

OPEN ACCESS: “EPISTEMOLOGY”

eISSN: 2663-5828;pISSN: 2519-6480

Vol.10 Issue 11 June 2022

## THE QUANTUM OF COMPENSATION FOR *KHUL'* IN ISLAMIC LAW AND LEGAL SYSTEM OF PAKISTAN WITH SPECIFIC REFERENCE TO CASE LAW OF SUPERIOR COURTS

**Dr. Hafiz Muhammad Siddique**

*Post-Doctoral Fellow, Faculty of Law, University of Oxford,  
United Kingdom &*

*Assistant Professor, Faculty of Shariah & Law,  
International Islamic University Islamabad, Pakistan.*

**Abstract:** The Holy Qur'an has evidently stated the objective of marriage as *mawaddah* and *rahmah* (love & mercy). This must be adopted by husband and wife throughout their whole marital life. But, if due to unavoidable reasons their married relationship could not go beyond then it becomes essential for them to be parted. Marriage can be dissolved in many ways; dissolution of marriage by husband, through the court of law, with mutual consent of spouses, and several grounds denoted by the Muslim jurists and Pakistani law as mentioned in section 2 of Dissolution of Muslim Marriage Act 1939, and some others types of dissolution like *Li'ān*, *Zihar*, *Īlā'*. Before the advent of Islam, the woman was not having or granted any right to dissolve her marriage or ask for divorce whatsoever the reasons and circumstances but Islam permits the dissolution of marriage at the request of a wife by the consent of the spouses or through the court of law or right is delegated to her for dissolution of marriage and she becomes independent to separate herself whenever she thinks that their marital companionship could not go longer. Ending the marriage tie is not recommended or encouraged in the true spirit of Islamic law for the husband and as well as for wife. But it is considered a disliked or disapproved act and a woman who demands separation without any valid ground would be deprived of paradise. *Khul'* is a type of divorce in lieu of money paid by the wife to the husband. The present research discusses the quantum of an amount to be paid in *Khul'*. It also denotes what could be the nature of compensation by analyzing the opinions of Muslim jurists. This paper specifies the nature of considerations to be made in *Khul'* and what the effect could be if the amount is not mentioned. The present work focuses on the role of the

superior judiciary on the quantum of money in *Khul'* by examining the case law.

**Keywords:** *Khul'*, Islāmic Law, Family Law, Women's rights, Pakistani Law, Superior Courts.

## INTRODUCTION

In Islamic legal system, marriage enlists a dynamic position in the family institution. The significance of marriage can be acclaimed from the fact that preserves the family unit and is considered one of the objectives of Islamic Law. In the Holy Qur'ān, marriage is described as a firm contract "*mīthāqanghalīzā*".<sup>1</sup> The Holy Prophet (PBUH) accentuated in many traditions as his *sunnah* and warned that whosoever turns away from my *sunnah* is excluded from my nation.<sup>2</sup> The fundamental purpose that persuades by a marriage contract is love and sympathy among the spouses.<sup>3</sup> This is also a spirit of the marriage that brings peace and tranquility among couples. If the companionship of the husband and wife loses love, mercy, kindness and compassion then Islam has permitted to dissolve such a relationship but it is considered the most detestable act by almighty Allah.<sup>4</sup> The wife has also been warned by the Holy Prophet (PBUH) to separate herself or demand a divorce from her husband without any reason.<sup>5</sup> The marital relationship can be ended in many ways; sometimes by the husband, sometimes by the mutual consent of spouses such as *Khul'* and sometimes through the court of law on the basis of various reasons.<sup>6</sup> Pakistani law has also described several grounds for the dissolution of marriage.<sup>7</sup> *Khul'* is one of the types for dissolution of marriage by the mutual consent<sup>8</sup> of the spouses or by the wife or anyone else or through a court of law.<sup>9</sup> This paper denotes the concept of *Khul'* by discussing its legitimacy and the amount of consideration but focuses on the examination of the decisions of the superior court of Pakistan.

The literal meaning of *Khul'* is "taking off, or removing or taking out and putting off something."<sup>10</sup> For instance, taking off one's clothes, gloves and shoes.<sup>11</sup> The married relationship of husband and wife is considered as "*libās*"<sup>12</sup> in the Holy Qur'ān and it emphasizes on the strong relationship among the spouses. If they dissolve their marriage through any type of separation, it means they have put off their garment.

Technically, there are several definitions among Muslim jurists due to the nature of *Khul'*. Mālikī jurists define *Khul'* as a divorce for compensation with the words of *Khul'* whether compensation is paid by a wife, guardian and someone else.<sup>13</sup> Shāfi'ī jurists define *Khul'* as "a separation between the spouses for a definite compensation, and it is to be pronounced by the words of *Ṭalāq* or *Khul'*."<sup>14</sup> For example; husband has to say that I divorced you or separated on the amount so and so, and she accepts it. Dr. Wahabah Al-Zuhaylī considers this definition the best and highlights its implementation in

Egypt and Syria.<sup>15</sup> *Khul'* is defined by Ḥanbalī jurists as husband's relinquishment of his wife for compensation; paid by her wife or someone else and it is to be pronounced by certain words.<sup>16</sup> Ḥanafī Jurists define *Khul'* as Eradicating the contract; conditioned on the wife's consent and it is to be eliminated by using the word *Khul'* or similar words in the same meaning.<sup>17</sup> Imām Al-Kāsānī has stated *Khul'* of two kinds: without compensation and with compensation.<sup>18</sup> The effect of *Khul'* without compensation and with compensation is not the same; hence, if a husband says to his wife, "I grant you *Khul'*" but he does not mention any compensation, it means he intends to divorce and such statement treated as *Talāq* and if the same statement pronounced by him in lieu of compensation is regarded as *Khul'*. Imran Ahsan Khan Nyazee further explains *Khul'* without compensation that the intention of the husband will be taken into account. If he intends one repudiation it will be treated as one and if he intends three, they will be treated as three.<sup>19</sup> As discussed several definitions of the Muslim Jurists regarding *Khul'* the definition of Ḥanafī jurists looks more appropriate particularly the definition of Imām Ibn 'Abidīn due to its comprehensiveness, clarity and closeness to the lexical meaning of the word *Khul'*. Thus, *Khul'* refers to the elimination of the marriage contract in exchange for a pecuniary recompense by the wife or someone else on behalf of her wife.

### Opinions of Muslim Jurists

Muslim Jurists have different opinions regarding the quantum of compensation for granting *Khul'*. Because the amount of money dually paid in *Khul'* has not been stated explicitly in any sources of Islamic Law. However, they agreed paying compensation to the husband is a pre-requisite for *Khul'*. There are several questions to be answered in this paper: What could be the quantum of compensation (more or less than dower) for *Khul'*? What could be the nature of compensation (subject matter for compensation) for *Khul'*? Whether a husband can take more amount than dower provided by him in a marriage contract? If he takes more than the prescribed amount in *Nikah Nama* is permitted in Islamic Law?

With regard to the quantum of compensation for *Khul'*, there are two main viewpoints of Muslim Jurists in the determination and estimation of compensation in *Khul'*. Firstly, Mālikī<sup>20</sup> and Shāfi'ī jurists<sup>21</sup> stated that the compensation a husband gets from his wife for *Khul'* should be left unspecified and it is up to the husband how much he gets from his wife as compensation less, more or even the same amount as given in dower. But it is preferred that the husband should not get more than the amount of dower.

Imām Mālik stated in this regard:

"I had never seen or known any of those whom we follow, prevent a compensation that is higher than the dower, but I

believe that taking a compensation higher than the dower is not of gracious manners.”<sup>22</sup>

The Shāfi‘ī jurists stated regarding this particular issue that there will be no restrictions, the amount of in *Khul'* could be higher or lower than what is actually specified in the dower.<sup>23</sup>

They argue their viewpoint by presenting some verses of the Holy Qur’ān and some traditions of the Holy Prophet (PBUH) as Almighty Allāh states in Sūrah Al-Baqarah

فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا

“Now, if you apprehend that they would not maintain the limits set by Allah, then, there is no sin on them in what she gives up to secure her release.”<sup>24</sup>

This *āyah* means, she may give something for her freedom and something could be too little or too much. The husband is not blamed for getting what the wife pays in compensation for freeing herself from him. They further support their opinion with the evidence of the Holy Sunnah, Imām Al-Baihaqī reported about Abū Sa‘īd Al-Khudrī, who said

عَنْ أَبِي سَعِيدٍ قَالَ: أَرَادَتْ أُخْتِي أَنْ تَخْتَلِعَ مِنْ زَوْجِهَا فَأَتَتْ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ مَعَ زَوْجِهَا فَذَكَرَتْ لَهُ ذَلِكَ , فَقَالَ لَهَا رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: " تَرُدِّينَ عَلَيْهِ حَدِيقَتَهُ وَيَطْلُقُكَ؟ " قَالَتْ: نَعَمْ وَأَزِيدُهُ , فَقَالَ لَهَا النَّبِيُّ: تَرُدِّينَ عَلَيْهِ حَدِيقَتَهُ وَيَطْلُقُكَ؟ " قَالَتْ: نَعَمْ وَأَزِيدُهُ فَقَالَ لَهَا التَّالِيَةَ , قَالَتْ: نَعَمْ وَأَزِيدُهُ , فَخَلَعَهَا فَرَدَّتْ عَلَيْهِ حَدِيقَتَهُ وَزَادَتْهُ

“My sister wanted to get *Khul'* from her husband and she came to the Holy Prophet (PBUH) with his husband. She raised the matter to the Allāh’s Messenger (PBUH) and He (PBUH) said to my sister: Give him back his garden and he will divorce you. She replied: Yes I will, and I will give him his garden and more.”<sup>25</sup>

The second opinion is the one adopted by Ḥanafī<sup>26</sup> and most of the Ḥanbalī<sup>27</sup> jurists, including Alī Ibn Abī Ṭālib, and others like Imām Zuhrī, Ata, and Ṭawūs and Amrao bin Shoab.<sup>28</sup> It relies on the point that the husband is not permitted to take in compensation more than he had paid in the marriage contract as a dower. They went a step further and said that if he had already done so, he should return the extra money to her.<sup>29</sup>

They also argue and support their opinion with the same verse of the Holy Qur’ān and several aḥādīth of the Holy Prophet (PBUH) as Allāh Almighty states

وَلَا يَحِلُّ لَكُمْ أَنْ تَأْخُذُوا مِمَّا آتَيْتُمُوهُنَّ شَيْئًا إِلَّا أَنْ يَخَافَا أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا

“It is not lawful for you to take back anything from what you have given them, unless both apprehend that they would not be

able to maintain the limits set by Allah. Now, if you apprehend that they would not maintain the limits set by Allah, then, there is no sin on them in what she gives up to secure her release. These are the limits set by Allah. Therefore, do not exceed them.”<sup>30</sup>

This *āyah* clearly expresses that it is illegitimate to take back what one had already given to his wife except in the case of *Khul'*. It is possible only for the husband to take some of what you had given them and not all of it. If it is not permissible for the husband to take all of what he gave, how could it be possible for him, then, to take more than he had paid as dower?

The Evidence from Holy Sunnah as reported in Sunan A1-Darqutni, narrated by Abū Al-Zubair said that

أن ثابت بن قيس بن شماس كانت عنده زينب بنت عبد الله بن أبي بن سلول وكان أصدقها حديقة فكرهته فقال النبي صلى الله عليه وسلم أتردين عليه حديقته التي أعطاك قالت نعم وزيادة فقال النبي صلى الله عليه وسلم أما الزيادة فلا ولكن حديقته قالت نعم

*“Thabit bin Qais had given a garden to his wife as a dower; thus, when she complained to the Holy Prophet (PBUH) asking for khul', He (PBUH) asked her: Would you give him back the garden he had given you? She replied: Yes, and more. The Holy Prophet (PBUH) said: no, don't give him more, just his garden.”*<sup>31</sup>

It is evident from the above-mentioned arguments that the husband is prohibited from taking more than what he had paid to her wife as a dower. In this context, the second opinion is more reasonable. According to them a husband is not permitted to get more than the amount paid by him to the wife as a dower. One may say why the husband should not be allowed to take money from his wife that exceeds the value of the dower. This is based on the assumption that if the husband is permitted to get extra money, this will pave the way for husbands of weak faith, particularly in this materialistic age we live in nowadays, to blackmail their wives and ask them for higher compensations. This obviously may be something some wives cannot afford. This is also not consistent with the wisdom of legislating *Khul'*, because instead of protecting the wife from any potential harm, the wife in this case finds herself falling into another trap. Again, this goes against the legal rule of “*la Darara wa la Dirār*”, which means that “there should be no harm done to either party”.<sup>32</sup>

### **The Nature of Compensation in *Khul'***

As discussed above that if the initiative of dissolution of marriage through *Khul'* is from the wife and they mutually agreed on the dissolution of marriage, compensation is to be paid by her. The amount that she has to pay as compensation could be equivalent to dower or could be more or less.

However, the husband should not be awarded any compensation in case of fault and *shiqaq* from him.

Muslim jurists have different views on the nature of compensation that what could be given in *Khul'* as compensation but they all are agreed that it is necessary for compensation in *Khul'* must be a legally permitted thing. Hanafi Jurists opine that the nature of compensation must be known and have ascertainable value and if an illegal commodity is mentioned as consideration then it would be considered null and void but *Khul'* takes effect without compensation if the husband agrees on unlawful objects.<sup>33</sup> Maliki<sup>34</sup> and Hanbali<sup>35</sup> Jurists are with Hanafi Jurists regarding mentioning unlawful things as compensation in *Khul'*, however, they consider *Khul'* as valid without entitling the husband for any compensation. But they permitted all the things coming in the definition of property and asset such as house, car, debts or a thing having an ascertained value.<sup>36</sup> Shafi'i Jurists have a viewpoint that all lawful things become a consideration for *Khul'* and what could be delivered possibly to the husband. If any unlawful commodity or thing is mentioned as compensation, then wife must pay *Mahr Mithl*.<sup>37</sup>

With respect to the nature of compensation for *Khul'*, the Muslim Jurists have agreed on the legality of the commodities and no question on the effect of the *Khul'*. They also have come to the opinion that *Khul'* also takes effect by utilization of benefits such as maintaining a child or feeding him.<sup>38</sup>

#### **Consideration for *Khul'* in case of fault or discard**

There are diverse opinions of the Muslim Jurists on the issue of paying compensation for *Khul'* in case of discard; fault and discard may be from husband; may be from wife; may be from both of them.

All the four schools of thought<sup>39</sup> agreed on the issue that if a discard is from husband and he forces a wife to get *Khul'* the he is not legally permitted to get compensation on the basis of a verse of the Holy Quran as states

وَإِنْ أَرَدْتُمْ أَنْ تَبْدُلُوا زَوْجَكُمْ مَكَانَ زَوْجِكُمْ وَأَنْتُمْ بِمَا كُنْتُمْ إِعْدَاءً فَلَا تَأْخُذُوا مِنْهُ سَبِيحًا فَاتَّخِذُوا مِنْهُ زَوْجًا مَبِينًا.

“But if you intend to replace a wife by another and you have given one of them a Qintar (of gold i.e. a great amount as Mahr), take not the least bit of it back; would you take it wrongfully without a right and (with) a manifest sin?<sup>40</sup>”

Almighty Allah has explicitly mentioned that the spouses have to live with kindness and ordered a husband to treat his wife to retain her in kindness or release her in kindness and do not retain her for cruelty as states

وَلَا تُمْسِكُوهُنَّ ضِرَارًا لِيَتَّعْتَدُوا وَمَنْ يَفْعَلْ ذَلِكَ فَقَدْ ظَلَمَ نَفْسَهُ

“But do not take them back to hurt them, and whoever does that, then he has wronged himself.”<sup>41</sup>

The Holy Qur'an also forbids harming a wife by taking back what has been given to her as a dower and recommends treating her with kindness as states

وَلَا تَعْضُلُوهُنَّ لِتَذْهَبُوا بِبَعْضِ مَا آتَيْتُمُوهُنَّ إِلَّا أَنْ يَأْتِيَنَّ بِفَحِشَةٍ مُّبِينَةٍ وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ

“Nor should ye treat them with harshness, that ye may take away part of the dower ye have given them, except where they have been guilty of open lewdness; on the contrary live with them on a footing of kindness and equity.”<sup>42</sup>

It has become evident from these arguments that if discard and fault is from husband without any reason than he is not permitted to get back anything. It is also not looking rational with the wisdom of legislating *Khul'*. She is to be protected from any potential harm and not to put her into another trap. This also goes against a saying of the Holy Prophet (PBUH) as said

لا ضرر ولا ضرار

“There should be neither harming nor reciprocating harm.”<sup>43</sup>

This hadith has become a universal legal rule in the legal system of Islam that there should be no harm done to either party and if dower or other amount is returned for *Khul'* in case of fault from husband then it is against the Islamic injunctions and Maliki Jurists go beyond this view that if she has given something for *Khul'* in case of discard from husband then it is to be returned back.<sup>44</sup>

### Analysis of Case Law of Superior Courts

There are some cases of the superior courts in which it was decided whether dower has to be paid to a husband in consideration of *Khul'* or not on the basis of discard? The superior Courts have drawn a distinction between *Khul'* due to husband's fault and that due to wife's own will. In case of husband being at fault, courts have frequently held that no consideration for *Khul'* is to be given by wife.<sup>45</sup> This rule is based on the sound rationale that it would be unjust to deny dower to a wife who has been forced into seeking dissolution on account of reprehensible acts or omissions of her husband.<sup>46</sup> So in the absence of wife's fault, she has usually not been deprived of her dower and other rights.<sup>47</sup> However, in case of *Khul'* out of wife's own will or due to some reason for which she had hatred or disliked her husband but the latter had nothing to do with it, courts have usually asked the wife to restore the dower to her husband.<sup>48</sup> If the hatred and disliking, however, stemmed from husband's conduct, such as mental or physical torture, non-payment of maintenance allowance, second marriage without her consent or some other obnoxious behavior, then the return of dower has not been deemed necessary.<sup>49</sup>

There is no explicit Qur'anic *āyah* or Ḥadīth that expresses the payment of dower in consideration of *Khul'* becomes recommendation or obligation on the wife. Non-payment or return of dower in the case of *Khul'* do not invalidate the dissolution of marriage in Islamic Law. However, there

are some decisions of the courts that indicate that payment of dower or any other property as consideration is obligatory for a woman who wishes to be granted *Khul'*. Now we have to go through some of such cases as under:

In *Mr. Munir Anwar vs. Mst. Nabeela Safdar*,<sup>50</sup> the court held that a woman has to give back all the properties and commodities which she has achieved as a wife from her husband in consideration of a marriage contract. The court further explained that *Khul'* ceased all the rights of the woman based on marriage contract. The same was mentioned in *Shamshad Begum vs. Abdul Haque*.<sup>51</sup>

In *Abdul Majid v. Razia Bibi*,<sup>52</sup> it was held that the dower must be paid in *Khul'* as a consideration, the court has to make it possible either the dower was prompt or deferred.<sup>53</sup> In *Mukhtar Ahmad vs. Ansa Naheed*,<sup>54</sup> the court observed that if a woman filed a case for dissolution of marriage, recovery of dower, dowry articles on various grounds as well as *Khul'*. The woman would be entitled for recovery of dower, dowry articles and other claims as she had denoted. But when she demands the dissolution of marriage solely on the basis of *Khul'*, situation of the case would be changed, the court has to realize that in the case of *Khul'* initiative has been made by a woman and she offers consideration, so, it has to be provided to the husband.<sup>55</sup>

In *Parveen Begum vs. Muhammad Ali*,<sup>56</sup> the question of discussion, in this case was how much amount or what is to be given in consideration of *Khul'*. The court held that the dower amount or any other property specified as dower is to be returned to the husband as a consideration and it must not be exceeded from the prescribed quantum of dower. Although, some Muslim jurists has argued on the basis of verse 229 of Surah Al-Baqrah that the consideration amount in *Khul'* could be extended with the mutual consent of the parties.<sup>57</sup>

In *Karim Ullah vs. Shabana*,<sup>58</sup> the Peshawar High Court gives a clear and detailed description of the law regarding consideration in *Khul'*. The facts of the case are that the wife sought termination of marriage tie on the ground of husband's cruelty. She claimed that husband mistreated her and now it has become impossible for me to fulfill the marital obligations as prescribed by *Shari'ah*. She also claimed recovery of 15 tolas of gold ornaments as dower. The Court observed that case and made an important question for discussion to resolve of matter. The court raised a question that whether a court of law is authorized for denial of returning dower to the husband as a consideration in *Khul'* on the basis of cruelty from husband or if woman is forced to return the dower or other properties to dissolve the marriage.

The Peshawar High Court after considering the verse 2:229 of Qur'an, ahādīth of Prophet (PBUH), opinions of classical jurists, contemporary scholars, and the case law on the subject and approved the judgment of *Anees Ahmad vs. Uzma*,<sup>59</sup> that where *Khul'* granted to a woman on the ground of

husband's cruelty, she is not to return her husband the dower or any other property as consideration. The court further observed that where the court, through a legal, cogent and convincing evidence, comes to an irresistible conclusion that the husband because of his brutal attitude and displaying his masculine aggressiveness has compelled the wife to ask for *Khul'*, the courts shall have the powers to repudiate returning the dower amount.<sup>60</sup> The Court concluded that, she was entitled to the gold ornaments as dower as well.<sup>61</sup>

In the regard of cruelty and mistreatment from the husband in *Khul'* case, Mawlānā Shiblī Nomanī maintained that where the husband was to blame for the breakdown of the marriage, the wife had the right to *Khul'* divorce without payment of compensation.<sup>62</sup>

Mawlānā Muftī Taqī Usmanī states in this regard that if the fault and discard is from the husband then the husband has to divorce her wife without getting anything in consideration and almost all the Muslim jurists have the same opinion.<sup>63</sup>

The superior courts have played a vital role with respect to facilitating an isolated woman by interpreting the *Shari'ah* in its true spirit. In so many cases, their efforts can be observed such as in *Javed Iqbal vs. Nasreen Akthar*,<sup>64</sup> *Khul'* was granted to a woman even without the provision of any amount as consideration. There are some other cases, in which, the courts have granted *Khul'* to a woman but with the return of dower or any other property as consideration such as in *Mr. Maqbool Ahmad Abid vs. Mrs. Rehana Kausar*,<sup>65</sup> the court held that a dower amount is to be given back to the husband as consideration for dissolution of marriage as *Khul'* and in *Shamshad Begum vs. Abdul Haque*,<sup>66</sup> as well as in *Hamidan Begum vs. Abdul Riaz*,<sup>67</sup> the courts decided the case of *Khul'* by granting a decree to women but the courts made entitled the husbands to receive the consideration the amount of dower. It was further observed that in case of the failure of the consideration from wife to the husband, could not affect the decree of *Khul'* or would not invalidate *Khul'* decree but the right of the husband to recover the consideration still existed. The courts also provided the benefit to the women by using the notion of *Ijtihād* even in those cases where the conclusive evidence was not provided by the women.

The Superior Courts in both Pakistan and Azad Jammu & Kashmir have, over the years, adopted these principles in many cases. Here we have to examine some cases in which the quantum is discussed by the superior courts. In various cases, courts have also reduced the quantum of dower where the fault was found on the husband's part.<sup>68</sup> It has been held that the *Qur'ānic* text is not explicitly making an obligation that the full amount of dower is to be returned to the husband by the wife. The courts have the power to reduce it partially in some exceptional cases.<sup>69</sup> There are some cases, in which the courts have also held that the time she has spent with her husband or the

services she has rendered to her husband can amount to consideration for *Khul'*.<sup>70</sup> In some cases, courts have utilized the authority to determine whether the wife would be liable to return any benefit provided her at the conclusion of marriage contract, and if so, what would be its quantum of it.<sup>71</sup>

In *Razia Begum v. Sagir Ahmad*,<sup>72</sup> the question in discussion was the determination of the amount of compensation in *Khul'*. The court has to answer this issue what could be the amount or quantum as compensation in *Khul'*? The court firstly examined the main factors for determination of compensation quantum which could be taken into consideration.

The court concluded that it could not be made obligatory for the wife to give back all the benefits to the husband in every case of *Khul'*. After the close observation of the facts and evidences of the case, the amount of *Khul'* would be determined accordingly by the Court. In case, a wife claims *Khul'* without mentioning and proving the discard or fault of the husband, the court grants the decree of *Khul'* to her by ordering to return the dower amount or the court can make an order to give him back all other benefits received by her. But the court has to consider only the reciprocal benefits received by the wife.<sup>73</sup>

The non-payment of the compensation for whatever reason does not invalidate the dissolution of the marriage itself; it only creates a civil liability regarding the benefits.

In *Dr. Akhlaq Ahmed v. Kishwar Sultana*,<sup>74</sup> the Supreme Court held that:

“Non-payment of stipulated consideration for *Khul'* did not invalidate the marriage ended through *Khul'*. Once the family court observed and finalised that the spouses can't remain in the limits of Allah and the dissolution of marriage by *Khul'* 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 regard to the benefits, husband has to recover and wife has to return to husband, and does not affect the dissolution itself.”<sup>75</sup>

In *Mrs. Zubaida vs. Muhammad Akram*,<sup>76</sup> 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 condition first.

There are various *Khul'* cases in which the courts did not provide any dower amount or compensation due to the fault and discard of the husband.

In *Zahida Bibi vs. Muhammad Maqsood*,<sup>77</sup> the court concluded that there is a consensus of the Muslim jurists that when marriage is dissolved due to some fault on the part of the 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.<sup>78</sup>

In *Khalid Mahmood vs. Aneesa Bibi*,<sup>79</sup> the Lahore High Court, after discussing the amount of compensation, stated that:

“It is established that court has authority to specify the compensation quantum in case of *Khul'*. After recording and observing the evidences, the court come to conclusion that a claim from the wife to dissolve the marriage by *Khul'* is not just her willingness but the discard has been also found from the husband side and fault could be considered the reason for recourse to *Khul'*.”<sup>80</sup>

The same point has been asserted in many other cases.<sup>81</sup> The Court stated that a wife has to give back the dower or other property to the husband received by her in the marriage contract, fixed as dower if she asks for *Khul'*. The court further denoted that if the fault is found from the husband side then marriage will be dissolved in accordance with the ground as prescribed in section 2 of DMMA, 1939. In such case, she is not obliged to return the dower amount or any other benefit to her husband, but she has to keep with her dower and all other benefits received by her husband.

In *Munshi Abdul Aziz vs. Noor Mai*,<sup>82</sup> the Lahore High Court allowed to terminate the marriage contract by *Khul'* and since cruelty had also been alleged in the case, held that cruelty was a legal bar for claiming compensation.<sup>83</sup>

In *Syed Dilshad Ahmed vs. Mst. Sarwat Bibi*,<sup>84</sup> is loaded with too many citations from the various books of Islamic Law and has been cited by many courts in their decisions. The court held that:

“If the fault or discard lies with the husband, in the fulfillment of his obligations to his wife, the acceptance of compensation for *Khul'* by him is forbidden in *Sharī'ah*.”<sup>85</sup>

The quantity of dower to be restored has also been a point of contention in various cases. Courts have, however, appeared to be unanimous in their view that dower has to be returned only in that form or quantity that is mentioned in the *Nikāh Nāma*.<sup>86</sup> So even if dower was actually given in some form or quantity other than that mentioned in it, the only obligation that may exist would pertain to returning it in the form or quantity mentioned in it.<sup>87</sup> Besides, there have also been several cases in which husband has claimed that since he gave dower to his wife, even though not at the time of marriage, still it ought to be returned for effecting *Khul'*. Courts have usually responded to such reservations by holding that though right to exercise *Khul'* by the wife was dependent upon restoration of dower to the husband, the same was qualified with the word at the time of marriage.<sup>88</sup> So the dower amount is paid

at any time after marriage other than the time for conclusion of marriage contract. It could not be re-established at the time of dissolution of marriage, if all the possible efforts for reconciliation failed.

There have also been a host of instances when a woman cannot provide the evidences on the alleged ground under the DMMA, 1939 but still the marriage was dissolved in the alternative on the basis of *Khul'*.<sup>89</sup> Courts have generally been of the view that if the marriage has irretrievably broken down or a woman is not interested at all to live with husband, then the marriage shall be dissolved on the basis of *Khul'*, even if it is an unclaimed ground.<sup>90</sup> The same approach is also to be adopted if compelling the wife to live with her husband would give rise to a hateful union.<sup>91</sup> The rationale is that Islam does not envisage the wife being forced to live a miserable life, which is devoid of harmony and happiness.<sup>92</sup> Besides, courts have also reiterated time and again that if grounds other than *Khul'* are available and have been established for dissolving the marriage, then it cannot be dissolved on the basis of *Khul'*, as this would possibly deprive the wife of her dower and other benefits.<sup>93</sup> However, in case of divorce on the basis of the reasons prescribed in Section 2 of the DMMA, 1939 the burden of proof would lie on the wife.<sup>94</sup> But once a ground under DMMA has been established, not only the court would be obligated to dissolve it on that basis, but also the wife would not be required to return the dower or other benefits that she might have received from her husband.<sup>95</sup>

## CONCLUSION

*Khul'* is an elimination of the marriage contract in exchange for a pecuniary recompense by the wife or someone else on behalf of her. But it must be a legal commodity otherwise it could not be considered as remuneration, however, according to all Muslim Jurists *Khul'* takes effect and a marriage tie ends. They also have diverse opinions regarding the amount as compensation for *Khul'*, it could be more or less as mutually agreed but they prefer that it could not be more than the quantum paid as dower. The legislature is to make law on the issue by not taking more than the amount of dower in *Khul'*. Muslim Jurists unanimously agreed not to pay anything to the husband if discard arises from the husband and results in *Khul'* and they go one step further that if paid must be returned her back. Generally, lower courts decide the cases and permit the husband to get dower amount as a consideration but the superior courts' decisions vary by the nature of the case and the fault of the spouses. With respect to discard and fault, Superior Courts are very strict and helped the dismal and miserable women by favouring them in their decisions by not returning the dower or any other amount as compensation.

## REFERENCES &amp; NOTES

- <sup>1</sup> The Holy Qur'ān, 4:21
- <sup>2</sup> Ibn Majah, *Al-Sunan*, Kitab al-Nikah, Hadith 1919
- <sup>3</sup> The Holy Qur'an, 30:21
- <sup>4</sup> Abu Dawud, *Al-Sunan*, Kitab-al-Talaq, Hadith 2178
- <sup>5</sup> Al-Tirmadhi, *Al-Sunan*, Kitab-al-Talaq, Bab Ma Ja'a fi al-mukhtale 'at, Hadith 1187.
- <sup>6</sup> Wahabah Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu*, (Damascus: Dar Al-Fikr, 1997), 9: 6863.
- <sup>7</sup> See for detail: *Dissolution of Muslim Marriage Act 1939*, Section 2.
- <sup>8</sup> Wahabah Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu*, 9: 7008.
- <sup>9</sup> Ibid.
- <sup>10</sup> *Al-Mu'jam Al-Wasīṭ*, s.v. *Khul'* (خ ل ع)
- <sup>11</sup> In the same context there is a verse of the Holy Qur'ān as Allāh Almighty said to Hazrat Musa (PBUH) when he went to receive the sacred law: *إِنِّي أَنَا رَبُّكَ فَارْحَلْ نَعْلَيْكَ إِنَّكَ بِالْوَادِ الْمُقَدَّسِ طَوًى* "It is Me, your Lord, so remove your shoes; you are in the sacred valley of Tuwa". See: The Holy Qur'ān, 20:12
- <sup>12</sup> The word "libas" means "garment" as Almighty Allah states: *هُنَّ لِبَاسٌ لَكُمْ وَأَنْتُمْ لِبَاسٌ لَهُنَّ* "They are apparel for you, and you are apparel for them". See: The Holy Qur'ān, 2:187
- <sup>13</sup> Dardīr, *Al-Sharḥ al-Saghīr*, 2: 517.
- <sup>14</sup> Al-Sharbīnī, *Mughnī al-Muḥtāj*, (Cairo: Maṭba' al- Muṣṭafā Al-Bābī, 1985), 3: 262.
- <sup>15</sup> Wahabah Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu*, (Damascus: Dar Al-Fikr, 1997), 9: 7008.
- <sup>16</sup> Al-Bahūtī, Mansūr, *Kashshāf al-Qinā' 'An Matn al-Iqnā'*, (Beirut: Dār Al-Fikr, 1982), 3: 126.
- <sup>17</sup> Al-Tamartashī, Shams Al-Dīn, *Radd al-Muḥtār 'alā al-Durr al-Mukhtār*, (*Hāshiyah Ibn 'Abidīn*), 5: 86-88.
- <sup>18</sup> Al-Kāsānī, 'Ala Al-Din, *Badai' al- Sanā'i'*, (Beirut: Dār Al-Ma'rifah, 2000), 3: 152
- <sup>19</sup> Imran Ahsan Khan Nyazee, *Outlines of Muslim Personal Law*, (Rawalpindi: Federal Law House, 2012), 92.
- <sup>20</sup> Wahabah Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu*, 9: 7027.
- <sup>21</sup> Ibn Rushd, *Bidāyat al-Muḥtāhid*, (Qāhirah: Dār al-Ḥadīth, 2004), 3: 89.
- <sup>22</sup> Mālik bin Anas, *Al-Mudawwnah*, (Beirut: Dār al-Kutb Al-'ilmiyyah, 1994), 2: 245.
- <sup>23</sup> Al-Nawawī, *Al-Majmū' Sharḥ al-Muḥadḥab*, (Beirut: Dār Al-Fikr, n. d. ), 16: 8.
- <sup>24</sup> The Holy Qur'ān, 2: 229
- <sup>25</sup> Abū Bakr Ahmad bin Hussain Al-Baiḥqī, *Al-Sunan Al-Kubra*, Kitāb Al-*Khul'* wa Al-Talaq, Bāb al-wajhalladhitahillubehealfidyah.
- <sup>26</sup> Ali Ibn Abi Bakr Al-Marghinani, *Al-Hidāyah*, (Beirut: Dār Ahya al-Turath Al-'Arabi), 2: 261.
- <sup>27</sup> Ibrahim Ibn Muhammad Ibn Muflih, *Al-Mubdi' fi Sharḥ al-Muḥni'*, (Beirut: Dār al-Kutb Al-'ilmiyyah, 1997), 6: 277.
- <sup>28</sup> Ibn Qudāmah, *Al-Mughnī*, 7: 325.
- <sup>29</sup> Ibid.
- <sup>30</sup> The Holy Qur'ān, 2:229
- <sup>31</sup> Abū Al-Ḥassan, Ali Ibn Umar Al-Darqutnī, *Sunan Al-Darqutni*, Kitāb Al-Nikāh, Bāb Al-Mahr
- <sup>32</sup> Al-Baiḥaqī, *Al-Sunan Al-Kubrā*, kitab Al-Sulḥ, Bāb La Darar walā Dirār.
- <sup>33</sup> Ibn Nujaym, *Bahr Al-Ra'iq*, (Cairo: 1311 AH), 4:87; See also: Ibn Humam, *Fath Al-Qadir*, (Cairo: 1356 AH), 3:207

- <sup>34</sup>Ibn Rushd, *Bidāyat al-Mujtahid*, (Qāhirah: Dār al-Ḥadīth, 2004), 2: 66-67; See also: Wahabiah Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu*, 9: 7022.
- <sup>35</sup>Ibn Qudamah, *Al-Mughni*, 2: 55; See also: Wahabiah Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu*, 9: 7022.
- <sup>36</sup>Wahabiah Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu*, 9: 7022.
- <sup>37</sup>*Ibid.*, 9: 7023.
- <sup>38</sup>*Ibid.*, 9: 7029-7031
- <sup>39</sup>Wahabiah Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu*, 9: 7028.
- <sup>40</sup>The Holy Qur'an, 4:20
- <sup>41</sup>The Holy Qur'an, 2: 231
- <sup>42</sup>The Holy Qur'an, 4:19
- <sup>43</sup>*Muwatta Imam Malik*, Kitab Al-Aqdiyah, See also: *Sunan Ibn Majah*, Kitab Al-Ahkam, Bab Man Bana Fi Haqqehi Ma Yadurru Bejarehi
- <sup>44</sup>Wahabiah Al-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu*, 9: 7028.
- <sup>45</sup>*Asif Jahangir vs. Mst. Zaheen Kausar*, 2015 YLR 1547, *Waseem Ahmad Rathore vs. Mst. Fozia Raheem*, 2015 CLC 171, *Chanzeb vs. Mst. Yasmeen Bibi*, 2015 MLD 1140, *Liaquat Ali vs. Additional District Judge*, 2012 YLR 1895, *Shamas Ali vs. Additional District Judge, Sambrial*, PLD 2012 Lah. 183, *Sadia Sultan vs. Additional District and Sessions Judge Hafizabad*, 2012 PLD 98
- <sup>46</sup>PLD 2012 Lahore 183
- <sup>47</sup>*Gul Hassan vs. Mst. Naseem Akhtar*, 2014 YLR 1743, *Nadia Bibi vs. Additional District Judge*, PLD 2013 Lahore 41
- <sup>48</sup>PLD 2013 Peshawar 12
- <sup>49</sup>*Syed Haroon Sultan Bokhari vs. Syeda Mubarak Fatima*, 2014 CLC 1270, *Nasir vs. Mst. Rubina and 2 others*, 2012 MLD 1576, PLD 2013 Peshawar 12
- <sup>50</sup>*Munir Anwar vs. Mst. Nabeela Safdar*, 2004 YLR 674
- <sup>51</sup>*Shamshad Begum vs. Abdul Haque*, PLD 1977 Kar. 855
- <sup>52</sup>*Abdul Majid v. Razia Bibi*, PLD 1975 Lah. 766
- <sup>53</sup>The Court relied on case on *Razia Begum vs. Saghir Ahmad*, 1982 CLC 1586
- <sup>54</sup>*Mukhtar Ahmad vs. Ansa Naheed*, PLD 2002 SC 273 (a)
- <sup>55</sup>*Ibid.*
- <sup>56</sup>*Parveen Begum vs. Muhammad Ali*, PLD 1981 Lah.116
- <sup>57</sup>*Ibid.*
- <sup>58</sup>PLD 2003 Pesh.146, See also *Malik Ghulam Nabi Jilani vs. Mst. Pirzadi Jamila*, PLD 2004 SC 132
- <sup>59</sup>PLD 1998 Lahore 52
- <sup>60</sup>PLD 2003 Peshawar 146
- <sup>61</sup>*Ibid.*
- <sup>62</sup>Furqan Ahmad, "Role of Some Indian Muslim Jurists in Development and Reform of Muslim Personal Law in India", *JILI* 34:4 (1992), 571.
- <sup>63</sup>Mufti Taqi Usmani, *Khul' ki Haqiqat*, (Karachi: Mamon Islamic Publishers), 6-7.
- <sup>64</sup>*Javed Iqbal vs. Nasreen Akhtar*, PLD 1994 Azad J&K 86 (b)
- <sup>65</sup>KLR 1996 Sh Cases 50c
- <sup>66</sup>PLD 1977 Kar. 855
- <sup>67</sup>1993 CLC 2170 (a)
- <sup>68</sup>*Abdul Rashid vs. Mst. Shahida Parveen* 2013 YLR 2616, *Liaquat Hussain vs. Zil-E-Huma*, 2012 CLC Shariat Court AJK 1386, *Liaquat Ali vs. Additional District Judge and 2 others*, 2012 YLR 1895
- <sup>69</sup>*Rabia Rasheed vs. Faisal Mir* 2013 CLC 1203

- <sup>70</sup>*Abdul Rashid vs. Mst. Shahida Parveen* 2013 YLR 2616, *Shamas Ali vs. Additional District Judge, Sambrial*, 2012 PLD Lahore 183, *Mst. Humaira Majeed vs. Habib Ahmad*, 2012 PLD Lahore 165
- <sup>71</sup>*Nasir vs. Mst. Rubina and 2 others*, 2012 MLD 1576
- <sup>72</sup>*Razia Begum v. Sagir Ahmad*, 1982 CLC (Karachi) 1586
- <sup>73</sup>*Ibid.*
- <sup>74</sup>PLD 1983 SC 169
- <sup>75</sup>*Ibid.*
- <sup>76</sup>1988 MLD 2486
- <sup>77</sup>1987 CLC 57
- <sup>78</sup>*Ibid.*
- <sup>79</sup>PLD 2007 Lahore 626
- <sup>80</sup>*Ibid.*
- <sup>81</sup>Such as *Parveen vs. Muhammad Ali*, PLD 1981 Lahore 116, *Mst. Zahida Bibi vs. Muhammad Masood* 1987 CLC 57, *Shagufta Jabeen vs. Sarwar Bi*, PLD 1990 Karachi 239, and *Dilshad vs. Mst. Musarat Nazir*, PLD 1991 SC 779
- <sup>82</sup>1985 CLC Lah. 2546
- <sup>83</sup>*Ibid.*
- <sup>84</sup>PLD 1990 Karachi 239
- <sup>85</sup>*Ibid.*
- <sup>86</sup>*Muhammad Aamir vs. Nazia Bibi*, 2015 YLR 1667, *Mussarat Iqbal Niazi vs. Judge Family Court*, 2013 CLC 276
- <sup>87</sup>*Muhammad Aamir vs. Nazia Bibi*, 2015 YLR 1667
- <sup>88</sup>*Saeed Alam vs. Family Judge, Rohri*, 2014 YLR 105, PLD 2013 Peshawar 12, *Liaquat Ali vs. Additional District Judge*, 2012 YLR 1895, 2013 MLD 487,
- <sup>89</sup>*Meharban Hussain vs. Zahida Kausar* 2015 MLD SC AJK 955, *Muhammad Arif vs. Saima Noreen* 2015 SCMR 804, *Saima Gul vs. Haider Zaman* PLD 2015 Peshawar 14, *Amel Khan Kasi vs. Noreen Kausar* 2015 CLC Kar. 153, *Shazia Haider vs. Gul Islam* PLD 2014 Peshawar 194, *Major Qama rZaman Qadir vs. Judge Family Court, Jehlum* 2013 PLD Lahore 88, *Humaira Majeed vs. Habib Ahmad* 2012 PLD Lahore 165, *Syed Muhammad Ibrahim vs. Anam Ahmed* PLD 2012 Karachi 478, *Wahid ul Islam vs. Shaheen Akhtar* 2011 CLC Lah. 566, *Abdul Aleem Khan vs. Tabinda Naseer Qazi* 2011 PLD Karachi 196, PLD 2014 FSC 43, *Ishrat Bibi vs. Muhammad Arshad* 2013 MLD Peshawar 537, *Liaquat Hussain vs. Zil e Huma* 2012 CLC Shariat Court AJK 1386
- <sup>90</sup>*Saeeda Javed vs. Javed Iqbal* PLD 2013 Peshawar 88, *Muhammad Faisal Khan vs. Sadia* PLD 2013 Peshawar 12, *Gul Hassan vs. Mst. Naseem Akhtar* 2014 YLR 1743
- <sup>91</sup>PLD 2013 Peshawar 12
- <sup>92</sup>*Saleem Ahmad vs. Govt. of Pakistan*, PLD 2014 FSC 43, *Saeeda Javed vs. Javed Iqbal* PLD 2013 Peshawar 88
- <sup>93</sup>*Chanzeb vs. Yasmeen Bibi* 2015 MLD Peshawar 1140, *Sajjad Hussain vs. Judge Family Court, Mailsi* 2015 CLC Lahore 1347
- <sup>94</sup>PLD 2013 Peshawar 12
- <sup>95</sup>*Sajjad Hussain vs. Judge Family Court, Mailsi* 2015 CLC Lahore 1347