.L.D 1959 Lahore. 5

¹⁵³ P.L.D 1967 AJK&K . 32.

¹⁵⁴ P.L.J 1975 A.J.K. 22.

¹⁵⁵ P.L.J 1975 Lahore. 243.

¹⁵⁶ P.L.D 1968 Lahore. 411.

which may give rise to further moral and social wrongs which may lead to disrespect for the limits of Allah Almighty. And the spouses in that condition cannot live together.¹⁵⁷

In the case of Mst Hakimzadi Vs Nawaz Ali the court held that it is not required to prove each and every allegation as true. It is sufficient if she prove that the marriage is broken down and that the reconciliation has failed. So the parties cannot live together.¹⁵⁸

In the case of Mst Parveen Begam Vs Muhammad Ali the court decided that there is no fault on side of wife or on the side of husband so far as the termination of marriage is concerned on the basis of judicial khul'a. But it is found by the court the spouses cannot live together due to hate and aversion arises between them. The marriage is dissolve on the basis of judicial khul'a without the permission of husband.¹⁵⁹

In the case of Mst Shaista Vs Sh.Liaquat Ali Sathi the court said that under the Islamic law if the husband is of sound mind and has attained puberty he can divorce his wife even without any cause whenever he desires. Such absolute right is not given by Islam to wife if she wants to terminate the marriage or winds up the unhappy union she can do so only through the court or Qazi. If the wife wants to terminate the marriage she will have to pay consideration or dower if already paid to husband.¹⁶⁰ But in the case of Lal Hussain Akhtar Vs Khadija Bibi the court said that the wife right for termination of marriage by judicial khul'a is absolute and takes effect only through the decree of court.¹⁶¹

In the case of Javed Iqbal Vs Mst Nasreen Akhtar the court held that the evidences and conclusion of the case shows that the spouses cannot live together and the performance of marital duties is not possible in accordance with Islamic Injunction. So in such situation

¹⁵⁷ P.L.J 1974 Lahore. 216.

¹⁵⁸ P.L.D 1972 Karach. 540.

¹⁵⁹ P.L.D 1981 Lahore . 116.

¹⁶⁰ P.L.D 2006 Lahore. 158.

¹⁶¹ P.L.J 1975 Lahore. 424.

the separation of spouses is necessary. The court held that no permission from the husband is required.¹⁶²

The court in the case of Abdul Hamid Vs Mst Rubina Bibi said that the decree on the basis of judicial khul'a is not against the injunction of Islam but the *Quran* had provided the legality and basis of judicial khul'a in the verse of *Sura Al Bakara*, 229. The wife stated that she cannot live within the limits of Allah with her husband so if the marriage is not dissolved it would lead to social evils. Court presumed that the spouses cannot live together with harmony.¹⁶³

In the case of Nabeela Safdar the court held that the legality of judicial khul'a is proven from *Quranic* verse *Sura Al Bakar*, 229. So when there is apprehension that the parties cannot live together and the wife will pay consideration to husband to get herself free from marriage tie.¹⁶⁴

In Zohra Bibi case two sister marriage was dissolved by judicial khul'a but the appellate court reversed the decision and order for restitution of conjugal rights. On appeal the AJK Supreme court held that if the court will not give judicial khul'a to them it will amount to force them to live with hateful union. Supreme Court held that the marital relation is based on love, trust, affection, good will and sacrifice but if there is no such relation then it is a forced relation but not spouseism. He said if the woman decided not to live with husband for any reason then there is no chance of reconciliation then the court should dissolve the marriage. If the court will not dissolve the marriage the wife will not be able to live with husband within the limits of Allah. In this case the court dissolves the marriage by judicial khul'a.¹⁶⁵

¹⁶² P.L.D 1994 Azad J & K . 86.

¹⁶³ C.L.C 2010 Lahore . 1681.

¹⁶⁴ Y.L.R AJ&K . 674.

¹⁶⁵ PLJ 2005 SC AJ&K .171; Muhammad Munir, The Rights of Women and the Role of Superior Judiciary in Pakistan with Special Reference to Family laws cases from 2004-2008 (N,d), 283.

In the case of Naseem AKhtar the husband refused to maintain the wife and thrown her out of home, she filed a suite for judicial khul'a .The trial court and the court of first appeal refused the wife suit then the wife filed a petition in High court which also refused the suit of wife. Then the wife filed appeal in Supreme Court .The wife said in the court that due to hate and aversion she cannot live with husband. Justice Javed Iqbal said that no criterion could be fixed which defines or measures the hate which would be inferred on the basis of the circumstances of each case and is depend on the statement of wife.¹⁶⁶ The emotion of love and hate cannot be judge by any human and the only aspect which will be required to find out is that whether the husband and wife can live with each other and not the solid proof of hate and aversion. Justice Javed Iqbal gave the reference from the case of Amanullah Vs District judge in which it was held that hate and aversion cannot be prescribed and defined by any mechanism. He further said that the wife filing a suit for the dissolution of marriage by judicial khul'a is express that she does not want to live with husband.¹⁶⁷

The court in the case of Syeeda Khanam said that the incompatibility of temperament means total lack of affinity between the spouses. The incompatibility of temperament means "incapacity for harmonious combination or association".¹⁶⁸ The incompatibility of temperament means the different factors that exit in marital life of the couple which infuse them for the harmony and happy married life so where there is lack of such factor exit it means that incompatibility of temperament exist between the parties due to which they cannot live together. The judge held that the incompatibility of temperament exist between the parties. But the court held that incompatibility of temperament is no ground for judicial khul'a.¹⁶⁹ This was a law until the Bilquiis Fatima Vs Najamaul Hassan. In Bilquiis Fatima the question before the court was "Can a wife demand judicial khul'a as a right?" The court

¹⁶⁶ P.L.J 2005 SC . 1325.

¹⁶⁷ Muhammad Munir,The Rights of Women and the Role of Superior Judiciary in Pakistan with special Reference to Family laws cases from 2004-2008 , 284.

¹⁶⁸ PLD 1952 Lahore. 113.

¹⁶⁹PLD 1959 Lahore . 566.

decided for the time in the affirmative, provided she satisfies the court that the marriage is in fact broken down. The court held that giving a right of divorce to husband and denial of it to wife is unreasonable .A wife should not be called to prove misconduct on the part of husband in order to obtain dissolution of marriage but should have a comparable to that of her husband So Syeeda Khanam was overruled.¹⁷⁰

The decision given by Mr Justice Abdur Rahman and Mr Justice Harnes in the case of Umar Bibi Vs Mohd Din said that the court cannot give judicial khul'a without the permission of husband. It was held by the court that the court cannot terminate the marriage on the grounds of incompatibility of temperament, dislike or aversion.¹⁷¹ The same decision was given in the case of Syeda Khanam that incompatibility of temperament ,dislike, aversion on the side of wife are not sufficient grounds for judicial khul'a under Muslim law and the judicial khul'a cannot be given without the permission of husband.¹⁷² But the wife may successfully keep her right to judicial khul'a if its basis is exit. Incompatibility of temperament is depending on each case fact and it is a question of fact. If the relation is reach such a condition that it is not possible for spouses to live within the limits of Allah then it is the right of wife and the court has no discretion.¹⁷³ But later on in the case of Khurshid Bibi the court held that the purpose of married life is happy and harmonious union of husband and wife and if such is not exist the purpose of married life which explain by Islam is failed so the incompatibility of temperament is sufficient ground for judicial khul'a.¹⁷⁴

If the judge fear that the parties cannot maintain the limits of Allah then the judge can terminate the marriage by judicial khul'a and the wife will pay consideration to husband. But this is not meant that the wife has the right equivalent to come at any time to court for

¹⁷⁰ Ibid.

¹⁷¹ AIR 1945 Lahore . 51.

¹⁷²Rehman, *A code of Muslim Personal Law* ,1: 537.

¹⁷³ Muhammad Munir, *The Rights of Women and the Role of Superior Judiciary in Pakistan with special Reference to Family laws cases from 2004-2008* , 284.

¹⁷⁴ P.L.D 1967 Surem Court . 97.

termination of marriage on payment of consideration but the court will have to satisfy itself that there is fear that the parties will not maintain the limits of Allah in their relation towards each other and that a harmony in married life is now not possible as order by Islam then the court will dissolve the marriage on the basis of judicial khul'a. The court will consider whether the wife is serious in her demand and whether it is not possible for her to live with happy union with husband. P.L.D 1967 S.C:97,P.L.D 1959 Lahore 566,PLR 1959 Lahore 321,DLR Lahore 193,PLD 1968 Lah,411,PLD 1975 Lahore 615,PLJ 1975 Lahore 215,PLD 1975 Lahore 805,PLJ 1975 Lahore 241,PLD 1975 AJ & K 27,PLJ 1975 AJ & K 21,PLJ 1975 Lahore 256,PLD 1975 Lahore 766 in all these case the courts decided that spouses cannot maintain the limits of Allah and the judicial khul'a is given without the permission of husband.¹⁷⁵

4.3. Pakistani Court's Practices Regarding Compensation in Judicial Khul'a

The court in the Mukhtar Ahmad Vs Ansa Naheed¹⁷⁶, Samia Akbar Vs Muhammad Zubair¹⁷⁷, Abdull Majid Vs Razia bibi¹⁷⁸, Mst Shaista Vs Liaquat Ali¹⁷⁹ held that the court dissolving the marriage on the basis of khul'a and the wife will return the certain benefits which she had received at the time of marriage from husband. Mukhtar Ahmad Vs Ume Kalsoom the court held the wife will not pay compensation to husband but she will not entitled to her dower.¹⁸⁰

When a minor wife wants to take khul'a and agrees to give up her dower in consideration or other property and the husband accepts the proposal of khul'a then one revocable divorce will be affected but she will not be responsible for payment of

¹⁷⁵ Rehman, *A code of Muslim Personal Law*, 1:540-541.

¹⁷⁶ PLD 2002 Suprem Court. 273.

¹⁷⁷ PLD 1990 Lahore. 71.

¹⁷⁸ PLJ 1975 Lahore. 256.

¹⁷⁹ PLD 2006 Lahore .158.

¹⁸⁰ PLJ 1975 Lahore. 241.

consideration and in such case the divorce will be revocable.¹⁸¹ When the mother of minor girl agrees and makes herself liable for the payment of consideration and take khul'a of daughter then that khul'a will be valid. But if the mother did not take responsibility for payment of khul'a then khul'a shall not be affected.¹⁸² If the wife wants to take Khulna through the agent then the agent cannot change the amount of consideration specified by wife unless he himself makes himself responsible for the excess part.¹⁸³

4.4 Views of Council of Islamic Ideology (CII) Regarding Judicial Khul'a

Maulana Muhammad Khan Sherani said that in 199th meeting of the CII.

“Courts are dissolving Nikkah in the name of Khul'a, which is not correct. Courts cannot dissolve marriage contracts but only the husband has the right to grant Khul'a,”¹⁸⁴

Some of the modern jurists among which the Chairman of CII Maulana Muhammad Khan Sherani also included said that the permission of husband is necessary for judicial Khula. It cannot be just on the demand of wife without the consent of husband. These jurists do not accept the dislike or hate of wife for her husband as ground for judicial Khulna. In Egypt the jurists of Al Azher also have the same opinion. They reject the law of their country which gives the woman the right of judicial khul'a. The law of the Egypt is that if woman said that she hate her husband or dislike her husband and she cannot maintain the limits of Allah the court will give her judicial khul'a without any ground and reason.¹⁸⁵

Recently in Daily Jang newspaper Mualana Doctor Abdul Razak issue a Fatwa that in khul'a consent of both husband and wife is essential and if one of the party of contract of marriage is not agree to khul'a then the decree of court will not be valid in *Shariah* and the

¹⁸¹ Bahadar, *Fatawa i Kazee Khan*, 256.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ <http://tribune.com.pk>, 27 May 2015.

¹⁸⁵ Muhammad Tahir Mnzori, *Family Law in Islam Theory and Application* (Islamabad: *Shariah Academy*, 2006), 136.

Nikah between husband and wife will continue. He farther said that as the court decree is not valid so the spouses can live as a husband and wife without renovations of *Nikah* because the court decree has no preference on *Shariah*.¹⁸⁶

The Quranic verse II, 229 gives the right on woman to seek dissolution of marriage, names the *Qazi* as a judge of the cause, and provide the rule of decision, this shows the power of the judge to dissolve the marriage through khula in appropriate case even without or against the consent of husband and he must depend on the decision of judge. The *Quran* is the primary source and is consists of the Divine Will of Allah, the laws that are mentioned in *Quran* are decrees and orders of the Divine origin and not only having priority over other Muslim law but it cannot be change by any human agency. Verse of the Quran II, 229 are the Quranic law and *Hadith* of Holy Prophet (peace be upon Him) comes next. The Hanafi school of law recognizes the *Ijtihad* and *Ijma* as remaining sources of Islamic law but they fall under the single category. The opinion of jurist and commentators are not higher in weight and authority then *Quran* and *Hadith* and nor can change the Quranic law or *Hadith*. If the views of scholars are in conflict with *Quran* and *Sunnah* they are not binding on courts and being a Muslim it is the duty of judge to follow the *Quran* and *Sunnah* because Allah says in *Quran Ati ullah wo ati ur Rasool*.¹⁸⁷ The woman cannot live with hateful union with husband and if she is compelled to live with husband then in result it will destroy the moral and cultural value of society and due to this the purpose of *sharia* will be spoiled. So the conduct of Holy Prophet (peace be upon Him) shows that to enforce the order of khula it is sufficient that the wife hate her husband and don't want to live with him.¹⁸⁸

¹⁸⁶ Daily Jang Newspaper, (11 September, 2015), 9.

¹⁸⁷ P.L.D 1967 Surem Court. 97.

¹⁸⁸ Moudodi, *Haqooq uz zawjeen* (Lahore: Iddar I Tarjumane i Quran, 1943), 67.

Conclusions and Recommendations

It is correct that the real form of khul'a is when the parties agree to it mutually. But the hardship arises when the wife demands khul'a and the husband refuses to give khul'a and the wife is convinced that there is no way to live with him and cannot live within the bounds of Allah and she will not be able to fulfill the marital obligation which the contract of marriage and Islam imposed on her, in such a case it would not be valid to persist on the permission of husband. Such insistence would have bad effect on the integrity of family. The cases of Holy Prophet (peace be upon Him) and the companions shows that they did not persist on the permission of husband.

Most of the jurists and Islamic Ideology Council object that the in present law judicial khul'a is the violation of injunction of *Shariah* and said that it destroys the mutual agreement and the courts are giving judicial khul'a without the permission of husband while he is the party to the contract of marriage and which cannot be enforced without his consent. They said that the judicial khul'a should not be given by the court even if the wife has hate and aversion for her husband and dislikes him. This research thus concludes that the authority of courts in matter of judicial khul'a is recognized by *Quran* and *Hadith*. The courts can dissolve the marriage through judicial khul'a when it found that the husband and wife cannot live together. The relation of husband and wife should continue with kindness and harmony. If it is not possible for them to live together then they can separate and this will avoid the situation which destroys not only the families but also the societies. Due to this reason Islam has given the right of *talaq* to man and the right of khul'a to woman. But she cannot by herself dissolve the marriage she will have to go court for the dissolution of marriage through judicial khul'a and the court will grant judicial khul'a after satisfying itself that the spouses cannot live together to maintain the limits of Allah Almighty. This research thus concludes

that in Pakistan there is no certain law about judicial khul'a. The suggestions of Islamic Ideology Council created confusion, between the woman and courts, on the matter of judicial khul'a. Now a days ignorance and less knowledge about *Shariah* creates discord in social life. In law no grounds and condition is provided for judicial khul'a due to which women are confused about this. The grounds of judicial khul'a must be the sole desire of wife and not any of the ground which is specified in Dissolution of Muslim Marriage Act, 1939. Another difficult situation of the present legislation is the amendment in West Pakistan Family Courts Act 1964. Most of the time women are compel for judicial khul'a as the husband release himself from dower and other rights of women which is clearly against the spirit of Islam. The proviso to section 10 (4) of West Pakistan Family Courts Act 1964 makes it compulsory upon the court to return to the husband dower received by the wife. Thus no matter on what grounds the wife takes the judicial khul'a and in some cases the fault is on the side of the husband. But according to *Shariah* if the fault is on the side of husband no compensation should be taken from the wife. The procedure of the Family courts are very lengthy, like the lawyer in the proceedings and the serving of notice to parties' take too much time and modern mean of communication such as telephone are and mobile number are not recognizing in law. There is no provision to inform the accuse living in a foreign state. The numbers of the cases which are fixed in Family courts are more than 100 cases and it is not possible for any judge to hear and decide all these case due to which backlog is keep on Family courts.

This research thus, recommends reforming relevant provisions of Muslim Family Law. Separate, clear and certain law should be made for judicial khul'a. The consideration for judicial khul'a must not be mandatory but voluntary. In camera proceedings should be introduced in Family courts and privacy of the parties must be taken under consideration so that the female can openly discuss their matter to the female judge. The information relating

to Family law and rights and obligation of both male and female must be given to general mass through seminars, workshops, print and electronic media.

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