



Khula under Islamic Law & Judicial Practice in Pakistan: A No Fault Divorce Regime

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ABSTRACT

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Marriage is a highly esteemed union in Islam and is treated and protected as an eternal bond. Despite its stress on preservation of marriage bond, Islam allows its termination as a last resort, considering it the most abominable among the permissible acts, for estranged spouses if they fail to observe the limits ordained by Allah Almighty. The termination of marriage may be by divorce, khula or the order of court dissolving the same. Research focuses on the termination of the marriage by Khula, exploring its Islamic as well as the legal perspective with particular emphasis on the approach of Courts in Pakistan for empowering women and ensuring the grant of rights given to them by Islam centuries ago. The research explores whether the amendments pertaining to quantum of Haq Mehar/ dower introduced in the year 2002 by Ordinance LV of 2002, in the proviso of section 10(4) the Family Courts Act, 1964 and further amendments introduced in the province of Punjab in 2015 by the Punjab Family Courts (Amendments) Act, 2015 are against the injunctions of Islam. The research also explores the proposition of the Council of Islamic Ideology and Federal Shariat Courts on these amendments.



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INTRODUCTION

Khula means to untie the knot and in its legal sense, When the woman pays or agrees to pay compensation to Khula, it's deemed the end of the marriage. Khula, according to Imam Abu Hanifa, is the dissolution of a marriage against the will of the spouses, with the wife's consent.

(Aurangzeb, 1349). Imam Malik believes that any divorce in lieu of contemplation is referred to as Khula, whether or not the name Khula has been used. Imam Shafi stated that every word which means and resulted in separation between spouses against some consideration is called Khula. There are two variations of Imam Ahmed Hanbal that have been reported. According to one version, Khula is a separation of spouses in lieu of consideration realized by the husband from his wife. According to another version, it is a divorce. (Tanzil-ur Rehman, 1978).

The Privy Council in *Moonshee Buzloor Rahman vs Lateefun Nissa* explained that Khula is always at the instance of wife where she pays or agrees to pay some consideration to husband for her release from marriage bond. In such a case, the terms of agreement are matters of arrangement between husband and wife, and the wife may, as consideration, give up her dower and other rights or make any other arrangement for the benefit of the husband. The courts may dissolve the marital tie on the basis of Khula if it is of the opinion that it is not possible for spouse to live with each other as per the injunctions of Islam. The rationale behind this rule is to avoid the hateful union.

Authority of Khula under Islamic Law

This section provides a brief of the discussions on Khula as provided in Quran, Sunnah and the details discussed in juristic opinions.

Rules of Khula in the Holy Quran and Beliefs of the Holy Prophet (PBUH)

Marriage is considered sacrosanct in Islam, but if the husband and wife cannot lead their lives within the limits ordained by Allah Almighty, then both of them can terminate it. The husband can terminate marriage by pronouncing divorce and the women by seeking Khula. Allah Almighty said in Surah al Baqarah;

“Divorce is twice. Then [after that], either keep [her] in an acceptable manner or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allāh. But if you fear that they will not keep [within] the limits of Allāh, then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allāh, so do not transgress them. And whoever transgresses the limits of Allāh - it is those who are the wrongdoers [i.e., the unjust].” [2:229]. There are no consequences for the woman bribing herself, according to the verse in the second half. This indicates that the case of khula is when the woman pays something to the husband as compensation for her freedom from the marriage tie. So there is no disagreement among jurists on the validity of Khula. The disagreement, however, is that who has the authority to decide if the partners can or cannot live within the limits prescribed by Allah Almighty. (Muhammad Munir, 2015).

The majority of Muslim Jurists think that addressees in the verse is state authority and arbitrators / conciliators in absence of state. Lahore High Court in many of its decisions had asserted that state and the judicial ministry of the state are the addressees of this verse. (*Balqis Fatima v Najm-ul-Ikram Qureshi*, 1959). According to Maliki jurists, the arbitrators appointed as per the rule of Surah Nisa verse 35 have the authority to look into the cause of discord. The verse states “If you anticipate a split between them, appoint a mediator from his family and another from hers. If they desire reconciliation, Allah will restore harmony between them. Surely Allah is All-

Knowing, All-Aware.” The arbitrators have to try reconciliation and if it fails, they may decree separation that will be binding on the spouse. (Muhammad Munir, 2015).

An account of Khula, the wife of Thabit bin Qays, appeared before the Prophet (PBUH) and argued that she and her husband could not cohabit because of the restrictions placed by Allah Almighty that validates Khula's authority. The Prophet (PBUH) directed Thabit bin Qays to release her in lieu of the garden he had gifted her. (Sahih Al-Bukhari Hadith 7.197).

Khula and Views of Muslim Jurists.

With the exception of Maliki jurists and Shia jurists, all Sunni schools of thought hold that Khula cannot take effect without the husband's consent. They view khula as a means of reaching an agreement (bay) that requires the mutual consent of both sides. However, Maliki jurists believe that the court or arbitrators designated by it can dissolve a marriage without the consent of both the husband and the wife by divorce or khula (divorce). Ibn e Rushd treats khula as a right of a woman that is not dependent upon the consent of the husband. (Muhammad Munir, 2015).

Expression for Khula:

Under the Sunni law, it is not an essential condition of Khula that only the Arabic language should be used to obtain or to give a Khula (Muhammad Munir, 2015). Hence, couples can use any language which they know and use for granting / obtaining khula. According to the Shafi law, every divorce in consideration of property constitutes Khula whether the word Khula is used or not. It is however, necessary that the word or expression must referred to as Khula whether expressed or by implication. (Tanzil-ur Rehman, 1978) views of Imam Malik on the subject are same as those of Imam Shafi. The Hanbali law prescribes the use of certain specified words such as Khula, Faskh (cancellation) and Fidyah (ransom) and describes it as that divorce in which the husband separates from his wife using certain specified words for a consideration accepted by him. Khula must be pronounced in Arabic according to Shia law. The Talaq must come after the word Khula (Divorce). There must be two impartial witnesses present for the Khula like the Talaq. (Tanzil-ur Rehman, 1978).

Nature of Compensation

Anything which is capable of being legally given as dower is capable of being subject matter of compensation for khula. (Tanzil-ur Rehman, 1978).

Nature of Separation

There is contrast of viewpoint encompassed by the jurists about nature of separation resulting from khula. Some consider it a dissolution of marriage (faskh) and some a divorce. According to Hanafi and Maliki law, Khul'a is an inevitable divorce. (Aurangzeb, 1349). The author of Al-Hidayah, Burhan al-Din Marghinani has said that the Khul'a shall be considered as one irrevocable divorce and the wife shall pay ompensation to husband. In Shafi' shool of thoughts, Khula affects dissolution between the husband and wife, but does not take effect as a divorce. However, aording to his subsequentdecree, Khula is one irrevocable divorce. According to Imam Hanbal, Khula will only be considered as divore if intended so by the husband. Hence according

to them, Khula without the intention of divorcing by husband will not decrease the number of pronouncing divorces. (Tanzil-ur Rehman, 1978)

Khula, A Case Study of Pakistan

Islamic law and western culture guarantee gender equality that coexists in Pakistan's unique constitutional framework. Islam is officially recognised as Pakistan's official religion by the country's 1973 constitution. In addition, the Constitution of 1973 added Article 2-A, which stated that all laws must be in accordance with the Quran and the Sunnah. The Constitution also outlined essential rights in addition to Islamic obligations. Article 2A and the fundamental rights are considered by the West as a conflicting notion based on their lack of understanding as it was Islam which gave the idea of human rights in the history of mankind and the last sermon of the Holy Prophet (PBUH) was actually the first charter of Human Rights. The fundamental rights granted by the constitution provides that all citizens are equal before the law and entitled to the equal protection of law. (A.Redding, 2004). Discrimination on the basis of sex alone is prohibited by the law of the land though it allows special provision for the protection of women and children. The courts in Pakistan have used Article 25 as effective tool for protecting women rights. (Ghulam Mustafa Insari vs Govt of Punjab and others, 2004) and maintained discrimination on the basis of sex only sometimes when they operate favourably to protect women. (Mst.Safia Bibi vs Mulazim Hussain, 2001).

The courts in Pakistan, while interpreting the right to life have expanded it to include rights necessary for a dignified existence and for enjoying a meaningful life. (Shehla Zia and others vs WAPDA, 1994). Courts have understood the right to life to imply the rights of couples to marry, establish a home and live together. (Humaira Mehmood vs The State, 1999). If the rights to marry and have a family are fundamental rights then right to dissolve a marriage naturally follows. (Yefet, 2011). The decision to divorce is as important as marriage itself because a bitter relationship deeply affects the quality of life. In addition, denial of the right to Khula means denial of the fundamental right to remarry. Therefore, right to divorce is linked with two constitutional rights: right to marriage and right to life.

Khula under Statutory Law

Dissolution of Muslim Marriage Act 1939 (DMMA) does not expressly provide any provision regarding dissolution of marriage through Khula, but clause (ix) of the section 2 states that the wife can seek dissolution on any other ground which is recognized as valid for the dissolution of marriage under the Muslim Law. As in Muslim Law "Khula" is one of the recognized methods for dissolving the marriage if the wife is prepared to return the benefits of marriage, mainly Haq Mehar, then this ground is covered under clause (ix) of the DMMA, 1939.

Section 5 of the West Pakistan Family Courts Act 1964, empowers the Family Courts to deal with cases of dissolution of marriage, including *khula* (divorce on the wife's demand), and the allied issues of dower, maintenance, restitution of conjugal rights, custody of children, guardianship, dowry, personal property and belongings of the wife. (West Pakistan Family Courts Act., 1964). Prior to the amendment in the year 2002 by Ordinance LV of 2002 in the family courts Act 1964, the cases of khula were to be decided after examination of evidence on the reasonability

of obtaining khula by the wife (1984 SCMR 1372 SC) (1995 MLD 1095 Lahore). The right of khula was not absolute right (1984 PLD 329 SC) and the wife was refused to grant khula in a number of cases (1984 SCMR 523 SC). The wife has to forego her claim of maintenance allowance along with dower for separation of her marriage on the principle of khula as under khula (1995 CLC 440 Lahore). Gradually, the courts shifted to the concept that placing of conditions of zare khula as pre-requisite to grant of khula is without lawful authority, especially when the husband has not claimed the same (1995 MLD 981 Lahore) .

Unconditional khula was granted due to the circumstances created by the husband (1995 MLD 1852 Lahore). Refusal of khula by the trial Court on the ground of adamant behaviour of the wife was not appreciated and it was decided that refusal of khula by the court may tantamount to pressurizing parties to live in an invidious union which is against the standards of justice (1995 CLC 657 Lahore). In 2002, a provision was inserted to Section 10 of the Family Courts Act, 1964 which said that if the reconciliation procedure fails, the family court shall pass a legislation for the separation of marriage on the basis of khula without requiring any additional proof. This provision was challenged in six identical petitions in Federal Shariat Court (FSC), which held that it did not find the provision of section 10(4) of the West Pakistan Family Courts Act 1964 in violation of any specific injunctions of (Muhammad Munir, 2015).

It was introduced in 2015 by way of the Punjab Family Courts (Amendment) Act 2015 that allowed the Courts in Punjab the ability to order a wife to surrender up to 50% of her postponed dower or 25% of her accepted prompt dower in the event that a husband is being investigated for a khula-based divorce. Similarly, the court was empowered to direct the husband to pay whole or any part of the outstanding delayed dower to the wife while granting khula. The amendment changed the concept of surrender of all the benefits to husband in order to obtain khula and restricted the payment up to 50% of deferred dower or 25% of admitted prompt dower.

Approach of Judiciary - Analysis of Case Law

In Pakistan, the courts have played substantial role in the divorce history in Pakistan. DMMA gave a blank cheque to the courts in shape of clause ix of section 2, but courts realized the mandate after so long and finally formulated a divorce law in favour. (Haider, 2000). Since 1959, courts have been determining divorce claims to see the khula doctrine. If the wife raised conflict of ego and prompted to return her dower, she would be tagged to divorce even without her husband's permission. (Mst. Bilquis Fatima vs Najm ul Ikram Qureshi, 1995). In 1996, the Supreme Court of Pakistan affirmed the unilateral understanding of khula. (Mst Khursheed Bibi vs Baboo M Amin, 1967). The Court supported its decision with Quranic verses and Beliefs of the Holy Prophet (PBUH) and accepted the women right of a no-fault unilateral divorce. (Yefet, 2011). The Federal Shariat Court reformulated the khula doctrine by giving it simple interpretation and said that the woman has to only satisfy the conscience of the court that the couple cannot rectify and live a balanced life within the limits advised by Allah. (Haider, 2000).

The courts followed this approach and expanded the women's right to divorce by utilizing khula. If a suit for disunion of marriage on any of the grounds described in section 2 of DMMA stand failed, the woman can still demand divorce on the basis of khula. Even if the woman has no reason and no circumstances justifying her aversion for the husband, she only has to say that she hates him and it is enough for the court to grant her khula.

When a wife files an appeal with the court for the dissolution of her marriage on the grounds of khula, Mrs. Nasira Iqbal Javed states that the court is obligated to approve her request since the wife is entitled to a divorce on the grounds of khula as *ex debito justitiae* (as of right) (Mst. Sofia Bibi vs Mulazim Hussain, 2001). It is quite unlikely that the woman will offer an explanation as to why she now despises her husband and will not speak to him about it. It is sufficient if it can be proven that the wife has become enraged and hostile toward her husband, and that there is no chance that they will ever be able to reconcile their differences. (Shakila Bibi vs Muhammad Farooq, 1994). The feelings of love and hatred cannot be legislated on the basis of rationality. In these kinds of situations, the only thing that needs to be taken into consideration is whether or not the husband and wife can live together in order to fulfil their obligations as a married couple, as well as whether or not there is concrete evidence of dislike or aversion between them. (Mst. Naseem Akhter Vs Muhammad Rafique and others, 2005).

Where a wife filed a suit for disintegration of marriage on the grounds of cruelty, husband's failure to perform marital obligations, desertion and contracting second marriage without her permission and also khula, the family court decreed the suit on the basis of khula subject to return of dower. It was held that the wife would lose her dower if she sought disintegration of marriage on sole grounds of khula, but not when she raises other grounds along. (Sadia Sultan vs Additional District & Session Judge, 2012). If dissolution is sought based on a number of different grounds, one of which is Khula, the fact that the wife was unable to establish her allegations regarding the other grounds does not mean that she is disqualified from seeking an independent determination of her right to have her marriage dissolved on the basis of Khula. (1998 CLC 1929).

For couples living in an atmosphere of suspicion, doubts, non-confidence, natural disrespect, discard and hatred, it would be better to separate them (Shakoor Akhtar case, 1999). The court is not supposed to objectively analyse wife's claim, but should see her state of mind and her objective conditions that she cannot possibly live in peace and harmony with her husband. (Mst. Zubaida Mai vs Muhammad Yousaf, 1989). In case of husband contracting second marriage during pendency of suit for dissolution of marriage, Family Court rightly concluded that it was not possible for spouses to live within the limits of God (2000 CLC 2012).

The analysis indicates that the courts in Pakistan have devised certain tools to diminish the economic emanation of khula divorce so where the marriage lasted for long time and the husband himself through his conduct forced her to demand khula, the court will grant it even without returning the dower. (Muhammad Khalil vs Shazia Iqbal, 2006). At times, the court diminished or sometimes dissipated, the pool of property returnable to the husband by reducing additional benefits he received from wife including house work and childrearing. (Muhammad Saqlain vs Zaibun Nisa, 1988). Since the Holy Quran does not command in explicit terms that the entire dower has to be returned, the judge is tasked with the responsibility of determining whether or not, in specific and exceptional circumstances, the dower as a whole is to be repaid by the wife or whether or not only a portion of it is to be repaid by the wife. In addition to this, it is also able to indicate the amount that the husband may be able to save from the payment of dower to the wife, if it has not already been paid. (Dr Fakhruddin vs Mst. Kosar Takreem and others, 2009).

Where a condition was included in nikahnama restraining wife from approaching court for talaq on the ground of khula and an earlier suit for dissolution of marriage was withdrawn, it was held by the court that a condition in nikahnama restraining wife from approaching family court for khula is not a valid condition. (Malik Ghulam Nabi Jilani vs Mst. Pirzada Jamila, 2004). It was

also held by the court that a subsequent suit for disintegration of marriage on the ground of khula was not barred as a recurring cause of action could accrue to the party. (Malik Ghulam Nabi Jilani vs Mst. Pirzada Jamila, 2004). Where a condition was included in nikahnama that in case of wife demanding khula, she will pay the husband Rs. 250,000/- and if husband divorces her, he will pay the same amount to her. Suit was filed by the woman for disintegration of marriage on the basis of khula and the same was irrevocable in her favour. The husband approached family court and then High Court that it was incumbent upon Family Court to award Rs. 250,000/- in his favour. The Supreme Court dismissed the petition on ground of being frivolous and held that parties in a marriage tie should remain together in a peaceful atmosphere not to be bound by stringent conditions.

Under the Pakistani law, khula is considered as single irrevocable divorce. For remarriage after Khula, no intermediate marriage of woman with another male is necessary. The marrying by another husband, before a woman can be lawful to her previous husband, is a condition which has been imposed on in the case of a divorce pronounced thrice and not in that of Khula. No such fetter has been placed on the reuniting of a woman who has obtained dissolution of her marriage in the Khula from (PLD 1970 Lah. I-PLR 1970 (2) W. P. 894-Law Notes 1969 Lah. 387] (This was a case where two divorces earlier to Khula had not been pronounced by the husband. It was held in *Fazal-e-Subhan vs Sabereen & Others* (Fazli e Subhan vs Sabereen, 2003), in case of divorce through khula, it was not obligatory on wife to marry a third person before remarrying her first husband. Remarriage with the same husband, of course would be subject to performance of fresh nikkah.

CONCLUSION

To preserve marriage and family is one of the basic objectives of shariah. Marriage is considered as a highly esteemed institution and Islam stresses upon its preservation. But where it becomes extremely difficult for the partners to live together in peace and harmony, Islam gives them an option to dissolve their marriage. A woman under Islamic law can seek disintegration of her marriage on the basis of khula on returning amount of dower back to her husband. Her right of Khula is recognized in the Holy Quran, the Sunnah of Holy Prophet (PBUH) and the Muslim Jurists. Majority of Muslim Jurists consider the consent of the husband mandatory for affecting khula because in their opinion khula is a transaction (bay) as woman is buying her freedom from man and consent of both parties is necessary for a valid transaction. But Maliki jurists do not consider consent of husband necessary for affecting khula. In their view, court or arbitrators appointed by the spouses can declare the talaq or khula even without consent of husband or wife or both.

Pakistan as a state does not expressly provide any statutory provision for dissolution of marriage on grounds of khula, but it is dealt under a provision [sec 2 (ix) of DMMA 1939] which provides that dissolution of marriage can be demanded on any other ground (in addition to those expressly mentioned in other clauses of the same section). In 2002, section 10(4) of the West Pakistan Family Courts Act was amended and it provides that The Family Court, when hearing a case for the dissolution of a marriage, must, if attempts at harmony are unsuccessful, immediately issue a proclamation for the dissolution of the marriage, and it must also return to the husband the Haq Mehr that the wife received as a deliberation of marriage at the time of their wedding. In 2015, through the Punjab Family Courts (Amendment) Act, 2015 the province of Punjab introduced amendmet in section 10 of the Family Courts Act, 1964 and inserted section 10(5) and 10(6) wherein, it permitted the Court to direct the wife to surrender upto 50% of her charged dower or

upto 25% of her admitted prompt dower to her husband in case of seeking her dissolution of marriage on the basis of khula.

Similarly, the Court was empowered to direct husband to pay the whole or part of the outstanding deferred dower to the wife while granting khula. The concept of surrender of all the benefits to husband in order to obtain khul has been shrunked to 50% of deferred dower and 25% of admitted prompt dower. It can rightly be said that women in Pakistan have a better and liberal divorce regime as compared to American women in some jurisdictions. A female initiated no fault regime is prevalent in Pakistan, which is infamous worldwide for its unprecedented violations of human rights.

REFERENCES:

- A.Redding, J. (2004). Constitutionalizing Islam: Theory and Pakistan. *INTLL* , 759.
- Aurangzeb. (1349). *Fatawa Alamgiriya*. Kanpur: Dar Al-Kotob Al-Ilmiyah.
- Balqis Fatima v Najm-ul-Ikram Qureshi, 566 (Lahore High Court 1959).
- Bushra Bano vs Shabir Ahmed (Shariat Court Azad Kashmir 1999).
- Dr Fakhrudin vs Mst.Kosar Takreem and others (Peshawar High Court 2009).
- Fazli e Subhan vs Sabereen (Peshawar High Court 2003).
- Ghulam Mustafa Insari vs Govt of Punjab and others (Supreme Court of Pakistan 2004).
- Haider, N. (2000). Islamic Legal Reform: The Case of Pakistan and Family Law. *Yale Journal of Law & Feminism* , 329.
- Humaira Mehmood vs The State (Lahore high Court 1999).
- Malik Ghulam Nabi Jilani vs Mst. Pirzada Jamila (Supreme Court of Pakistan 2004).
- Mansoor Bibi vs Khan Muhammad (Supreme Court 1982).
- Mst Khursheed Bibi vs Baboo M Amin (Supreme Court of Pakistan 1967).
- Mst. Bilquis Fatima vs Najm ul Ikram Qureshi (Lahore High Court 1995).
- Mst. Nagina vr Mukhtar Hussain (Supreme Court of Pakistan 2009).
- Mst. Naseem Akhter Vs Muhammad Rafique and others (Supreme Court 2005).
- Mst. Rabia Rasheed v Faisal Mir and two others (Peshawar High Court 2013).
- Mst. Sofia Bibi vs Mulazim Hussain (Lahore High Court 2001).
- Mst. Zubaida Mai vs Muhammad Yousaf (Supreme Court 1989).
- Mst.Safia Bibi vs Mulazim Hussain (Lahore High Court 2001).
- Muhammad Faisal Khan vs Mst. Sadia (Peshawar High Court 2013).
- Muhammad Hafiz vs Shamaila Bibi & two others (Supreme Court 2013).
- Muhammad Khalil vs Shazia Iqbal (Supreme Court 2006).
- Muhammad Munir, D. (2015). The Law of Khul'in Islamic Law and the Legal System of Pakistan. *LUMS*

Law Journal (LLJ) , 9.

Muhammad Saddique vs Mst Sarwar (Supreme Court of Pakistan 2008).

Muhammad Saqlain vs Zaibun Nisa (Blochistan High Court 1988).

Qibla Ayaz, D. (2008-2009). *Islamization of laws*. Islamabad: Federal Government Official Publications.

Sadia Sultan vs Additional District & Session Judge (Lahore High Court 2012).

Shakila Bibi vs Muhammad Farooq (Lahore High Court 1994).

Shakoor Akhtar case (Supreme Court 1999).

Tanzil-ur Rehman, D. (1978). *A Code of Muslim Personal Law*. Karachi: Hamdard National Foundation.

West Pakistan Family Courts Act. (1964). Official Gazette of Government.

Yefet, K. C. (2011). The Constitution and Female Initialed Divorce in Pakistan. *Harvard Journal of Law and Gender* , 566.