

# A Critical Analysis of Judicial *Khul'* through Interpretation of Pakistani Case Laws

---

\*Nadia Zafar

\*\*Rizwana Gul

\*\*\*Shaista Naznin

## Abstract

This work will focus on case law regarding *Khul'* in Pakistani courts and the prerequisite of approval of husband in case of *Khul'* and grounds of *Khul'*, as grounds mentioned in Section 2 of DMMA 1939. In 1939; first time the woman's right of *Khul'* had been established in section 2, this law has shaped a huge confusion whether *Khul'* is the separation of marriage (*faskh-e-nikah*) or Divorce (*talaq*), whether courts have any authority to grant *Khul'* lacking of permission of husband. In 1959 the Lahore high court first time in its verdict in Balqis Fatima case laid down the rule about the consent of the husband and this rule was also endorsed in Khurshid Bibi case after 8 years. In 2014 Federal Shariat Court in Saleem Ahmad case again reinforced this view. Now it is settled that Balqis Fatima and Khurshid Bibi cases are landmark judgments and examples of judicial explanation of *Khul'* in Pakistan. The Pakistan Superior Courts have recognized that where the male partner is directly responsible for the marital disharmony and marriage must be dissolved on the basis mentioned in section 2 of DMMA. Section 10 (4) of West Pakistan Family Courts Act, 1964 has been given new practicable and dynamic interpretation by the Superior Courts of Pakistan.

**Keywords:** *Khul'*, *Talaq*, DMMA, Judicial *Khul'*, FSC

## Introduction:

In Islam; the marriage is to commence a marital life within the parameters directed by Allah Almighty and this bond requires mutual understanding and trust between the husband and wife, permissible in Shari'ah<sup>1</sup>. *Khul'* is the privilege of a woman to demand separation from her husband, may be granted by the family courts for dissolution of marriage. Word *Khul'* meant to put off, *Khul'* denoted lying by the husband of the rights and influence over his wife, at her own motion, on receipt of consideration<sup>2</sup>. *Khul'* is a right of divorce conferred upon the women to obtain divorce if she feels that the matrimonial relations are so strained that she could not reside with her husband with normal relations as well as within the boundaries approved by Divine law<sup>3</sup>. The *Khul'* is equal to the right of the husband to pronounce *talaq* to his wife<sup>4</sup>. According to the "Dissolution of Muslim Marriage Act 1939" a woman can exercise judicial *Khul'* by resorting court of law even without the consent of her husband but she may be to return the money (dower) to husband. *Qur'an* guides that women have the

---

\*Ph.D Scholar, Department of Law, faculty of Shariah and law, International Islamic University, Islamabad.

\*\*Assistant Professor, Department of Law, Abdul Wali Khan University Mardan, Ph.D Scholar International Islamic University, Islamabad.

\*\*\*Assistant Professor, Department of Law, Abdul Wali Khan University Mardan, Ph.D Scholar International Islamic University, Islamabad.

<sup>1</sup> Syed Shoukat Gillani vs. Mst. Ansar Gillani, 2017 MLD, p. 1677, Shariat Court Azad Kashmir

<sup>2</sup> Saleem Ahmad vs. Govt. of Pakistan, 2014 PLD, p. 43, Federal Shariat Court.

<sup>3</sup> Ashraf Ali vs. 1<sup>st</sup> Family Judge, Noushahro Feroze, 2017 YLRN, p. 402. Karachi High Court.

<sup>4</sup> Bibi Feroza vs. Abdul Hadi, 2014 CLC, 60.

same rights as the men have as they have a right of divorce<sup>5</sup>. The right to ask for Khul' along with dower was unconditional rights of wife which lawfully could not be opposed if the wife persevered to such claim<sup>6</sup>. Court will decide how much and what to be departed by the wife to husband, and if she failed to returned anything it does not rendered Khul' ineffective but the husband has to approach the court and file a separate suit for the recovery of other articles.

#### **Interpretation of Concept of Khul' :**

*Khul'* is a dissolution of marriage by means of "to put off" 'similar to the fact as when a man or woman put off his or her clothes; it is presumed that he or she has Khul' or khul them. In law, it is a right of the husband to exercise it over his wife<sup>7</sup>. According to Fatwa-i-Alamgiri; when the married couple is of the view that they are unable to observe the limits and apprehension that they cannot confine them in the parameters ordained by the Divine law and further continuation of matrimonial rights and duties is impossible; then both have rights to dissolve the marriage by means of talaq and Khul' <sup>8</sup>. According to Ibn Humam<sup>9</sup> Khul' is to separate the combination of marriage in return for a financial conclusion with the word of Khul' ". While Keith Hodgkinson describes divorce as a unilateral refutation by the husband, Khul' by the wife and the *Faskh-e-Nikh* is the termination of marriage by judicial decree<sup>10</sup>. The difference between talaq and Khul' is that the husband can divorce his wife without intercession of court while wife has to approach the court to obtain separation of wedlock on the basis of Khul' , and the court has no choice except to grant Khul' <sup>11</sup>.

#### **Qur'anic Reference as to Consent of Husband in Khul' :**

The meanings of Quranic verse is that; if wife has fear from her husband of evasion; it is not a sin for her or for them if they would have been agreed upon terms and conditions and the same are good for them. And if they, both spouses, fear from Allah, no doubt Allah is best acquainted to you deeds<sup>12</sup>.

#### **Literature Review:**

Although there is existing literature on Khul' by means of articles of different scholars who have discussed this core issue with diverse angles. But in recent past the Superior Courts of Pakistan have elaborated the major principles of Khul' and by this way new dynamic interpretations have been given and in the earlier literature the most updated views of Superior Courts of Pakistan has not been discussed. Muhammad Farooq in his article "Re-marriage of the Parties Separated via Khul' " is based on arguments that what are the options for a woman who wants to rejoin her ex-husband<sup>13</sup>. Riaz Ahmad Moazmi in his article "Ethnography of Panchayat: cass of Khul' from Mandi Baha-ud-Din" has mentioned the importance of Panchayat as an institution to resolve the cases of Khul' <sup>14</sup>. Barrister Ali Shaikh in his

<sup>5</sup> *Al-Qur'an, al-Baqarah, 2:228*

<sup>6</sup> *Zahid Hussain v. Mst. Farhana*, 2019 MLD 720, Karachi High Court

<sup>7</sup> Bailie, I, 305-308; Hedaya, 112-116, Umar Bibi vs. Mohd. Din, AIR 51 Lahore (1945)

<sup>8</sup> Fatwa-i-Alamgiri, I, 669

<sup>9</sup> Humam, I. Fath al Qadir, Lahore: Maktabat Urasheed (1999).

<sup>10</sup> Hodgkinson, K. Muslim Family Law, published by Australia: Crime Helm (1984).

<sup>11</sup> *Abdul Rasheed v. Judge family Court*, Mian Cahnnu, 2010 CLC, Lahore High Court, 797.

<sup>12</sup> *Al-Qur'an, al-Nisa, 4: 128*

<sup>13</sup> <https://www.researchgate.net/publication/327386898> Re-marriage of the Parties Separated via Khula

<sup>14</sup> <https://www.researchgate.net/publication/342331797> Ethnography of Panchayat Cases of Khula from Mandi Baha-Ud-Din

paper "Law of Divorce and *Khul'* in Pakistan" has discussed the basics of Divorce and *Khul'* but no case laws have been referred by the said author. "An analysis of Husband's consent in *Khul'*"<sup>15</sup> is written by Ahmad Khan and Ubaid Ahmad Khan in which only basic principles of *Khul'* has been elaborated, without any judgment of Superior Courts. In the present article the authors have added latest precedents of Superior Courts in relation to *Khul'*; therefore, this article is unique from the existing literature which will provide the readers clear views of court decisions on *Khul'*.

### **Judgments of Superior Courts on *Khul'* as Right of Female:**

The prerequisite of permission of husband in *Khul'* is not new, it can be seen in Text and Traditions in the time of Prophet (Peace be upon him). In Pakistani Courts system this issue was observed first time in 1959 in Balqis Fatima<sup>16</sup> Case and after 8 years the Supreme Court has also endorsed that permission of the husband is not necessary in *Khul'*. Islam does not compel a wife to lead a sinful life and only for this reason the right of *Khul'* has been given to the wife with the mandates of Holy Quran<sup>17</sup>. The Federal Shariat Court of Pakistan<sup>18</sup> in a case; the petitioner challenged the provisions of Family Court Act<sup>19</sup> with the allegation that said section is contrary to the injunctions of Islam and Qazi/judge is not authorize to pass a decree of *Khul'* if husband is not consenting. The Honorable Federal Shariat Court of Pakistan has made exceptional remarks that where the husband did not accept reimbursement by his wife for reasons of *Khul'* and refusal to set free her from his marital tie and also denied to divorce her<sup>20</sup>, question was what ought to be the remedy for the wife; would it be reasonable to let a wife to live in darkness who could not live cheerfully or perform her conjugal compulsions; should she be compelled back to her husband to remain in congestion, depressed, dissatisfied. Islam did not aim to compel a wife to live a depressed life, in an unbearable miserable union, eternally<sup>21</sup>. If wife would have not been happy and reconciliation has been unsuccessful, she must be permitted to get relief as this is what justice required<sup>22</sup>. The right of *Khul'* is not conditional upon the approval of husband but is reliant upon attainment wrapping up by the court that husband and wife cannot live within the restrictions of Allah Almighty<sup>23</sup>. In Islam; a woman has been given a right to dissolve her marriage if she feels, due to any reason, that she is unable to continue the bond of marriage in accordance with the limits of Allah Almighty and on such eventuality she has to forego her mahr<sup>24</sup>. The wife had a right of *Khul'* through the intervention of the court when relations between the spouses became irreconcilable<sup>25</sup>. The *Khul'* may be granted with a condition that wife will surrender her mehr, if received, and if not received, will waive the same in favor of

---

<sup>15</sup> [https://www.researchgate.net/publication/343927566\\_An\\_Analysis\\_of\\_Husband%27s\\_Consent\\_in\\_Khula](https://www.researchgate.net/publication/343927566_An_Analysis_of_Husband%27s_Consent_in_Khula)

<sup>16</sup> Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi, 1959 PLD, Lahore, 566.

<sup>17</sup> Raja Tahir Bashir v. Mst. Gulsheeda Bibi, 2008 CLC, Shariat Court Azad Kashmir, 952.

<sup>18</sup> Saleem Ahmad v. Govt. of Pakistan, 2014 PLD, p. 43, Federal Shariat Court.

<sup>19</sup> Section 10 (4) of West Pakistan Family Courts Act, 1964.

<sup>20</sup> Saleem Ahmad case, 2014 PLD, Federal Shariat Court, 43.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Syed Sajid Abbas Rizvi v. Mst. Naureen, 2013 PLD, Karachi High Court, 348.

<sup>25</sup> Syed Matanat Bukhari v. Dr. Arfa Saeed, 2010 CLC, Karachi High Court, 58.

her husband<sup>26</sup>. The exercise of right of *Khul'* by the wife does not preclude the husband to provide maintenance for the period of iddat<sup>27</sup>.

The Honorable Lahore High Court in case titled Sardar Abid Iqbal has observed that marriage can be dissolved without recording of evidence and there is only one requirement i.e. provides opportunity for reconciliation and if the said reconciliation fails, then decree for dissolution of marriage can be passed<sup>28</sup>. That recording of statement of husband in the pre-trial reconciliation is not mandatory and decree for dissolution of marriage can be passed without such a statement<sup>29</sup>. The right of *Khul'* is a reciprocal right i.e. the problem is created by wife; the husband can divorce her and if same is created by husband; the wife has the right of *Khul'*<sup>30</sup>.

#### **The prevailing Laws on Dissolution of Marriage in Pakistan:**

1. Child Marriage Restraint Act (CMRA) 1929.
2. Dissolution of Muslim Marriage Act (DMMA) 1939.
3. Muslim Family Laws Ordinance (MFLO) 1961.
4. Muslim Family Law Rules (MFLR) 1961.
5. Reconciliation Courts Ordinance (RCO) 1961.
6. West Pakistan Family Courts Act (WPFCA) 1964.
7. West Pakistan Family Courts Rules (WPFCA) 1965.
8. Hadd-e-Qazaf Ordinance (HQO) 1979.

#### **Controversy as to Grounds of *Khul'* and DMMA:**

In the beginning; the courts as a general practice, not used to consider these grounds and pass decree on the basis of *Khul'* but subsequently the courts of Pakistan has basically recognized these grounds. All above said grounds now-a-days are being considered and judgments are being passed relating to *Khul'*. In Muhammad Shahid Farooq case; High Court has ruled that it is permissible for entitled to dissolve the wedlock on the basis of non-payment of maintenance allowance and non-performance of marital responsibilities by the husband and the same time she cannot be compelled to pay back any benefit received by her from her husband on account of marriage<sup>31</sup>. In the present suit the trial court has decreed the case on two grounds under of section 2 (ii & iv) of Dissolution of Muslim Marriages Act, 1939. In another case Mst. Shahana BiBi case<sup>32</sup> the Honorable High Court has explained cruelty and observed that "Cruelty was not limited to physical beating rather same can be either mental or even by conduct. Now another question arises that for obtaining a decree on the basis of grounds of DMMA what a wife has to do, the answer is that the wife is under legal obligation to establish the ground(s). In a recent case of Muhammad Arif<sup>33</sup>; the wife has approached the court for disbanding of wedlock on the ground of brutality but the court observed that the wife could not prove the cruelty and the court passed judgment and decree on the ground of *Khul'*. The wife being aggrieved from the order approached Supreme Court of Pakistan

<sup>26</sup> Yousuf vs. Mst. Mabeela, 2013 CLC, p. 450, Karachi High Court. Also in Liaqat Hussain vs. Zil-e-Huma, 2012 CLC, p. 1386, Shariat Court Azad Kashmir.

<sup>27</sup> Mst. Ghazal Sadia v. Muhammad Sajjad, 2012 YLR 2841, Lahore High Court, Lahore. Also, Rabia Bibi v. Muhammad Iqbal, 2012 MLD, Lahore High Court, Lahore, 1943.

<sup>28</sup> Sardar Abid Iqbal v. Tabassum Khursheed, 2009 YLR, Lahore High Court, Lahore, 1745.

<sup>29</sup> Muhammad Ismail v. Judge Family Court, RYK, 2009 YLR, (Lahore: High Court, Lahore), 1700.

<sup>30</sup> Khalid Mahmood v. Anees Bibi, 2007 PLD, p. 626, Lahore High Court, Lahore.

<sup>31</sup> Muhammad Shahid Farooq versus Judge Family Court and others, 2016 CLNC, 103.

<sup>32</sup> Mst. Shahana Bi Bi v. Nadeem Shah, 2015 MLD, 1623.

<sup>33</sup> Muhammad Arif v. Saima Noreen, 2015 SCMR, 804.

and the court ruled that Family Court has rightly decreed the suit on the basis of *Khul'* because when the ground of cruelty has not been proved then the court cannot pass the order on the said ground, there has been only one option with the court to decree the suit on the basis of *Khul'*; therefore, the court ought to disband the marriage on the ground of *Khul'* and on said eventuality the wife has to forego dower.

#### **Whether Return of Dower is Mandatory in *Khul'* or not?**

Majority of Islamic schools of law came to an understanding that the return of dower in case of *Khul'* is imperative and according to the Islamic injunctions but the husband is not entitled for more amount than the original sum of dower (mahr), as Prophet ordered to Jamila return only orchard and not more than else. However, some explanations propose that the husband is eligible a greater reimbursement<sup>34</sup> and sometimes men choose and force their wives for *Khul'* as an alternative of talaq and for this reason the husband can assert the return of the mahr. Another situation that seldom arises in *Khul'* is that male demands an arbitrary financial compensation<sup>35</sup> that is not according to Islam. Islam declares for return of dower but not excessive as Quran<sup>36</sup> guides that it is not permitted to the men to ask for return from the wives any part of the mehr (given at the time of solemnization of marriage) except on the eventuality when both spouses having fear that they cannot observe the limits directed by Allah Almighty. And in case they fear that they are unable to pursue the said limits then there is no sin for them in case the wife returns the mehr or any part of the mehr for her *Khul'*.

#### **Courts' View regarding Return of Dower in Case of *Khul'* :**

It is important to mention here that in Pakistan Superior Courts have clarified the concept of return of dower/consideration received by the wife at the time of Nikkah. The Superior Courts have distinguished the cases in which the dower/consideration is required to be returned and in which cases not to be returned. In Muhammad Kamran case; the Court held that where wife had got the decree for dissolution on *Khul'* she has to return the dower amount<sup>37</sup>. Dissolution of marriage by way of *Khul'* is always and invariably subject to return of dower, unless waived off by the husband as a matter of grace<sup>38</sup>. *Khul'* is conditional divorce against the reinstatement of haq mehar to the husband if paid to the wife<sup>39</sup>. Under the Sharia; the marriage can be disbanded on the ground of *Khul'* with the condition the wife will return the dower amount to husband<sup>40</sup>. In case titled Asif Jahangir<sup>41</sup> the court has observed that order for dissolution of marriage may be passed without consideration of *Khul'* and legally the husband is not entitled for asking return of dower, especially in the circumstances when the *Khul'* has been required due to fault of the husband. In case titled Waseem Ahmad Rathore the wife sought dissolution of marriage on *Khul'* on the ground of haterance and grabbing of gold ornaments, the court ruled that the wife had been granted a judgment and decree on the basis of *Khul'* due to hatred towards her husband<sup>42</sup>, husband was permitted to ask

<sup>34</sup> Seymour Gonne Vessey-Fitz Gerald, *The Muhammadan Law: An Abridgement According to its Various Schools*, 1979, 137-138.

<sup>35</sup> Macfarlane, 2012, 195-6.

<sup>36</sup> *Al-Qur'an, Al-Baqarah:229*

<sup>37</sup> *Muhammad Kamran v. Mst. Samera Majeed*, 2018 YLR, Lahore High Court. 1251.

<sup>38</sup> *Muhammad Hassan v. Federation of Pakistan*, 2018 PLD, Federal Shariat Court, 1.

<sup>39</sup> *Ashraf Ali vs. 1<sup>st</sup> Family Judge, Noushahro Feroze*, 2017 YLRN P. 402.

<sup>40</sup> *Tania Naseer v. Muhammad Zubair*, 2017 YLR, 1481.

<sup>41</sup> *Asif Jahangir v. Zaheen Kausar* YLR 1547, Shariat Court Azad Kashmir (2015).

<sup>42</sup> *Waseem Ahmad v. Mst. Fozia Raheem*, 2015 CLC 171, Federal Shariat Court Azad Kashmir

for entire dower amount from wife as an alternative amount fixed by the Family Court<sup>43</sup>. Where wife herself seeking *Khul'*, she was bound to surrender the dower<sup>44</sup>. When the marriage between the husband and wife was dissolved on the basis of *Khul'* then the outstanding dower became due and the postponed dower, which was the responsibility of the husband, was to be paid to the wife to the extent of 50% in terms of section 10(5)<sup>45</sup>. The separation of wedding on the ground of *Khul'* is always subject to return of dower amount<sup>46</sup>. When a house or alike thing is given as gift the same is not returnable on the occasion of *Khul'*<sup>47</sup>.

#### **Period of 'Iddat in case of Judicial Khul' :**

According to scholarly consensus; when a woman obtains a *Khul'* and she is pregnant then her iddat will continue till the time she gives birth to the child<sup>48</sup>. But in case the wife is not pregnant, the scholars differ regarding iddat period. Most of the intellectuals are of the view that she must wait for three menstrual cycles, for the reason that the common meaning of the ayah (interpretation of the meaning):

*“And divorced women shall wait (as regards their marriage) for three menstrual periods”*<sup>49</sup>.

#### **Conclusion:**

*Khul'* indicates a provisional situation for the wife, for the purpose of dissolving matrimonial tie at her request, in lieu of reimbursement paid or agreed to be paid by her to the husband out of dower. The wife can exercise the right of *Khul'* in the situations which make it difficult for her to abide by the matrimonial relations in accordance with limits of Allah. Where the circumstances are such that the union of spouses will give birth to hateful and unbearable situation, especially for wife, the court must dissolve the marriage on the basis of *Khul'* which a right of the wife. The *Khul'* is granted to the wife subject to the condition that wife will surrender her right of receiving dower amount, if not already received, and restoration of the same if already has received. The maintenance received by the wife is not subject to the grant of *Khul'* and it is the privilege of the wife to be looked after and maintained by her husband during existence of marriage. The Superior Courts of Pakistan has also settled the principle that the consent of the husband is not necessary and by this dynamic interpretation has cleared many existing anomalies. In the present ear when the Courts are working under the codified laws and most of the principles of marriage are not written; therefore, in that eventuality the interpretation of court becomes sine qua non for a society and Pakistani Courts have dealt with it and resolved the same.

---

<sup>43</sup> Ibid.

<sup>44</sup> *Mst. Basmina v. Imran*, 2018 MLD, Peshawar High Court, 870.

<sup>45</sup> Family Courts, Act, 1964.

<sup>46</sup> Muhammad Kamran's case 2018 YLR, 1251.

<sup>47</sup> *Naseem Ahmed Khan v. XIVTH* Civil and Family Judge Karachi Central, 2011 YLR, 2625.

<sup>48</sup> Al-Mughni, 11/227

<sup>49</sup> *Al-Qur'ān, Al-Baqarah*, 2:228