A Woman's Right to Unilateral Divorce under Islamic Law

Saleem Ahmed v Government of Pakistan
PLD 2014 FSC 43

Salman Ijaz*

Introduction

Saleem Ahmed v Government of Pakistan is a landmark case decided by the Federal Shariat Court ('FSC') that settled the controversy surrounding the requirement of a husband's consent for the dissolution of marriage initiated by a wife (*khula*).[1] In this case, the Court made a departure from the strict principles of *Hanafi* jurisprudence, and extended to wives the right of *khula* without the consent of their husbands by making a direct recourse to the Qur'an and Sunnah.[2] The discussion in this note begins by briefly introducing the facts of the case, which is followed by the *ratio* of the decision. The note then moves on to discuss prior law in order to highlight the importance of this decision as a judicial precedent, followed by a brief analysis of the judgment. Finally, the discussion is summed up by contextualizing the judgment within the broader legal framework of social justice within the context of marital rights under Islamic law.

Facts and Ruling

The petitioners filed applications under Art. 203-D of the Constitution of Islamic Republic of Pakistan 1973, challenging a recent amendment to Section 10(4)[3] of the Family Courts Act 1964 on the ground that it is repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (SAW).[4] They

* B.A. LL.B (Hons) Candidate Lahore University of Management Sciences (LUMS).

[1] See *Saleem Ahmed v Government of Pakistan* PLD 2014 FSC 43; 'The word *khula* literally means 'to put off'.... It signifies as [a] conditional situation on the part of wife, entered into for the purpose of dissolving the marital tie at her instance, in lieu of a compensation paid or agreed to be paid by her to the husband out of her property.'

[2] Islamic Law in Pakistan largely adheres to the dictates of Hanafi jurisprudence. See generally Rubya Mehdi, *The Islamization of Law in Pakistan* (Routledge 2013); Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Brill 2006).

[3] After the 2002 amendment, section 10(4) provides for a summary procedure in *khula* cases and states that in circumstances where reconciliation fails, the court is obliged to pass a decree for dissolution of marriage and restore to the husband the *Haq Mehr* [dower] received by the wife in consideration of marriage at the time of marriage.

[4] (n 1) 45.

contended that the amended form of the provision allowed women to obtain a divorce without the recording of evidence, which meant that women no longer needed to prove hardship in their marriage through the fault of the husband, as was previously required under the Dissolution of Muslim Marriages Act 1939.[5] This amounted to granting women a unilateral right of divorce; a very serious aberration from traditional Islamic law of divorce.

In this light, the FSC was confronted with a number of pertinent questions. The first and foremost concern was the admissibility of the petition, since the court was not empowered to examine questions related to Muslim Personal Law. To this, the FSC answered that since the matter of *khula* concerned enacted law and not the uncodified *fiqh*, the decision in *Dr. Mehmood ur Rehman Faisal*[6] granted it jurisdiction to examine the matter.

With that matter settled, the FSC turned to the question of the relative relevance and weight to be accorded to the *fatawa* of juris-consults and *fuqahā'* while applying the repugnancy test. In response to the FSC's questionnaires, an overwhelming majority of juris-consults had returned the opinion that *khula* could only be granted with the consent of the husband. Without it, the *Qazi* lacked the authority to order dissolution of marriage by way of *khula*.[7] On this point, the FSC observed that the benchmark for repugnancy as laid down in the Constitution is limited to Islamic injunctions as laid down in the Qur'an and Sunnah, and that in the absence of a clear and specific *nass* (text) of the Holy Qur'an and Sunnah of the

[5] The Dissolution of Marriage Act, 1939 provides the ten grounds for the dissolution of marriage: (i) Disappearance of the husband for four years; (ii) Husband's failure to provide maintenance for two years; (iii) Husband's taking of an additional wife without the consent of the wife as required under the MFLO 1961; (iv) Husband's imprisonment for seven or more years; (v) Husband's failure to perform his marital obligations for three years; (vi) Impotency of the husband at the time of marriage and its continuity; (vii) Insanity of husband for two years or suffering from leprosy or a virulent venereal disease; (viii) Repudiation of marriage by a minor upon attaining the age of puberty; (ix) Cruel treatment of the wife by the husband (includes mental cruelty, association with women of ill repute or leading an infamous life, forcing a wife to live an immoral life, interference with wife's property, obstruction in her observation of religious profession or practice, and failure to treat wives equitably); and (x) any other ground recognized as valid under Muslim law.

[6] *Dr Mehmood ur Rehman Faisal v Government of Pakistan* PLD 1994 SC 607; The Shariat Appellate Bench of the Supreme Court held that 'a law which a particular sect of the Muslims, considers as its personal law based on its own interpretation of Holy Qur'ān and Sunnah is excluded from being scrutinised by the Federal Shariat Court under Article 203-D of the Constitution, as it would fall within the meaning of 'Muslim Personal Law'. All other codified or statute laws which apply to the general body of Muslims will not be immune from scrutiny by the Federal Shariat Court in exercise of its power under Article 203-D of the Constitution…'

[7] (n 1) para [4].

Holy Prophet (SAW) prohibiting or enjoining commission or omission of any particular act, it could not declare a law or provision of law repugnant to the Injunctions of Islam.[8]

On this foundation, the FSC went on to explore various verses of the Qur'an, including the verse 2:229 and found that 1) there is no express prohibition on allowing a woman to get divorce without the consent of her husband, and 2) marriage in Islam is significantly dependent on the possibility of reconciliation, thus if the wife expresses her unwillingness to continue the union, then the purpose of the marriage is defeated. The FSC held that the rights and responsibilities of husband and wife are similar and that there is no room for discrimination. Thus, as men could arbitrarily divorce to dissolve the marital tie, women could also ask for their release from the same bond through *khula*, if the parties felt that they could not live together while remaining within the limits prescribed by Allah.[9]

Background and Prior Law

The Pakistani judiciary favoured a more liberal construction of *khula* than the traditional *Hanafi* jurists of the subcontinent would have permitted. While the pre-partition decision in *Mst. Umer Bibi*[10] declaring that *khula* cannot be obtained without the consent of the husband was initially reaffirmed in *Mst. Sayeeda Khanam*[11] in 1952, by 1959, there was a notable departure from such a reading of divorce rights under Islamic law. In *Mst. Balqis Fatima*,[12] the Lahore High Court interpreted verse 2:229 of the Qur'an to rule that a wife could be granted *khula* without the husband's consent, and that the state (represented by the judges) was vested with the authority to determine the annulment of the marriage.[13] It held that if the court was of the opinion that the spouses would not be able to remain 'within the limits prescribed by Allah', it has the authority to unilaterally grant *khula* to the wife without the consent of the husband.

The decisive moment, however, came eight years later, when the Supreme Court held in *Khurshid Bibi*[14] that the Qur'an and Sunnah supported equal rights between the spouses concerning divorce rights in Islam. Justice S.A. Rehman drew

[8] Ibid, para [7].
[9] (n 1) para [20].
[10] *Mst. Umer Bibi v Muhammad Deen* AIR 1945 Lahore 51.
[11] *Mst. Sayeeda Khanam v Muhammad Sami* PLD 1952 Lahore 113.
[12] *Mst. Balqis Fatima v Najm-ul-Ikram Qureshi* PLD 1959 Lahore 566.
[13] Ibid.
[14] *Khurshid Bibi v Muhammad Amin* PLD 1967 SC 97.

support from the Qur'an and various *ahadith* to declare that *khula* would be valid even in cases where the wife has an incurable aversion to her husband, and in such cases the court was empowered to grant her *khula* without the husband's consent. In doing so, the court distinguished the exercise of *khula* from *faskh*,[15] thereby no longer requiring the wife to prove that her husband was at fault. The test for courts was relaxed to only require a woman to show that a continuation of the marriage would lead to either party being unable to remain within the 'limits prescribed by Allah.'[16]

As expected, the conservative *ulama* in Pakistan did not welcome the Supreme Court decision in the *Khurshid Bibi* case. A leading Deobandi scholar, Mufti Taqi Usmani, wrote a thorough rebuttal of the judgment in his book *Islam Mein Khula Ki Haqeeqat (The Reality of Khula in Islam)* in which he gave a detailed alternative account of the practice of *khula* and the position of the various traditional schools of *fiqh* on some of its rules and requirements. He argued that *khula* is viewed as an agreement between the parties, and so necessarily requires the consent of the husband to release the wife from wedlock, where he gives this consent in return for some form of compensation. *Khula*, according to him, is a transaction between willing parties, who cannot be forced to execute its conditions except where they do so of their own accord, free from any type of duress or coercion.[17]

While the superior judiciary neglected most of Taqi Usmani's contentions, they readily adopted and deployed his argument concerning the moral obligation of man who is at fault in the dissolution of the marriage to not accept compensation for *khula*. In *Syed Dilshad Ahmed*,[18] the court held that the acceptance of compensation for *khula* by a husband who is at fault in the fulfilment of his obligations to his wife is forbidden in *Shari'a*. This ruling was subsequently reaffirmed in *Muhammad Rafi*[19] and *Abdul Rashid*.[20] In *Karim Ullah*,[21] the Peshawar High Court held that if

[15] The grant of *Faskh* requires the wife to declare and prove a fault by the husband in order to plead for divorce. *Faskh*, as illustrated in the Dissolution of Muslim Marriages Act, 1939, contains a limited number of faults of the husband which would validly constitute a divorce and do not view incompatibility or hatred as grounds for divorce.

[16] (n 13), para 12, 13. See for details Karin Carmit Yefet, 'The Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb' (2011) 34 Harvard Journal of Law & Gender 553, 588.

[17] See for details, Mufti Taqi Usmani, *Islam Mein Khula Ki Haqeeqat (The Reality of Khula in Islam)* (Memon Islamic Publishers Karachi).

[18] *Syed Dilshad Ahmed v Mst. Serwat* PLD 1990 Karachi 239.

[19] *Muhammad Rafi v Atta Ullah Kausar* 1993 CLC 1364.

[20] *Abdul Rashid v Shahida Parveen* 2013 YLR 2616.

[21] *Karim Ullah v Shabana* PLD 2003 Peshawar 146.

khula is granted due to the husband's cruelty, then he is not entitled to receive any compensation.

Similarly, the judiciary readily expanded on *Khurshid Bibi* to ease the exercise of the right of *khula*. In *Mst. Shakila Bibi*,[22] the court held that the wife is not required to give any reasons, nor disclose the circumstances, justifying her aversion for her husband.[23] It was observed that the court may upon its discretion spare the wife the compensation she has to pay to the husband, and that monetary payment is limited to returning the *mehr* (dower) the wife personally received upon her marriage.[24] Where a certain benefit to be received by the husband has already been considered as returnable property, the husband has to prove with 'unimpeachable evidence' that he is entitled to that property in the specific circumstances of his case. The enhanced standard of proof has subsequently often resulted in the husband's total failure to prove returnable property, thereby allowing the wife a divorce without having to pay any compensation.[25] In *Mst. Nabila Safdar*,[26] the court held that the wife's failure to pay the required compensation did not amount to the invalidation of the *khula* decree, but rather incurred a civil liability upon her. This ruling was upheld in *Bibi Feroza*.[27] In *Mst. Nazir*[28] and *Abdul Ghafar*,[29] it was held that even where no fault can be proved on part of the husband, the wife could still invoke *khula* by meeting only the most minimal burden of proof. Recently, in *Abdul Rashid*,[30] it was held that it is possible for the court to accept the time a wife has spent with her husband, as well as the services she has rendered, as consideration for *khula*. The court also reiterated that the amount of compensation could not be fixed at a figure higher than the dower amount and that the court may even grant *khula* without any compensation.

Analysis

There are certain aspects of the *Saleem Ahmed* case that warrant attention, particularly because the judgment implicitly reaffirms and builds upon many

[22] *Mst. Shakila Bibi v Muhammad Farooq* 1994 CLC 231.
[23] Ibid, 588.
[24] Ibid, 589-590.
[25] See *Bashir Ahmad v Family Court* 1993 CLC 1126.
[26] *Mst. Nabila Safdar v Muneer Anwar* PLD 2000 SC 560.
[27] *Bibi Feroza v Abdul Hadi* 2014 CLC 60.
[28] *Mst. Nazir v Additional District Judge, Rahim Yar Khan* 1995 CLC 296.
[29] *Abdul Ghafar v Parveen Akhtar* 1999 YLR 2521.
[30] *Abdul Rashid v Shahida Parveen* 2013 YLR 2616

principles and judicial decisions of the superior courts in Pakistan concerning Islamic law and Islamic jurisprudence.

Firstly, the Court did not rely upon the conclusions of the various juris-consults who provided their expert opinions on Islamic law concerning *khula*. Instead, the Court preferred to engage with their reasoning and dismissed their opinions on merits. The decision to not give preference to the views of *fuqahā'* tacitly fell in line with the decision in *Khursheed Jan*,[31] in which the Lahore High Court held that 'courts can differ from views of Imams and Muslim juris consults on grounds of public policy, justice, equity and good conscience.'[32] In that case, the Court held that the Holy Qur'an and Sunnah were not esoteric texts that required specialised knowledge to understand, and that it was the task of judges to use *ijtihad*[33] and *istihsan*[34] as means to adapt Islamic law to address modern social problems in light of contemporary needs, especially in circumstances where there was disagreement amongst various *fuqahā'*.[35] Therefore, the FSC was not bound to abide by the advice tendered to it by the juris-consults, and this necessarily implies that religious scholars now, at best, occupy the position of *amicus curiae* in repugnancy matters before the FSC.

Secondly, while the FSC made no direct observation regarding its preference of methodology, it evidently opted for a loosely construed, purposive *Maqasid al-Sharia*[36] based approach, rather than resorting to a more textualist, *taqlid*-based[37] approach. The Court engaged in a detailed discussion of the purpose of marriage and the various rights and obligations that a husband and wife owed each other under Islam and concluded that the purpose of marriage would be defeated if a woman was forced to remain in a marriage against her will. This suggests that the judges of the

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[31] *Khursheed Jan v Fazal Dad* PLD 1964 Lahore 558.

[32] Ibid, para [5].

[33] Ibid; refers to independent reasoning through personal effort, unfettered by the jurisprudential schools/*madhabs*; *See generally* Al-Shāfi'ī, *Al-Risāla fī uṣūl al-Fiqh* (2nd edn Majid Khadduri tr, The Islamic Texts Society 1961) 295-303.

[34] Ibid; the equivalent of equity in Islamic jurisprudence. See *Khursheed Jan* (n 31).

[35] Ibid.

[36] See generally Felicitas Opwis 'Maslaha in Contemporary Islamic Legal Theory' (2005) 12.2 Islamic Law and Society 182; *Maqasid al-Sharia* is an Islamic jurisprudential interpretive approach that is comparable to Purposive interpretation of statutes within the Common Law tradition.

[37] See generally Muhammad Fadel 'The Social Logic of Taqlid and the Rise of the Mukhtasar' (1996) 3.2 Islamic Law and Society 193; *Taqlid* refers to the strict adherence to the opinions of past/ancient jurists who rank higher in the hierarchy of *mujtahids* within a particular *madhab* (school).

FSC favoured a rationalist reading of Islamic law rather than a traditionalist/*taqlidi* one. They operated under the presumption that Islamic law provides absolute gender equality and that marriage is a contract between two equal parties, rather than a sacred covenant. In this respect, the judges sought guidance from the writings of modernist jurists, and showed deference to classical jurists in spirit, but not in letter.

Thirdly, it is worth noting that if the challenge against section 10(4) of the Muslim Family Courts Act 1964 had been successful in this case, it would have had the effect of overruling *Khurshid Bibi* and *Balqis Fatima*. It is a distinct possibility that this is what the petitioners desired. Earlier, the FSC had demonstrated a willingness to strike down certain provisions of the Muslim Family Law Ordinance 1961 in the *Allah Rakha* case,[38] and it is possible that the petitioners had been encouraged by that ruling to levy a challenge against the law on *khula*.

Conclusion

The ruling in *Saleem Ahmed* surprised many people, given that the FSC has tended to adopt more traditional postures in the past, but it is evident that the decision fits in perfectly with contemporary legal and scholarly currents surrounding Islamic law in Pakistan. The use of *khula* as a vehicle for creating a woman's unilateral right to divorce gained significant attraction in Pakistani law following the *Khurshid Bibi* decision. Even the provincial legislatures have followed the judiciary's lead in the matter. In 2015, the Punjab Assembly made an amendment to section 10 of the Family Courts Act 1964, adding a subsection that set the ceiling for compensation paid to the husband in case of *khula* at fifty percent of the deferred dower or twenty-five percent of the prompt dower, further reducing the financial burden of obtaining *khula*. Further, it is a little known fact that in 2008, the Council of Islamic Ideology issued recommendations to the Government suggesting that once the wife has given a written request asking for divorce, the husband has to divorce her within ninety days, and absent a revocation from the wife, if the husband refuses to divorce her, the marriage will be automatically dissolved within ninety days.[39] This stands in sharp contrast to the oft-repeated criticism that Islamic law remains rigid and insensitive to changing social circumstances and needs. In this respect, the *Saleem Ahmed* ruling is reason for great optimism, not only from the perspective of women's rights, but also for the movement to reinvigorate *ijtihad* in Islamic jurisprudence.

[38] *Allah Rakha v Federation of Pakistan* PLD 2000 FSC 1.

[39] Council of Islamic Ideology's meeting 171, *Annual Report*, 2008-9 (Islamabad: Council of Islamic Ideology, 2009) 170.