

# **KHULA: A WOMAN'S ABSOLUTE RIGHT TO DIVORCE AND A REMARKABLE DEVELOPMENT WITHIN THE ISLAMIC LEGAL SYSTEM**

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## **ABSTRACT**

*Islam has awarded women with an absolute and unconditional right of Khula. But the current debate of different fuqaha and different approaches taken by judicial courts in Pakistan suggest that the validity of a Khula obtained without the consent of the husband is at issue. For a comprehensive analysis, recourse should be made to Holy Quran, especially the verses 2:229 and 4:35. Guidance should also be taken by the detailed analysis of Shariah, mainly Habiba's case. Furthermore, the Council of Islamic Ideology can also be seen making recommendations regarding the consistency of proposed law with the injunctions of Islam related to Khula. Although recommendations by the Council are not binding still they can act as a source of guidance. It is also observed that despite the complexity of this particular issue, the road to Khula is still not a smooth ride. The social stigma associated with Khula and other factors may make a woman think twice before asking for Khula. Nevertheless, we all are expected not to surrender and continually play our part in empowering women of our society.*

## INTRODUCTION

Khula is an unequivocal right granted to a woman in Islam. The seeds of khula are rooted in the landmark case of *Balquis Fatima* (1959)<sup>1</sup>, which equated Khula with an absolute and unconditional right of a woman. This position was endorsed in the Supreme Court decision of *Khurshid Bibi* in 1967<sup>2</sup>. In Egypt, Law No. 1 of 2000 did the same thing as was done by the Superior Court of Pakistan.

Validity of consent requirement has always been an issue when one goes to file Khula. This article aims to resolve the unsettled question of consent by analysing the opinions of different jurists. What are verses 2:229 and 4:35 of the Holy Quran trying to convey, and how courts interpret them? To what extent guidance can be taken from Shariah. The article also discusses the recommendations of the Council of Islamic Ideology and determines whether the council has exceeded its mandate. In addition to the vagueness in the doctrine of Khula, it is not easy for women to break the shackles associated with a marriage. Despite the issues faced by women filing Khula, it is fortunate to observe an increase in the number of Khula cases in recent years<sup>3</sup>. This positive change should be wholeheartedly welcome because this is how women could be empowered enough to break the chains of unsaid pain and suffering.

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<sup>1</sup>*Mst Balquis Fatima v Najm ul Ikwam Qureshinaiz Ahmad and others* PLD (1959) Lahore 566.

<sup>2</sup>*Mst. Khurshid Bibi v Muhammad Amin* PLD (1967) SC 97.

<sup>3</sup> Farahnaz Zahidi 'Khula; A woman's right to divorce with dignity' *Tribune* (2016) <<https://tribune.com.pk/story/1076496/khula-a-womans-right-to-divorce-with-dignity>> accessed 20 May 2021.

## I. KHULA; ITS MEANING IN THE LAW OF ISLAMIC JURISPRUDENCE

In the law of Islamic Jurisprudence, Khula is a woman's unequivocal right to divorce. In literal terms, the word Khula means extracting oneself<sup>4</sup>. 'Alauddin Mas'ud al-Kasani, defines Khula as '[t]he *khul*' is lexical, '*al-naz*' and '*al-naz*' is to pull out/extract something from something.' Thus, '*khala'ha* means that he has removed her from his marriage.'<sup>5</sup> In other words, Khula is the act of accepting compensation from the wife in return for releasing herself from the wedlock. According to Ibn Hajr, khula is the 'separation of the husband from his wife for a money consideration to be given to the husband.'<sup>6</sup> Ibn Rushd argues that 'the terms *khul*,' *fidya*, *sulh*, and *mubara'a* refer to the same meaning, which is a transaction in which a wife pays compensation for obtaining her divorce<sup>7</sup>.'

### *HISTORICAL ASPECT*

The earliest case reported in the subcontinent related to Khula is *Munshi Buzul-ul-Raheem*<sup>8</sup>. In which Judicial Committee of the Privy Council made a ruling that the Khula cannot be granted without the consent of the husband. The situation has now become different in Pakistan and Bangladesh, but Indian Courts still apply the earliest rules of Khula. Gangrade argues that it is uncertain whether an Indian woman files a case of Khula without the consent of her husband<sup>9</sup>. In

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<sup>4</sup> Dr. Muhammad Munir, 'The law of Khul in the Islamic Law and legal system of Pakistan' (2014) <<https://sahsol.lums.edu.pk/law-journal/law-khul-islamic-law-and-legal-system-pakistan>> accessed 23 July 2021

<sup>5</sup> Muhammad Yasin Darvish, *Dar Ihya' al-Turath al-'Arabi* (first published 2000)

<sup>6</sup> Muhammad b. Ahmad Ibn Rushd, *Bidayat Al-Mujtahid* (first published 2000, Garnet Publishing)

<sup>7</sup> Muhammad b. Ahmad Ibn Rushd, *Bidayat Al-Mujtahid* (first published 2000, Garnet Publishing)

<sup>8</sup> *Munshi Buzul-ul-Raheem v Luteefutoon-Nissa* (MIA) 1861.

<sup>9</sup> K.D Gangrade, *Social Legislation in India* (first published 2011, Concept Publishing).

the Lahore High Court's case, *Umar Bibi v Mohammad Din*<sup>10</sup>, the appeals of two women who were asking for Khula on the grounds of incompatibility in temperament were rejected because they were doing this against the wishes of their husbands. The case was again upheld in 1952 in the same court in the case of *Sayeeda Khanam v Muhammad Sami*<sup>11</sup>. The court re-visited the role of the Prophet in Habiba's case and observed that the Prophet did not take upon himself to divorce Habiba. In fact, he ordered Thabit to do so.

### ***KHULA AND JUDICIAL ATTITUDE***

Later in 1959, a full bench of Lahore High Court re-considered the already established law of khul. In *Balqis Fatima v Najm-ul-Ikram Qureshi*<sup>12</sup>, the main question before the bench was whether the wife is entitled to dissolve the marriage, provided that she restored what she has received from her husband in consideration of marriage? Court decided the case by giving a fresh interpretation of the Quran verse 2:229. Before enlightening you with the decision of the court, verse 2:229 is worth mentioning.

Divorce can be pronounced twice: then, either honourable retention or kindly release should follow. (While dissolving the marriage tie) it is unlawful for you to take back anything of what you have given to your wives unless both fear that they may not be able to keep within the bounds set by Allah. Then, if they fear that they might not be able to keep within the bounds set by Allah, there is no blame upon them for what the wife might give away of her property to become released from the marriage tie.

The court interpreted this verse in a way that permits the wife to terminate the marriage if she passes consideration to the husband. But courts were still left with the question of whether such termination is affected only by agreement between the husband and wife or whether

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<sup>10</sup> *Umer Bibi v Muhammad Din* (ILR) 1944 Lahore 25.

<sup>11</sup> *Sayeeda Khanam v Mohammad Sami* (PLD) 1952 Lahore 113.

<sup>12</sup> *Balqis Fatima v Najm-ul-Ikram Qureshi* (PLD) 1959 Lahore 566.

the wife can ask for termination even if the husband is not a consenting party to it<sup>13</sup>. In other words, Should it be determined by the parties themselves, or should it be the responsibility of the courts?

The Lahore High Court has accepted the interpretation of 'you' used in the phrase 'if you fear' is addressed to the state authorities (i.e., courts) in the case of Balquis Fatima. And the spouses are referred to in the third person like them or they<sup>14</sup>.

Maliki jurist discusses verse 4:35 of the Quran, which states, 'If you fear a breach between the two, 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 knows all, is well aware of everything.' Qurtubi argues that arbitrators are assigned the responsibility to find out the cause of the dispute. After establishing this, the marriage can be terminated through Khul<sup>15</sup>. The arbitrators representing each side should remind the partner about their union in order to begin a reconciliation. But if the partners refuse to live together and if arbitrators find it appropriate to dissolve the marriage, then they can issue a decree of Khula. Such a decision would be binding on the partners even if the partners did not delegate the authority to do so<sup>16</sup> or their (arbitrators) decision is with or against the decree of the local court. This is the true interpretation, and this can also be evidenced by Habiba Bint Sahl's case.

### ***KHULA AND THE SIGNIFICANCE OF HABIBA'S CASE***

According to the report of Al-Bukhari in his *al-jami' al-sahih* section on *khul'*:

Ibn' Abbas narrated that the wife of Thabit Bin Qyas came to the Prophet (PBUH) and said that I disliked his ingratitude in Islam. The

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<sup>13</sup> Ibid.

<sup>14</sup> *Balqis Fatima v Najm-ul-Ikram Qureshi* PLD (1959) Lahore 566.

<sup>15</sup> Qurtubi, *Al-Jami li-Ahkam al-Qur'an* (4<sup>th</sup> edn, 21 Vol. Arabic, DKI 2014) 175.

<sup>16</sup> Ibid.

Prophet asked in response, “Will you return his garden to him?”. “Yes.” She replied. Then the Prophet ordered Thabit to accept his garden and divorce her<sup>17</sup>.

It is also reported from the second and third versions of the same incident that the Messenger of Allah said to Thabit, “Divorce her in return of your garden.”<sup>18</sup>

Ibn Maja and Abu Dawud observe in their report that the husband (Thabit) was never asked for his consent for separation. Hence he does not place a decisive role. So the crux can be drawn from the above-mentioned incidents that the husband’s consent is not required and Khula can be obtained provided that the wife is willing to return her dower (if already paid) or give up her dower (if yet to be paid) as seen in Habiba’s case.

The Quran also says that the wife can get her release or ransom herself, and it is plain that these words clearly connote the woman’s right to Khul<sup>19</sup>. Ali b. Abi Talib (May Allah be pleased with him) also said, [There are three] phrases when uttered by the wife [to the man], it becomes legal for him to take '*al-fidya*' (i.e., the compensation) When she tells him that I will not obey you, that I will not fulfil your promise on oath, and I will not purify myself after sexual intercourse with you.<sup>20</sup>

Qurtubi mentions that according to 'Atta b. Abi Rabah, '*Khul*' and taking (compensation for the husband) become legal when the woman

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<sup>17</sup> Muhammad Isma'il al-Bukhari, *al-Jami' al-sahih* (Published 9 century, People's Edition). The *hadith* is also available at <<http://www.sunnipath.com/library/Hadith/H0002P0071.aspx>> accessed 1 February 2021; also available at <<http://hadith.al-islam.com/Page.aspx?pageid=192&BookID=24&TOCID=2943>> accessed 15 March 2021.

<sup>18</sup> Ibid.

<sup>19</sup> PLD 1967 SC 97, 117-118 (*per* S.A. Rahman, J).

<sup>20</sup> Jassas, *Ahkam al-Qur'an* (Arabic, DKI 1993) 534.

says to her husband: I hate you and do not like you or something similar.<sup>21</sup>

### ***KHULA AND REIMBURSEMENT OF DOWER***

Sometimes, the problem regarding the reimbursement of dower transpires. Although, according to Maliki School, if the husband is the reason why the dispute between them occurred, then he must pay dower if not yet paid. and if the wife is found to be the cause of dispute, then she must return the dower that was paid to her by her husband. All schools agree at a point that the resultant separation would be an irrevocable talaq (also known as Talaq ul Bidaat, under which the utter immediately takes effect and no reconciliation is possible after that). The compensation to be paid may be equivalent to or more or less than the actual amount of dower. The settlement on more than the amount of dower is legally binding but morally reprehensible. Aby Bishoy and Aby Wagih claim that the return of return is often problematic. This is the case mostly occurs in Egypt that husbands do not accept the dower payment given in the registered marriage contract and take the case to a civil court in order to claim 'real' dower.

It is also interesting to note that Khula is the option suitable for rich women because they can afford to relinquish their financial rights. However, NGOs and many persons working in the field of judiciary rejected the idea that Khula is only available for rich women<sup>22</sup>. Keeping the issue of financial hardship aside, the main issue is that there is still no consensus among different jurists on whether the consent of the husband is an essential requirement or not.

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<sup>21</sup> Muhammad b. Ahmad al-QurTubi, *Al-Jami' li Ahkam al-Qur'an* (Samir al-Bukhari ed, Riyadh: Dar 'Alam al-kutub 2003).



## II. CONCEPT OF KHULA PERCEIVED BY DIFFERENT FUQAHA

### *HANAFI SCHOOL OF THOUGHT*

The views of Imam Malik and his exegesis on the issue of consent differ from most Sunni scholars. In spite of fully acknowledging the hadith of Habiba, the Hanafi jurists unanimously assign a controlling and decisive role to the husband. The fact that the Prophet sought the opinions of both Thabit and Habiba places the former at the centre of debate since the Prophet could have granted the divorce to Habiba himself by dismissing Thabit completely out of the picture<sup>23</sup>. Hanafi jurists are of the view that the husband's consent is an essential requirement in the process of Khula. It is observed by Abu Bakr al-Sarakhsi that *khul'* 'is a transaction that requires the consent of the [parties] like all other transactions<sup>24</sup>.' Kasani calls offer and acceptance the basic element of Khul, and the agreement (Khula) cannot be made out without the other party (husband) accepting it. In other words, the court cannot grant khul without obtaining consent from the husband. There is no conflict among Hanafi jurists on this (particular) issue<sup>25</sup> because, for all of them, Khul is an irrevocable talaq<sup>26</sup>, and adjudication is not necessary because it can be settled outside the courtroom<sup>27</sup>. According to Abu Hanifa, the husband must not withdraw his offer should he initiate khula because he is governed

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<sup>23</sup> Jassas, *Ahkam al-Qur'an* (Arabic, DKI 1993) 539

<sup>24</sup> Muhammad b. Ahmad al-Sarakhsi, *Kitab al-MabsuT* (Arabic, Dar al-Kutub al-'Ilmiya Beirut Lebanon) 169

<sup>25</sup> Uthman al-Zayla'i, *Tabyin al-Haqa'iq* (Ahmad 'Azzu 'Inaya ed, Dar al-Kutub al-'Ilmiya 2000)

<sup>26</sup> Jassas, *Ahkam al-Qur'an* (Arabic, Dar al-Kutub al-'Ilmiya 1993) 116.

<sup>27</sup> Jassas, *Ahkam al-Qur'an* (Arabic, Dar al-Kutub al-'Ilmiya 1993) 539. Muhammad b. Ahmad al-Sarakhsi, *Kitab al-MabsuT* (Arabic, Dar al-Kutub al-'Ilmiya Beirut Lebanon) 169

by the terms of oath and should wait for his wife to accept or reject his offer. The wife has to comply with the rules of compensation and is entitled to revoke her offer before the husband responds. Abu

Hanafi relates Khul with a sale transaction as the wife wants to free herself and buy back the control over herself<sup>28</sup>. If the husband is the cause of discord, then he is not entitled to take any compensation from the wife in return for khul<sup>29</sup> In other words, the question arises if the husband is given a central place, then Khula becomes another opportunity to sever relations from her and be financially better for it?. The Quran assumes that the discord emanated from the wife; that is why it expects her to pay compensation in order to free herself. Kasani argues that

If the matter in question is resolved by a stranger, then he can order the wife to pay compensation (the equivalent of dower), and if her orders to pay more or less than the amount of dower, then in the case of former, it is not binding without the approval of wife and in case of latter, without the approval of husband<sup>30</sup>.

Kasani, who is referred to as the king of Ulema among Hanafi jurists, is of the view that the consent of the husband is required in any case, even if he accepts the compensation less than the actual amount of compensation.

### ***MALIKI SCHOOL OF THOUGHT***

The linguistic formulation possessed by the Maliki school of thought is not easy to comprehend, and one needs to conduct an in-depth analysis in order to reach a clear conclusion on whether the consent of the husband is a necessary requirement for Khul. The main issue is whether or not the Maliki jurists consider the husband's

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<sup>28</sup> Uthman al-Zayla'i, *Tabyin al-Haqa'iq* (Ahmad 'Azzu 'Inaya ed, Dar al-Kutub al-'Ilmiya 2000).

<sup>29</sup> Dr. Muhammad Munir, 'The law of Khul in the Islamic Law and legal system of Pakistan' (2014) <<https://sahsol.lums.edu.pk/law-journal/law-khul-islamic-law-and-legal-system-pakistan>> accessed 23 July 2021.

<sup>30</sup> Ibid.

consent a legal necessity by implication. In the light of Quranic verse 4:35, Habiba's ruling and other cases involving the neglectful conduct of husbands, Maliki's legal formulations suggest that it assigns two arbitrators the key role in the dissolution of marriage, either by Khula or Talaq. Maliki also presumes a negotiated settlement<sup>31</sup>. Under the Maliki School of thought, the court has the power to issue the decree of Khula or Talaq even without the consent of both parties.

If the court does not find out the cause of discord, then it shall appoint two arbitrators. One is to represent each husband and wife. Maliki jurists have widely described the roles assigned to arbitrators. In general, arbitrators are authorised to grant orders such as Khula or Talaq, depending upon who was the cause of discord. Some Maliki jurists even allow courts or arbitrators to dissolve the marriage even without the consent of the husband or wife. This view can be read from many classical texts (*mutun*) and commentaries on the texts commenting on verse 4:35, which is phrased as 'If you fear a breach between the two, 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 knows all, is well aware of everything.' Ibn Juzi al-Kalbi al-Garnati argues,

Allah has already mentioned in the Quran how to treat an obedient and a disobedient wife, and he also mentions another situation. Where a conflict arises between husband and wife, and reconciliatory efforts have been failed, and the cause of dispute could not be determined. Then in such a case, two arbitrators should be appointed to investigate the case. And their decision shall be binding on the partners, whether it be Khula or Talaq.

Ibn 'Abdul Bar also said something similar. He states, "The spouses can appoint one arbitrator each without the intervention of state authorities. If the husband is the cause of the dispute, then the

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<sup>31</sup> Sahnun b. Sa'id, *Al-Mudawwana al-Kubra li'l Imam Malik b. Anas* (Publish 1325 AH, Khayriyya Press).

marriage will be dissolved without anything. In such a case, the wife is not expected to pay anything in the name of compensation. And if the wife is the cause of dispute, then the decree of khula shall be issued, provided that the wife returns the dower<sup>32</sup>. What happens if both husband and wife are equally found to be blameworthy? In such a case, Abdari argues that the husband shall not be given anything.”<sup>33</sup>

Imam Malik discusses three versions of Habiba’s case and tends to infer the consent-by-husband requirement in the third version where the Prophet told Thabit her wife’s willingness to give her garden in return of dissolution. And Thabit said this is to my liking, Yes. And then the Prophet ordered Habiba to return the garden. Unfortunately, Maliki jurists are not very specific as to the requirement of the husband’s consent in the process of Khul. However, Imam Malik shares an interesting opinion in the chapter of '*Hakamayn*.' He states,

‘If the arbitrators could bring in reconciliation [between the two], they should reconcile between the two [the husband and the wife]; then, it is lawful [for the two arbitrators] if the two [arbitrators] decided to dissolve the marriage between the two [the husband and the wife] without the [permission] of the state authority. And if the two [arbitrators] decided to take [compensation] from her [and give it to the husband] so that it becomes [separation by] *khul'*, they [the arbitrators] can do that.’<sup>34</sup>

This opinion gives us the impression that husband consent is not required for the Khula. The issue of consent has become more confusing because imam malik does not use precise words to address the issue. However, the majority of other Maliki jurists assert that the

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<sup>32</sup> Yusuf b. 'Abdullah b. 'Abdul Bar al-QurTubi, *Al-Kafi fi Fiqh Ahl al-Madina al-Maliki* (Maktaba al-Riyadh al-haditha, 1980) 596.

<sup>33</sup> Muhammad b. Yusuf 'Abdari, *Al-Taj wal Iklil li Mukhtasar Khalil* (Dar al-Fikr n.d.) 17.

<sup>34</sup> Ibid.

consent of marriage is not a requirement for khul. According to 'Abdul Wahab Baghdadi,

If it is unknown who was the cause of the dispute, then the court shall issue two articles (one from each side). They will look into the matter and give their decision whatever they think is better for both parties. And then, the court decides whether they agree or disagree with the findings and decision of arbitrators<sup>35</sup>.

Ibn Rushd shares an interesting opinion on Khul. He observes that 'yet, the juristic reasoning is that *fida* (ransom) granted to a woman is something equivalent to what is possessed by the man; namely, (the right to) divorce. A man possesses repudiation when he pressurises a woman, while a woman possesses *khul'* when she wants to pressurise a man (her husband).<sup>36</sup> In other words, Khul is a woman's right, and she can exercise it without the consent of her husband. Khul is used by a woman when she wants to pressurize her husband. But this passage does not provide a clear picture of the issue of consent.

While mentioning the crucial role of arbiters, Ibn Rushd says that "There has been a dispute on the agreed decision of arbiters to dissolve the marriage, among jurists. Malik and his exegetes said that the decision of arbiters should be binding on both husband and wife. It does not matter if they agree with the decision or not"<sup>37</sup>. Whereas, Al-Shafi'i, Abu Hanifah, and their disciples assert that arbitrators have no such right, except where the husband delegates his authority to them. It is now clear that Maliki jurists have awarded arbitrators with a right to dissolve the marriage, even if the husband or wife disagrees with their decision, and such a decision would be binding on the parties.

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<sup>35</sup> Abdul Wahab Baghdadi, "*Al-Talqin* (Dar al-kutub al-'Ilmiyah, n.d).

<sup>36</sup> Ibn Rushd, *Bidaya* (Vol 1 Brill 1994) 81

<sup>37</sup> Ibid.

### *SHAFI'I SCHOOL OF THOUGHT*

Imam al-Shafi'i argues that just like *talaq*<sup>38</sup>, *khul* is also given only by the consent of the husband<sup>39</sup>. According to him, *Khul* should be treated as *talaq*<sup>40</sup> and can be settled in or outside of a court 'as the paying of compensation and *talaq* are permissible in the court as well as outside it.<sup>41</sup>

### *HANBALI SCHOOL OF THOUGHT*

Ibn al-Qaiyam of the Hanbali school of thought makes a reference to the versions of Al-Nasa'i, Al-Bukhari, Al-Dar QuTni, and Abu Dawud while discussing the Prophet's ruling in Habiba's case and derives some rules regarding *Khula*. According to him, the Quranic verse 2:229 indicates that resultant separation is an irrevocable *talaq*, and God has called it *Fidya*, and if the separation would be revocable, then there will be no ransoming for the woman after paying (compensation) to him.

The Qur'anic verse '*fa la junaha 'alihima fima aftadat bihi*' (there shall be no sin upon either of them for what the wife may give up [to her husband] in order to free herself), 'also indicates that taking more or less (than the amount of the dower) is allowed and that he can take more than what he gave her.' Ibn al-Qaiyam has also produced a ruling made by 'Uthman b. 'Affan (d. 35/656) in which a woman returned everything she once owned and Uthman ordered the husband to get back even her hairband<sup>42</sup>, and 'Umar b. Al-Khattab was reported that whose wife could not fulfil her marital obligations, then he ordered her husband to separate from her even if she gives her earnings<sup>43</sup>. Ibn al-Qaiyam mentions that taking more than the dower given to her is

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<sup>38</sup> Ibn al-'Arabi, "*Ahkam al-Qur'an*" (Dar al-Kutub al-'Ilmiya Beirut 2003 CE) 250.

<sup>39</sup> Al-Shafi'i, *Kitab al-umm* (BeituT Dar Qutaybah) 183.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

unacceptable (*makruh*)<sup>44</sup>. Ibn al-Qaiyam also argues that Khula is equivalent to Fidyah as it involves the concept of compensation, and hence it is consensual<sup>45</sup>.

According to Muhammad b. Hazam (d. 456A.H.), if a woman feels that she is unable to fulfil the marital commitments, then she can request the husband to separate from her. If the husband is unwilling to do so, then nobody can force him. On the contrary, a woman cannot be forced to free herself from wedlock. '[A]nd the consent of both (the husband and wife) is essential for its legality (i.e., *khul'*). And if it (i.e., *khul'*) was affected without these two conditions (i.e., compensation from the wife and the consent of the husband), then it is invalid<sup>46</sup>.'

The *Ahl al-hadith* in Pakistan allows a woman to exercise her right of khula if she has a natural hatred for her husband. 'Abdullah Ropri also argues that mere abhorrence or aversion is sufficient for a woman to obtain a divorce<sup>47</sup>. Also, Ropri does not explicitly talk about the consent of the husband. He advises that in such a situation, a woman can dissolve her marriage by raising the case in the panchayat.<sup>48</sup>

### **SHI'A SCHOOL OF THOUGHT**

According to Hilli of the Ithna 'ashari (Twelver) Shi'a school of thought, the words used for Khul are 'you are redeemed for so much (*khala'tuki 'ala al-kaza*)<sup>49</sup>.' Khula is only allowed where the husband used the word khula instead of talaq. But according to the other opinion, the word Talaq must come after Khula in order for it to be

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Abdullah Ropri, *Fatawa Ahl al-hadith* (Muhammad Siddique ed, Idara Ihya' al-Sunna al-Nabawiya n.d.) 523.

<sup>48</sup> Ibid.

<sup>49</sup> Thus it is the husband who has to say it.

valid<sup>50</sup>. The editor of Hilli's book defines Khula as 'putting an end to marriage when the woman abhors her husband only in return for compensation from the woman<sup>51</sup>.'. In other words, if she shows aversion for him and wants to separate herself from her, then he must make an offer that can be accepted or rejected by the husband. This is how it makes the consent of the husband mandatory. This type of separation would be irrevocable talaq (where words uttered from the mouth of the husband take immediate effect and no reconciliation is possible after that) rather than faskh (where the request of dissolution of marriage is solely made by the wife, and the decision is made by a qazi or a judge) 'If they agreed on *khul*,' then the husband cannot retract, but she can retract in paying *fidya* during her '*iddat*' (waiting period), and he can retract if she offers to do it.

### III. ANALYSIS DRAWN FROM THE OPINIONS OF FUQAHA

In the light of the opinions of the *fuqaha*' belonging to the various schools of thought, the picture comes out as follows;

All schools of thought cite the Quran verse and Habiba's case and permit Khul. According to Maliki School, if the husband is the cause of dispute, then he must pay the dower, if not yet paid. And if the wife is found to be the cause of dispute, then she must return the dower that was paid to her by her husband. All schools agree at a point that the resultant separation would be an irrevocable talaq. The compensation to be paid may be equivalent to or more or less than the actual amount of dower. The settlement on more than the amount of dower is legally binding but morally reprehensible. The majority of

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<sup>50</sup> Najmuddin al-Muhaqiq al-hilli, *Shar'a'i al-Islam* (Al-Syad sadiq Al-Shirazi ed, Dar al-Qari 2004) 42.

<sup>51</sup> Ibid.



schools regard the consent of the husband as an essential requirement for the validity of Khula. However, Maliki holds a view that the decision of the arbitrator would be binding on both parties, even if the husband does not delegate the authority to arbitrators to do so. The majority consider Khul as consensual, but Maliki assigns a crucial role to arbitrators and calls their decision binding. Khul can be obtained with or without the intervention of courts.

The majority of jurists are inclined towards granting husbands the absolute right at the expense of his wife because of the notion of Qawama. In such a case, resort to the court becomes unavoidable, and the court has to determine the issue of hatred between the parties or harm to the wife in addition to calculating the quantum of compensation if the husband says that they can live within the boundaries prescribed by God, but the wife says that she cannot, then a third-party intervention would be required who shall be supposed to determine whether living within the boundaries is possible and whether the hatred has reached a point from where no reconciliation is possible.

But logically speaking, the wife's right to khul should be unconditional. It is rather a mockery of Shariat if we attach a condition such as a husband's consent or Qazi's verdict with a woman's right to Khula. Based on similar reasoning, the supreme court of Pakistan rejected the Saeeda Khanam case<sup>52</sup> and endorsed Balqis Bibi when it decided the case of Khurshid Bibi. The court held:

When the husband is not ready to give the woman her right of divorce, then a need arises to let a third party intervene who is supposed to resolve the matter, and then the Qazi will adjudicate the dispute. Mufti Muhammad Zahid also agrees that the Qazi (or a Judge) can declare the nullity of Nikkah on solid grounds, even if both parties to the (marital) contract are not consenting to it. The Quran

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<sup>52</sup> Both were conflicting decisions from equal Benches of the Lahore High Court.

also says that the wife can get her release or ransom herself, and it is plain that these words clearly connote the woman's right to Khul<sup>53</sup>.

### ***RESTRICTIONS ON THE RIGHT OF KHULA***

However, when it comes to the Supreme Court, we see that the most superior court puts some restrictions on women's right to khula. According to the court, it must be satisfied that the husband and wife could not live together in harmony and in conformity with their obligations<sup>54</sup>.

The Lahore High Court in *Balquis Fatima* also observes,

The wife cannot be granted Khula for every passing impulse<sup>55</sup>. Khula is possible only where a judge apprehends that the parties will not keep themselves within the limits prescribed by Allah.

Carroll argued that satisfaction or apprehension of the judge is a subjective evaluation<sup>56</sup>. It needs to be supported by (material) evidence. Justice Javed Iqbal of the Lahore High Court also made an attempt to clarify the law and held:

If the judge reaches a conclusion that no reconciliation is possible, then the wife can get her marriage dissolved, and if continuing the marriage would amount to compelling her to live in a hateful union with her husband, then the judge is expected to dissolve the marriage on the grounds of khula.

The method used by the court to introduce a new law on Khula, without referring to the *fuqaha* different schools of thought, should be discussed here.

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<sup>53</sup> PLD (1967) SC 97, 117-118 (*per* S.A. Rahman, J).

<sup>54</sup> *Ibid*.

<sup>55</sup> *Mst Balquis Fatima v Najm ul Ikwam Qureshiaz Ahmad and others* PLD (1959) Lahore 566.

<sup>56</sup> Carroll, *A Charter Granted to the Wife? Judicial Khul' in Pakistan* (Vol 3 No. 1 Brill Press 1996)

In *Balqis Fatima*<sup>57</sup>, the full bench of the Lahore High Court made a ruling that a course different from what is laid out by different schools of thought can be adopted. The court shared its opinion,

We are only supposed to interpret what the Quran says. We are not bound by the views shared by classical jurists. If we are clear as to what the Quranic verse wants to deliver, then we are obliged to give effect to that interpretation regardless of what the jurists state. It is also important to note that the courts apply similar considerations to the traditions of the Prophet. A similar type of reasoning is also used in the *Kurshid Bibi* case. In this case, the court made it clear that if there lies a conflict between the opinions of jurists and the Quran/Sunnah, then we are not bound to follow what the jurists say. We are only obliged to give effect to the sayings derive from the two most sacred sources, i.e., Quran and Sunnah.

In 2012, section 10(4) of the Family Act 1964 has been amended by the legislature in order to provide summary dissolution of marriage in the form of Khul by requiring that 'the Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass a decree for dissolution of marriage forthwith and also restore the husband the Haq Mehr [dower] received by the wife in consideration of marriage at the time of marriage.' The new provision was challenged in Federal Shariat Court, particularly in the case of *Saleem Ahmad v The Government of Pakistan*<sup>58</sup>. The court, in that case, made an observation that with great regard to the scholarship, Taqwa, and deep insight of the honourable Ulema Kiram and Aimman Ezam, the court cannot declare any law or any provision merely on the basis of Fatwas or verdicts issued by eminent scholars whosoever they might be.

The court further ruled that the provision is s. 10(4) does not conflict with any injunction mentioned in Quran and Sunnah<sup>59</sup>. The

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<sup>57</sup>*Mst Balqis Fatima v Najm ul Ikwan Qureshiaz Ahmad and others* (PLD) 1959 Lahore 566.

<sup>58</sup> *Saleem Ahmad V The Government of Pakistan* PLD (2014) FSC 43.

<sup>59</sup> *Ibid.*

court also observed that courts are there to resolve the disputes between the parties. They are authorized to dissolve all types of matters, including the dissolution of marriage on specific grounds. Here, a question might be asked here that why the courts are not allowed to decide the cases of Khula, where the husband is not ready to separate from the wife and reconciliation is not possible in such circumstances<sup>60</sup>.

After considering various arguments by jurists, verses of Quran and Hadith, the court came to a conclusion that there is no specific verse or hadith that acts as a constraint to the exercise of the adjudication by a competent Qazi to issue the decree of Khula after all the reconciliatory efforts fail.

#### ***KHULA; AN ALTERNATE REMEDY***

After the above section, i.e., s. 10(4) came into effect, it has become easy for a woman to obtain khula, but the issue is that Khula is granted as an alternate remedy. In many cases, a woman (complainant) asks for the dissolution of marriage on the grounds of non-maintenance by her husband, the cruelty of her husband or in-laws, or any other remedy prescribed under the DMMA 1939 and asks for Khul only as an alternative remedy under which the wife is compelled to return her dower to the husband<sup>61</sup>, which in other words, can become a financial burden on her. However, there are cases in which the courts tried to correct these aberrations and lay down the true exposition of Khula law<sup>62</sup>.

#### ***JUDICIAL IJTIHAD, A SATISFACTORY ANSWER?***

The superior courts of Pakistan do not consider themselves as being bound by Taqleed and tend to resort to Ijtihad (**ijtihād** can

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<sup>60</sup> Ibid.

<sup>61</sup> *Hakimzadi v Nawaz Ali* PLD (1972) Karachi 540; *Bashiran Bibi v Bashir Ahmad* PLD (1987) Lahore 376; and *Bibi Anwar v Gulab Shah* PLD (1988) Karachi 602.

<sup>62</sup> See also *Zahida Bi v Muhammad Maqsood* CLC (1987).

be defined as a "process of legal reasoning and hermeneutics through which the jurist-mujtahid derives or rationalizes law on the basis of the Qur'an and the Sunna"). The courts are seen to assert the three most important rights. First, the right to free and independent interpretation of sacred sources, mainly the Quran and Sunnah, where necessary. Secondly, the right to deviate from the classical legal texts emerged by the various schools of thought. Thirdly, the right not to give effect to the (relevant) rulings made by the Privy Council<sup>63</sup>.

Superior courts of Pakistan are generally inclined toward exercising *ijtihad* rather than focusing on *talfiq* or *takhayyur* and have relied on the verses of the Quran and Sunnah. It is also said that section 2 of the Enforcement of *Shariah* Act, 1991 has added other sources which the court takes into account while deciding *Khula* cases. Section 2 of the Act gives meaning to the word *Shariah*, states that the *Shariah* means injunctions prescribed by the Quran and Sunnah. The explanation for section 2 states that: in the course of interpreting and explaining the *Shariah*, the recognized principles of the Quran and Sunnah shall be followed, and opinions and expositions of the eminent jurists associated with prevalent Islamic Schools of thought may be taken into account for consideration<sup>64</sup>.

It is ironic that the words phrased in Section 2, i.e., may be taken into consideration, are recommendatory rather than mandatory. Furthermore, the word used 'prevalent' is also vague. It apparently gives judges a permit to practice *takhayyur*, choosing and preferring the opinion of one school over the other, and not exercise strict adherence to only one school of thought.

However, a closer look reveals that the courts in *Khula*-related cases did not resort to *ijtihad* itself<sup>65</sup> but rather followed the Sunnah

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<sup>63</sup> *Rashida Begum v Shahab Din* PLD 1960 Lahore 1142 and *Zohra Begum v Sh. Latif Ahmad Munawar* PLD (1965) Lahore 695.

<sup>64</sup> Section 2 of *Shariah Enforcement Act 1991* (Act X of 1991).

<sup>65</sup> Imran A.K. Nyazee, *Theories of Islamic Law* (Islamabad: Islamic Research Institute, 1995, 3<sup>rd</sup> reprint 2009) 307.

in preference to the interpretation of jurists in Islam. In other words, the court did deviate from beliefs shared by the majority of Muslim jurists because they (courts) think that their opinions are not consistent with what the Quran and Sunnah say. Since the topic of *ijtihad* per se and its modes are complex, any statement to the effect that the National courts have resorted to *ijtihad* (with regards to *Khul*) would be a sweeping statement<sup>66</sup>. That is why cases like *Balqis Fatima* and *Khurshid Bibi* are said to be bold because in such cases, the court deviated from the traditional opinions of various schools of thought, including Hanafi, Shafi'i, and Hanbali schools as well as the Shi'a school of thought. Moreover, in both cases, the courts used the opinions of these schools to support the argument that consent of the husband is not a requirement in *Khul*. But the court, in order to support its stance, needed to mention the (vast) literature within the Maliki School of thought. That is why *ulama* have managed to level a scathing attack on the ruling repeatedly made by the Superior Courts of Pakistan regarding *Khula*. It is worth noting that women have repeatedly been granted *Khul* by Superior Courts, especially after the (2002) amendment in the Family Courts Act 1964<sup>67</sup>.

#### ***RECOMMENDATIONS GIVEN BY THE COUNCIL OF ISLAMIC IDEOLOGY***

The council of Islamic Ideology makes recommendations to the President, Provisional Assemblies, and the Parliament on whether the proposed law is inconsistent with the injunctions of Islam. The duties of the council are only advisory and recommendatory in nature. The council does not have independent power of enforcement. By virtue of Article 227-231 of the Constitution of Pakistan, the Council is only capable of having advisory input on the Islamic credentials of current

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<sup>66</sup> Imran A.K. Nyazee, *Islamic Jurisprudence: Usul al-Fiqh* (Islamabad: International Institute of Islamic Thought 2000) 266.

<sup>67</sup> *Parveen Begum v Muhammad Ali* PLD 1981 Lahore 116; *Syed Dilshad Ahmed v Sarwat Bi* PLD (1990) Karachi 239.

and proposed laws<sup>68</sup>. The recommendations made by the Council to the Government of Pakistan are reproduced below:

In the council's opinion, the law should be enacted at the state's level. After a written request for divorce, the husband must have been under the obligation of a divorced woman within the period of 90 days. Even if the husband is not willing to divorce her, then the marriage shall dissolve automatically once the period of (90 days) passes, except where the complainant (wife) revokes her request. The husband should not be given any right to revoke after that. If demanded by the husband, the wife has to return the property/ assets given to her by her husband except for maintenance and dower or else seek a remedy by approaching the court for the resolution of conflict<sup>69</sup>.

There are several points that are important to note. The council seems to deviate from the words phrased in the Quranic verse 2:229, which states that the wife has to pay something in order to free herself from wedlock. The council can also be seen deviating from the precedent set out by the Prophet in Habiba's case in which the Prophet ordered her to return dower to her husband in return for Khula. Furthermore, the council is consistent with the Quran and Sunnah in cases where the husband was said to be the cause of the dispute. Finally, the council's recommendations also include section 10(4) of the West Pakistan Family Court Act 1964 as amended in 2002, which is linked with the present law on Khul. However, we can see a change in the views of the council with the change of its chairperson. On 27 May 2015, Mawlana Muhammad Khan Shirani, Chairman CII, shared his opinion that 'courts should refrain from dissolving '*nikah*' (marriage contract) in the name of 'khula' or separation.' He further argued that '[k]hula is an agreement between two parties and it should not be granted until the husband agrees to it.' Mawlana Shirani wants

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<sup>68</sup> Jeffrey A. Redding, 'Constitutionalizing Islam: Theory and Pakistan' (2004).

<sup>69</sup> Council of Islamic Ideology's meeting 171, *Annual Report* (Council of Islamic Ideology 2009) 170.

to engrain the views of Hanafi School in Pakistani's minds, thus forgetting the fact that the council only renders advice according to the Quran and Sunnah of the Prophet.

### ***KHULA; A CHALLENGING TASK?***

The second issue the article aims to shed light on is despite being an undeniable right. We are still struggling to accept it as a right. Even today, filing for Khula has not become an easy task. Women filing for Khula are subjected to the backlash of their very own families. The first reaction such women encounter is that this is the price urban women paying in return of economic empowerment. Hum TV Dramas and human rights activists have corrupted our women is the most common reaction when the number of Khula cases rises<sup>70</sup>.

The societal stigma attached to Khula stops women from gathering courage and file for Khula. Because we live in a society where mothers and aunties teach their young daughters, "jis ghar mei shareef aurat ki doli jaati hai, wahan say us ka janaza uth'ta hai" (a decent woman's funeral should be in the same house where she goes as a bride). This doli to janaza mentality has cut the wings of many women to want to free themselves from the shackles of an abusive marriage, and thus they choose to weep and suffer in silence till their last breath.

Sometimes the thought of children stops a woman from standing up for herself. She does not dare to take that leap of faith because she feels that the stay in a marital home would do good for her children. The onus of protecting children from the effects of broken marriage scares a woman to the extent that she changes her decision to get separated.

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<sup>70</sup> Farahnaz Zahidi, 'Khula; A woman's right to divorce with Dignity' *The Express Tribune* (2016) <<https://tribune.com.pk/story/1076496/khula-a-womans-right-to-divorce-with-dignity>> accessed 20 April 2021.



It would not be futile to say that way to Khula is not always a smooth ride. Human rights lawyer Summaiya Zaidi says that a woman applying for khula can make a man vindictive. She mentions, “in most cases, the potential drama of divorce is unveiled when one reads the grounds for Khula as stated in the Plaint by the woman. Even if a man was willing to grant the Khula, once he reads the allegations against him, he might become defensive; it affects his ego.”<sup>71</sup>

### ***KHULA; A TOOL THAT LEADS TO WOMEN EMPOWERMENT***

Despite all this, we see a number of women filing for Khula are growing at an unprecedented rate, and data retrieved from family courts confirm this. There were 36 applications of Khula filed in Karachi alone within the first ten days of 2016. On 31 December 2015, 700 cases were reported in Malir, which made it a locality of Karachi with the highest number of registered Khula cases. Urdu journalist Arshad Baig says, “If 10 cases are resolved or disposed of, 50 new ones are added.”<sup>72</sup>

Today, more women feel empowered to step out of unhappy marriages. This positive change should be welcomed as we see women suffering in silence for decades. Nothing would be more pleasing than to conclude this part with the empowering note of Nida Kirmani, an influential gender activist, “If previous generations suffered, with more awareness of women’s rights hopefully future generations will progressively get better. It’s a part of progress, of life moving forward.”<sup>73</sup>

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

## CONCLUSION

In the light of the above analysis, it is observed that according to the majority of the school of thoughts, Khula is a consensual act, and the marriage cannot be dissolved without the consent of either party (mainly the husband). On the other hand, Malikis argue that the decision taken by arbitrators shall be binding. The Pakistani courts have taken a more generous approach and have been sympathetic towards women demanding khul. The Federal Shariat Court has ruled that 10(4) of the Family Courts Act 1964 is consistent with the injunctions of Islam. In addition, the Court ruled that it is not bound by the views of Muslim jurists. A change in the views of the Council of Islamic Ideology on the law of Khul has also been witnessed. In 2015, the council returned to its traditional view under Mawlana Shirani. It is surprising that neither the Federal Shariat Court nor the Supreme Court has dug deeper into the comprehension and interpretation of verse 4:45. The Council has also ignored verse 4:35: along with the views of Maliki Jurists as well as Habiba's episode. Also, despite the fact that the way to Khula is not always a smooth ride, and we have to play our part in empowering women by raising awareness regarding their rights.

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