

A Comparative Study of the Concept of *Khula'* in the Perspective of Sharia' and the Legal System of Pakistan

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Abstract

The study comparatively examines the concept of *Khula'* (خلع) from the perspectives of *Sharia* (شريعة) and the legal structure of Pakistan. The four prominent major Fiqhi schools of thought unanimously prohibit a Muslim woman to obtain *Khula'* (خلع) without seeking the consent of her husband. However, the Maliki school of thought approve the role of intermediaries, the authority in form of the state, the court of the state or the spouses themselves in resolution to the dispute between the spouses, who can decide separation or union with the prior consent of the spouses. Moreover, the legal system of Pakistan also privileges women to get *Khula'* (خلع) without their husband's consent from the court. The paper analyses that the foundation of this law on *Khula'* (خلع) is partially based on the fiqh rulings. Thus, the Pakistani courts seek the validity of its legal position in the rulings of the Maliki school of thought on the concept of *Khula'* (خلع).

Introduction

The study attempts to explore the guiding principles of *Sharia* and the rulings of the Pakistani laws on the issue of *Khula'* (خلع) (Marital Redemption, خلع). According to *Sharia* rulings, a Muslim husband is permitted to divorce his wife if he wills, however; in the case of a wife seeking *Khula'* (خلع) from her husband, the *Sharia* (شريعة) applies some conditions. The question arises whether a woman is permitted to obtain marital redemption or *Khula'* (خلع) from the court without her husband's consent; if yes, then what are the circumstances under which

she can demand *Khula'* (خلع) from the court and what are the conditions which she has to fulfil. There are two major jurist opinions on the validity of *Khula'* (خلع): 1. Jamhoor jurists do not allow women to take *khula'* without seeking the approval of their husbands. 2. Maliki jurists consider the role of arbitrators i.e. the court, or judge in case a wife does not seek the consent of her husband and directly approaches the court.¹

The *Sharia* (شريعة) rulings on *Khula'* (خلع) are based on the principles laid down by the commandments of the Quran and the Sunnah and it guides throughout the walks of life. The *Khula* procedure can be accomplished in certain circumstances where the legal and behavioural rights of the wife are denied or violated: (1) if the husband has been found missing for more than four years without any intimation (2) if the husband is proven impotent, (3) if husband is insane (4) if the husband does not provide bread, clothing, and shelter to his wife. However, the *Khula* suit can be dismissed by the court if a husband manages to comply with the court orders and ensures the provision of both legal and behavioural rights to his wife. Hence, in any of the above-mentioned cases of the denial or violation of matrimonial rights, the wife is entitled to file *Khula'* (خلع) in the court. Specifically, the judge may annul the marriage on his own accord in case of the violation of legal marital rights without the husband's agreement.² However, the husband's consent is mandatory to be taken in case of the violation of the behavioural rights of a wife. Conclusively, the *Khula* can only be approved by the arbiter without the husband's approval in case of the violation of only the legal rights of the wife. Preferably, the prerequisite in hearing the *Khula* case emphasized by Shariah is that the judges are supposed to decide the *Khula'* (خلع) suit after hearing both spouses and the judgement must be made according to the *Sharia* rulings.³

The literal meaning of the term *Khula'* (خلع) is to disrobe the dress, thus it is defined as the man disrobing his wife when she has paid *fidya* through her property. the ,Consequently⁴ husband divorces his wife and separates her from marital bonding. This separation is known as the dissolution of marriage because the husband and wife have made the dress for each other. Allah Almighty has described the marital relationship of man and woman in a very beautiful way that He has likened them both to each other's clothing, just as clothing protects a person from heat and cold, gives a person beauty, and covers him and his dignity. Likewise, husband and wife help and support each other in their sorrows, secrets, and sufferings.

However, the *Sharia* rulings require the consensus of both spouses for the validation of *Khula'* (خلع). No individual, institution or court is authorized to annul the marital contract on demand of wife with her husband's consent.⁵ In case of violation of *Sharia* (شريعة) rulings, the demand for *Khula'* (خلع) is null and void and the woman is bound to stay in the marital contract

with her husband. Consequently, being in the *Nikah* with her present husband, she cannot sign a new marital contract, thus, her second contract is invalid. Such misjudgment may lead her to an intentionally or unintentionally sinful life.

Moreover, *Sharia* (شريعة) instructs the procedural guidelines for the judges to the disposal of the cases of *Khula'* (خلع) which are strictly implemented in the civil courts of Pakistan. Therefore, according to the family laws of the Qur'an and Sunnah, if a *Khula'* matter comes to court, the first and foremost duty of the judge is to make a reconciliation between the spouses after hearing both of them. However, in case of no reconciliation and persistent demand of the wife for *Khula'* (خلع), she should make some transactions to get *Khula'* (خلع) from her husband. If none of these measures is effective and the wife states a reason from the *Sharia* which is the cause of the distinction and the judge is convinced to some extent that it is true in the light of facts and evidence; then, the Judge being the arbitrator is entitled to annul the marital contract. Thus, it is evident that the consent of both spouses is mandatory to validate *Khula'* (خلع).⁶ This is also supported by the Qur'an and Sunnah. 1. إلا أن يخافا ألا يقيما حدود الله. 2. فيما اقتدت به (in the wealth that the woman gives as ransom) 3. فلا جناح عليهما (So there is no sin on both of them).⁷ Apart from these arguments regarding the consent of the husband, this argument has also been mentioned:

وَإِنْ طَلَّقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمْسُوهُنَّ وَقَدْ فَرَضْتُمْ لَهُنَّ فَرِيضَةً فَوَيْسُفُ مَا فَرَضْتُمْ إِلَّا أَنْ يَعْفُونَ أَوْ يَعْفُوا الَّذِي بِيَدِهِ عَقْدَةُ النِّكَاحِ.⁸

“However, if you divorce them prior to consummation but following the fixation of a dower for them, they will be owed half of the dower unless they agree to forego it. Or (the man's half) is waived by the one holding the marital vows.” The words in it are الَّذِي بِيَدِهِ عَقْدَةُ النِّكَاحِ. They say that (the person to whose hand marriage is related) refers to the husband according to the words of the Holy Prophet himself, about which the verse made it clear that the relationship of marriage is alone. It is in his hands, so no one can end this relationship except him.

Review of the Literature

This part of the study reviews the prominent opinions of the major Jurists on *Khula'*. The jurists and authors of the famous schools of thought (Hanafi, Maliki, Shafi'i and Hanbali) have given diverse explanations of *Khula'*. The husband is given a major role in the *khula'*, according to all Hanafi scholars, who fully recognize the hadith related to *Habiba*. According to Jassas, the

Prophet could have entirely rejected Thabit and divorced Habiba himself, but instead, he asked both Habiba and Thabit for their opinions. This puts Thabit in the spotlight of the discussion.⁹ Hanafi jurists maintain that for khula to be legal, the husband's approval is required. Abu Bakr al-Sarakhsi contends that, like all other transactions, khula' 'is a contract and it requires the consent of both parties involved.'¹⁰ The fundamental component of khula', according to Kasani, is "offer and acceptance" because it is considered equivalent to divorce for recompense and there cannot be separated without acceptance.¹¹ To put it another way, according to Kasani, a court cannot give khula without the husband's permission because no one can be forced to join into a contractual relationship.

On this subject, Hanafi jurists agree,¹² in considering khula as an irrevocable divorce¹³ and acknowledge that it can be resolved outside of court, thus negating the need for adjudication.¹⁴ If a man initiates khul'a, according to Abu Hanifa, he cannot withdraw his proposal since he is bound by the laws of oaths; instead, he must wait for his wife to accept or reject it. She must abide by the compensation guidelines but is free to revoke her offer before his reply. Imam e Azam (Abu Hanifa) gives his justification for the idea that the wife is engaging in a khula is bay' (sale transaction), as she is regaining control over herself.¹⁵ It is not permitted for the husband to accept any payment in exchange for khula if the discord stems from him."¹⁶ The conflict is always thought to be due to the woman because the Qur'an assumes that she pays recompense to release herself. According to Kasani, if the issue of khula is decided by a third person, he will order the lady who is demanding khula to pay the amount which is equivalent to the dower; nevertheless, if he gave orders [her to pay] more [than the amount of the dower], it is not binding without the approval of the woman, and if it is less [than the amount of the dower], it is not binding without the husband's approval and agreement.¹⁷ So even if the amount of the husband's compensation is smaller than the amount of the dower, Kasani, believes that the husband's agreement is still required. In other words, according to the Ahnaaf, the husband appears to have the power to veto decisions regarding divorce and khula'.

According to the school of thought of Imam Malik, when a woman has trouble coexisting with her husband and seeks help from the court, it must be evident which party is to blame for the problems. The court must make efforts to mediate reconciliation when it is clear from the evidence that either the husband or the wife is to blame for the conflict. The court has the authority to dissolve the marriage if this is not feasible.¹⁸ If the court determines that the spouse was the root of the problem, it will issue a khula order. In this case, the woman will be required to return the dower that the husband gave her. The marriage will be dissolved by divorce, and if the husband has not already paid the dower, it will be ordered that he do so if it is determined

that the wife was the root of the conflict. Without the husband's and wife's permission, the court has the authority to issue a divorce or khula' decree to Maliki scholars.

The court has to employ two different mediators, from both parties, if it is unclear which of the two parties is at fault for the disagreement. Maliki jurists have explained the roles of authorities clearly. They all concur that, depending on who is at fault for the disagreement, the arbitrators may choose to end the marriage via khula or talaq. Even further, according to some Maliki jurists, the court or arbitrators can end the marriage without the approval of both the husband and the wife through the Talaq or khul'a procedure. Allah has described how to handle an un-obedient wife and an obedient one, and then he has described another case, namely, when there is strife between the two people and it is unknown who caused it. To investigate the dispute between the two, the court [in this case] should select two Muslim arbitrators. If they decide to end the marriage through a khula without the husband's agreement or through a talaq, their decision must be carried out.¹⁹

Three different interpretations of Habiba's situation are covered by Imam Malik, the third one appears to introduce the husband's agreement when the Prophet (peace be upon him) invited Thabit and informed him about his wife's readiness to return to the garden. Thabit responded, "This is to my liking; Yes," to the Prophet's invitation. The Prophet ﷺ remarked, "Then she returns it. According to Imam Malik, the two arbitrators' respective roles are.

The arbitrators ought to attempt to mediate a settlement [between the two]. If they are unable to do so, they ought to try to mediate a settlement between the husband and wife. Without the [approval] of the relevant state authorities, the two arbitrators would be able to legally end their marriage in this situation. And if they [the two arbitrators] decide to take her to pay [and give it to the husband] to achieve [separation by] khul', they [the arbitrators] have the authority to do it.²⁰ It appears from Imam Malik's viewpoint that the husband's approval is not required for the validity of khula. To further clarify this matter, we have provided more detailed viewpoints from other Maliki jurists. The situation became complicated since Imam Malik did not express his viewpoint on whether the husband's approval is required for khula in clear terms. The claim made by other Maliki jurists, however, makes it clear that the husband's approval is not required for khula and that it can be carried out without it.

It should be terminated, in accordance with 'Abdul Wahab Baghdadi, if one of them has a history of inflicting harm on others during disputes or agitational outbursts. If it is uncertain who started the brawl, the State authority [court] will dispatch two arbitrators to resolve the dispute. There will be two arbitrators: one from the husband's side and one from the wife's. Regardless of whether the husband and wife concur or the State authority [court] approves or

disapproves of their decision, the arbitrators should be impartial jurists who carefully consider the evidence and reach a conclusion that they believe is best for the husband and wife, including separation or reconciliation. Ibn Rushd's perspective on Khul' is intriguing. However, he asserts that "the fidya (ransom) offered to a woman is comparable to a man's entitlement to divorce according to the legal method."²¹ According to this verse, Ibn Rushd believed that khul', which is the Islamic term for divorce, was a woman's natural right and was independent of her husband's consent. This paragraph raises questions about whether Ibn Rushd or the Maliki school agreed on the issue of the husband's consent. Ibn Rushd, who emphasises the value of arbitrators, claims that the jurists disagreed on whether the husband's consent was required for the arbitrators to rule that the couple should be divorced.

According to Shafi, Khula' is equivalent to a divorce and only affects the spouse. He argues that since it is a sale similar to other sales and he is not allowed to take control of her money while still possessing her, when a man wants to split from his wife and plans divorce but does not intend a specific number, the divorce is a single irreversible divorce. Two accounts of the Habibi incident are provided by Al-Shafi'i, one from Imam Malik and the other from Ibn 'Uyayna. In the second version, Habiba complains that she has suffered "damage" to her person, which is most likely a physical harm. Al-Shafi'i reiterates the Prophet's (peace be upon him) advice to Thabit to "accept what she is providing you" in both versions. Khul'a is treated as Talaq by Imam al-Shafi'i.²² It permits it to be resolved inside or outside of a court "as the giving of restitution and Talaq are permissible inside and outside the court."²³

Ibn al-Qayyim of the Hanbali fiqh analyses the Prophet's choice on Habiba and draws several rulings about khul'a from the narratives of Imam Bukhari, Imam Nasa'i, Imam Abu Dawud, and Dar Qutni. He asserts that Qur'anic verse 2:229, which permits it with or without the sultan's agreement, says that khul'a is permissible. The passage argues that since God gave the word "fidya" to describe the separation, it will be an irreversible Talaq (ransom). The woman wouldn't need to be held captive after paying the man if the separation were reversible, as some people believe.²⁴ It also implies that taking more or less (than the amount of the dower is authorized and that he can take more than what he paid her) is permitted in the Quran. Ibn al-Qayyim describes a situation in which 'Uthman b. 'Affan (d. 35/656) ordered the husband to take possession of even her hairband after a lady paid her khul'a settlement by renunciation of everything she owned.²⁵ Additionally, a man who had a wife who had broken her marriage vows (nashiza) informed Umar B. Al-Khattab, and Umar gave him the order to abandon her (ikhla'ha), even if she sought to make up by giving him some of her jewellery (qirat).²⁶ Ibn al-Qayyim delves into the subtleties of the disputes between the jurists and adds that, in the view

of Imam Ahmad b, taking more dower than is necessary is improper (makruh). According to Ibn e Qayyim, the word khula is called fidya (ransom) because it involves the payment of restitution, suggesting that it is a consensual transaction.

Discussion and Findings

The following picture emerges when the viewpoints of the fuqaha' from various schools of thought are discussed: 1) All the fiqhi scholars believe that Khul' and reference the incident involving Habiba and verse 2:229; 3) All of the jurists concur that the resulting parting will be irreversible, i.e. a Talaq; and 2) According to the Maliki school, if the wife is to blame for the strife, she must compensate the husband; if the husband is to blame, he should not receive or receive any compensation. 4) The amount of the compensation may be more, lower, or equal to the dower; Based on verse 4:35, the Maliki jurists came to a different result, giving the arbitrators the power to dissolve marriages without the husband's agreement even if the couples haven't given them that power. 6) The major scholars disobey the decision in Habiba's case and insist that the husband provide his permission before Khul; nevertheless, the Malik decision states that if they agreed to anything more than what he gave her, it is ethically wrong. 8) Khul can be settled by the parties, with or without assistance from the government; 9) All Sunni jurists have mentioned the Prophet's decision in the case of Habibi, when the Prophet reportedly forbade her from paying more than her dower, despite their belief that her paying more was legal.

Based on the concept of qawama, the jurists provide the husband with complete right. The court will also need to decide how much compensation to award. However, it seems probable that a khula case will end up in court, and the court will need to weigh in on the issue of whether the wife was damaged or whether the two parties were hostile. If a husband says they can live within Allah's restrictions and the wife says they can't, whose assertion should be taken into consideration? A third party would be required to assess whether the wife and husband cannot coexist and whether the degree of hostility and aversion has reached an unhealthy level.

In Islam, there is a method for disputing parties to take to go before a judge if they are unable to settle their differences through negotiation. The wife of Thabit bin Qais was the first person in Islamic history to submit a complaint and ask for separation due to interpersonal difficulties. During the Caliphs' rule, women occasionally had their marriages annulled due to domestic impotence concerns that persisted even after the Prophet's passing. The notion that "help can be received from the court for divorce" is not brand-new, but some jurists, including Saeed bin Jubir and Ibn Sirin, assert that a court order is required to pursue a divorce. Divorce is impossible without it. However, other legal professionals argue that since just the husband

and wife must consent to the divorce, a court is not essential. In some situations, the wife does not want to live with the husband and the husband refuses to divorce despite the woman's offer. The wife appears in court in these situations, and the judge issues a partial divorce. Will the court's arbitrary decree to grant a divorce be enforceable if the husband's permission is disregarded? Scholarly circles then began to discuss whether the divorce would be considered Sharia-compliant if the court decided to grant it without the husband's consent.²⁷

A decision of the Supreme Court of Pakistan regarding divorce in 1967²⁸ was severely criticized by many scholars of Pakistan who commented that the court cannot issue a decision on divorce without the consent of the husband. The court's decision was that "if the court research that the spouses will not be able to maintain the limits of Allah, then the court can divorce without the consent of the husband". It is against and wrong according to Shari'ah".²⁹ Moreover, according to our research, practically all Islamic jurists concur that getting a divorce requires both parties' consent and that neither party can force the other.

According to scholars, divorce is treated like any other affair and requires the parties' cooperation; neither party may compel the other to consent, nor may a third party intervene without the parties' approval. They claim that whenever divorce is stated in the Qur'an, both the husband and wife are mentioned simultaneously, proving that both of their consents are required. The hadiths that have emerged in this regard have not been discussed, and all of them are taken from verses of the Qur'an. However, a choice is only reached after carefully considering all the relevant factors while bearing in mind the relevant hadiths and verses from the Quran. There is no question that the Habiba event and the Messenger of Allah's decision to take that course set the stage for the subsequent interpretation of the Quranic verses.³⁰

At the time of the existence of Islam, there were different types of agreements in Arabia. Islam maintained some of these agreements, abolished some, and reformed some. Marriage was also like a contract and at that time the Arabs used to divorce their husbands to annoy them and then return before the end of the *Iddat*, there was no limit to these divorces and the power for the woman to terminate the contract. Islam reformed it and freed women from this oppression and by limiting divorce, gave women the right to divorce. This is the context and lessons of divorce. There are wide powers that he can terminate whenever he wants and the other party does not have any such authority and even if this right is given, it is subject to the consent of the other party. It is not compatible with the teachings of Islam. The consent of both the boy and the girl is considered necessary at the time of marriage, and even after that, whenever the husband wants to leave his wife, he has the right to do so with the presence of a *Sharia* (شريعة) excuse, and the wife's consent is not considered in this. So, in the same way, the

wife should also have such authority and the Shariat has also given that if she wants to separate, she can do so and she has this right too. Make it subject to the consent of the husband, then what is the benefit of this right when the husband does not agree to it? They have no status in sight.

When the husband does not pay the rights of a woman's bread and alimony, then the ruler of time can compel the husband to pay these rights because the ruler of time has his powers and the consent of the husband is not valid. It was done in the same way that divorce is the right of the wife, because when these cases were presented to the Messenger of Allah ﷺ, the Prophet ﷺ did not ask the husband if he agreed to it, but ordered the husband to divorce her, but the wife. He must have asked whether you will return the right of dowry given to him. The Messenger of Allah, said: "أتردين عليه حديقته؟" She said: Yes (the Messenger of Allah, peace, and blessings be upon him) said, "Will you return her garden to her? He said yes." If he does not pay this right, then when this case comes to him, the ruler should use his authority to differentiate between the two, while there are texts in this regard from which we can reason. If in these texts, the husband even if the consent is proved, it is not a clear argument, it is a possible case. Likewise, there is a possibility of the husband's non-consent, even though some expressions and evidence are also indicating it, for example, *قد قبلت قضاء ﷺ - وكان يحبها أشد الحب*. There is a jurisprudential rule in Islamic jurisprudence

الضرر الأشد يزال بالضرر الأخف.³¹

"A great loss will be remedied by a small loss".

In the case of not giving the right of divorce to the wife and the right of divorce to the judge, and making the divorce subject to the consent of the husband, there is a loss of the non-existence of the limits of Allah, which is not a trivial matter that we make it subject to the consent of the husband. If we consider the consent of the husband as an essential part of Khula, then the Hudud of Allah and the accord of the husband are conflicting, and in this case the Hudud of Allah will be exempted and the husband's consent will not be considered. In the non-existence of Hudud Allah, this small loss (decision without the husband's consent) will be accepted.

Conclusion

Some scholars have a strong disagreement regarding judicial khula and they are not in favour of giving the Qazi any authority in the matter of khula. They say that divorce is an issue between spouses i.e. husband and wife, and no one else has any right to interfere in it. Whatever decision is made in divorce, the consent of both will be considered. The decision to divorce cannot be made without consent. And they argue that in the matter of divorce, Allah *Ta'ala* has

mentioned both of them together, so no decision can be made without the will of one of them. Similarly, they say that the first divorce in Islam was decided according to the consent of the husband.

However, some scholars also give the judge the right to decide in the case of divorce, if the husband does not agree to divorce and the matter deteriorates to such an extent that both of them can't maintain the limits of Allah, then against the will of the husband. The judge has the right to dispose of the khula kafila. These gentlemen argue that Allah Almighty has also involved the Qazi in the matter of Khula, so he must also be involved in this matter somewhere else, otherwise, his mention will be deemed pointless. They argue that the first divorce in Islam was in which the Messenger of Allah (peace and blessings of Allah be upon him) gave the decision himself. The decision to evict was announced.

Recommendations and Suggestions

The primary responsibility of the government is to play its role in creating such a society in which families become sympathetic to each other. To spread such teachings that become the basis of a righteous and strong family. Before establishing the relationship of marriage, husband and wife should be informed about their rights and duties. If there is ever a conflict between husband and wife, then they should try to solve this problem themselves. And if the matter is not being resolved by both of them, then the knowledgeable and sensible members of both families should try to resolve this issue. It is the responsibility of the court to listen to the parties and not make any decisions in haste without research. The court should appoint one person from both sides to resolve this matter, and give them full authority to investigate and make a decision in the light of their investigation and recommendations.

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