
Judicial Separation in Islamic Law (A Critical Analysis of Dissolution of Marriage Beyond Talaq in Pakistani Law)

Rabia Tus Saleha

Lecturer, Department of Shariah and Law, The Islamia University of Bahawalpur & PhD Scholar, Department of Shariah, International Islamic University, Islamabad Pakistan

Dr. Muhammad Amin Makki

Assistant Professor, Faculty of Shariah and Law, International Islamic University, Islamabad - Pakistan

Dr. Mudrasa Sabreen

Assistant Professor / Incharge, Department of Shariah (Female), Faculty of Shariah and Law, International Islamic University, Islamabad Pakistan

Abstract

This research explains the authority of *šhara'i qāḍi* for annulment and dissolution of marriage under Islamic Jurisprudence as elaborated by different schools of thought. Further, the rulings of four basic schools of thought are compared with Pakistani law. Dissolution of marriage by the *qāḍi* is different from *talaq* as the *talaq* occurs with the permission and consent of husband. While, the separation by *qāḍi* may occur with the ruling of the judge that enables the woman to end the wedlock by forcing the husband. Generally, the last option of judicial separation is resorted to in the cases where optional means of divorce or *khul'* fails. Pakistani law has adopted these ways of separation to get rid of harmful relations between spouses. The primary purpose of judicial separation is to protect the woman from injustice as well as to discipline the man who does not respect the rights of his wife. Though, it is an ideal legal solution to address the problems of abuse against married women. Besides this, a condition of delegated divorce may be selected in the certificate of marriage in Pakistan to protect and overcome the abuse against women in family institutions. However, this paper includes the matters of judicial separation exclusively. In Pakistan, two important statutes correspondingly, Dissolution of Muslim Marriages Act of 1939 and The Muslim Family Laws Ordinance of 1961, are enforced to deal with family matters. The validity of these two laws has always been controversial among religious circles and law makers. An important question that arises between the critics is associated with the legal separation (*tafreeq šhara'i*) between husband and wife without the pronouncement of *talaq* by the husband.

Keywords: Judicial Separation, Islamic Jurisprudence, Islamic Law, Dissolution of Marriage, Separation by judge

Introduction

The history of British rule in the subcontinent elaborates that some critics have stated that Islam has not provided any direct solution without the involvement of *šhara'i qāḍi* to overcome the situation if husband denies to give *Khul'* (irrevocable divorce of minor degree). The women at British India started to renunciate Islam and declared themselves non-Muslims to annul their marriages due to this issue. It should be noted here that the action of renunciation of Islam does not invalidate the marriage itself. But the cohabitation is prohibited (haram) unless she recommences Islam and renews her marriage again. As it is not allowed for a Muslim to marry a non-believer woman expect *ahal-e-kitab*. Marrying a non-believer woman who is not *ahal-e-kitab* is void ab initio and haram as per definitive evidences.¹ However, the solution to the problematic issue of renunciation of Islam by women has been elaborated by some eminent scholars of Sub-continent.² According to them, there should be incorporation of *šhara'i qāḍi* in the legal system of Sub-continent. For this purpose, a person having all the qualifications in consonance with the qualifications of *šhara'i qāḍi* can be appointed to the seat of *šhara'i qāḍi*.³ Whereas, if no-one qualifies to be a *šhara'i qāḍi*, then the matter should be referred to the Ulema for fatwa. There are many problems which a woman faces after her marriage like husband's behavior, cruelty, emotional negligence and ignorance in maintaining her. History quotes that sometimes she wanted to take divorce but responsibility of children, pressure of family as well as society and challenges of litigation stopped her from taking hard decisions. There are many examples from the British era in the subcontinent that have disclosed many hurdles faced by women in taking divorce from the husband due to unavailability of *šhara'i qāḍi* and the verdict of non-Muslim judge was not enforceable under *Sharī'ah*. Sometimes, Muslim judges decided the matter but their decisions were not satisfactory due to their lack of knowledge regarding Islamic Laws. To overcome this issue, some Ulema have elaborated that a condition of delegated divorce can be incorporated in the certificate of marriage.

Besides the right of delegated divorce, *fiqh Hanafi* lacks the solutions to overcome these problems. In this case, other schools of thought may be approached to find out solutions to these problems. As it is permitted to follow the other school of thought with the proper fulfillment of conditions and limitations. The unanimous initial condition to be fulfilled between all schools of thought is that the practice of a different school of thought should be a dire need of the time⁴ and adherence should also be given to all conditions presented under one conclusive issue by one school of thought. The fabricated ruling (*al-ḥukm al-mulfiq*) is invalid by consensus of jurist.⁵

Shara'i Qāḍī and Dissolution of Marriage beyond Talaq in Islamic Law

Dissolution of marriage by the qāḍī is different from talaq as the talaq occurs with the permission and consent of husband. While, separation by qāḍī occurs with the ruling of the judge that enables the woman to end the wedlock by force from the husband. Jurists have elaborated that the qāḍī has a jurisdiction to annul the marriage in certain cases. Maḥmūd al-Mosalī in his book *Al-Ikhtiyār li Tāleel Al-Mukhtar* wrote: "The annulment is considered a divorce if the judge does it on behalf of the husband."⁶ Abu Yahya wrote in *Asna Al-Matāleb*: "If the husband refuses to divorce after the order of judge, the judge will announce the divorce on behalf of the husband because this right is directed to him and the representation (nayabah) includes in it. If he refuses, the judge represents him, such as in the case of paying off a debt or where a walī unjustly prevents a woman from marrying."⁷ It is reported by the Shafa'i Jurist in his book, *I'ānatu al-Ṭālbīn*, if the husband refused to divorce, "the judge will pronounce one divorce at the woman by way of representing the husband."⁸ The author of *Baghītu al-Muqtaṣid Sharḥ Bidāyat al-Mujtahid* has also incorporated the issue of divorce by the judge in the chapter of *wilāya tul qāḍī* after mentioning the tradition of the Prophet Muhammad (ﷺ): "the ruler is the walī of one who has no walī." He elaborated that "if the husband refuses to go back to his wife, the judge will order him to divorce and the judge will divorce her upon the refusal of husband to give divorce."⁹ He further agreed with the Shafa'i jurist, Abu Yahya, and written that this matter is similar to the issue of marriage of a woman in the case where the walī unjustly prevents her from marrying.

Moreover, some contemporary scholars have also considered the judge as a representative of husband in the issue of separation of spouses.¹⁰ Muhammad Raafat Othman wrote: "If the husband is unable to maintain his wife and refuses to divorce her. The judge will issue the divorce on behalf of the husband."¹¹ He stated while explaining separation due to discord and disagreement: "If discord is found due to the distinct natures of spouses, the judge will issue the divorce to the wife and the husband is released from the dower. In this regard, the judge will order him to give divorce and if he refuses, the judge will issue the divorce to the wife on behalf of the husband and releases the dower from the husband as a compensation for khul' on behalf of the wife."¹²

There are many grounds that lead to dissolution of marriage by ruling of the judge in Islamic jurisprudence. The Shara'i qāḍī is authorized to give ruling regarding separation of spouses due to impotence, a long absence or imprisonment, an insolvency, lack of competence of husband and the

annulment of the marriage of an adult woman on her request if her guardian marries her without her permission.

1. Separation due to impotency of husband

The jurists of the four major schools of thought, Hanafi¹³, Maliki¹⁴, Shafa'i¹⁵ and Hanbali¹⁶, are agreed on the permissibility of separation between spouses due to two defects: sterility and impotence while they differed on other defects of marriage. If a woman finds after marriage¹⁷ that her husband is impotent or sterile, she is permitted to request for separation from qāḍī¹⁸.

2. Separation due to a long absence or imprisonment

Jurists have divided the absence of the husband into two kinds and elaborated a distinct rule for each kind. First one is a short absence when there is correspondence between them or his whereabouts are known and his message reaches. All the jurists unanimously agreed that they should not be separated in the case where she can spend on her from the property of husband.¹⁹ The second kind is a long absence and his whereabouts are also not known. Jurists have two different opinions in this regard. In the case of long absence of the husband, the Hanafi²⁰ and Shafa'i²¹ jurists have described the rule on the impermissibility of separating them until his death is confirmed or over a long period of time his whereabouts are unknown. They have elaborated the time period as one hundred and twenty years or one hundred and seven years. The second opinion is of the Maliki²² and the Hanbali²³ jurists. Their opinion permit to separate the spouses due to the long absence of the husband. They said that the wife is greatly harmed due to the absence of husband and this harm should be prevented as much as possible according to the saying of the Prophet (ﷺ): "There should neither be harming (of others without cause), nor reciprocating harm (between two parties)."²⁴ Moreover, the jurists have made certain conditions that must be fulfilled for the separation between spouses. Firstly, it must be a long absence. According to Maliki jurists, the long absence means at least one year with or without excuse. In another opinion, they include two or three years in the calculation of long separation.²⁵ And, it is four years in the case of missing persons according to them.²⁶ While according to Hanbali school of thought, a long absence includes six month or more and there is no difference in ruling if it was with an excuse such as pilgrimage or trade, or without any excuse.²⁷ Further, Hanbali jurists have made it clear that the qāḍī should not separate them if the husband makes any excuse and her maintenance is continuously paid. But if he does not make excuse and her maintenance is unpaid, the qāḍī should separate them.²⁸ Moreover, the predominant opinion permits to separate them after setting the appropriate precautionary time period for their

separation. The judge has a discretion in this matter and he will estimate the time period as per the circumstances of each case.

3. Separation due to insolvency of husband

Jurists have divided the insolvency of husband into disability to pay dower and maintenance. If the husband is unable to pay the dower of wife on her demand and it is due on him. This issue will be referred to the judge and it is consisted of two types of situations. First case is where his inability to pay the dower occurs before consummation and his wife demands the dower or the dissolution of the marriage. Jurists have different opinions in this matter. The rule elaborated by the Hanafi jurists²⁹ and some Shafa'i³⁰ as well as some Hanbali jurists³¹ does not entitle her to annulment or dissolution of wedlock. They further state that she has no right to demand for annulment and she can only refuse to surrender herself to him until he pays her dower if it is due. She is entitled to maintenance in the case of her detention/retention in the house according to the Hanafi and Hanbali jurists. However, Hanafi jurists explicitly stated that she can refuse just in the case where consummation of marriage was not a condition before the due date of dower. But if they both agreed and he stipulated this condition with her acceptance, she does not have a right to refuse according to the unanimous opinion of the Hanafi jurists.³² Moreover, Maliki jurists³³, the most recognized and evident opinion among Shafa'i³⁴ and Hanbali jurists³⁵ permit her to request for annulment of wedlock before the consummation of marriage when the dower is due on him. The second case is regarding his inability to pay the dower after consummation when the dower is due. Jurists are divided into two rulings hence two groups in this matter. First group of jurists, Hanafi³⁶, Maliki³⁷, some of the Shafa'i³⁸ and Hanbali³⁹ jurists have elaborated that she has only a right to demand the dower and has no right to annul the marriage. While, the second opinion is the opinion of Shafa'i⁴⁰ and Hanbali jurists⁴¹, the second group, who have derived the ruling which permits the wife to request for annulment if he is unable to pay the dower. However, the first group as consisted of majority of jurist holds a predominant opinion and she has no right to request for annulment or dissolution of marriage before or after consummation. She has only a right to demand for dower as well as to prevent herself from surrendering to him until he pays the dower. This opinion is also consistent with the principles of Shari'ah in preventing the harm to both the parties as the married life is to be continued even with his inability to pay dower and the woman should accept that because dower is due and he is accountable to pay. But if he is unable to pay before consummation, even he was given a long period of time, then she can request for annulment to prevent herself from further harm as

according to the opinion of the Maliki jurists, the most evident opinion of Shafa'i and Hanbali jurists as prescribed earlier.

In addition to the previous discussion, the second division of insolvency of husband is his inability to provide maintenance after it becomes obligatory and the wife demands it. Then, she can bring this issue before qāḍī. The majority of jurists have agreed that the wife has no right to request for separation if the husband is wealthy and the wife has already taken her dower. It is also permissible for her to stay with her husband if the husband is unable to pay the maintenance and she agrees to stay with him. However, they differed on when the husband is unable to pay maintenance and the wife is not agreed in staying with him. They have two different opinions in this regard. The first opinion, the opinion of Hanafi⁴², Hanbali⁴³ and some Shafa'i⁴⁴ jurists, denies the right of a woman to request for annulment of the marriage just because of the refusal of husband to spend on her due to his insolvency. While, the Maliki⁴⁵, the evident opinion of Shafa'i⁴⁶ and Hanbali jurists⁴⁷ allow a woman to ask as per her choice for dissolution of marriage due to insolvency of husband and his refusal to provide maintenance. The second opinion: The Malikis, the most apparent among the Shafi'is, and the doctrine of the Hanbalis hold that the wife has the right to request annulment and separation between her and her husband due to her husband's insolvency and his refusal to provide maintenance. She has the choice: if she wishes, she can remain married and borrow from him, or if she wishes, she can take her case to the judge to request annulment and separation.

The predominant opinion is the opinion of Hanafi, Hanbali and some Shafa'i jurists. This opinion denies her right of annulment due to the insolvency of husband as she can demand maintenance from the husband while filing in the court and the judge will fix her maintenance and force him to pay her maintenance. They have derived their ruling from the verse of Surah Baqara: "Either you retain her on reasonable terms or release her with kindness."⁴⁸ This verse applies to the wealthy person who refuses to provide maintenance. As for the poor, Allah Almighty has defined the ruling in the same surah: "And if he is in hardship, then let there be postponement until it is easy for him."⁴⁹ This can also be derived from the life of the poor companions of the Prophet Muhammad (ﷺ) who did not leave their wives and they were the people who always stuck to the reasonable terms. So, the poor person cannot be considered outside the limits of 'reasonable terms.' Further, there is no tradition of the Prophet Muhammad (ﷺ) that indicate the divorce of a woman or choice for her to dissolve the marriage on the ground of the insolvency of husband even the most of the companions were poor.

Moreover, the analogy/comparison of maintenance on impotency and sterility is a measure with different basis because the consummation of marriage is an original ruling in marriage and one of the original purposes of marriage, procreation, is lost without it. The maintenance is considered an accessory and is not lost, but is delayed and remains a debt on the husband's account while the impotency cannot be remedied. And the annulment is not the only way to remove the harm, rather she can be ordered to borrow from him or he can be imprisoned until he agrees to provide maintenance for her.

4. Separation due to lack of competence of husband

The compatibility of spouses is one of the important things that should be considered during marriage as some jurists have considered it a condition for the validity of the marriage and the contract is invalid due to absence of this condition. The jurists have mentioned distinct qualities under the competence of husband in their books.⁵⁰ The judge has to separate them in this case according to an opinion of Hanafi jurists, one opinion of Hanbali jurists and some Maliki jurists. It was narrated from Imam Abu Hanifa that if a woman marries someone who is not compatible, the contract is invalid. Accordingly, Imam Sarakhsi said: "It is more cautious, because not every walī is good at accompanying the judge, and not every judge is fair, so it was more cautious to close this door."⁵¹ The Maliki jurists said that it is forbidden for a woman to marry an immoral person in the first place. Neither she nor her guardian should consent to such marriage because mixing with the immoral person is forbidden and abandoning him is a religious obligation. If an immoral person marries her then this marriage must be annulled.⁵² According to Imam Ahmad, if the master marries an Arab woman, they are to be separated.⁵³

While, the other group does not consider the compatibility of spouses as a condition for the validity of the marriage and the contract is valid according to them. Whoever form the walī or the woman is not agreed on the marriage contract, they have a right to request the annulment of marriage and it must be annulled by the ruling of the judge.⁵⁴

5. Annulment of marriage of an adult woman on her request if her father married her without her consent

If the father or other guardian marries an adult daughter, the jurists have divided such girl into two kinds. First is if she was previously married and if she was never married. If she was previously married then no one can compel her and she has the right to request annulment according to the majority of scholars.⁵⁵ They derived the ruling from the Hadith of Sahih al-Bukhari as Khansa bint Khiddam al-Ansariyya was married by her father without her consent even she was previously married. She disliked it and

came to the Messenger of Allah (ﷺ) and he annulled his marriage.⁵⁶ Whereas if she was never married before, the jurists have differed in ruling. The Hanafi jurists and the one opinion of Hanbali school held that an adult woman should not be forced into marriage even she was never married before. Moreover, she has a right to request annulment if she was forced to marry.

Dissolution of Marriage and Judicial Separation in Pakistan

There are two important statutes enforced in Pakistan in relation to family matters: Dissolution of Muslim Marriages Act, 1939 and The Muslim Family Laws Ordinance, 1961. The validity of these two laws has always been controversial among religious circles and law makers as the Islamic personal law was enforced in subcontinent before the enforcement of Dissolution of Muslim Marriages Act, 1939. All the settlements regarding family matter of Muslims were delt under the Islamic personal law at that era. As elaborated earlier, British India was dominated by the Hanafi school of thought and there was no provision under which a woman could have her marriage annulled by a judge or a court of law in case of strictness or serious discord. Muslim woman had no way to get out of marriage even in serious discord. Women of British India started converting to other religions to get rid of their husbands. The ulema laid down the rule that if a woman converted to another religion, the government would imprison her until she converted to Islam again. But this rule was not implemented and the Supreme Court had ruled that if one of the spouses converts to another religion, it would lead to their separation. With this ruling, the number of conversions of Muslim women increased. Islamic scholars then elaborated if there is no rule for a problem in Hanafi jurisprudence, then the rules could be taken from other schools of thought like the rules of Imam Malik, Shafi'i and Ahmad.⁵⁷

Federal Shariat Court has made a detailed study on the subject⁵⁸ and certain ways of dissolution of marriage are elaborated in it. If they cannot live a harmonious life and there is a serious disagreement between them, the woman can ask her husband to release her with the return of the dower, which is called mubārāt. The jurists are unanimous that a third party must be present to adjudicate the matter in the case if husband rejects the offer of wife. So, the case will be placed before the judge for adjudication. Here the question arises that whether the judge has the authority to dissolve the marriage without the consent of husband? The courts have given distinct views on the issue as the Lahore High Court has made it clear that the consent of husband is necessary for the dissolution of the marriage by way of Khul' and the judge has no authority to dissolve the marriage on the ground of hatred or dislike without the consent of husband.⁵⁹ In another case,

Saeeda Khanum vs. Muhammad Sami, it was stated that incompatibility of temperament, dislike or hatred on the part of the wife towards her husband are not valid grounds for divorce under Islamic law unless the husband consents to it.⁶⁰ Moreover, the Lahore High Court has come forth with a divergent view in Fatima vs. Najm-ul-Ikram Qureshi in 1959. It was held that if the judge apprehends that both parties will not observe the limits of Shari'ah then the wife is entitled to dissolve the marriage in return of mahr. This judgement clearly elaborated and declared that the consent of husband is not necessary.⁶¹ Further, the Supreme Court in the Khurshid Bibi vs. Baboo Muhammad Amin held that the judge had the authority to dissolve the marriage without the consent of husband where the judge apprehends that the spouses will not be able to observe the limits prescribed by Allah Almighty due to incompatibility of temperament between them.⁶²

The Ulema, jurists and judges have derived their arguments from certain verses of the Holy Quran and the traditions of the Holy Prophet (ﷺ). Allah Almighty has clearly elaborated in Surah Baqarāh:

“It is not permissible for you to take back what you have given to them unless there is a fear that they both will not observe the limit prescribed by Allah and if you fear that they both will not observe the limit of Allah, then there is no blame on either of them if she gives something for her freedom.”⁶³

The verse clarifies the prohibition of asking for and the return of mahr except in the case of fear of not respecting the limits prescribed by Allah Almighty and there is no blame on them if the wife gives something to her husband with her free consent to take the freedom from marriage. There is incident from the traditions of the Prophet (ﷺ) when the wife of Thabit bin Qais, named Jamila, came to the Prophet (ﷺ) and complained that she does not want to live with him because of dislike. She has agreed to return back the garden which he had given her in mahr when the Prophet (ﷺ) asked her to return. Prophet (ﷺ) ordered Thabit bin Qais to divorce her.⁶⁴ As in another tradition of Prophet (ﷺ), he ordered to give back everything that the wife of Thabit bin Qais, Habībā, has taken in marriage from him.⁶⁵ The Prophet (ﷺ) has also ordered the khul' between Mughīth and Barīrā when she denied to live with him. While, the narration also mentioned that he loved her so much that he used to cry and walk behind her in the streets of Medina.⁶⁶

The Federal Sharia Court has also mentioned the decision of Omar ibn al-Khattab and Uthman ibn Affan about the woman who asked for separation from her husband. He ordered the imprisonment of this woman in a house with a lot of dung. She stayed there for three days then Omar ibn al-Khattab asked her about her stay there and she replied: “I have not found comfort since I was with him except for these nights of imprisonment.” Omar ordered her husband to divorce her even in exchange of her earring.”⁶⁷

Moreover, Uthman ibn Affan has also permitted khul' and ordered the husband to take a headband or something less.⁶⁸

While, the Islamic scholars and courts differ in understanding these arguments. The high courts have explained in distinct cases that the verses related to the spouses are directed to the head of state or the judge in a state of fear when they both will not be able to observe the limits of Allah Almighty. The courts have ruled dissolution of marriage by the judge without the consent of the husband in such type of cases.⁶⁹ However, the point of view of Islamic scholars is different on the subject and they said that the verses are directed to the spouses as it is mentioned in the verse "except if they fear", so it is clear that what is meant here is if the spouses fear that they will not uphold the limits of Allah. According to them, it is not permissible for the ruler or the judge to annul the marriage without the consent of husband even if the verse is considered to be directed to the ruler. He can only urge the husband for separation.

Secondly, in the case of Jamila and Habeeba, the Higher Courts stated that the Prophet (ﷺ) ruled like a judge. He ordered Thabit to divorce his wife without asking him whether he wanted a divorce or not and Thabit followed his order. The same procedure is followed in other cases as well. While, the Islamic scholars interpreted and said that the Prophet Muhammad (ﷺ) did not annul the marriage himself but ordered Thabit and others to divorce their spouses to issue the verdict of divorce.

Thirdly, separation of spouses by way of khul' is dissolution/annulment and not divorce according to the Higher Courts while separation of spouses before a judge is divorce and not annulment according to Islamic scholars. The courts in Pakistan have preferred the opinion of Imam Shafa'i, Ahmad Dawood Al-Zahiri and others. Nevertheless, Islamic scholars have preferred the opinion of Umar ibn Al-Khattab, Ali ibn Abi Talib, Abdullah ibn Mas'ud (رضوان الله عليهم), Hassan Al-Basri, Qāḍī Al-Shurāih, Imam Abu Hanifa and Imam Malik. Further, the lower courts have followed the ruling of the Supreme Court on the issue as mentioned above, and the interpretation of Islamic scholars differs from this ruling. It is worth mentioning here that there are twelve grounds mentioned in the Dissolution of Muslim Marriages Act of 1939 and on these grounds a Muslim woman can resort to the Family Court to annul her marriage. The judge has the authority to annul her marriage without the consent of her husband as per the provisions of the Act.

Statutory Provisions and Case Laws on Different Grounds of Dissolution of Marriage

It is important to quote certain case laws for understanding the basis of the decisions of the judiciary on different grounds of dissolution mentioned in the Dissolution of Muslim Marriages Act of 1939.

1. Separation due to impotency of husband

Statutory law of Pakistan clearly elaborates that the judge has power to dissolve the marriage if the husband has failed to perform his marital obligations without any reasonable cause for three years⁷⁰ or if he was impotent from the start of marriage until the present day.⁷¹ There are many judgements on the matter.

The Family Court ruled to dissolve the woman's marriage on the grounds of impotency. But the High Court in Appeal rejected the ruling of the Family Court on two grounds. Firstly, the spouses have provided their medical certificates themselves and the court did not provide them a doctor for examination. Secondly, the Family Court cannot issue a decision to dissolve the marriage on the grounds of impotency of husband unless the husband does not satisfy the court within a full year that he is not impotent.⁷²

2. Separation due to a long absence or imprisonment

The judge may dissolve the marriage contract if the whereabouts of the husband are unknown for four years.⁷³ In another provision, the law states that a judge may dissolve a marriage in case of his neglect or failure to provide maintenance to his wife for two years⁷⁴ or if he has been imprisoned for seven years or more⁷⁵.

The Peshawar High court ruled to dissolve the marriage on the grounds of non-payment of maintenance for more than 21 years and the continuous absence of the husband. The husband was living in Japan, while the wife was in Pakistan. He did not come to Pakistan during his marriage except for four or five months.⁷⁶ In another case, the Federal Sharia Court held that a husband can delegate the power to divorce to his wife or to any other person. The person to whom this power is delegated may use or declare it accordingly. Delegated divorce is served as a check on a man who is cruel, ignorant and neglects the maintenance of wife or who is a missing person for a long time or who is absent for very long period without providing his wife finances required for her maintenance and still does not agree to give his wife the right to khula or refused to divorce her at any cost.⁷⁷ The Family Court ruled that a suit resulting from Khula for dissolution of marriage on all these grounds leads wife to not claim the right of dower or maintenance. But the High Court accepted the constitutional petition and decided that if it was a suit for dissolution of marriage by way of Khula and there were many reasons, then the wife has the right to recover the dower amount. After that, the Supreme Court agreed with the High Court in its ruling.⁷⁸

3. Separation due to insolvency of husband

There is no specific law regarding the dissolution of marriage on the ground of non-payment of dower. Moreover, Section 2(ii) of The Dissolution

of Muslim Marriages Act 1939 gives the authority to the judge to dissolve the marriage if the husband has neglected or failed to provide her maintenance for a period of two years.⁷⁹

There are many judgments where the judges have ruled regarding non-payment of due dower by the husband. The courts have ruled that the woman have a right to not surrender herself in front of him until the husband pays the dower.⁸⁰

Pakistani courts have also issued many decrees while making the analysis of the non-maintenance by the husband for more than two years without any fault on the part of the wife. Some of the cases of the Supreme Court and high courts are discussed hereafter. The Supreme Court stated that the High Court dissolved the marriage on the basis that the husband did not pay maintenance to his wife for more than two years. There is no appropriate justification to interfere with the judgment of the High Court.⁸¹ The suit was filed by the wife for dissolution of marriage in the family court on the basis of cruelty, disposing of her property without her consent and not providing her maintenance for more than two years. While, the husband rejected all the allegations. The family court dismissed the suit on the basis of failure to prove the claims. However, the court discovered in appeal that the wife had been living away from the husband in another place for six years. At this time, the husband had failed to provide maintenance during this period and the court considered that the relationship between the husband and wife had become embittered and impossible. The court issued a decision to dissolve the marriage. Furthermore, the case reached the High Court due to a plea by the husband who claimed that the dissolution of marriage on the basis of khula' is subjected to restoration of the benefits received by the wife in consideration of the marriage. However, the court rejected the plea on the grounds that the dissolution of the marriage between the two parties in the appeal court was not based on Khula' but rather the marriage was dissolved on the basis of failure to provide maintenance to the wife for more than two years without any fault on the part of the wife. The Kashmir High Court also decided the case as the Supreme Court had done in the case of Muhammad Jameel vs. Sarwar Jahan and ordered the dissolution of the marriage on the ground of non-maintenance for more than two years. The Court added that the term "cruelty" does not only include physical assault or physical harm but includes all types of cruelty including legal, mental and physical cruelty. The Court ordered the husband to pay the deferred dower to his wife on the ground of dissolution of marriage.⁸² In another case, the Supreme Court upheld the judgment of the High Court and the Court of Appeal regarding dissolution of marriage on the ground of non-maintenance and cruelty by the husband. It held that the two Courts had relied on sound evidence to conclude

that the wife had a right to dissolve the marriage on the ground of cruelty.⁸³ The Peshawar High Court ruled to dissolve the marriage on the ground of non-payment of maintenance for more than 21 years as the husband was living in Japan and the wife was in Pakistan. He only came to Pakistan for four to five months during the marriage. The court also ordered to pay previous maintenance of 19 years to the wife.⁸⁴ In another case, the court ruled to dissolve the marriage on the ground of non-payment of maintenance for seven years.⁸⁵

4. Separation due to lack of competence of husband

There is no Pakistani law on the competence of marriage and the marriage of a woman is valid even she marries herself without the competence and consent of walī. It can be analyzed from the certificate of a marriage contract of a Sui Juris Woman. Marriage certificate of Muslim citizens of Pakistan is regulated under rules 8 and 10 of the West Pakistan Rules under the Muslim Family Laws Ordinance of 1961. There is no different form of marriage contract for a Sui Juris Woman rather the same two-page form is executed for all types of marriages. This certificate includes the detailed information about the spouses, their lineage, addresses, details of dower as well as signatures of bride and groom, marriage witnesses, marriage registrar, etc. However, there is no specific column for the signatures of the walī or guardian. Only the presence of the bride's agent is required who can be anyone without limitation to prohibited relation with the woman. Pakistani law is not completely in conflict with Hanafi jurisprudence but the necessary conditions compatibility between spouses and a mahr al-mithl required by Hanafi jurisprudence are not articulated in the law. In the Hanafi jurisprudence, the contract may be dissolved by the walī in certain situations if any of the condition is not fulfilled during marriage without the consent of father. The marriage certificate should be amended to take into account these conditions as prescribed by Hanafi jurisprudence as well as precautionary requisites for the protection of woman.

Moreover, the issue mentioned above is not incorporated in law so it is not a matter of court in Pakistan. However, there are judgements regarding the dissolution of marriage by the judge on the basis of incompatibility of temperaments between spouses, for instance contradictory mental, moral and emotional stances and hatred between them. There are many cases where a wife pleads dissolution on the grounds of hatred to her husband or extreme incompatibility between their temperaments. The Supreme Court ruled that the judge can order separation by way of khul' on these grounds.⁸⁶ In another case, the court upheld the case in favor of the wife on the basis of incompatibility of temperaments between the spouses.⁸⁷ The Peshawar High

Court has elaborated in the case that the incompatibility between the spouses or contradictory mental, moral and emotional stances and hatred between the spouses are valid grounds for separation under Islamic law.⁸⁸ Though, there are many cases in which the courts have elaborated these grounds and decreed khul' or judicial separation between the spouses.

5. Annulment of marriage of an adult woman on her request if her father married her without her consent

Section (vii) states that if a minor girl under 16 years is given in marriage by her walī, she may repudiate this marriage before attaining 18 years of age until the marriage is not consummated.⁸⁹ This section is in consonance with Article 274 of the Mahammedan Law which elaborates that if the marriage of a minor is contracted by any guardian other than the father or the father's father, the girl child has the option to refuse the marriage upon reaching puberty" and this is called "the option of puberty."

There are many case laws related to the subject and are in approval of Islamic law. In this case, the marriage of minors was done by the guardians and the court said that the girl can annul the marriage if she reaches puberty without consummation as it is her right in Islamic law. She has the option to exercise her right to annul the marriage after reaching puberty or before reaching age of majority. The option can be exercised expressly or by not submitting to her husband for consummation. The marriage of a minor requires her approval. The girl in this case did not expressly approve of her marriage and had not submitted to her husband. She has filed a suit seeking a declaration of annulment from the court. This suit itself explains her option of reaching puberty to annul the marriage by her.⁹⁰ Nevertheless, the Lahore High Court held that the option of puberty for a female lapse if she, after being informed of the marriage, does not refuse the marriage without reasonable delay after reaching puberty.⁹¹

Comparison between Islamic Jurisprudence and Pakistani Law

A short comparison is engraved here to understand the similarities and distinctions between both laws on different matters discussed earlier. Pakistani law is in consonance with the opinion of Imam Shafa'i regarding the separation of spouses by the judge through Khul' as it is considered a dissolution and not a divorce in Pakistani law. While, Pakistani law is distinct from Islamic jurisprudence regarding the dissolution of marriage by the judge without the permission of husband in the event of incompatibility of temperament between spouses. Pakistani law permits the dissolution of marriage by the judge without the permission of husband in this case and it is contrary to the rulings of basic four schools of thought.

Further, there is no conflict in the judge's representation in the ruling of separation and dissolution of marriage due to impotence as the jurists of the Hanafi, Maliki, Shafa'i and Hanbali schools agreed on the permissibility of separation between spouses due to two defects: impotence and sterility. The woman is permitted to request for separation in both the cases.

In the case of absence of husband, the two schools of thought, Maliki and Hanbali agreed on separation by the Judge due to a long absence of the husband or in the case if his whereabouts are unknown for a long period of time. As the wife is greatly harmed by his absence. As mentioned earlier that a long absence contains two years in Pakistani law and the minimum limit of long absence is one year and six months correspondingly by Maliki and Hanbali school. However, Pakistani law defines seven years for an imprisoned and four years for a missing person and Maliki school described four years for a missing person. So, these Pakistani laws are in consonance with the Islamic Jurisprudence. Moreover, it is not permissible to separate the spouses under Pakistani law if the absence of husband is for a short time period and also uninterrupted and this law is also unanimous with the opinion of majority of jurists.

Moreover, Pakistani law agrees with the majority of jurists that the judge does not have authority to separate the spouses due to insolvency in the dower and she has only right to prevent herself from surrendering to husband until he pays it.⁹² This ruling prevails among the Hanafi, Maliki and Hanbali jurists and one opinion of Shafa'i jurists is also in harmony with majority opinion. Jurists have also divided the ruling on insolvency in dower before and after consummation and this division does not exist in Pakistani law.

Pakistani law is in harmony with the Shafa'i and Hanbali schools of thought on allowing the separation between spouses due to lack of maintenance for a period of two years. One opinion of Maliki school also agreed on separation due to lack of maintenance. The wife has a right to appear before the judge for such separation as per Pakistani and Islamic law. Furthermore, the judge can dissolve the marriage of an adult woman if her father marries her without her permission and both laws and it is known as "the option of puberty". This rule is agreed upon by the Hanafi school and the Hanbali narration as the jurists forbade forcing an adult virgin to marry and in case if she was forced, she has a right to request dissolution until her marriage is not consummated.

Though, there is no Pakistani law on the issue of compatibility between spouses. Jurists have made condition of compatibility for the validity and completion of marriage. According to them, the marriage contract is valid in the absence of compatibility. But, if anyone does not

agree from the walī or the woman, that person has a right to request the dissolution of marriage and it must be dissolved by the ruling of the judge. However, such type of marriage is absolute and valid without any reservations in Pakistan.

Conclusion

It is to be concluded from the above-mentioned explanation that all the schools of thought have determined different rulings regarding different grounds of dissolution of marriage. As according to Hanafi School of thought, it is permissible for an adult woman to marry herself without the permission of her walī, and a woman of the age of eighteen is her own guardian under Pakistani law which permits for her to marry herself without the permission of her guardian. However, Pakistani law does not require compatibility and an equal dower as these are necessary conditions under the Hanafi school of thought which must be fulfilled in the case if she marries without the permission of walī. Further, the most preferable opinion is the opinion of the majority of jurists as they authorize the judge to divorce a woman on denial of husband to divorce her in the event of impotence, insolvency, in providing maintenance and the option of puberty. However, the judge is not authorized to separate the spouses due to insolvency in providing the dower according to the most preferable opinion among jurists and Pakistani law. Moreover, Pakistan needs an explicit law for the marriage of women and the role of the walī in it, so that there will be no ambiguity in the matter of marriage and separation as it was held in some cases that the court has approved her marriage even though she was under sixteen years old.⁹³ On the other hand, the court annulled the marriage contract in some cases because it was without the permission of walī, even the girl was over sixteen years.⁹⁴

References

- 1 Al-Quran, 2:221.
- 2 Ashraf Ali Thanvi, *Al-hila al-Najizah* (Maktaba Razi Deoband, 2005).
- 3 Rabia Tus Saleha, "Qualifications of a Qāḍī: A Sharī'ah Appraisal and Pakistan," *Islamabad Law Review* 6, no. 2 (2022): 115-135.
- 4 Taqi ud-din Abu Abbas – Ibn e Taimiyah Hanbali, *Al-Fatawa al-Kubra* (Dar Al-Kutub Al-Ilmiyah, 1987), 3:204.
- 5 Muhammad Bin Ali Bin Abdur Rahman Al-Hanafī Al-Haskafī, *Al-Dur Al-Mukhtar Sharh Tanvir Al-Absar* (Beirut: Dar Al-Kutub Al-Ilmiyah, 2002), 55.
- 6 Abdullah Bin Maḥmūd Bin Modood al-Mosalī, *Al-Ikhtiyār li Tāleel Al-Mukhtar*, (Cairo: Matba'a al-Ḥalbī, 1951), (3:100). He wrote that: "أَنَّ الفسخ يكون طلاقاً إذا فعله القاضي نيابة عن الزوج".

- 7 Zyn āl-Dyn Ābu Yhyā, 'Āsn al-Mṭālib fī Shrh Rūd al-Ṭālib (Dar al-Kutub Islāmī, 1431H), (3:356).
- 8 Abu Bakr al-Bakrī, I'ānatu al-Ṭālibīn 'lā Ḥal Alfāz Fath al-Mo'īn - al-Fiqh al-Shāfa'ī, (Dār al-Fikr li-Ṭbā't wa al-Nashar wa Altūrī, 1997), (4:41).
- 9 Muḥammad Bin Ḥamūd al-Wā'ilī, Baghītu al-Muqtaṣid Sharḥ Bidāyat al-Mujtahid, (Beirut: Dār al-Ḥazam, 2019), (16:9955).
- 10 Aḥmad al-Ḥājī al-Kurdī, Faskh al-Zawāj: Baḥath Muqārīn baīn al-Sharī'a al-Islāmīa wa al-Sharī'ataīn al-Masīḥīa al-Yāhūdīa wa-Alqwānīn al-'rabīa, (Dār al-Nashar al-Yīmāma, 1989), 107; Yusuf Qāsim, Hūqūq al-Usra fi al-Fiqh al-Islāmī, (Dār al-Nahḍa al-'rabīa – Maṭb'a Jāmi'a al-qāhira, 1992), 275.
- 11 Muḥammad R'afat 'Othmān, Sulṭatū al-Qāḍī fī al-Tafrīq baīn al-Zaujāin bil-Āmūr alatī Tamna'u al-istamtā', (Dār al-Kitāb al-Jāmi'ī, 1981), 78.
- 12 Mujāhid al-Islām al-Qāsimī, Darāsāt Fiqhīa wa-'ilmīa – Majma' al-Fiqh al-Islāmī al-Hind, (Beirut: Dār al-Kutub al-'ilmīa, 2003), 159-160.
- 13 Abdullah Bin Maḥmūd Bin Modood al-Mosalī, Al-Ikhtiyār li Tāleel Al-Mukhtar, (Cairo: Matba'a al-Ḥalbī, 1951), (3:115).
- 14 Muḥammad Bin 'Abdullāh al-Kharshi al-Mālikī, Sharḥ Mukhtaṣir Khalīl – Fiqh Mālikī, (Beirut: Dār al-fikr lil-Ṭabā'a), (3:237); Khalīl Bin Ishāq Bin Mūsā Ḍīā' al-Dīn al-Jundi al-Mālikī al-Miṣrī, al-Taūḍīḥ fī Sharḥ al-Mukhtaṣir al-Far'ī li-Ibn al-Ḥājib – Fiqh Mālikī, (Markaz Najībwiyyh lil-Makhtūṭāt wa-Khidma al-Turāth, 2008), (4:119).
- 15 Zikrīyā Bin Muḥammad Bin Zikrīyā al-Anṣārī al-Sanīkī, Asnā al-maṭālib fī Sharḥ Raūd al-Ṭālib, (Dār al-Kitāb al-Islāmī), (3:176).
- 16 'Abū Ishāq Burhān al-Dīn al-Rāmīnī al-Maqdisī al-Ḥanbalī, Al-Mabda' fī Sharḥ al-Muqna', (Beirut: Dār al-Kitāb al-'ilmīa, 1997), (6:165).
- 17 Muḥammad bin Aḥmad Al-Sarakhsī, Al-Mabsoot, (Beirut: Dar al-marifa, 1993), (5:104); Alauddīn Abi Bakr Bin Mas'ud Al-Kasanī, Badai Al-Sanai, (Cairo: Dar al-Kutub al-Ilmiya, 1986), (2:327); Muḥammad Bin Aḥmad bin Urfah Ad-Dasuki Al-Mālikī, Hashiyah Ad-Dasuki 'Ala Al-Sharḥ Al-Kabir, (Dār al-Fikr), (2:277); Shams al-Dīn Muḥammad Bin Abi al-'bbās Aḥmad Bin Ḥamza Shahāb al-Dīn al-Ramalī, Nihāya tul-Moḥṭāj ila Sharḥ al-Minhāj – Fiqh Shafa'ī, (Beirut: Dār al-Fikr, 1984), (6:312); Abdullah Bin Aḥmad Ibn Qudamah, Al-Mughni (Egypt: Maktabah al-Qaherah, 1968), (7:202).
- 18 Muḥammad Bin Aḥmad Al-Sarakhsī, Al-Mabsoot, (Beirut: Dār al-Marifa, 1993), (5:104); Alauddīn Abi Bakr Bin Mas'ud Al-Kasanī, Badai Al-Sanai, (Cairo: Dar al-Kutub al-Ilmiya, 1986), (2:327); Muḥammad Bin Aḥmad Bin Urfah Ad-Dasuki Al-Mālikī, Hashiyah Ad-Dasuki 'Ala Al-Sharḥ Al-Kabir, (Dār al-Fikr), (2:277); Shams al-Dīn Muḥammad Bin Abi al-'bbās Aḥmad Bin Ḥamza Shahāb al-Dīn al-Ramalī, Nihāya tul-Moḥṭāj ila Sharḥ al-Minhāj – Fiqh Shafa'ī, (Beirut: Dār al-Fikr, 1984), (6:312); Abdullah Bin Aḥmad Ibn Qudamah, Al-Mughni (Egypt: Maktabah al-Qaherah, 1968), (7:202).
- 19 Muḥammad bin Aḥmad Al-Sarakhsī, Al-Mabsoot, (Beirut: Dār al-Marifa, 1993), (11:34); Muḥammad Bin Aḥmad Bin Urfah Ad-Dasuki Al-Mālikī, Hashiyah

- Ad-Dasuki 'Ala Al-Sharh Al-Kabir, (Dār al-Fikr), (2:479); Zyn āl-Dyn Ābu Yḥyā, 'Āsn al-Mṭālib fī Shrh Rūḍ al-Ṭālib (Dar al-Kutub Islamī, 1431H), (3:400); 'Abū Ishāq Burhān al-Dīn al-Rāmīnī al-Maqdisī al-Ḥanbalī, Al-Mabda' fī Sharḥ al-Muqna', (Beirut: Dār al-Kitāb al-'Ilmīa, 1997), (6:249); Mansūr Bin Yūnas Bin Idrīs al-Bahūtī, Kashāf al-Qanā' 'an Matan al-Iqnā', (Riyadh: Maktaba al-Naṣr al-Ḥadītha, 1928), (5:193).
- 20 Muḥammad bin Aḥmad Al-Sarakhsī, Al-Mabsoot, (Beirut: Dār al-Marifa, 1993), (11:34).
- 21 Zyn āl-Dyn Ābu Yḥyā, 'Āsn al-Mṭālib fī Shrh Rūḍ al-Ṭālib (Dar al-Kutub Islamī, 1431H), (3:400).
- 22 Muḥammad Bin Aḥmad Bin Urfah Ad-Dasuki Al-Mālikī, Hashiyah Ad-Dasuki 'Ala Al-Sharh Al-Kabir, (Dār al-Fikr), (2:479).
- 23 'Abū Ishāq Burhān al-Dīn al-Rāmīnī al-Maqdisī al-Ḥanbalī, Al-Mabda' fī Sharḥ al-Muqna', (Beirut: Dār al-Kitāb al-'Ilmīa, 1997), (6:249).
- 24 Sunan Ibn al-Maja, (2:784), Ḥadīth no. 2340.
- 25 Muḥammad Bin Aḥmad Bin Urfah Ad-Dasuki Al-Mālikī, Hashiyah Ad-Dasuki 'Ala Al-Sharh Al-Kabir, (Dār al-Fikr), (2:431).
- 26 Muḥammad Bin Aḥmad Bin Urfah Ad-Dasuki Al-Mālikī, Hashiyah Ad-Dasuki 'Ala Al-Sharh Al-Kabir, (Dār al-Fikr), (2:479).
- 27 'Abū Ishāq Burhān al-Dīn al-Rāmīnī al-Maqdisī al-Ḥanbalī, Al-Mabda' fī Sharḥ al-Muqna', (Beirut: Dār al-Kitāb al-'Ilmīa, 1997), (6:249).
- 28 'Abū Ishāq Burhān al-Dīn al-Rāmīnī al-Maqdisī al-Ḥanbalī, Al-Mabda' fī Sharḥ al-Muqna', (Beirut: Dār al-Kitāb al-'Ilmīa, 1997), (6:249).
- 29 Muḥammad Amin Ibn 'Abidin, Radd al-Muḥṭār 'ala al-Durr al-Mukhtār, (Beirut: Dār al-Fikr, 1992), (3:143).
- 30 Shams al-Dīn Muḥammad Bin Muḥammad al-Khaṭīb al-Shirbīnī, Mughni al-Moḥṭāj ila Ma'rafati Ma'āni Alfāz al-Minhāj, (Dār al-Kutub al-'Ilmīa, 1994), (5:176); Abū Zikrīā Moḥyi al-Dīn Bin Sharaf al-Nawawī, Al-Majmū' Sharḥ al-Muhadhib, (Cairo: Idāra al-Ṭabā' al-Munīriā, 1431h), (16:377).
- 31 Abdullah bin Aḥmad Ibn Qudamah, Al-Mughni, (Egypt: Maktabah al-Qaherah, 1968), (7:261).
- 32 Muḥammad Amin Ibn 'Abidin, Radd al-Muḥṭār 'ala al-Durr al-Mukhtār, (Beirut: Dār al-Fikr, 1992), (3:145).
- 33 Muḥammad Bin Aḥmad Bin Urfah Ad-Dasuki Al-Mālikī, Hashiyah Ad-Dasuki 'Ala Al-Sharh Al-Kabir, (Dār al-Fikr), (2:299).
- 34 Shams al-Dīn Muḥammad Bin Muḥammad al-Khaṭīb al-Shirbīnī, Mughni al-Moḥṭāj ila Ma'rafati Ma'āni Alfāz al-Minhāj, (Dār al-Kutub al-'Ilmīa, 1994), (4:370).
- 35 Abdullah bin Aḥmad Ibn Qudamah, Al-Mughni, (Egypt: Maktabah al-Qaherah, 1968), (7:261).
- 36 Muḥammad Amin Ibn 'Abidin, Radd al-Muḥṭār 'ala al-Durr al-Mukhtār, (Beirut: Dār al-Fikr, 1992), (3:143).

- 37 Muḥammad Bin Aḥmad Bin Urfah Ad-Dasuki Al-Mālikī, Hashiyah Ad-Dasuki 'Ala Al-Sharh Al-Kabir, (Dār al-Fikr), (2:299).
- 38 Abū Zikrīā Moḥyi al-Dīn Bin Sharaf al-Nawawī, Al-Majmū' Sharḥ al-Muhadhib, (Cairo: Idāra al-Ṭabā' al-Munīriā , 1431h), (16:377).
- 39 Abdullah bin Aḥmad Ibn Qudamah, Al-Mughni, (Egypt: Maktabah al-Qaherah, 1968), (7:261).
- 40 Abū Zikrīā Moḥyi al-Dīn Bin Sharaf al-Nawawī, Al-Majmū' Sharḥ al-Muhadhib, (Cairo: Idāra al-Ṭabā' al-Munīriā , 1431h), (16:377). He further elaborates that: "If it was before consummation, the annulment is proven. If it was after consummation, then there are two opinions on it: one of them is: she is not proven to have the annulment and the second is: she is proven to have the annulment, and this opinion is correct."
- 41 Abdullah bin Aḥmad Ibn Qudamah, Al-Mughni, (Egypt: Maktabah al-Qaherah, 1968), (7:261). The correct view among the Hanbali jurist is consisted of two opinions: "If the husband becomes insolvent after consummation, she has the right to prevent herself from surrendering to him and she has a right to annul the marriage. The second opinion is that she does not have a right to prevent herself from surrendering to him as well as she has no right to annul the marriage."
- 42 Muḥammad Amin Ibn 'Abidin, Radd al-Muḥtār 'ala al-Durr al-Mukhtār, (Beirut: Dār al-Fikr, 1992), (3:590). Imam Ibn 'Abidin states: "they should not be separation due to his inability to provide her with the three things: food, clothing and housing, nor due to his failure to fulfill her rights, even if he is solvent. But Imam Shafa'i permitted annulment in the case of the husband's insolvency. However, the most correct and accepted view among them is that there is no annulment as long as he is solvent, even if his whereabouts are unknown and she can obtain maintenance from his money, as stated in Risala Al-Umm. While if a Hanafī ruled on it, it would not be implemented, but if a Shafa'i ordered it and ruled on it, it would be implemented."
- 43 'Abū Ishāq Burhān al-Dīn al-Rāmīnī al-Maqdisī al-Ḥanbalī, Al-Mabda' fī Sharḥ al-Muqna', (Beirut: Dār al-Kitāb al-'Ilmīa, 1997), (7:161). He said that "she does not have the right to annul the marriage due to insolvency. The first school of thought is that if the husband is insolvent in terms of past expenses, or the expenses of the wealthy, the middle class, the servant, or the slave, then she has no right to annul the marriage according to them. The expenses are a debt on him. However, if he is insolvent in terms of housing or the dower then this is of two types: first one is there is no annulment, and the second is that she has the right to annul the marriage."
- 44 Shams al-Dīn Muḥammad Bin Muḥammad al-Khaṭīb al-Shirbīnī, Mughni al-Moḥtāj ila Ma'rafati Ma'āni Alfāz al-Minhāj, (Dār al-Kutab al-'Ilmīa, 1994), (5:177). "According to them, if the husband is insolvent and she cannot be patient, then she has the right to annul the marriage as per the most evident opinion (5:176). But the most correct opinion according to them is that there is no annulment insolvency whether he is present or not" (5:177).

45 Khalīl Bin Ishāq Bin Mūsa al-Jundi al-Māliki, Mukhtaṣir al-‘alāma Khalīl, (Cairo: Dār al-Ḥadīth, 2005), (1:137). He has written that “she has a right to annul the marriage if he is unable to provide for the present maintenance and not the past. But her right to annul is denied in the case if she knows at the time of marriage contract that he is poor or that he is a beggar. If people stop to give him money, she can go to qāḍī and if he finds hard for him to provide for the expenses and clothing he will order to divorce.”

46 Shams al-Dīn Muḥammad Bin Muḥammad al-Khaṭīb al-Shirbīnī, Mughni al-Moḥtāj ila Ma’rafati Ma’āni Alfāz al-Minhāj, (Dār al-Kutab al-‘Ilmīa, 1994), (5:152), (5:176).

47 ‘Abū Ishāq Burhān al-Dīn al-Rāmīnī al-Maqdisī al-Ḥanbalī, Al-Mabda’ fī Sharḥ al-Muqna’, (Beirut: Dār al-Kitāb al-‘Ilmīa, 1997), (7:161); Abdullah bin Aḥmad Ibn Qudamah, Al-Mughni, (Egypt: Maktabah al-Qaherah, 1968), (8:204). He states that “if a husband prevents his wife, and she does not find anything to take and then she chooses to separate from him, the judge shall separate them.”

48 Al-Qur’an, (2:229).

49 Al-Qur’an, (2:280).

50 Rabia Tus Saleha, Nīyāba tul Qāḍī ‘an Ṣāḥib al-Ḥaq al-Khāṣ fī AL-Shau’ūn al-‘usarīa wā al-Mālīa, Dirāsa Muqārna Baīn al-Qānūn al-Bākistānī wā al-Fiḥ al-Islāmī (Vicarious Authority of the Judge in Family and Financial Affairs of Private Right Holder: A Comparative Analysis of Pakistani Law and Islamic Jurisprudence), Ph.D. Dissertation – International Islamic University Islamabad, (114-116).

51 Abdullah Bin Maḥmūd Bin Modood al-Mosalī, Al-Ikhtiyār li Tāleel Al-Mukhtar, (Cairo: Matba’a al-Ḥalbī, 1951), (3:100).

52 Shams al-Dīn Abū ‘abdullāh al-Ru’īnī al-Mālkī, Mwāhib al-Jalīl fī Sharḥ Mukhtaṣir Khalīl, (Dār al-Fikr, 1992), (3:461).

53 Abdullah bin Aḥmad ibn Qudamah, Al-Mughni, (Egypt: Maktabah al-Qaherah, 1968), (7:33). This is the opinion of Sufyan and same is the opinion of Imam Ahmad Bin Hanbal.

54 Abdullah Bin Maḥmūd Bin Modood al-Mosalī, Al-Ikhtiyār li Tāleel Al-Mukhtar, (Cairo: Matba’a al-Ḥalbī, 1951), (3:98); Abū al-Walīd Muḥammad bin ‘Aḥmad bin Muḥammad Ibn Rushd, Bidayatul Mujtahid wa Nihayatul Muqtashid, (Cairo: Dār al-Kutab al-‘Ilmiya, 2004), (3:42); Shams al-Dīn Abū ‘abdullāh al-Ru’īnī al-Mālkī, Mwāhib al-Jalīl fī Sharḥ Mukhtaṣir Khalīl, (Dār al-Fikr, 1992), (3:461); ‘Abū Ishāq Burhān al-Dīn al-Rāmīnī al-Maqdisī al-Ḥanbalī, Al-Mabda’ fī Sharḥ al-Muqna’, (Beirut: Dār al-Kitāb al-‘Ilmīa, 1997), (6:123).

55 Alauddīn Abi Bakr Bin Mas’ud Al-Kasanī, Badai Al-Sanai, (Cairo: Dar al-Kutub al-Ilmiya, 1986), (2:241); Abū Zikrīā Moḥyi al-Dīn Bin Sharaf al-Nawawī, Al-Majmū’ Sharḥ al-Muhadhib, (Cairo: Idāra al-Ṭabā’ al-Munīrīa, 1431h), (16:165); ‘Abū Muḥammad Mūawfaq al-Dīn Ibn al-quḍāma al-Maqdisī, Al-Kāfi fī Fiḥ al-Imām Aḥmad, (Dār al-Kitāb al-‘Ilmīa, 1994), (3:19); Abdullah bin Aḥmad Ibn Qudamah, Al-Mughni, (Egypt: Maktabah al-Qaherah, 1968), (7:42); Abū al-Walīd Muḥammad bin ‘Aḥmad bin Muḥammad Ibn Rushd, Bidayatul Mujtahid wa Nihayatul Muqtashid, (Cairo: Dār al-Kutab al-‘Ilmiya, 2004), (3:43).

- 56 Saḥīḥ al-Bukhārī, Subchapter: when he marries her daughter who she was previously married, (7:18), Ḥadīth no: 5138.
- 57 Ashraf Ali Thanvi, *Al-hila al-Najizah* (Maktaba Razi Deoband, 2005), 26-38.
- 58 Notes of Federal Shariat Court regarding Dissolution of Muslim Marriages Act, 1939. <https://www.federalshariatcourt.gov.pk/research/16-%20%20Dissolution%20of%20Muslim%20Marriage%20Act,%201939.pdf> (accessed on December 28, 2024).
- 59 Umar Bibi vs. State, AIR 1945 LHR 51.
- 60 Saeeda Khanum vs. Muhammad Sami, PLD 1952 LHR 113.
- 61 Fatima vs. Najm-ul-Ikram Qureshi, PLD 1959 LHR 566.
- 62 Khurshid Bibi vs. Baboo Muhammad Amin, PLD 1967 SC 97.
- 63 Al-Qurān, 2:229.
- 64 Saḥīḥ Bukhārī, Chapter on Khul' and How to Divorce in It, (7:47), Hadith no. 5275.
- 65 Sunan Nasāī, Chapter on What Was Narrated Concerning Khul', (6:169), Hadith no. 3462; Mālik Bin Anas Mūṭ'a, Chapter on What Was Narrated Concerning Khul', (4:810), Hadith no. 2082.
- 66 Saḥīḥ Bukhārī, Chapter on The Intercession of The Prophet (ﷺ) for Barīrā's Husband, (7:48), Hadith no. 5283.
- 67 'Abū Bakar Bin Abī Shaiba, *Al-Muṣanaf fi al-Aḥādīth wā al-Āthār*, Chapter: He Who Permits Taking More from A Woman Who Has Been Divorced Than He Gave Her, (4:125), Hadith no. 18525.
- 68 'Abū Bakar 'Abd ur-Razzāq Bin Hammām al-Ṣan'ānī, *Muṣanaf 'Abd ur-Razzāq*, Chapter: The Ransomed Woman with An Increase in Her Dower, (6:504), Hadith no. 11850.
- 69 Khurshid Bibi vs. Baboo Muhammad Amin, PLD 1967 SC 97.
- 70 Section 2(iv), The Dissolution of Muslim Marriages Act, 1939.
- 71 Section 2(v), The Dissolution of Muslim Marriages Act, 1939.
- 72 Abdullah vs. Mst. Shaheen, 1998 MLD 1216; Leemon vs. Kazbano, 1982 PLD 449 Karachi.
- 73 Section 2(i), The Dissolution of Muslim Marriages Act, 1939.
- 74 Section 2(ii), The Dissolution of Muslim Marriages Act, 1939.
- 75 Section 2(iii), The Dissolution of Muslim Marriages Act, 1939.
- 76 Shafqat Ullah vs. Mst. Anjuman, 2024 CLC 363.
- 77 Khawar Iqbal vs. Federation of Pakistan, 2013 MLD 1711 FSC.
- 78 Mukhtar Ahmed vs. Ansa Naheed, 2002 PLD 273 SC.
- 79 Section 2(ii), The Dissolution of Muslim Marriages Act, 1939.
- 80 Muzaffer Ali vs. Mehrun Nisa, 1989 CLC (Lahore) 1805; Tahir Ayub Khan vs. Alia Anwar, 2017 MLD (Karachi) 412; Zulai Khan vs. Noor Muhammad, PLD 1986 (Quetta) 290.
- 81 Muhammad Jameel vs. Sarwar Jahan, 1983 SCMR 398.
- 82 Mehvish Kazmi vs. Parvaiz Hussain, 2022 PLD 1 Supreme Court Azad

-
- Kashmir; Asghari Sultana vs. Chaudhry Shamim Ahmad, 2002 CLC 123 Lahore; Wahid Bakhsh vs. Sughran Mai, 1988 CLC 1638 Lahore.
- 83 Abid Hussain vs. Addition District Judge Alipur, District Muzaffargarh, 2006 SCMR 100.
- 84 Shafqat Ullah vs. Mst. Anjuman, 2024 CLC 363.
- 85 Mst. Rukhsana Younas vs. Aziz ur Rehman, 2014 CLC 1751 Peshawar.
- 86 Abdul Rahim vs. Shahida Khan, 1984 PLD 329 SC; Ikram Ullah Khan vs. Maliha Khan, 2007 PLD 423 LHC.
- 87 Muhammad Akhtar vs. Judge Family Court, 1989 SCMR 615; Sayeeda Khanam vs. Muhammad Sami, 1952 PLD 113 LHC.
- 88 Tanveer Khan vs. Amber Liaqat, 2009 CLC 1210 PHC.
- 89 Section 2(vii), The Dissolution of Muslim Marriages Act, 1939.
- 90 Muhammad Iqbal vs. Siani, 2004 PCRLJ 193 FSC; Mulazim Hussain vs. Amina Bibi, 1994 CLC 1046 LHC.
- 91 Tahira Bibi vs. Station House Officer, 2020 PLD 811 LHC.
- 92 Muzaffer Ali vs. Mehrun Nisa, 1989 CLC (Lahore) 1805; Tahir Ayub Khan vs. Alia Anwar, 2017 MLD (Karachi); Zulai Khan vs. Noor Muhammad, PLD 1986 (Quetta) 290.
- 93 Bakhshi vs. Bashir Ahmad, PLD 1970 SC 323.
- 94 Abdul Waheed vs. Asma Jahangir, PLD 2004 SC 219; Abdul Razaq vs. The State, 2022 PCr.LJ 953.