

KHUL`A AND THE SHARIAH

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Abstract

Khul`a, Mubara`h and Talaq in lieu of money all are contracts for a counter value depending upon the consent of the parties. The consent is expressed through offer and acceptance. According to most jurists, the contract takes effect even if the parties do not appear before a qadi. It is, however, common practice now to appear before the court for affirmation. All these contracts result in a single irrevocable divorce. From the perspective of the husband these are contracts contingent upon acceptance by the woman. The session of the contract is session of the woman, thus, an offer made by the husband is not terminated if he moves away from the session prior to acceptance by the woman. The session of the woman begins when the offer reaches her. The position is reversed where the offer is made by the woman.

Key Words: Talaq, Khul, Mubarah, Divorce. Iddah'

MAIN ARTICLE

The history of humanity is evident that the customs and traditions of various social systems are far stronger than the laws. The traditional and cultural pattern of societies shows that, for several years women are being ill-treated in the name of customs and have been deprived of the most fundamental rights such as selection and consent to marriage and rights to decide issued connecting to their own marriage. Today, women constitute about more than half of the population of the world but still humiliated and treated as their status is no more than a commodity. ²

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²Munir, Arshad And Gulam Ali Khan, *A Social Custom "Vani": Introduction And Critical Analysis* (VFAST Transactions On Education And Social Sciences, Accessed February 3, 2014 from http://pu.edu.pk/images/journal/alqalam/PDF/4-%20Vani%20Paper%2007-9-12%20_v28_issue40-2013.pdf).

Customs and traditions deprived and oppressed women in different forms and under different circumstances. This is contrary to the teachings of Islam as Allah (ﷻ) granted equal rights to men and women in every subject of life. Marriage is recognized in Islam as a basic and fore step towards prosperity and development of a Muslim society. A peaceful human society is not possible without stability and prosperity among families.³

A Marriage bond is based on mutual consent and not on the traditional mate selection which consist of forced and strange marriage patterns. The characteristic of a Quranic society are that women are equal to men in status and worth as a human being in every regard and in every aspect of life. According to Holy Quran men and women are equal and possess equal status.

يٰۤاَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيْرًا
وَنِسَاءً وَاتَّقُوا اللَّهَ الَّذِي تَسَاءَلُوْنَ بِهِۦٓ وَالْاَرْحَامَ اِنَّ اللَّهَ كَانَ عَلٰیكُمْ رَقِيْبًا ۙ

“O people! Fear your Lord, Who created you from a single soul and from it created its mate and from them both spread abroad a multitude of men and women. Fear God in whom you claim (your rights) of one another, and toward the wombs (that bore you). Lo! God has been a Watcher over you.”⁴

This verse of Holy Quran clearly indicates that men and women are equal and this concept of equality gave equal rights to women along with the men that marriage contract did not only comprise of men’s consent but women’s consent is also important for this sacred contract. However, the pre requisite to recognize these rights is that women have full awareness about their status and rights so to receive these rights with full honor. Allah (ﷻ) said:

اِنَّ اللَّهَ يٰۤاْمُرُ بِالْعَدْلِ وَالْاِحْسٰنِ وَاِتٰى ذِي الْقُرْبٰى وَيَنْهٰى عَنِ الْفَحْشٰءِ
وَالْمُنْكَرِ وَالْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُوْنَ

“Lo! God enjoins justice and kindness and giving to kinsfolk, and forbids lewdness and abomination and wickedness. He exhorts you in order that you may take heed”⁵

In deciding the most important matter of life i.e., marriage and dissolution of marriage, the consent should be borne by both man and woman. In addition to this, awareness can only be attained when men and women both will be aware of rights especially those rights which are compulsory for contracting and dissolving a marriage contract, such as free consent .

Human relations are constantly being established, but they are broken too even though not with the same rapidity. The most important of these relations is the matrimonial bond, which is constituted through a contract called *Nikah*. This contract grants legal approval for the creation of a family by having children and

³Mansoori, Muhammad Tahir, *Family law in Islam* (Islamabad: Shari’ah Academy, 2009),1-2.

⁴Al-Qur’ān,4:1

⁵ Al-Qur’ān, 16:90.

bringing them up in an environment that has been granted legal approval by society. The important contract of *nikah* continues as long as good relations between the husband and wife are maintained. Those contracts that fulfill all the stipulations of the *nikah* contract create devotion and deep affection between the two partners necessary for the permanence and success of a family.⁶

Islam recognizes the value of this institution and advocates marriage as the foundation for families. Indeed, establishing this institution and raising a family are the third principle of the *maqsid al-shari'ah* or the purposes of Islamic law. Marriage is a *Sunnah* of all Prophets which the Islamic Prophet Muhammad re-introduced and passed on to the Muslim *Ummah*. The contract is recommended under normal circumstances, but is deemed obligatory in certain cases. Marriage is a Contract containing the standard essentials.⁷

The contract of marriage with the exception of a *Muta'ah* or temporary marriage, permissible under the *Shi'a* law, is to last for the life-time of the husband and wife. But when relations between the spouses become so strained that a continuation of their union becomes undesirable, the spouses are allowed to terminate it. It can be dissolved either by husband on his own initiative or at the instance of the wife or by mutual agreement. In the first two cases there is breach of the implied contract that the marriage will subsist during the life-time of the parties. If it is the husband who is guilty of this breach, he is penalized by becoming liable for the immediate payment of his wife's deferred dower, while if it is the wife who wants the termination of the marriage, she has, as a rule, to compensate the husband. This termination of the marriage at the instance of the wife is called *Khul'*. It is one of the ways for the dissolution of marriage and has been well recognized and followed from the early period of Islam.

Khul'a is derived from the word *Khal'un* which literally means extracting out one thing from another. Technically, the word *Khala'*, on the line of *Naza'a*, means "taking out" or "taking off", for instance "*Khala'a al-Thawb*" means "he took off the clothes", The term *Khul'a*, in *Shari'ah*, means that a husband after accepting a compensation from his wife renounces over her, his rights and authority under the marriage contract. In Pre-Islamic Arabia women had no right to claim a dissolution of the marriage tie on any ground whatever, unless a special reservation was made in her favor by the marriage contract. As neither a general rule, neither the pre Islamic Arabs nor the Jews recognized the right of divorce for women.

In old times, on the other hand *khul* was a friendly arrangement between the husband and his wife's father, by which the latter repaid the dowry and got back his daughter. The marriage contract was absolutely cancelled, because the material consideration paid by the husband resolved to live no longer with his wife, and yet did not get back the *Mahr*, it is obvious that the women would not be absolutely free under such a theory of the marriage contract as exist in Arabia. The husband had purchased the exclusive right to *use the woman as a wife*, and this right was of the nature of the property, and did not revert to the women or her kin simply because the owner declined to use it.

Basis of *Khul'a*:

The basis and the origin of the legality of *Khul'a* is the Qur'anic verse:

"A divorce is only permissible twice; after that, the parties should either hold together on equitable terms or separate with kindness. It is not lawful for you (men) to take back any of your gifts (from your wives) except when both parties fear that they would be unable to keep the limits ordained by Allah. If ye (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of

⁶Muhammad Munir,"Stipulations in a Muslim Marriage Contract with Special Reference to Talaq al-Tafwid Provisions in Pakistan" *Yearbook of Islamic and Middle Eastern Law* 12:12 (2005), 237.

⁷ Sharif,M.M, *A History of Muslim Philosophy*, (Pakistan:Royaarl Book Company,1983)139.

them if she gives something for her freedom. These are the limits ordained by Allah, so do not transgress them”⁸.

The verse thus means, if there be such a dislike between the husband and the wife that it becomes difficult to lead their life in mutual love and happiness the wife may, on payment of compensation, obtain *Khul'a* from the husband. That is, *Khul'a* is permissible when there is no possibility for happy union between the couple and there is the apprehension that due to their extreme differences they shall not be able to live in accordance with the dictates of *Shari'ah*. However, if the fault lies with the husband, in the fulfillment of his obligations to his wife, the acceptance of compensation for *Khul'a* by him is forbidden in *Shari'ah*.

According to Ibn Rushd the philosophy of *Khul'a* is that it is a right within the power of wife similar to the husband's right of divorce. Thus, when life becomes troublesome for the wife she may make use of her right of getting *Khul'a* effected. Likewise, when some trouble arises for the husband due to the wife, he may make use of his right of divorce.⁹

Shaykh Kamaluddin Ibn Humam says :

“The husband's relinquishment, with the word “*Khul'a*”, of his title and rights under marriage contract in lieu of consideration is called *Khul'a*. Al-Kasani mentions that *Khul'a* is of two types, one is *Khul'a* without compensation and the other is *Khul'a* with compensation. Hence, he writes, “If the husband in case of *Khul'a* without compensation, intended from the word *Khul'a* to affect divorce the same shall take effect without compensation. Indeed, in case of “*Khul'a* with compensation, the *Khul'a* shall not take effect without (mentioning) compensation”.¹⁰

It is an essential condition of *Khul'a* that the parties must stand to one another as husband and wife. It means, in other words, that a marriage be subsisting between them at the time of *Khul'a*. But it is immaterial whether the marriage has or has not been consummated. Moreover, the marriage must be valid. A wife cannot, therefore, exercise a *Khul'a* when the marriage is *batil* (Void) or *fasid* (irregular) because a void or irregular marriage does not create the relationship of husband and wife between a man and a woman. If a wife pays consideration to her husband for obtaining '*Khul'a*' and it transpires subsequently that the marriage was void or invalid then he is bound to return the consideration received by him from the wife as he was not entitled to it.

Proposal may be made by a spouse or other person. It is a necessary condition of *Khul'a* that there must be a proposal by one party and its acceptance by the other party. But it is not necessary that the proposal for *Khul'a* should emanate from one of the parties to a marriage. It can be made by the guardian of a minor. According to some jurists a third party may persuade the husband to give a *Khul'a* to his wife for a consideration agreed to be paid. Thus, according to them, should a third say to the husband, “give a *Khul'a* to your wife in consideration of my house or for so much money belonging to me, and if the husband acts accordingly, a *Khul'a* shall be effected. In the same way if some persons ask the wife if she was willing to seek a *Khul'a* in consideration of a specified return and she agrees and then they ask the husband if he agrees to give a *Khul'a* for the specified consideration and he too agrees then a *Khul'a* shall be effected. A husband's consent to a proposal for *Khul'a* may be express or implied as when he accepts the consideration for a proposed *Khul'a* without expressly giving his consent to it. The marriage shall be dissolved on his acceptance of the consideration even when he does not divorce the wife.

⁸ Al- Quran 11:229

⁹ Ibn Rushd

¹⁰ Al-Kasani, *Badie-Sanie*, Cairo.

The acceptance of a proposal for *Khul'a* must be expressed in the same terms as the proposal, that is, the acceptance cannot introduce a new or different consideration or a different condition. When a wife delivers the consideration demanded by the husband without expressly giving her consent to the husband's proposal, it shall be deemed to be an implied consent and a *Khul'a*. Similarly, it is not necessary that the husband should expressly give his assent to the wife's proposal. Such assent may be inferred from his conduct. Thus where a wife seeks a *Khul'a* for a specified consideration and the husband accept the same, his consent shall be presumed and a *Khul'a* shall be affected as soon as he accepts the same. The wife must give her reply in the same sitting in which she receives information of the husband's proposal. If she fails to do so, her right shall be lost and the husband's proposal shall cease to have any effect. Similarly, the husband should accept the wife's proposal in the same sitting in which he receives the proposal. If he fails to do so, the proposal shall stand cancelled.

The condition that the wife should declare her acceptance to the husband's proposal for *Khul'a* in the same sitting in which she receives it is very hard. It seems to be based on the Muslim jurists' conception of the law of contracts which has lost much of its importance in modern time. Under the present law, an acceptance of an offer has to be made within a reasonable time and it is not only desirable but necessary that effect should be given to this aspect of *Khul'a* also, irrespective of the fact whether it is the wife or the husband who has not express the assent or dissent. The wife can reserve an option in respect of her proposal for *Khul* that she shall have the right to withdraw or revoke her proposal within certain specified time. Whereas, a husband cannot reserve an option in respect of *Khul* that he can with draw or cancel his offer within a specified time.

According to Imam Abu Hanifah a husband can give an option to the wife, to accept or refuse to accept his proposal for *Khul'a* within a certain specified time, Imam Muhammad and Abu Yusuf do not agree with him and hold the option to be invalid. A divorce shall be affected on the acceptance of the husband's proposal by the wife without any regard to the option.

A wife and the husband can propose a *Khul'a* subject to a condition contingent on the occurrence or non-occurrence of certain specified future events. Sometime the parties want to make their position safe before the acceptance of *Khul'a*, the other party should back out after dower has been released or divorce has been pronounced. To provide against such a contingency it is usual to propose a *Khul'a* subject to a condition. Thus the wife may say to her husband, "When you divorce me then you shall stand relieved of the liability for the payment of dower". Similarly, the husband may say, "When you pay me such and such consideration I shall be presumed to have given you a *Khul* and the marriage then shall stand dissolved." An offer for *Khul'a* by the husband should be distinguished from a conditional divorce. The difference between the two is that a *Khul'* pronounced with some such safeguards as mentioned above is effected and the marriage dissolved immediately, the proposal is accepted irrespective of the payment of the consideration for with. In case of a conditional divorce the marriage shall subsist as long as the condition is not satisfied.

Ordinarily intention is a necessary condition of *Khul'a* because the amount of consideration of *Khul'a* cannot be settled when the husband has no intention of giving a release to the wife in lieu of a specified consideration. But as in the case of divorce the Hanfi jurists hold the view that a *Khul'a* given under compulsion is valid. If the husband forces his wife to take a *Khul'a* and she does so, a divorce shall be effected, but the payment of the consideration shall not be incumbent upon her. It is stated in *Jawahir al-Uqud*, if a husband forced his wife to seek a *Khul'* under coercion as by threatening to kill her or beating her or by starving her then a divorce shall be effected but the payment of any consideration shall not be incumbent on her. The divorce in such a case shall be *Raj'i* i.e revocable. Maliki, Shafi'i and Ahmad ibn Hanbal do not accept the validity of a divorce under compulsion.

Whatever is lawful to be accepted for dower can also be lawfully accepted as consideration for *Khul'*. Thus,

it can consist of such things as, immovable property, cash, jewels, etc. But it cannot consist of things which cannot be lawfully possessed by a Muslim. Thus it cannot consist of wine, swine, pork etc. But if the husband agrees to release his wife in consideration of such an unlawful object the *Khul'* divorce shall be effected, but the payment of such consideration would not be incumbent upon the wife. This is due to the fact that the husband cannot lawfully possess such an object and so he cannot ask the wife to give it to him. Under the Maliki law all those objects which are lawful can form the consideration for *Khul'*. If the consideration consists of such things as are forbidden like pork, wine or something which had been obtained by theft or by violent means or by usurpation then the *Khul'* shall be valid but the husband shall not be entitled to any consideration._

Under the Shafi'i law all those objects which can be given for dower can be given for *Khul'* and these should consist of lawful objects. The wife must be capable of delivering it to the husband.

The amount of the consideration to be paid for *Khul'* has to be specified. If a husband grants *Khul'* to his wife without specifying or fixing any consideration and the wife agrees to the *Khul'* an irrevocable divorce shall be effected but no consideration shall be payable by the wife. She shall, however, have to return the dower if she has already realized it. If she has not realized it, it shall be extinguished. Moreover, all the rights of the wife against the husband arising out of the marriage shall also be extinguished.

Legal effect of *Khul'a*

The marriage is dissolved as soon as *Khul'a* is sought or the proposal is agreed to by the other spouse. As soon as a release has been agreed to by both parties, the wife is completely separated from her husband, even though no compensation has been paid as yet.

Observance of "Iddah

Khul'a in its nature is a divorce and brings about the termination of marriage. It is, therefore, incumbent on the wife to observe 'iddah for the same period of time as in the case of divorce, namely, for three terms of menstrual discharge or for three months if the wife is not subject to them.

***Khul'a* under Compulsion:** Ordinarily intention is a necessary condition for *Khula'* because the amount of consideration for *Khula'* cannot be settled when the husband has no intention of giving a release to the wife in lieu of a specified consideration. But as in the case of divorce the *Ahanaf* hold that a *Khul'* given under compulsion is valid. If the husband forces his wife to take *Khul'* and she does so, a divorce shall be effected, but the payment of the consideration shall not be incumbent upon her. It is stated that if a husband forced his wife to seek a *Khul'* under coercion or by threatening to kill her or beating her or by starving her then a divorce shall be effected but the payment of any consideration shall not be incumbent upon her. The divorce in such a case shall be *Raj'i* or revocable. *Maliki, Shafi'* and *Ahmad ibn Hanbal* do not accept the validity of a divorce under compulsion.

***Khul'* under the influence of Drink:-**

There is a difference of opinion amongst the Sunni jurists in respect of a *Khul'* given under the influence of drink. According to Dawud of Isfahan, a *Khul'a* by a drunken man is not valid. *Shafi'* expressed different views at different times. Abu Nasr b. Muhammad b. Salam says that *Khul'* shall be effected only if his act of drinking is voluntary and without any necessity. Abu Yusuf also holds it to be valid. Maliki law holds that a *Khul'* under the influence of drink shall be valid. Both *Shafi'i* and Ahmad b. Hanbal have expressed different views at different times. But the usually accepted view of the Imams is that *Khul'* given under the influence of drink shall be effected.

The underlying wisdom of *Khul'* and *Mubarah*:

Khul and *mubarah* are contracts in which the use of these words without additional stipulations or qualifications implies a certain minimum with respect to claims and waivers. The parties are at liberty, however, to make additional stipulations for other amounts or for claims pertaining to common and shared property. The truth is that these contracts are not dispute oriented; they are based on mutual respect and amicable settlement between husband and wife who decide they cannot live together and must separate. If they have joint property, it can be divided through mutual agreement. The contracts may also be based upon mediated settlement between spouses. This is not difficult to conceive in the west where lawyers sit with the parties and come to a settlement amicably, peacefully and through negotiations. The contract of *khul* and *Mubarah* are also meant for an out-of-court settlement.¹¹

References

- Asghar Ali. Rights of Women in Islam, (2008). Sterling Publishers Private Limited, New Delhi.
- Ahmed, Masud-Bin. The Muslim Family laws (1987) . Kausar Brothers, Lahore Pakistan.
- Baillie, Neil B.E. Digest of Moohummadan Law, Premier Book House, Lahore, Pakistan.
- Hosseini, Ziba Mir. Marriage on Trial, (1997). St Martin Press. New York.
- Hussain, Imtiyaz, Muslim Law and Customs. (1989). Sringar Law Journal Publication, Kashmir.
- Khan, Tauqir Mohammad. Law of Marriage and Divorce in Islam. (2007). Pentagon Press, New Delhi, India.
- Layish, Aharon, Women and Islamic law in a Non-Muslim State, Israel University Press, Jerusalem.
- Mahmood, Dr.Tahir. The Muslim Law of India, (1982). Law Book Company, New Delhi.
- Nasir, Jamal J. The Islamic Law of Personal Personal Status, (1990). kulwer Academic Publishers Group, USA.
- Nyazee, Imran Ahsan .Outlines of Muslim Personal Law Islamabad, 2012. Theories of Islamic Law Islamabad, 2007.
- Qadri, Anwar A. Islamic Jurisprudence in the Modern World, (1981). Ashraf Printing Press, Lahore.
- Russel, Alexander David. A manual of the Law of Marriage, (1979). Law Publishing Company, Lahore.
- Siddiqi, Zakia A. Muslim Women Problems and Prospectus, (1993). MD Publications Pvt Ltd, New Delhi.

¹¹ Imran Ahsan Nyazee, *Outlines of Muslim Personal Law*. Federal Law House 2012.

Schacht, Joseph. *The Origins of Muhammadan Jurisprudence*. Oxford University Press, London.

Singh, Dr Rakesh Kumar. *Muslim law*, (2011), Universal Law Publishing co, New Delhi, India.

Verma, Br. *Islamic law*, (1986). Law Publishers, India

Welchman, Lynn. *Women and Muslim Family Laws in Arab Status*, (2007) Amsterdam University Press,