Judicial Law-Making: An Analysis of Case Law on Khul‘ in Pakistan

Muhammad Munir*

Abstract

This work analyses case law regarding khul‘ *in Pakistan. It is argued that* Balqis Fatima *and* Khurshid Bibi *cases are the best examples of judicial law-making for protecting the rights of women in the domain of personal law in Pakistan. The Courts have established that when the husband is the cause of marital discord, then he should not be given any compensation; and that the mere filing of a suit for* khul‘ *by the wife means that hatred and aversion have reached a degree sufficient for courts to grant her the separation she is seeking by resorting to her right of* khul‘. *The new interpretation of section 10(4) of the West Pakistan Family Courts Act, 1964 by Courts in Pakistan is highly commendable.*

Key words: khul‘, Pakistan, Muslim personal law, judicial khul‘, case law.

---

* muhammadmunir@iiu.edu.pk The author, is Associate Professor at Faculty of Shari‘a & Law, International Islamic University, Islamabad, and Visiting Professor of Jurisprudence and Islamic Law at the University College, Islamabad. He wishes to thank Yaser Aman Khan and Hafiz Muhammad Usman for their help. He is very thankful to Professor Brady Coleman and Muhammad Zaheer Abbas for editing this work. The quotations from the Qur’an in this work are taken, unless otherwise indicated, from the English translation by Muhammad Asad, *The Message of the Qur’an* (Wiltshire: Dar Al-Andalus, 1984, reprinted 1997).

Introduction

The superior Courts in Pakistan have pioneered judicial activism[1] regarding *khul'*. In 1959, the Lahore High Court gave a revolutionary decision when it decided the *Balqis Fatima* case, which judicially recognized for the first time, the right of *khul'* for a Muslim woman without the consent of her husband. This was a revolutionary decision and was endorsed by the Supreme Court of Pakistan in 1967 in the *Khurshid Bibi* case. Both were landmark decisions and are followed to date in Pakistan and Bangladesh. Since *Khurshid Bibi*, courts in Pakistan have given numerous decisions refining and polishing the law of *khul'* in Islam, based on the foundations of *Balqis Fatima*[2] *and Khurshid Bibi*[3] cases. These two cases are important for many reasons but one of the important ones is that they are the best examples of judicial law-making[4] in the legal system of Pakistan. This work

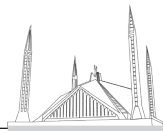
---

1 The phrase "Judicial activism" was first used to describe some decisions of the US Supreme Court. In the US jurisprudence, it means that in determining whether laws would meet constitutional muster, the Court was accused of acting more as a legislative body than as a judicial body. Justice Oliver Wendell Holmes JR (d. 1935) of the US Supreme Court from 1902-1932, in his famous dissenting opinion in *Lochner v. New York,* 198 U. S. 45 (1905) argued for "judicial restraint," cautioning the Court that it was usurping the function of the legislature. See, *West Encyclopedia of American Law*, Jeffrey Lehman & Shirelle Phelps eds., (MI: Thomson Gale, 2nd edn., 2005), vol. 6, p. 58, (Judicial Review). Two dissenting opinions were written in *Lochner,* one by Justice Oliver Wendell Holmes and the other by Justice John M. Harlan. Both dissents attacked the majority opinion as judicial activism and extolled the virtues of judicial self-restraint. *West Encyclopedia of American Law*, vol. 6, p. 361, (*Lochner v. New York*). See, also, Christopher Wolfe, *Judicial Activism: Bulwark of Freedom or Precarious Security* (San Diego: Harcourt College Pub, 1990). Judicial activism was never a feature of Pakistan's polity. It was born out of the guilt associated with the historic sins of our superior judiciary. As far as our constitutional history is concerned, it is replete with decisions which legitimized executive arbitrariness & extra-constitutional adventures. The law of *khul'* is, perhaps, the only exception in our legal system in which judges did not follow judicial restraint.

2 *Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi*, PLD 1959 Lahore 566; B.Z. Kaikaus, Shabir Ahmad, & Masud Ahmad JJ.

3 *Mst. Khurshid Bibi v.Muhammad Amin*, PLD 1967 SC 97; S.A. Rahman, Fazle-Akbar, Hamoodur Rahman, Muhammad Yaqub Ali, & S.A. Mahmood, JJ.

4 One of the heated jurisprudential debates is whether judges make or create law during adjudication in the same sense as the legislator or they simply discover it. Many famous jurists, among them Bacon, Hale, Blackstone, and Ronald Dworkin, were convinced that the office of the judge was only to declare and interpret the law, but not to make it. At the other end of



focuses on an analysis of the case law concerning *khul'* over the years to point out its pros and cons. It discusses the weaknesses and the strengths of these cases from the perspective of Islamic law that the judges have been referring to and makes recommendations for further development of case law in this regard.

Precedential Value of *Balqis Fatima* and *Khurshid Bibi* Cases

Balqis Fatima will be remembered, despite its shortcomings, as the best example of an original precedent on the law of *khul'*. First, *Balqis Fatima* was a Full Bench decision which was against the decision of the Lahore High Court in the 1952 *Sayeeda Khanam* case.[5] In *Sayeeda Khanam* the Court had rejected the plea that incompatibility of temperament is a ground for dissolution of marriage but seven years later, in *Balqis Fatima,* the Court accepted the same argument as ground for dissolution of marriage. Secondly, in *Sayeeda Khanam*, the Court had ruled that *khul'* cannot be granted without the consent of the husband but in *Balqis Fatima*, the Court held that *khul'* can be granted without acquiring the husband's consent. Thirdly, in *Sayeeda Khanam*, the Court had based its decision on the traditional view of the *fuqaha* (Muslim jurists), especially, of the Hanafi school of thought. In *Balqis Fatima*, the Court did not follow the opinions of jurists of any school of thought and gave its own interpretation to verse 2:229 of the Qur'an, and the *Hadith* with reference to the case of Habibah, wife of Thabit b. Qays b. Shamas. The Court gave a new interpretation to the verse 2:229 useing the incident of Habibah to grant *khul'* for the first time in Pakistan. Whether this amounted to independent *ijtihad* by the Courts or not but the Court certainly resorted to reasoning that was not used by the Muslim jurists. [6] This was something

---

the spectrum, equally great jurists as well as judges such as Bentham, Austin, Salmond, Lord Denning and Herbert Hart held the opposite view that judges make the law (the creative theory). For details, see, Muhammad Munir, "Are Judges the Makers or Discoverers of the Law: Theories of Adjudication and *Stare Decisis* with Special Reference to Case Law in Pakistan", *Annual Journal of International Islamic University, Islamabad*, Vol. 21 (2013), pp. 7-40.

5 *Sayeeda Khanam v. Muhammad Sami*, PLD 1952 Lahore 113; Cornelius, Acting C.J.; Muhammad Jan & Muhammad Khurshid Zaman, JJ.

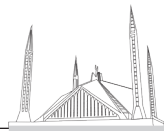
6 It can be said that in the case of *khul'*, Courts in Pakistan did not resort to *ijtihad* per se but rather applied the *Sunnah* of the Prophet (PBUH) and the Maliki school of thought without

impossible when the Privy Council was incharge. Fourthly, in *Balqis Fatima*, the Court praised a living scholar's work without examining him in the Court.[7] This was very unique and unusual. Fifthly, in *Khurshid Bibi*, it was observed by the Supreme Court that "The subordinate Courts, the District Judges and the Judges of the High Courts, in Pakistan, occupy a position akin to that of a *Qazi* [Judge], since they could affect a divorce on any ground on which it could be granted under the Muslim [Islamic] Law."[8] Finally, in *Balqis Fatima*, the Court considered its status and role and acted as if it was bestowed with the Divine authority under Islamic law within the State of Pakistan to interpret Islamic law, and in doing so, be allowed to deviate from the well-known and established opinions of Muslim jurists. This last point is probably more important than the ruling itself because it is exactly this point which other courts followed. *Khurshid Bibi* has endorsed

taking into consideration its interpretation by the majority of Muslim jurists. Since the topic of *ijtihad*, the domain of *mujtahid*, and the modes of *ijtihad* are complex rather than simple, therefore, any statement to the effect that the Pakistani Courts resorted to *ijtihad*, would be a sweeping one. For details, see this author's, "The Law of Khul' in Islamic Law and Legal System of Pakistan: The Sunnah of the Prophet or Judicial Ijtihad?" forthcoming.

7 The Court relied on Abu-l 'Ala Mawdudi's interpretation of *khul'* in his book *Huqooq Al-Zawjain*. Carroll argues that "It is extremely unusual for the opinions of a living person not examined in the Court to be cited in a judicial decision." See, Lucy Carroll, "Qur'an 2:229: "A Charter Granted to the Wife"? Judicial Khul' in Pakistan" *Islamic Law and Society* 3:1 (1996), 103

8 PLD 1967 S C 97 at page 134; per S.A. Mahmood, J. It is this aspect of *Khurshid Bibi* that has caused a stir among the religious clerics ('*ulama*) in Pakistan who have delivered a scathing attack on this ruling. See, for instance, Muhammad Taqi Uthmani, "*Islam me khul' ki haqiqat*" (The Reality of *Khul'* Under Islamic Law), in *Fiqi Maqalat* (Karachi: Maiman Publishers, 1996), 2:137-194. Just when I was busy in the initial draft of this article in June 2011, an interesting story was reported in the local newspapers. According to the report, a woman, Maryam Khatoon, in village Thoha in *tehsil* Talagang (near Rawalpindi), married one Shaukat Ali three years earlier. Two years later they developed differences and the wife demanded *khul'* which the Family Court granted and she married another man but the village's cleric refused to solemnize the *nikah* and the woman and her new husband got married at a local court in Talagang city. On 24th June, 2011, three clerics from the village issued a *fatwa* (religious ruling) from the mosque's loudspeakers declaring the new couple to have committed adultery and thereby liable to death. The local police registered a case against the three clerics." See, *Dawn*, 28 June 2011, 17. Such rulings have very serious repercussions because they challenge the State's authority, amounting to a parallel judicial system, and the '*ulama,* with the support of the people, want to take the law into their own hands.



Balqis Fatima and both have been cited by courts in *khul'* cases in Pakistan.

One of the problems associated with precedent or case law is that it takes time on a point of law to develop as judges could only answer questions raised particular to a case. As discussed below, case law on *khul'* suggests that the Superior Courts have refined and polished the various issues regarding *khul'*. At the same time, however, some judgments have created confusion regarding the Islamic legal history of *khul'*. Moreover, every point in a precedent case does not bind judges of the lower courts as only the *ratio* of a case, and not its *dicta*, is binding.

Some Case Law on *Khul'* Examined[9]

Since the *Balqis Fatima* and *Khurshid Bibi* cases, there have been decisions in which women were denied the newly-established right of *khul'*. In *Mst. Hakimzadi v. Nawaz Ali*,[10] the wife had sued for divorce under the Dissolution of Muslim Marriages Act, 1939 (DMMA). She alleged ill-treatment and false accusation of adultery with her husband's father. She was driven out of her house four times; she returned thrice following some sort of settlement but after the fourth time she sued for divorce under the DMMA, and alternatively, she pleaded for *khul'*. Her suit was dismissed by the trial Court and the District Judge also dismissed her appeal. On appeal to the High Court, it was held that the case of ill-treatment was proven and the grounds for the false accusation of adultery were wrongly presumed to be true. The Sindh High Court should have dissolved the marriage under the DMMA, however, the Court granted the wife a judicial *khul'*.

In *Bashiran Bibi v. Bashir Ahmad*,[11] the wife alleged that her husband attempted to force her to transfer to him the land she had inherited from her father, and on her refusal, she was beaten and driven out of her husband's house. Thereafter, her husband and his accomplices forcibly abducted her along with her sister and mother, and confined them illegally for some days. A criminal complaint was

9 This section is partly based on my earlier publication, see, Muhammad Munir, "The Rights of Women and the Role of Superior Judiciary in Pakistan with Special Reference to Family Law Cases from 2004-2008", *Pakistan Journal of Islamic Research*, 3 (2009), 271-299. For a comprehensive analysis of important *khul'* cases till 1995, see, Carroll, "Qur'an 2:229", 91-126.

10 PLD 1972 Karachi 540.

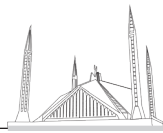
11 PLD 1987 Lahore 376.

filed in regard to these events and the husband was arrested. The wife filed suit for divorce on grounds of cruelty and non-maintenance; in the alternative she prayed for a judicial *khul'*. The Family Court dismissed her suit for divorce on the ground that she had failed to produce any independent evidence of ill-treatment. Her prayer for *khul'* was rejected on a novel ground: that since she had failed to establish the allegations regarding ill-treatment and abduction, she had no reason to develop extreme aversion to her husband which would entitle her to a judicial *khul'*. Her appeal was dismissed by the District Judge but the Lahore High Court granted her *khul'* in a writ petition. The Family Court and the District Judge, both, had denied her *khul'*. Unfortunately, the High Court did not dissolve her marriage under the DMMA but granted her *khul'*.

In *Bibi Anwar v. Gulab Shah*,[12] the wife was given in marriage by her father at the age of about eleven to a seventy-nine years old man. They lived together for about three years. The man became impotent about six months after the marriage and he began beating and ill-treating his wife. He drove her out of the house and she reunited with her family where she remained for three years before suing for divorce on the grounds of non-maintenance, cruelty, and misappropriation of her property – her dowry of half a *tola* (one *tola* is equal to 12 grams) of earrings which were sold by her husband despite her protest. Alternatively, she prayed for *khul'*. Although the wife's claims had remained unchallenged and were never refuted, yet the Family Court dismissed her suit and the District Judge dismissed her appeal. The wife approached the Karachi High Court in a writ petition. Justice Tanzil-ur-Rehman stated that all her claims of cruelty, non-maintenance, impotency, and disposal of her property by her husband, had gone unrebutted, although each one of them was a good ground for dissolution of marriage under the DMMA.[13] He also criticized the lower courts for refusing her the *khul'*. Unfortunately, the Court dissolved the marriage on the basis of *khul',* despite the fact that the judge himself mentioned that the allegations were not rebutted as the husband never attended the proceedings. Carroll has severely criticized this decision and opined

12 PLD 1988 Karachi 602.

13 An additional ground for dissolution of her marriage was the "option of puberty" under s. 2(vii) of DMMA, 1939. Since her marriage was consummated when she was below sixteen, she could have availed this option as well. Surprisingly, the Court denied her this right stating that since the marriage had been consummated, she could not exercise the option of puberty.



that:

The girl in this case, betrayed by her father into a most unsuitable marriage when only a child, lost her childhood, her virginity, and her dowry; she endured nearly three years of ill-treatment at the hands of an impotent old man; she spent five years in litigation (and could not even get costs from the defendant since he did not contest the suit); and, finally, she was permitted to purchase her freedom at the cost of *mahr*. The fact that her husband would probably have been unable to pay her *mahr* of Rs. 1,000 is immaterial; the Court should have at least left her with that shred of dignity and self-worth that recognizing the legitimacy of her complaints would have conferred.[14]

The examination of a few cases on *khul'* shows that Courts have been reluctant to dissolve marriage under the DMMA even when the evidence for dissolution is very strong. Moreover, battered women are forced to request *khul'* from the Courts in cases that are fit for dissolution under the DMMA. In some cases Courts, especially lower courts, have been refusing even *khul'*.

What Should the Complainant Wife Prove to the Court(s) to Obtain *Khul'*?

Previously the standards laid down by the Courts were very high. However, subsequently, the mere filing of a suit by the wife for obtaining *khul'* is considered as a sufficient basis for dissolution of a marriage. In *Shah Begum v. District Judge Sialkot*,[15] the Court has summarized the principles of *khul'*: first, *Balqis Fatima*, 1959 established the rule that the wife is entitled to *khul'* as of right, if she satisfies the conscience of the court that it will otherwise mean forcing her into a hateful union; secondly, *Khurshid Bibi*, 1967 established that if the wife had an incurable aversion to her husband, it was a sufficient basis for granting the *khul'*; thirdly, and finally, *Shahid Javed v. Sabba Jabeen*,[16] established that the right of *khul'* was an independent right and the wife's failure to establish grounds other than the

14 Carroll, "Qur'an 2:229", 119. Justice Tanzil-ur-Rehman seems to have corrected this wrong with his decision in *Syed Dilshad Ahmed v. Mst. Sarwat Bi* (PLD 1990 Karachi 239), discussed later.

15 PLD 1995 Lahore 19.

16 1991 CLC 805.

khul' claimed by her, would not prejudice her right to it.[17] However, according to the latest case law, the wife has to show hatred and aversion only and the mere filing of suit by the wife for obtaining *khul'* implies that hatred and aversion have reached a point of no return, and the trial court should dissolve the marriage by *khul'*. In *Naseem Akhtar* case,[18] the wife was thrown out of the house where the couple resided by her husband, and she filed her case after a passage of three years. During those three years she was not maintained by the husband, either. The couple had five children from their marriage. The wife filed a suit for *khul'* on 6th December 2000, and the husband filed a suit for restoration of conjugal rights on 3rd April 2001. Both the trial court and the court of first appeal refused the wife's suit. She filed a writ petition in the High Court which met the same fate, whence, she appealed to the Supreme Court. The wife's argument was that because of the hatred and aversion between the two she could not stay with her husband anymore. Justice Javaid Iqbal arrived at a very 'pro-women' but true interpretation of the law when he ruled that "no yardstick could be fixed to define or determine the *factum* of hatred which would be inferred on the basis of circumstances of each case *specially the statement of wife* [italics supplied]. It hardly needs any elaboration that emotion of love and hatred cannot be adjudged on rational basis and the only aspect which requires consideration in such-like would be as to whether husband and wife can live together in order to[19] perform their matrimonial obligations and not the solid proof qua hatred or aversion."[20] His Lordship relied on *Amanullah v. District Judge, Juranwala*,[21] *a*nd concluded that "hatred and aversion neither

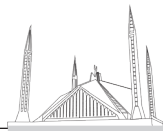
17 See also, *Ahmad Nadeem v. Assia Bibi*, PLD 1993 Lahore 249.

18 *Mst. Naseem Akhtar v. Muhammad Rafiq*, PLD 2005 SC 293.

19 PLD 2005 SC 293 at 295.

20 Ibid., at 295-6 PLD.

21 1996 PSC 59; also reported as 1996 SCMR 411. The observation of the Court in this case is worth quoting in full. It stated that "… when the contesting respondent stated that she had developed hatred towards the petitioner her assertion could not be rejected summarily; [in PLJ there is a comma. In PLD there is a semi-colon after summarily] it may also be mentioned that the relationship between the husband and the wife is of a very intimate nature. It may also be too embarrassing for either of them to disclose to the Court what has transpired between them in the privacy of their home. That being so, *there can hardly be any standard for assessing the substance in the wife's assertion that she has developed hatred for her husband*" [italics supplied].



can be prescribed nor confined within the limited sphere and no mechanism has been evolved so far to express "hatred and aversion" precisely and in a definite manner."[22] His Lordship went on to observe that the mere filing of the suit by the wife for the dissolution of her marriage was demonstrative of the fact that she "does not want to live with her husband which indicates the degree of hatred and aversion."[23] The wife's appeal was allowed. Thus, the mere filing of the suit by the wife for khul' means that hatred and aversion in that marriage have reached a point of no return.

The Quantum of Compensation to be Paid to the Husband in Case of *Khul'*

Under Islamic Law, if discord is caused by the wife, the husband will be paid compensation which is the equivalent of dower, or could be more or less, than it; however, if the husband is the cause of discord, then the *fuqaha* agree that he should not be awarded any compensation. Superior Courts in both Pakistan and Azad Jammu & Kashmir have, over the years, adopted these principles in many cases. In *Razia Begum* case,[24] for example, the Court discussed the factors to be taken into consideration in determining the quantum of compensation:

It is, therefore, not correct that in cases of *Khul* [sic] *ipso facto* the wife should return all benefits. This has to be determined in [light] of the facts and circumstances of each case and balance has to be maintained. If a wife seeks Khula [*khul'*] without pointing out to any default of the husband and the Court considers it proper to grant a decree for Khula [*khul'*], then the wife should be ordered to return all the benefits received by her and also forego such rights under which she can claim any benefit. However, while passing such an order, the court should take into

PLD 2005 SC 293 at 296.

22 At page 1327 in PLJ and at page 296 in PLD.

23 *Ibid*.

24 *Razia Begum v. Sagir Ahmad*, 1982 CLC (Karachi) 1586. See also, M.A.H. Ahangar, "Compensation in *Khul'* – An Appraisal of Judicial Interpretation in Pakistan", *Islamic and Comparative Law Review* 13:2 (1993): 113.

consideration the reciprocal benefits received by the parties.[25]

The non-payment of the compensation for whatever reason does not invalidate the dissolution of the marriage itself; it only creates a civil liability with regards to the benefits. In *Dr. Akhlaq Ahmed v. Kishwar Sultana*,[26] the Supreme Court held that:

> [N]on-payment of stipulated consideration for Khula [*khul'*] did not invalidate the dissolution of marriage by Khula [*khul'*]. Once the Family Court came to the conclusion that the parties cannot remain within the limits of God and the dissolution of marriage by Khula must take place, the inquiry into the terms on which such dissolution shall take place, does not affect the conclusion but only creates civil liabilities with regards to the benefits to be returned by the wife to the husband and does not affect the dissolution itself.[27]

In *Mst. Zubaida v. Muhammad Akram*,[28] it was held that non-fulfillment of conditions will not render the *khul'* decree ineffective; imposition of conditions merely creates a civil liability and a decree of *khul'* cannot be considered as dependent on requiring the wife to fulfill the conditions first.

Under the traditional Islamic law, however, the wife could only redeem herself in return for compensation if she was the cause of discord. Additionally, she could only free herself when she returned the promised compensation of *khul'* (usually the dower) and not before it. The Courts' decisions seem to be against the opinions of jurists in this sense. Perhaps the husbands in these cases were also blameworthy for the marital discord although *khul'* was initiated by the wives.

In a number of cases, the courts have established that when the husband is the

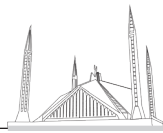
---

25 1982 CLC (Karachi) 1586 at 1591; *per* Saleem Akhtar, J.

26 PLD 1983 SC 169; Muhammad Afzal Zullah and Shafiur Rahman, J.

27 Ibid., at 172; *per* Justice Shafiur Rahman. In *Aurangzeb v. Gulnaz*, PLD 2006 Karachi 563, the husband argued before the High Court that *khul'* cannot be granted by the Family Court without restoration of the dower. The High Court endorsed and reproduced the above finding of the Supreme Court and rejected the contention. At 567; *per* Ali Sain Dino Metlo, J.

28 1988 MLD 2486.



cause of discord, then he should not be given any compensation. In *Mst. Zahida Bi v. Muhammad Maqsood*,[29] it was held that:

> The consensus is that when dissolution of marriage is due to some fault on the part of husband, there is no need of any restitution of property received by wife from husband at the time of their marriage or thereafter. However, when the husband is not at fault, then the position is otherwise, as in that case wife has to return the entire property so received by her.[30]

In *Khalid Mahmood v. Anees Bibi*,[31]the Lahore High Court, after discussing the amount of compensation, opined that:

> It is established ... that Court has the power to fix any amount of compensation, being the consideration of Khula' [*khul'*] if it is found after recording of evidence that Khula' is not claimed merely on the desire of wife but the fault of husband, is also the reason for recourse to Khula'.[32]

The same point has been asserted in many other cases.[33] The Court stated that the responsibility of the wife to restore to her husband the dower received by her at the time of marriage applies only if she is seeking dissolution of marriage on the basis of *khul'*. It should be noted that 'fault on the part of the husband' could be based on one of the grounds under the DMMA, under which the marriage must be dissolved while the wife gets to keep her dower and other benefits. In *Munshi Abdul Aziz v. Noor Mai*,[34] the Lahore High Court allowed dissolution of marriage on the grounds of *khul'*, and since 'cruelty' had also been alleged in the case, held that [cruelty] was a legal bar for claiming compensation.[35]

---

29 1987 CLC 57 [Azad J & K]; *per* Abdul Majeed Mallick, C J.

30 Ibid., 61. C.J., Abdul Majeed is, perhaps, thinking about a 'judicial consensus' in the above quote.

31 PLD 2007 Lahore 626.

32 At p. 632; *per* Syed Hamid Ali Shah, J.

33 Such as *Mst. Parveen v. Muhammad Ali*, PLD 1981 Lahore 116; *Mst. Zahida Bi v. Muhammad Masood* 1987 CLC 57; *Mst. Shagufta Jabeen v. Sarwar Bi*, PLD 1990 Karachi 239 and *Dilshad v. Mst. MusaratNazir*, PLD 1991 SC 779.

34 1985 CLC 2546 Lahore.

35 See also, *Anees Ahmad v. Uzma*, PLD 1998 Lahore 52.

Syed Dilshad Ahmed v. Mst. Sarwat Bi[36] is loaded with too many citations from various books of Islamic Law and has been cited by many courts in their decisions. In this case, the Court had observed that "[I]f the fault lies with the husband, in fulfillment of his obligations to his wife, the acceptance of compensation for Khula'*[khul']* by him is forbidden in Shari'ah."[37] In *Karim Ullah v. Shabana*,[38] the wife sought dissolution of marriage on the grounds, first, that her husband treated her with cruelty, and secondly, she had developed extreme aversion against him making living with him impossible within the bounds set by God. She also claimed fifteen (15) *tolas* of gold ornaments as dower. The Court reviewed the Islamic Law of *khul'* and the relevant case-law and held that where *khul'* is decreed on the basis of cruelty, the Court may not give any compensation to the husband. The Court observed:

On a logical and philosophical discussion of the matter, it can also be argued that a husband if left unchecked shall apprehend no loss if he, for any reason, develops a disposition to break the bondage of marriage and resorts to cruelty with a mind to compel the wife to demand 'khula' [*khul'*]instead of giving her 'Talaq'. In this way he will secure for him[self] the benefit of retaining or getting back the dower property/amount. Such a cruelty will undoubtedly be a purpose-oriented one of which the law and Courts must take notice so as to keep the husband off the oche of cruelty.[39]

The Court further held that:

Where the Court, through a legal, cogent and convincing evidence, comes to an irresistible conclusion that the husband because of machismonian attitude and displaying masculine aggressiveness has compelled the wife to ask for dissolution of marriage on the ground of 'khula' [*khul'*], then the Court shall have the power to refuse the return of the dowered property/amount to husband or to release him from the liability of payment.[40]

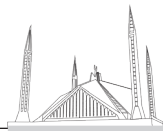
36 PLD 1990 Karachi 239; Tanzil-ur-Rehman , J.

37 Ibid., at 245.

38 PLD 2003 Peshawar 146; Justice Malik Hamid Saeed and Shahzad Akbar Khan, J.

39 Ibid., at 152; *per* Justice Shahzad Akbar Khan for the Divisional Bench.

40 Ibid., at 153.



In this case, the wife was tortured to the extent that she attempted suicide. The Court opined that she was entitled to her dower.

In *Malik Ghulam Nabi Jilani v. Mst. Pirzadi Jamila*,[41] the Supreme Court held ineffective a condition in the marriage contract restraining the wife's right to sue for dissolution of marriage on the ground of *khul'*.

A New Interpretation of the Law of *Khul'*

The Peshawar High Court gave a refreshing interpretation to section 10(4) of the West Pakistan Family Courts Act, 1964 as amended in 2002. The relevant portion of section 10(4) says that:

> If no compromise or reconciliation is possible, the Court shall frame the issues in the case and fix a date for the recording of the evidence. [Provided that notwithstanding any decision or judgment of any Court or Tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and also restore the husband the Haq Mehr [dower] received by the wife in consideration of marriage at the time of marriage].

In *Haseeb Ahmad v. Mst. Shaista*,[42] the Peshawar High Court gave an interesting interpretation to section 10(4) and held that this proviso can only refer to khul'. The Court observed that in a situation when the wife does not accept dissolution of marriage on the basis of *khul'* and emphasizes her entitlement to dissolution of marriage on the basis of cruelty or any other legal admissible ground, along with the return or retention of the received dower. "In that eventuality", observed the Court, "should a Family Court, after failure of pre-trial reconciliation proceedings, be left with no other option but to dissolve the marriage in terms of *khul'* only'?"[43] The Court held that dissolution of marriage on the basis of *khul'*, when other grounds exist, would make *khul'* a 'mechanical process' and will deprive the wife from getting her right on any or all other grounds of dissolution of marriage,

41 PLD 2004 SC 132.

42 PLJ 2008 Peshawar 205.

43 Ibid., at p. 207.

other than *khul'*, and "we cannot imagine that the proviso has been legislated to indirectly deprive women, of all their legally recognized grounds of dissolution of marriage, excepting *khul'*."[44] The Court held that the word 'shall' used in the above proviso "is directory in nature and not at all mandatory."[45] This is indeed a very welcome interpretation of the current law on *khul'*. The decision is important because if other grounds for the dissolution of marriage exist, they should also be taken into consideration to get the marriage dissolved because recourse to such an action would preserve the wife's right to retain her dower.

In *Dr. Nosheen Qamar v. Shah Zaman Khattak*,[46] the grounds for appeal are very interesting with regards to our discussion of the granting of *khul'* without asking the wife to return her dower to the husband. One of the grounds given by the Supreme Court to admit the appeal was to see whether or not the principle that 'if the husband has forced the woman to accept the *khul'*, a *talaq* will take place without any liability to pay the indemnity' by the wife to the husband, is attracted in this case.[47] In other words, if the husband is the cause of discord and has forced the woman to apply for *khul'*, should not the marriage be dissolved under the DMMA, 1939 rather than under section 10(4) of the WPFCA, 1964 as amended in 2010?[48]

In *Zohran Bi* case[49], decided by the Supreme Court of Azad Jammu and Kashmir, two real sisters were married to two real brothers. Both sisters had sought dissolution of their marriages on grounds of cruelty and failure of their respective husbands to maintain them. The trial court granted them *khul'* but the appellate court reversed the decision and ordered the restoration of conjugal rights. On

---

44 At 207; *per* Syed Yahya Zahid Gillani, J for the Divisional Bench.

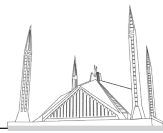
45 Ibid; *per* Syed Yahya Zahid Gillani, J for the Divisional Bench.

46 2007 SCJ 103.

47 Ibid., at 107.

48 As of 04 August, 2014 the case was pending. The Supreme Court converted Civil Petition No.132-P/2006 into appeal on 30 May, 2006, and the new appeal is Civil Appeal NO.1034-/2006. It is pending in branch Registry of the Supreme Court at Peshawar.

49 *Zohra Bi v. Muhammad Saleem and others*, PLJ 2005 SC (AJ & K) 171; also reported as 2005 YLR 896.



appeal, the AJ & K Supreme Court held that if *khul'* was not granted to both the sisters, it would amount to forcing them to live a hateful life. Syed Manzoor Hussain Gilani J, speaking for the Court, stated that matrimonial relations are based on trust, love, affection, good-will, and sacrifice for each other, and if these were lacking, "it is a forced union, not spouseism."[50] Highlighting the true law of *khul'* he further stated:

> The principle of *Khul'a* [*khul'*] is based on the fact that if a woman has decided not to live with her husband for any reason and there is no chance of reconciliation or her retrieving from the position, then it is left to the conscience of the Court to dissolve the marriage through *Khul'a* [*khul'*] and in case of non-dissolution under such circumstances the spouses cannot live within the bounds ordained by Almighty Allah.[51]

In the instant case, his Lordship concluded that dissolution of marriages on the basis of *khul'* must be ordered because attempts for reconciliation had already been exhausted by the elders and litigation had created additional bitterness between the parties.

In Pakistan, the procedure for instituting a plaint for *khul'* has also been simplified. In *Ahmad Hassan* case,[52] the issue was whether the written statement of the wife in response to a suit for restoration of conjugal rights could be treated as a plaint for dissolution of marriage. The High Court, at page 1027, answered it in the affirmative, stating that no separate suit for the dissolution of marriage was needed because of the new amendment to the West Pakistan Family Courts Act, 1964.

In *Sofia Rasool* case,[53] the High Court had ruled that if the wife had not asked for *khul'* in a suit or her written statement, then the court should not grant her the same, either. This was in response to the Trial Court's grant of *khul'* to the wife in the same, without her demand.

---

50 p. 174.

51 At p. 175.

52 *Ahmad Hassan v. Judge Family Court, Sadiq abad*, PLJ 2006 Lahore 1025

53 *Mst. Sofia Rasool v. Miss Abhor Gull*, PLJ 2005 Lahore 855; also reported as 2004 CLC 1932.

In two similar cases, *Ikramullah Khan*[54] and *Muhammad Rizwan*,[55] the Lahore High Court ruled in 2007 that in case of *khul'* the wife must return the benefits, especially the dower which she had received from her husband. In *Ikramullah Khan* case, Justice Syed Zahid Hussain, relied on *Khurshid Bibi*,[56] in which the Supreme Court had observed that in case of separation by *khul'*, if the husband insists, "it is legally permissible for him to demand something more than the dower."[57] Carroll argues that the assumption adopted in judicial *khul'* cases is that since the wife had failed to establish one of the specified fault-based grounds available under the Dissolution of Muslim Marriages Act 1939 the husband stands exonerated of any fault or blame.[58] This assumption is however untenable. Moreover, the Courts have totally ignored the 'reciprocal benefits' which the husband may have received from the marriage. It is in this background that decisions which involve exonerating the wives from paying anything when the husbands are at fault, must be appreciated. Such decisions have added a new and a positive dimension to the law of *khul'* in Pakistan.

In *M. Saqlain Zaheer v. Mst. Zaibun Nisa Zaheer*,[59] the husband had gifted his wife a house and a car during the marriage and wanted to recover both when she asked for *khul'* which was granted by the Family Court in 1986. A single Bench of the Sindh High Court dismissed the husband's request and ruled that in deciding the matter the family court had rightly considered "the reciprocal benefits received by the husband and continuous living together".[60] The Court opined that the petitioner and the respondent lived together for 20 years and apart from performing her marital obligations she must have worked as housekeeper and cook for the petitioner. In addition, she has also born him two children and "assisted the petitioner in bringing up the children which can also be considered

54 *IkramUllah Khan v. Maliha Khan*, PLD 2007 Lahore 423.

55 *Muhammad RazwanYousaf v. Additional District Judge*, 2007 CLC 1712.

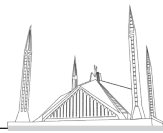
56 *KhurshidBibi v. Muhammad Amin*, PLD 1967 SC 97.

57 Ibid., at p. 121; *per* S.A.Rahman, J.

58 Carroll, "Qur'an 2:229", 124.

59 1988 MLD 427.

60 Ibid., at p. 431, para no. 14. (*per* Ahmed Ali U. Qureshi, J).



as benefits."[61] The Court stated that the house and the car were not given "by the petitioner to the respondent as consideration for marriage, but can be considered as compensation for the benefits that he got from the marriage for 20 years prior to the gifts."[62]

Unfortunately, *khul'* is still claimed as an alternative remedy should the wife fail in her primary claim for divorce on one or more of the grounds available under the DMMA. Moreover, in many instances, even when Courts in Pakistan have agreed that one or more of the grounds, such as cruelty or non-maintenance, have been proved, but they dissolve the marriage on the basis of *khul'* rather than under the DMMA. This means that the wife is usually asked to return her dower. Such examples include, *Abdul Majid*,[63] *Muhammad Sadiq*,[64] *Bashiran Bibi*,[65] and *Bibi Anwar* cases.[66]

In these cases, the battered wives had sought dissolution of their marriages on the bases of cruelty, non-maintenance, misappropriation of their properties, habitual assault, and even impotency in one case, but the Courts dissolved their marriages only on the basis of *khul'*, despite the fact that the grounds required for a divorce under the DMMA had been proved.

Conclusion

Judicial *khul'* is probably the best example of pro-women decisions of judicial law-making or 'judicial *ijtihad*' or judicial activism, to protect battered women from any cruelty on part of their husbands in the domain of personal law in Pakistan. The Courts in Pakistan have advanced the rights of women through *khul'* but their counterparts in India have yet to recognize those rights for Muslim women. Unfortunately, *khul'* is used as an alternative remedy. At first, a battered Muslim

61 Ibid.

62 Ibid.

63 *Abdul Majid v. Rizia Bibi*, PLD 1975 Lahore 766.

64 *Muhammad Sadiq v. Mst. Aisha*, PLD 1975 615.

65 *BashiranBibi v. Bashir Ahmad*, PLD Lahore 376.

66 *Bibi Anwar Khatoon v. Gulab Shah*, PLD 1988 Karachi 602.

wife, typically, attempts to save her marriage through an out-of-court settlement with recourse to the help of her family elders, failing which she sues her husband to get her marriage dissolved under the DMMA, 1939. The idea is that she will keep her dower, if already paid, or will get it from her husband, if unpaid. In her plaint for dissolution of marriage under the DMMA, when citing one or more of the typical reasons for dissolution of her marriage, e.g., the husband either has not maintained her properly, or treats her cruelly, or has misappropriated her property, or any other valid ground under the DMMA, the wife has to specify that alternatively her marriage may be dissolved through *khul'*. Knowing that any ground under the DMMA is very difficult to prove, the only remedy in which the wife does not have to prove anything besides hatred and aversion, is *khul'*. Knowing that now-a-days husbands who maltreat their wives seldom fear God, the Courts in Pakistan have rightly resorted to judicial law-making or judicial activism (rather than *ijtihad*) in *Balqis Fatima* and *Khurshid Bibi* cases, where it was held that *khul'* can be granted without the consent of the husband. It is now an established law that only hatred and aversion are enough for a wife to obtain *khul'* through the courts. In addition, when the husband is the cause of a marital discord, then he should not be given anything in compensation; whereas if the wife is the cause of a marital discord, then she has to return her dower. In 2002, an amendment was made to s. 10(4) of the West Pakistan Family Courts Act, 1964 which has made dissolution of marriage through *khul'* quite simple. The plain meaning of s. 10(4) seems to be that in every case, the Family Court has to attempt a reconciliation, failing which the Court has to dissolve the marriage through *khul'*, and order the wife to return the dower. However, under Islamic law, dower or its equivalent, or more or less, may be given to the husband only if the wife is the cause of discord and not in those cases when she is not. It is good to see that in some cases, Courts have given a good interpretation of s. 10(4) and held that the husband may be given less than the dower or may not be given anything. On the whole, the best decisions by the Superior Courts in Pakistan have been rendered in the field of Muslim personal law which has helped in making our legal system unique.