

IN THE FEDERAL SHARIAT COURT
(Original Jurisdiction)

Present

MR.JUSTICE HAZIQL KHAIRI, CHIEF JUSTICE
MR.JUSTICE DR.FIDA MUHAMMAD KHAN
MR.JUSTICE SALAHUDDIN MIRZA

SHARIAT PETITION NO.3/L OF 2005.

Saleem Ahmad son of Mushtaq Ahmed,
R/o 720/D, near Water Tank, Adam Chowk,
Ghulam Muhammad Abad, Faisalabad..... Petitioner.

Versus

- 1.Govt. of Pakistan through
Attorney General of Pakistan.
- 2.Govt. of Province of Punjab,
through A.G. Punjab,
- 3.Mudassar, Ex-wife of Saleem Ahmed,
D/o Haji M.Zulfiqar, resident of
Nehar Road Liaqat Town, Faisalabad.... Respondents.

Counsel for the petitioner Mr.Riazuddin Siddiqui,
Advocate.

SHARIAT PETITION NO.2/L OF 2006.

Muhammad Suleman Yahya son of
Suleman Asif, R/o St.No.7 Gulbahar Colony,
Mian Academy Road Lahore Cantt;
Lahore. Petitioner.

- 1.Federaton of Pakistan through Secretary
Ministry of Law & Parliamentary Affairs,
Islamabad.
- 2.Muhammad Amin Shahzad, Learned
Judge Family Court, Lahore.
- 3.Mst. Rukhsana Kausar wife of
Muhammad Sulamen Yahya,
R/o Nursing Hospital Jail Road,
Lahore. Respondents.

Counsel for the petitioner. Mr.Ejaz Anwar Butt
Advocate.

SHARIAT PETITION NO.1/K OF 2007

S.Mohiuddin M. Bukhari, son of
S.Barkat Ali Bukhair, resident of
House No.C-31/1, Block-5,
Gulshan-e-Iqbal, Karachi. Petitioner.

Versus

1. Federation of Pakistan through
Secretary, M/o Law, and Parliamentary Affairs,
Islamabad.
2. Mr.Jawed Haider Phulpoto,
Learned Judge Family Court, Karachi. Respondents.
3. Dr.Naheeda Begum D/o Late Mirza
Saeed Baig, resident of 5/10, block-3 G,
Nazimabad No.3, Near Gol Market,
Karachi.

Counsel for the petitioner. Mr.M.Shafi Muhammadi,
Advocate.

SHARIAT PETITION NO.2/K OF 2007.

Sheraz Akram son of Muhammad Akram,
R/o Houise No.A-244, Aladin Park, Block-11,
Gulshan-e-Iqbal, Karachi. Petitioner.

Versus

- 1.Federation of Pakistan through
M/o Law & Parliamentary Affairs,
Islamabad.
- 2.Mrs Alia Malik, Learned Judge Family Court,
Karachi, East Karachi.
- 3.Mst.Mehreen Mushtaq D/o Mushtaq Ahmed,
R/o Flat No.B-78, Sunny Pride,
Gulshan-e-Johar, Block No.19, Mian
Rashid Minhas road, Karachi. Respondents

Counsel for the petitioner. Mr.Abdul Nasir Sheikh,
Advocate.

SHARIAT PETITION NO.3/K OF 2007.

S.Matanat Mouzzam Bukhari, son of
Barakat Ali Bukhari, R/o H. No.786,
Neel Kot, Bosan Road, Multan Petitioner.

Versus

- 1.Federationof Pakistan through M/o
Law and Parliamentary Affairs,
Islamabad.
- 2.Alliya Malik, Learned Judge Family Court,
No.5, East Karachi.
- 3.Mrs. Arfa Begum, R/o Late Mirza Saeed Baig,
R/o H.No.5/10, Block 3-G, Nazimabad No.3,
Near Gol Market, Karachi. Respondents

Counsel for petitioner. Mr.M.Shafi Muhammadi,
Advocate.

SHARIAT PETITION NO.1/I OF 2007.

Ibad-ur-Rehman Lodhi, Advocate Supreme
 Court of Pakistan, R/o E-1/6, Holy Family Road,
 Satellite Town, Rawalpindi. Petitioner.

Versus.

Secretary, M/o Law, Justice and Parliamentary
 Affairs, Islamabad. Respondent.

Counsel for the petitioner. Nemo.

Counsel for Federal Government. Sardar Abdul Majeed,
 Standing Counsel for
 Federal Government.
 Mr.Shafqat Munir Malik,
 Addl; A.G, Punjab.
 Mr.M.Azam Khan Khattak,
 Addl; A.G. Baluchistan
 Mr.Fareed-ul-Hassan,
 Assistant A.G, Sindh.
 Mr.Muhammad Sharif Janjua,
 Advocate for A.G, NWFP.
 Mr.Ali Nawaz Kokhar, and
 Mr.Nasruminallah, S.O (L-A)
 Ministry of Human Rights,
 Islamabad.

Jurist consulta/Amicus Curiae Dr..Muhammad Farooqi,
 Dr.Muhammad Tahir Mansoori,
 Prof.Sajd ur Rehman Siddiqui,
 Dr.Hafiz Muhammad Tufail,
 Dr.M.Aslam Khaki
 Amicus Curiae

Date of Institutions. 18.4.2005, 17.2.2006,
 24.4.2007, 18.5.2007,
 26.5.2007, 14.7.2007.
 respectively.

Date of hearings. 11.3.2008, 25.3.2008,
 22.5.2008 (Judgment Reserved)
 Re-hearing 6.1.2009, 27.1.2009,
 11.2.2009 and Judgment reserved
 on 19.3.2009.

Date of decision. 28-5-2009

JUDGMENT

DR. FIDA MUHAMMAD KHAN J.- These six Shariat Petitions bearing No.S.P.3/L-2005, S.P.2/L-2006, S.P. 1/K-2007, S.P. 2/K-2007, S.P.3/K-2007 and 7/I-2007 are, respectively, filed under Article 203-D of the Constitution of Islamic Republic of Pakistan,1973, by Muhammad Suleman Yahya son of Suleman Asif, Saleem Ahmad son of Mushtaq Ahmad, S. Mohiyuddin Bukhari son of S. Barkat Ali Bukhari, Shiraz Akram son of Muhammad Akram, S.Matanat Muazzam Bukhari son of Barkat Ali Bukhari and Ibadur Rehman Lodhi, Advocate. The Petitioners have challenged sub-section (4) to section 10 of the Family Court Act, 1964, hereinafter referred to as the said Act, on the ground that it is repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (ﷺ).

2. For easy reference Section 10 of the said Act, as amended, is reproduced. It reads as mentioned hereinunder:-

Section 10: **Pre-trial Proceedings.** (1)
When the written statement is

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filed, the Court shall fix/ an early date for pre-trial hearing of the case.

(2) On the date so fixed, the Court shall examine the plaint, the written statement (if any) and the précis of evidence and documents filed by the parties and shall also, if it so deems fit hear the parties, and their counsel.

(3) At the pre-trial, the court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties, if this be possible.

(4) If no compromise or reconciliation is possible, the Court shall frame the issues in the case and fix a date for [recording] of 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 falls, shall pass decree for dissolution of marriage forthwith and 'shall also restore to the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage.'

3. In order to decide these Shariat Petitions the Court prepared a questionnaire relating to the impugned

amendment and sent that to the jurisconsults for their consideration and opinion. The said questionnaire reads as under:-

1. In the Quranic verse: which reads "If you fear that they both will not observe the limit of Allah (2.229) who is the addressee: The Qazi, Ul-ul-amr or the spouses?
2. In the case of Sabit bin Qais and Jamila, the Holy Prophet asked Sabit bin Qais to dissolve the marriage in lieu of the garden granted to Jamila. In which capacity the Holy Prophet asked Sabit to release Jamila from marriage bond. Whether this order passed by the Holy Prophet amounts to a court verdict in his capacity as being Qazi-ul-Quzat, or as head of the State or as a Messenger of God?
3. How can you evaluate the views of contemporary Ulema who are of the view that the Court is not empowered to dissolve the marriage without consent of the husband while on the other hand the august Supreme Court of Pakistan, Maulana Maududi and some Egyptian scholars have divergent views?
4. These Petitions were fixed for hearing, from time to time, at the Principal seat as well as at its Branch Registry, Karachi. Except Mr.Ibardur Rehman Lodhi, Petitioner, all other petitioners or their counsel were heard in detail. Dr. Aslam Khaki, Dr. Hafiz Tufail, Dr.

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Tahir Mansuri and Dr. Yousuf Farooqi who were appointed as Jurisconsults by the Court also entered appearance, made submissions and submitted their written comments. A consolidated statement of their opinion is annexed to this judgment as Appendix-A. Various Fatawas were submitted in support of the contentions made by the petitioners. Copies of these Fatawas are on record. The gist of these Fatawa can be summed up in the following words:-

“Khula’ can be granted at the instance of the wife only with the consent of her husband, per terms mutually agreed upon. The Qazi has no authority to order dissolution of marriage by way of Khula if the husband does not agree to it”.

5. Before dealing with the impugned section it may be pertinent to mention that Federal Shariat Court was established by virtue of Presidential Order No.1 of 1980, incorporated in the Constitution of Islamic Republic of Pakistan, 1973 as chapter 3-A. The functions of this Court, mentioned therein, include examining and deciding any law or provision of law, as defined in Article 203-B(c), on the touch stone of injunctions of Islam contained in the Holy Quran and



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Sunnah of the Holy Prophet (ﷺ). Defining the law or provision of law, Article 203-B(c) lays down that the law to be examined and decided, inter-alia, includes any custom or usage having the force of law but does not include the Constitution, Muslim Personal Law and any other law relating to the procedure of any Court or tribunal. In view of this bar, therefore, laws or provisions of law pertaining to various aspects of Muslim Personal Law are excluded from being examined by this Court. That's why laws dealing with Muslim Personal Law whenever challenged before this Court could not be examined and Shariat Petitions filed in this respect were always dismissed in limine for want of jurisdiction. However, in 1994, a verdict passed by the Hon'ble Shariat Appellate Bench of Supreme Court of Pakistan changed this position. While deciding a case titled "Dr. Mehmood ur Rehman Faisal versus Government of Pakistan", reported as PLD 1994 SC 607, the Hon'ble Shariat Appellate Bench interpreted the expression "Muslim Personal Law" and held as mentioned here in under:-

"The expression "Muslim Personal Law" used in Article 203-B(c), therefore, in our view means

the personal law of each sect of Muslim based on the interpretation of Quran and Sunnah of Holy Prophet (Peace be upon Him) by that sect. Therefore, a law which a particular sect of the Muslims, considers as its personal law based on its own interpretation of Holy Quran and Sunnah is excluded from being scrutinized by the Federal Shariat Court under Article 203-D of the Constitution as it would fall within the meaning of "Muslim Personal Law". All other codified or statute laws which apply to the general body of Muslims will not be immune from scrutiny by the Federal Shariat Court in exercise of its power under Article 203-D of the Constitution. Mere fact that a codified law or a statute law applied to only Muslim population of the country, in our view, would not place it in the category of "Muslim Personal Law" envisaged by Article 203-B (c) of the Constitution.

6. Thereafter, in view of the dictum laid down in the above judgment, the Federal Shariat Court started examining and deciding the Shariat Petitions pertaining to Muslim Personal Law, when it considered, prima-facie, that the impugned statute law was applicable to the general body of Muslims and not merely based on the interpretation of Holy Qur'an and Sunnah by any particular sect. Since all the petitioners, who have challenged the afore-said provision of law, produced

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various Fatawa issued by different Muslim scholars belonging to various schools of thought/sects, we admitted all these petitions for regular hearing to consider and examine in-depth the impugned provision, in the light of injunctions contained the Holy Qur'an and Sunnah of the Holy Prophet (ﷺ) .

7. In this connection, however, it is pertinent to point out that this Court is vested with the power to declare only those laws/provisions of laws, as defined in Article 203-C(b) of the Constitution, on the touch stone of Injunctions of Islam as contained only in the Holy Quran and Sunnah of the Holy Prophet (ﷺ). As such its scope and jurisdiction is limited to the Holy Qur'an and Sunnah of the Holy Prophet (ﷺ) only. With great regard and utmost respect for the scholarship, 'Taqwa' and deep insight of the eminent Aimma Ezam (رضي الله عنه) and Ulema kiram(رضي الله عنه) this Court cannot declare any law or provision of law merely on the basis of views, verdicts and Fatawa issued by the honourable scholars whosoever they might be. We believe that the honourable scholars of recognized schools of Islamic Fiqh must have, after

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thorough considerations, based their opinions on the Holy Quran and Sunnah of the Holy Prophet (ﷺ) and Sunnah of His companions. However, unless there is a clear specific "Nass" of the Holy Quran and Sunnah of the Holy Prophet (ﷺ), prohibiting or enjoining commission or omission of any particular act, this Court cannot declare any law or provision of law as repugnant to the Injunctions of Islam.

8. Before embarking on the point at issue, it would be useful at the outset to give a summary of the concept of Marriage, Divorce and Khula, as contained in the Holy Qur'an and Ahadith.

9. Marriage in Islam is a commendable institution designed as a basic social unit. Its main objectives are, inter alia, as follows;—

- a) Procreation of children, preservation and perpetuation of the human race, through legitimate sexual intercourse between a man and a woman whose relationship as husband and wife is publicly declared and made known to the society at large. The Holy Qur'an says;—



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"O Mankind, be conscious of your duty to your lord, Who created you from a single soul, created of like nature, his mate, and from the two created and spread many men and women" (4:1).

"Your wives are for you to cultivate: so go to your cultivation whenever you wish, and take care of what is for you, and heed God and know that you will meet Him".(2: 223)

b) Protection of morals through legally justified satisfaction of natural biological urges and, resultantly, curbing pre-marital or extra marital sex. The Holy Qur'an calls marriage 'Hisn' (حِسْن) which means a fortress, a castle i.e. protection against illegal sex relations. The Holy Qur'an referring to this aspect says:-

"So marry them with their guardian's permission and give them their marriage portions as wives, they being chaste, nor committing fornication or having illicit friendship". (4: 25)

At another place, the same point is highlighted with reference to the man":

"And respectable, believing women (are lawful) as well as respectable women from among those who are given the Book before you have given them their marriage portion and taken them in wedlock, nor fornicating or having illicit friendship" (5; 5)

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c) Establishment of sound emotional, spiritual, happy, lovely and peaceful life-long companionship. The Holy Qur'an highlighted this aspect and says:-

"And (one) of His signs is that He created for you, of yourselves, spouses so that you may console yourselves with them (and find rest and tranquility in them). He has set between you love and mercy". (30 : 21)

10. At another place, the relationship between the spouses has been described as that between 'the body and the garment'.

"They are garments for you and you are garments for them" (2 : 187)

Resembling the relationship of spouses to garment is very meaningful. The garment is something nearest to the body, protecting it from exposure to any thing harmful, covers and adorns it and adds to its beauty. The spouses are also supposed to be very close to each other, protecting each other's honour, life and property. This function of marriage is set forth in the form of prayer in a number of verses:

"Our Lord! Grant us in our spouses and our offspring the comfort of our eyes and make us a model for the heedful. (25 : 74)

My Lord! Make me keep up prayer and (also) let my offspring [do so]. Our Lord accept my appeal! Our Lord, forgive me and my parents..." (14, 40, 41)

11. Here we may mention that although the marriage has a moral, legal and spiritual bearing on the parties and is publicly sanctified by a "Khutba", in the presence of witnesses, and is rightly considered a Sunnah of the Holy Prophet (ﷺ), it is not a sacrament; it is not irrevocable but, in essence, it is civil contract between husband and wife which creates mutual rights and obligations. This contract is a life-long commitment, meant to last happily for the whole life between husband and wife, as hinted at by the Quranic verse, calling it "a firm pledge" (4 : 21). The main purpose referred to by another Quranic verse (30: 21) is love, peace and tranquility and therefore both the spouses are expected and required to maintain cordial, harmonious and lovely relations. For this purpose various instructions have been given by the Holy Qur'an. It has ordained "Live with your wives gracefully" (4:19). In continuation of the same it has

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highlighted the importance of tolerance and peaceful coexistence, it says: "If you dislike them in any manner, it may be that you dislike something in which Allah has placed much good" (4: 19)

12. Both the spouses have mutual rights and obligation and, as a matter of right, must enjoy the same, having regard to the moral, social and ethical values, as has been unambiguously advised in the verses mentioned herein above.

13. However, there are always ups and downs in the mutual relations between the spouses. At times the relations become so strained that the spouses feel unable to maintain a happy peaceful union within the limits prescribed by Almighty Allah and His Messenger (2:229). In such circumstances it has been directed that:-

"If you fear a breach between the two (i.e. husband and wife), appoint an arbitrator from his people and an arbitrator from her people; if they both want to set things right Allah will bring about reconciliation between them. Allah is All-Knowing, All-Aware" (4 : 35)

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The objective of this direction is to make every possible effort to save the marital contract intact and help the spouses in maintaining their happy union, in the best personal and social interests. Actually the institution of marriage is the backbone of society at large. All relations which bind people together and keep them connected with each other spring out from this single contract. The spouses, after some period of their marriage becomes parents, their children turn into brothers and sisters and resultantly the relations interse, spread in vertical and horizontal offshoots and form basis for a large universal community. The Holy Qur'an referring to the same says:

"O people! Fear your Lord who created you from a single being and out of it created its' male: and out of the two spread men and women" (4: 1)

By the way it is one of the three verses recited by the Holy Prophet (ﷺ) at the time of declaration of the Nikah between spouses, and since then, is still

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repeatedly recited in formal "Khutba" on all such

occasions. The other two verses are as follows:

- a) Believers, fear Allah as much as He deserves to be feared, and so that you do not die in complete submission to Allah (3: 102).
- b) Believers, fear Allah and always speak the truth. Allah will set your deeds right for you and will forgive you your sins. Whoever obeys Allah and His Messenger has achieved a great triumph (3: 70,71)

Obviously, the recitation of these verses at the time of performing Nikah ceremony is not just a mere formality to grant sanctity to the marriage ceremony. The objective is to remind the people, mostly consisting of the relatives and friends of both the spouses, to keep in mind the instructions contained in these verses and remain conscious of their mutual rights and obligations. They are ordered to obey all commands of Allah and follow the footsteps of His Messenger (ﷺ),

Who categorically said:

"The best among you is the one who is best to his family (Hadith)

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These are some of the moral and legal injunctions to keep the social contract made between spouse consistently continued with love, peace and harmony as far as possible. However, matters do not remain ideal all the time. The arbitration to bring about peace between the spouses may not succeed. The reconciliation efforts may fail altogether and the spouses, resultantly, may come to a dead lock. Then naturally both the spouses are allowed to terminate the contract entered into earlier by their mutual consent. According to Islamic injunctions the marital contract, in circumstances, can be dissolved either by the husband arbitrarily, on his own initiative, or at the instance of the wife, on the basis of Khula, or by mutual agreement. In all these options there are certain conditions to be followed. However, the spouses have been reminded to keep in mind that both divorce and "Khula" are most undesirable options and are allowed only when they genuinely come to the conclusion that continuation of their union is harmful, making them unable to perform their mutual obligations amicably enough to live within the bounds prescribed by Almighty Allah. The Holy Prophet (ﷺ), while

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referring to Divorce is reported to have said that the most detestable of lawful things in Allah's view is divorce. Regarding exercise of the right of Khula the Holy Prophet (ﷺ) said "Any woman who asks "Khula" from her husband without justification will be deprived of the fragrance of paradise—(Tirmizi).

14. Be that as may, a marriage may be dissolved not only by Talaq (divorce), which is the arbitrary act of the husband, but also by mutual agreement of the spouses which is called "Mubarat". Likewise it can be dissolved at the instance of the wife in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. Termination of the marriage by way of Talaq or Khula are the unanimously recognized ways of the dissolution of marriage and continuously being followed since the period of Holy Prophet (ﷺ) till date, whenever occasions demanding the same have arisen. Normally, extra judicial divorce is preferred in Islam to save the spouses from unnecessary litigations. Islam rightly expects the Muslims to be God fearing responsible and mature enough to act wisely and judiciously. However,

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all people are not alike. The aggrieved spouse may not be reasonable. Therefore, in this connection, a question regarding the exercise of the right of "Khula" by the wife has been agitated to the effect that whether dissolution of marriage when asked at the instance of wife can be decreed by a Qazi himself or even then also, it would be subject to the approval of her husband.

15. We have heard the parties, their learned counsel and the learned Jurist-consults.

It may be mentioned that the petitioners with reference to their personal cases in the Family Courts also sought relief in personum with a prayer to stay the proceedings before the Family Courts. However, in view of the jurisdiction in connection with Shariah Petition, conferred upon this Court, the prayer for granting relief in personum could not be allowed. The impugned provision of law was however examined and was not found to be in conflict with any specific injunction contained in the Holy Qur'an and Sunnah of the Holy Prophet (ﷺ). The reasons for our reaching

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at this conclusion are summed up in the subsequent paras.

The majority of learned counsel for petitioners as well as of the Jurist Consults contended that dissolution of marriage by way of Khula can be effected only by an offer from the wife to compensate the husband if he releases her from his marital tie, and acceptance by the husband of the offer. In their opinion a Qazi before whom prayer for dissolution of marriage is made is not authorized to decree in her favour if the husband is unwilling to accept the offer. This means that the husband has an upper hand in the matter throughout and the wife unless allowed and divorced by the husband, on her demand for Khula before a Qazi, has still to continue in his wedlock for ever. They placed reliance on the verses of the Holy Qur'an and Ahadith, referred to above, and particularly on verse 2:237, 2:228, 4:434 and the famous Ahadith regarding the cases of "Khula" asked for by Jamila and Habiba from Sabit Inb Qais, during the period of Holy Prophet (ﷺ). They contended:

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- that, the proviso of Section 10(4) of the Family Courts Act, 1964 has made it binding on the Court to pass a decree in case reconciliation fails at pre-trial stage without recording the evidence in the matter which is against the Injunctions of Holy Quran and the Sunnah of the Holy Prophet (ﷺ) as without producing any evidence in respect of liking and disliking on the basis of which the compromise is refused during the pre-trial proceedings the Family Court is bound to pass a decree for dissolution of marriage.
- that, although there are several sects/maslaks prevailing in the country with different views yet, in the matter of Khula there is no dispute over this aspect that the Qazi is bound to do his best to bring a compromise between husband and wife.
- that, according to "Fatawas" issued by the Ulema of different schools of thought in respect of the decree for "Khula" in the matters of marriage show that the provision relating to Khula which has to be granted by the court is against the injunction of Holy Quran and the Sunnah of the Holy Prophet (ﷺ).
- that, "Khula must mean only to show positively by producing tangible evidence that the conduct of the husband

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tantamounting to acute disliking by the wife and is not her simple unfounded wish.

that, the said amendment is repugnant to the Injunctions of the Holy Quran and the Sunnah of the Holy Prophet (S.A.S.), therefore; it is liable to be set aside and struck down from the Statute Book.

The Petitioners placed reliance on the following verses of the Holy Quran/Ahadith:

- "Divorced women shall keep themselves in wanting for three menstrual courses and it is unlawful for them, if they believe in and the Last Day, to hide whatever Allah might have created in their wombs. Should their husbands desire reconciliation during this time, they are entitled to take them back into wedlock (2: 228)

"Such divorce may be pronounced twice; then either retain them in a becoming manner or send them away with kindness. And it is not lawful for you that you take anything of what you have given them (your wives) unless both fear that they cannot observe the limits prescribed by Allah. But if you fear that they cannot preserve the limits prescribed by Allah, then it shall be no sin for either of them in what she gives to get her freedom. There

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are the limits prescribed by Allah, so transgress them not; and who transgresses the limits prescribed by Allah, it is they that are the wrong doer." (2: 229).

- "And when you divorce your wives (by a revocable) divorce, and they approach the end of their appointed period, then either retain them in a becoming manner or send them away in a becoming manner, but retain them not wrongfully so that you may transgress."
- "And the women have rights similar to those (of men) over them in equity but men have a rank above them." (2 : 231)
- "It is reported from Ibn-Abbas that the wife of Sabit-bin Qais came to the Messenger of Allah and said "O Messenger of Allah, I do not reproach Sabit in respect of character or religion but I do not want to be guilty of infidelity in Islam". So the Messenger of Allah said to her. "Would you give him back his garden?" She said "Yes". The Messenger of Allah said "Accept the garden and give her one Talaq" (Bukhari Bol.II, p.794 printed 1357 at Nur Muhammadi Asha Almatabi, Delhi) and in another version (also in Bokhari) "Will you give back his garden to him?" She said, "Yes". So she returned it to him and he (the

Messenger of Allah) ordered him and he separated her."

- (After reciting the narrators) Habiba, daughter of Sohil, was the wife of Sabit-bin-Qais-bin-Shamas and he was a short-statured and ugly man. She said, "O Messenger of Allah. By God, if I did not fear God, I would have spat at his face when he comes to me." The Messenger of Allah said, "Will you return his garden to him? "She said, "Yes", so she returned his garden to him and the Prophet of Allah separated them (Ibn-i-Maja vol.1, page 263.

Muhammad bin-Sirin used to say that their (other named) say that "Khula" is not possible, except before the Sultan. (From Saeed b. Jabeer Tabai).

- "Khula" will take place only when the husband first tries to advise the woman against it. If she accepts the advice well and good, otherwise, he might beat her. If she accepts, good, otherwise, both will go to the Sultan (i.e. persons in authority including Qazi or Court). The Sultan will then appoint Hakam from her family and another from his. Each of the Hakams will convey what he has heard from his client to the Sultan. Then if the Sultan comes to the conclusion that they should separate, he will separate them and if he forms the

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opinion that they should live together, he will order accordingly. (Almohallah-ibn-Hazam, vol.X, page237)

16. Some of the other prominent Jurist-consults, however, supporting the impugned provision of law contended that consent of the husband in case of Khula was not necessary and the Qazi, being addressee in verse 2;229, could order dissolution of marriage on the basis of Khula even if the husband was unwilling and refused to divorce his wife. They placed reliance on different interpretation of the said Quranic verses and Ahadith, relied upon by the petition.

17. Here we deem it appropriate to mention again even at the cost of repetition that Islamic Injunctions regarding the male and female genders, are based on equality without any discrimination whatsoever. This was a revolutionary step taken by Islam in a period when gender discrimination was at its peak, specially among Arabs and Indians. It is established on record that the women were deprived of all rights, even the right to live. The new born girls were put to death by being buried alive in the ditches (16, 58, 59). They

had no right to inherit or own any property. They had no respect whatsoever and were treated like chattel. However, Islam gave them the highest possible social status. Heaven was declared to be under the feet of mothers (Hadith). It was ordained that they be treated with dignity and honour (4: 19). As a wife her rights were declared to be at par with those of her husband (2: 228). Her rights as mother, as wife, as daughter and as sister were explained in unequivocal terms. Their rights in respect of honour, status, choice of a life partner, education, dower, maintenance, evidence, inheritance, participation in socio-political life etc have been clearly spelled out in great detail. However, lest we digress from the main issue, we do not want to dwell any more on these aspects. Here we are concerned about her right to separation on the basis of "Khula" and therefore we would confine our discussion to this aspect only.

18. The word "Khula" literally means "to put off". In the context of verse which states that "They are garments for you and you are garments for them" It denotes laying down by the husband of rights and

authority over his wife, at her instance, on acceptance of consideration by means of the word "Khula". It signifies as conditional situation on the part of wife, entered into for the purpose of dissolving the marital tie at her instance, in lieu of a compensation paid or agreed to be paid by her to the husband out of her property. In case of mutual agreement on such an arrangement, the wife needs not go to court and ask for dissolution of her marriage as in such a situation the husband would release her from the marital bond and the wife would be free to marry any other person after the 'iddat' period, as would be required in her case, if she is or is not pregnant. The relevant verse in this connection is 229 of Sura Al-Baqara (Reproduced herein above). As is evident, that mutual arrangement and agreement for putting an end to the marriage tie is not sinful in any way and appear commendable in case no reconciliation is possible. But a question arises if the husband does not agree to this arrangement and refuses to release her from his marital tie by not accepting any compensation even and also declines to divorce her, what should be the course of action for the wife? What would she do if reconciliation fails and the

husband proves adamant to dissolve the marriage? Will it be justified to leave the wife who can not live happily or perform her marital obligations grope in the darkness? Should she be pushed back to her husband to remain tongue-tied, tight-lipped, depressed, dejected, having a miserable survival throughout her whole life? Should she be kept, at the mercy of her in-laws, vulnerable to indecent immoral life? Can anyone call this sort of situation morally justified on any standard? Will this position assigned to her not defeat the very object of marital peace and tranquility? Who will be considered responsible if she can not bear the mental agony in this state of affair and put an end to her life by setting herself on fire or adopt any other method for committing suicide, which is our normal observation, off and on, in different parts of the country? who will stop or what will prevent her to administer poison to her husband if she finds herself entangled in a "holy dead lock"?

We put these questions to almost all the advocates and scholars but no satisfactory solution was suggested even. As mentioned above "Justice for all" is

the essence social teachings of Islam. No one is to be harmed.

It has been declared that "Let no harm be inflicted nor suffered in Islam". The Holy Quran has repeatedly stressed the husband's duty to keep the wife with kindness. It has been directed to keep them in good fellowship or let them go with grace (2: 229). At another place it has asked the husband to "retain them in kindness or set them free with kindness" (2:231). The husbands have been ordered not to retain them (unjustly) for injury and not to exceed the limits (2. 231). "Treat them with grace and kindness" (4:19) is a command and it has been to obeyed in letter and spirit. These pieces of command are not mere instructions or admonitions to be left to the sweet will of the husband only. An Islamic State is bound to implement them through suitable legislation so that it is ensured that none of the spouses is harmed or treated unjustly. It is duty-bound to constitute proper judicial forums where every one gets justice and where grievances are properly redressed. Obviously Islam does not intend to force a wife live a miserable life, in a hateful unhappy

union, for ever. If she is unhappy and reconciliation fails, she should be entitled to get relief whatsoever. This is what justice demands. This is referred to in the Verse: "Women shall have rights similar to the right against them, according to what is equitable" (2: 228).

19. Here it is pertinent to point out that "Khula" and 'Mubarakat' operate as a single, irrevocable divorce. Even thereafter both the spouses can contract fresh marriage with mutual consent, of course if they want to, without any intermediary marriage of the wife with another person, as is required in the case when a husband pronounces divorce for the third time. However, Iddat shall be incumbent on the wife if she wants to contract marriage with some one else.

20. Now first of all we refer to the following Verses/Ahadith repeatedly quoted in support of the petition.

a) "And if you divorce them before consummation, which you have already fixed for them an amount (of dower) then there is one half of what you have fixed, unless they (the women) forgive or forgives the one in whose hand lies the marriage tie" (2: 237)

b) "Divorce women shall keep themselves waiting for three menstrual courses, and

it is not permissible for them to conceal what Allah has created in their, if they believe in Allah and in the Last Day. Their husbands are best entitled to take them back in the meantime, if they really want reconciliation; and women have the same rights against their men as men have against them though for men there is a degree above them. Allah is All Powerful, All Wise (2: 228).

- c) Men are the protectors (i.e. care takers and maintainers) of women because Allah has made some of them excel the other (in strength), and because they spend out of their wealth (to support them)....." (4: 34).

Now let us consider the meaning of the verse at S.No.(a). As is evident the subject matter herein is the payment of dower in case the divorce takes place before consummation of marriage when the husband has not touched his wife while the amount of dower has already been fixed. The verse referring to this says that the wife will be entitled to half of the stipulated dower and the husband will be required to pay her the same amount unless the wife forgoes her claim. If in the second alternative, the husband has already paid full dower to her, he is entitled to take back half of the same. However he may show grace and forgive his claim. This is what is referred to in the verse: " or forgives the "one in whose hand lies the marriage

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tie and the remission (of the man's half) is closer to Taqwa, and do not forget to be graceful to one another. Indeed Allah is Watchful of all what you do"

Obviously this verse is not all related to the issue of Khula. Payment of dower is the obligation of husband and since he is the one in whose hand lies the marriage tie, he alone can forgo his right by not claiming half of the amount of dower, if already paid by him to his wife in full. Thus the question here pertains only to the payment or claiming of dower and not, in any way, to the issue of 'Khula'.

The second verse at S.No.(b) is also in the context of divorced women who have to wait for three menstrual courses before entering into another marital contract, provided they have not conceived and are not pregnant. Since determination of parentage is highly pertinent, they are directed not to conceal what Allah has created in their wombs. So in case of divorce they have to observe the "Iddat" period which is either three menstrual periods, if they are not pregnant, or delivery of the child if they are pregnant, and still in another case when they are too young or too old and have no

menstrual course, three months. However, men have an edge over them in this respect in the sense that they do not have to wait but can marry immediately any time, without any waiting period. Men have a degree in another sense also. They can directly exercise their right of divorce without any recourse to a court of law whereas in case of 'Khula' the wife has to seek indulgence of the court, if her husband does not agree to her demand of 'Khula'. The course of judicial process provides an opportunity to the wife to thoroughly consider pros and cons of her demand for 'Khula'. It is similar to the period of Iddat in case of revocable divorce given by the husband who can, on reconsideration, recall it if better sense prevails. Both wife and husband are provided opportunity to consider and reconsider their course of action and both have to bear financial liability if they insist on separation. No one has any superiority over the other in respect of their rights and responsibilities. It is pertinent to note that this very verse declares unequivocally that women have rights similar to what they owe to their husbands in graceful manner. Thus their rights and responsibilities are similar and there is no



discrimination whatsoever. Men can arbitrarily divorce to dissolve the marital tie and women can ask for her release from the same bond through "Khula", if the parties feel that they cannot live together within the limits prescribed by Allah Almighty. The third Verse at S.No.(c) above is self evident and specifies the responsible position of the husband being accountable for the maintenance of his wife and children. The word used here is **عَلِيٌّ**, plural of **عَلِيٌّ** which means a person responsible for administering managing and protecting the interests of a person or an organization and looks after its affairs,. In the context, this verse refers to the responsibilities of the man who is required to protect, safeguard and provide for the needs of those under his supervision. Obviously, there are psychological and physiological differences between the sexes and they have to perform different roles but, admittedly, no one is superior to the other except by Taqwa (I;e; faith and good deeds). Infact they are complementary to each other. No one can ever exist without the other. Both have similar rights/responsibilities with different roles to play in life. Nevertheless Islam affirms their equality as human beings and advocates and duly protects their

fundamental rights. All these three verses referred to again and again by the petitioner/counsel/Jurist Consult, thus do not specifically create a bar for court of competent jurisdiction to decree the case of 'Khula' when reconciliation fails. After all what are the Courts of law established for? The courts are there to dissolve the disputes that arise between the parties. They can decide all type of matters including, admittedly, dissolution of marriage on certain grounds. One wonders why they are not authorized to decide the case of Khula, if a husband does not at all agree to the divorce of his wife and all the reconciliatory efforts fail. In this view of the matter we find that this verse has nothing to do with the subject of "Khula", in the context as has been agitated and argued.

21. The famous Ahadith pertaining to the incidents of 'Khula' demanded by Jamila and Habiba, as relied upon by the Petitioners, are also not very explicit in this connection. Both the traditions relied upon by the petitioners are narrated as follows:-

"It is stated that one day Jamila wife of Sabit Ibn Qays appeared before the Prophet (ﷺ) and said, "O Messenger of Allah! I and Sabit can

never live together. I saw him coming from the other side with some men. I found that he had the smallest stature, was the blackest and ugliest amongst them: I swear by God that I do not dislike him on account of religious or moral turpitude, but I dislike him on account of his ugliness. I swear by God that if I did not fear God I would spit on his face when he comes to me (meaning that she hated his very sight). O Messenger of Allah ! You can see how beautiful I am while Sabit is an ugly person. I do not blame him for any depravity in his religious practices or morality, but I fear that I may be guilty of transgression of the injunctions of Islam." The Prophet (ﷺ) asked her if she would return the orchard given by Sabit to her as dower. She replied, "Yes: and if he demands more, then I am ready to give him more than that". The Messenger of Allah (ﷺ) said, "No: Not more than what he had given to you". He then asked Sabit to take back the orchard and to release her from the marriage-tie by divorcing her which he did.

The other occurrence is related to another wife of Sabit named Habibah, daughter of Suhayl, which is stated as follows: One day early morning, when the Prophet (ﷺ) came out of his house, he saw Habibah waiting outside. He asked her what the matter was and why she was standing there. She said that she could not pull on

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with Sabit. When Sabit came there, the Prophet (ﷺ) said to him, "Here is Habibah daughter of Suhayl. She has complained against you." Habibah said, "O Messenger of Allah ! I have still got all that Sabit had given me for dower." The Prophet (ﷺ) then ordered Sabit to take it and to release her, that is, to divorce her".

We may mention that in both the cases the words used by the Holy Prophet (ﷺ) are; **فَارْجُلْهَا** (Divorce her) **فَارْجُلْهَا** (separate here), **لَذِّبِرْهَا** (leave her), **لَذِّبِرْهَا** (he ordered him to divorce her) and **فَفَرَقْهُمْ** (He separated them). {For further detailed discussion see Huquq Zawjain by Syed Mawdudi Page 58-80 and Fiqhul Quran by Maulana Umar Ahmad Usmani Vol III Page 398-417.)

22. The upshot of the above discussion is that there is no specific verse or authentic Ahadith that provides a bar to the exercise of jurisdiction by a competent Qazi to decree the case of Khula agitated before him by a wife, after reconciliation fails. As discussed above in detail, the Ayaat and Ahadith relied upon by the petitioners neither specifically relate to the

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issue of Khula nor to the lack of authority of a Qazi duly authorized by an Islamic State to resolve the disputes between husband and wife. The interpretation of the said Verses and Ahadith is also not unanimous.

23. Consequently for the reasons stated above, we dismiss these petitions.


JUSTICE DR.FIDA MUHAMMAD KHAN


JUSTICE HAZIQUŁ KHAIRI
Chief Justice


JUSTICE SALAHUDDIN MIRZA

Announced on 28.5.2009
at Islamabad.
F.Taj/**

Fit for reporting

