

"KHUL": THE RIGHT OF A WOMAN TO INSTITUTE DIVORCE PROCEEDINGS: NATURE, PROBLEMS AND SOLUTIONS.

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1. INTRODUCTION

The moment the marriage contract is concluded, the spouses are enjoined to do their utmost to implement the obligations imposed on them through the teachings of Islam, so as to render their married life an abode of bliss and compassion. This, they have to do, despite their differences of opinion, thought, taste, temperament, inclination and behaviour etc. These differences are bound to arouse disputes which might develop grudges and subsequently brings about unbearable life.

If the level of *harmony* required of a married life is not attained because of some conflict, attention should be given to the source of conflict. Hence, spouses are always advised to keep down their temper, be patient, tolerant and treat each other honourably and with kindness. In short, they should always seek compromise and reconciliation.

Where the source of conflicts originates from the wife, the husband is instructed to follow a phased disciplinary course of three steps.¹ But where the source of conflict originates from the husband, the wife is instructed to initiate peace-making process and the husband is enjoined to reciprocate, so that the two may settle themselves quietly. If that course fails, two arbitrators representing both sides are chosen to make peace where all these fail, there are many avenues open to them. One of the avenues is *Khul*, the subject of this article for discussion.

2.(A) KHUL'- SELF-REDEMPTION

The word 'Khul' is the noun of the Arabic verb '*Khala`a*', which means to get rid of or to remove. This word '*Khala`a*' is commonly used when one pulls off his clothes, or extract his tooth or an important official is removed from his office. Therefore, in this context, the spouses by '*Khul*' get rid of each other, especially bearing in mind the Quranic verse which refers that the spouses are like garments to each other.²

Khul' is a divorce on consideration and by mutual agreement. This is a wife's right to divorce and it arises in a situation where the husband and wife agree to dissolve their marriage peacefully.

This is an irrevocable form of divorce, which is initiated by the wife rather than the husband. Where a wife is unhappy in her marriage for reasons best known to her and has no overt fault or guilt against the husband, she may seek for a divorce from him, by returning the *Sadaq* (dowry) or the like to compensate for his material and/or moral losses, to secure her freedom. In fact, instances abound in which women sought the divorce, and their request were granted by their mates without asking for or getting anything in return.

(B) LEGAL BASIS OF KHUL'

There are textual authorities both in the Holy Qur'an and sunnah in relation to *Khul'*. In the Holy Qur'an it is stated thus:

"And it is not lawful for you to take back anything of what you have given to your wives unless both (partners) have cause to fear that the two may not be able to keep within the bounds set by God, there shall be no sin upon either of them for what the wife may give up (to her husband) in order to free herself...."³

And in the Sunnah, the locus classicus is the ahadith of *Jamila, wife of Thabit Ibn Qays Ibn Shammās*. She complained to the Holy Prophet (S.A.W) that she found no fault on her husband's disposition as a man or morality, but fear injury to Islam and her relationship to Allah on account of his ugliness. The Holy Prophet (S.A.W.) asked her 'can you return his orchard he gave you as *Sadaq*? She said 'yes'. Therefore, the Holy Prophet (S.A.W.) ordered her to return the orchard to Thabit for him to pronounce one divorce on her.⁴

This is regarded as the 1st *Khul* in Islam.

From the above authorities, it shows that in Islamic Law, whenever a marriage is dissolved at the wife's instance without any offence against the husband, as far as his marital obligations are concerned, the wife is deemed as the contract breaking party and must, therefore return the *Sadaq* which she received from him at the time of concluding the marriage; and in this sense "there shall be no sin upon either of them" as mentioned in Chapter 2 V, 229, if the husband takes back the dowry with which the wife gives of her own free will.⁵

(C) CONSIDERATION FOR *Khul'*

The first and foremost issue is whether consideration is necessary or not to effect *Khul'*. There is unanimity among the jurists that consideration is not an essential condition for the validity of *Khul'*. The Husband can accept to release the wife from marital tie without accepting anything in return. This attitude is preferred by the Holy Qur'an and the Sunah of the Holy Prophet (S.A.W.). It is observed that most men from the high and the middle class receive nothing as consideration for *Khul'*. The demand and acceptance of *Khul'* is more prevalent with the lower class.

The second issue as to whether the consideration for *Khul'* is to be specified or not, the jurists differ. According to the Hannafi, Maliki and Hanbali jurists, specification of consideration is not a condition for the validity of a *Khul'*.⁶ But according to Shafi'i and Shi'a jurists, specification of consideration is a condition for the validity of *Khul'*.⁷

The third issue is whether the consideration *Khul'* the wife will give may be more or less than what the Husband gives as *Sadaq*, the jurists are divided on it.

A group of jurists of which include Maliki, Shafi'i' and Zahiri jurists, are of the view that the *Khul'* consideration can be, the equivalent, more or less of the *Sadaq* given by the husband according to their agreement.⁸

They rely on Chapter 2 V. 220 and that the word either in verse implies any amount and the *abadith* narrated by al-Bayhaqi on the authority of Abu Sa'id al-Khudri, who said "My sister was marrying an *Ansar* and their relationship became strained, so they brought their case to the Holy Prophet (S.A.W.) and the Holy Prophet (S.A.W.) said to my sister, 'will you return his (i.e. her husband's) garden? She said, 'I will even add something on it'. And she returned (to him) his garden with an addition".⁹

In short, this group is of the view that the increase of *Khul'* consideration is lawful. Another group of Jurists (which is the strong view) are of the view that the husband is entitled to the equivalent amount of his *Sadaq* as *Khul'* consideration. They relied on the *abadith* narrated by ad-Dar Qutni, according to which Abuz-Zubair mentioned that he gave her a garden (as *Sadaq*) and (when she sought *Khul'*) the Holy Prophet (S.A.W.) said (to her), "will you return to him his garden which he gave you (as *Sadaq*)?" She replied, "yes, and even add on it". Then the Holy Prophet (S.A.W.) said, "with regard to the addition" no (you will not give it to him)", it is only the garden that you will return to him". She then said "yes".¹⁰

The *additional amount* if encouraged to be given as *Khul'* consideration, will give some unscrupulous husbands the basis to make it practically impossible for wives to effect *Khul'* when the need for it arises. It should not be encouraged at all. It is based on this that Imams Abu Hanifa and Ahmad Ibn Hanbal did not agree for husband to take from their wives more than what they have given them as *Sadaq*. Where that has taken place, to these two Imams, those husbands are deemed to have committed sin.¹¹

(D) DISTINCTION BETWEEN KHUL' AND TALAQ

Khul' and *Talaq* are two forms of dissolving a marriage. The two can be distinguished as follows:-¹²

- (i) in the case of *talaq*, as long as it is not the third *talaq* and the *Iddah* (waiting period) does not expire, the husband has the right of *raja'ah* (revocation). Whereas, in the case of *Khul'*, once it is effected, the husband is not entitled to revoke so as to have the wife back to the marriage tie.
- (ii) As for *talaq*, the *Iddah* is three *quru* (monthly course or state of purity), whereas in *Khul'*, the *Iddah* is only one monthly course.

(E) THE ROLE OF HUSBAND IN THE EXERCISE OF KHUL'

There are many unscrupulous husbands who force their wives to seek *Khul'* by depriving them of some of their rights or by inflicting harm on them.

Where the husband do so, some jurists including that of Maliki and shafi'i schools, are of the view that such *Khul'* are invalid and if the consideration has been paid by the wives, it must be returned to them even if judgements have been given by the Courts to that effect.¹³

They relied on the following authorities:-

- (i) "O you who have attained to faith, it is not lawful for you to (try to) become heirs to your wives (by holding unto them) against their will; and neither shall you keep them under constraint with a view to taking away anything of what you may have given them, unless it be that they have become guilty, in an obvious manner of immoral conduct...."¹⁴
- (ii) "But if ye decide to take one wife in place of another, even if you had given the later a whole treasure (for dowry); take not the least bit of it back; would you take it by slander and manifest wrong"¹⁵

Some jurists including Imam Abu Hanifah on the other hand, are of the view that where husbands obtain *Khul* by force, depriving wives their rights, etc, it is valid and the consideration is incumbent upon the wives, though the husbands are considered to be *sinner*s.¹⁶

There are the third jurists, of which Ibn Qudamah is included, who are of the view that husbands who compel their wives to seek *Khul* without any justifiable cause, they are not entitled to considerations, but is regarded as *talaq* without any consideration.¹⁷

(F) THE ROLE OF COURTS IN THE EXERCISE OF *KHUL*'

Where both spouses desire to separate, there can be no difficulty if either of the following happens:-

- (i) They mutually agree to terminate the marriage.
- (ii) The husband may divorce the wife subject to certain conditions (if any) as may be agreed upon between them.
- (iii) The wife may seek *Khul*' to which the husband may agree.

Where any of the above happens, it is unnecessary for the spouses to have recourse to judicial action in the court.

But where the husband refuses to grant *Khul*', or where the spouses could not come to an agreement on the conditions upon which *Khul*' is to be granted, it is then the role of the Court to resolve the dispute.

It is this role of the Courts to resolve the dispute between the spouses that has not been judiciously exercised as evidenced from the following decided cases.

(1) RABI USMAN V. USMAN DANDARE KAWARA.¹⁸

This was a case in which the wife (plaintiff in this case) sought for a divorce. The reasons being that she did not like the husband but her parents forced him unto her and he defecates (by passing excreta) whenever they are consumating the marriage in bed, and the whole room will be smelling. She confronted the husband over it and he admitted that before he married her, he had that defect and begged her not to expose him. She told the Court because of this defect, she cannot live with him and hence, the reason for her divorce. The defendant admitted her claim and said the defect was there before he married her. But that court should beg her to tolerate him like that. She refused and was willing to refund back his dowry ₦4,000 since their marriage then was just one week old. The husband agreed to all that the wife had said but still was begging her to tolerate him like that. The court gave them one week for reconciliation, which proved abortive. It was on the strength of this, the husband

requested for a refund of the dowry to regain her freedom. The Court held that since the wife's claim for divorce has been confirmed by the husband that he used to defecate whenever he is consummating the marriage but begged the wife to remain with him like that, which she declined, but agreed to refund the dowry of ₦4,000. The court relied on *Jawahirul Iklil* Vol. I 298 which says that a marriage is dissolved between a husband and wife once there is a defect from either or one of them and is not aware of the defect before or after marriage. Also the Court relied on *Bahja* Vol. 1. Page 312, that since the wife requested for a divorce from the husband, she has to redeem herself.

Based on these, the Court ruled that the marriage stands dissolved from 18/4/94 on condition that she refunds the ₦4,000 he gave her as dowry, she is also expected to observe Iddah of three monthly courses.

A critical look at the decision of the case above will show that it was wrongly decided. The amount (₦4,000) which Rabi Usman gave her husband, Dandare Kawara as *Khul'* consideration must be returned to her, the decision notwithstanding.¹⁹ The marriage in the above case should have been dissolved on account of bodily defect, since it will not promote the purpose of marriage.²⁰ Moreover, the wife is not aware of the defect and when she became aware of it after marriage she has not waived her right.

(2) BALARABA MAGAJI SHIKA V. MAGAJI ISA GIWA

This was a case in which the wife sought for a divorce on the ground that the husband constantly accused her of immorality with men whenever she goes out, even to her parent's home or elsewhere. The husband denied her claim and on two occasions they were given opportunity to reconcile but to no avail. The husband demanded for ₦30,000.00 as *Khul'* consideration for her freedom. The Guardian of the wife (one Alh. Bako Abdullahi) was invited by the Court, who said the husband paid ₦500 as dowry not ₦30,000.00. The wife agreed to pay ₦1,000 as *Khul'* consideration for her freedom. The Court held that the wife should pay ₦10,000 as *Khull'* consideration for her failure to prove her claim or to go back to the husband's house. There is an abuse of the exercise of *Khul'* in the above case. The normal thing is for the Court to ask the wife to refund ₦500 which was given to her 7 years ago as dowry, and not to insist on the wife paying ₦10,000.²² This is very exploitative and has the tendency of drifting the wife into premature prostitution and the like vices so as to be able to satisfy the amount required of her. Our judges need to be realistic in determining the *Khul'* consideration so that *Khul'* should not be seen as destructive weapons by the husbands against their innocent wives.

(3) **INDO ALHAJI IBRAHIM V. DANLADI ALI²³**

The issue of *Khul'* was raised in this case, in which the husband claimed a refund of ₦248.53 being expenses and dowry incurred on the wife. The trial Area Court ordered the wife to pay ₦80 only for the husband's expenses without ordering for the payment of the dowry. The husband appealed before Upper Area Court, Jos which after determining the various issues of facts and law ruled that expenses incurred on gifts should be treated as gifts and not to be returned while the amount paid as dowry should be refunded as part of *Khul'* money which was ₦120. The wife dissatisfied appealed to Sharia Court of Appeal, Jos. The Sharia Court of Appeal held, inter alia, that where a husband incurs expenses on his marriage such expenses cannot be deemed to constitute part of the dowry but are incurred as gifts only, the husband cannot claim those expenses as *Khul'* money on the dissolution of his marriage on the basis of *Khul'*. The Court affirmed the decision of Upper Area Court that ₦120 as the *Khul'* money to be refunded by the wife. The decision to agree on the *Khul'* money at ₦120 is wrong, because ₦40 was only paid as dowry and ₦80 was expended on general gifts. A tradition of the Holy Prophet (S.A.W.) had it that whoever gives gifts to others and later demand them is acting like 'dog vomiting and licking what it disgorges'.

"He who takes his gifts back is like a dog which takes back its vomittings"²⁴

It is also a settled matter in Islamic Law, that it is the right of the wife to retain all the property given to her by the husband (by way of gifts) if she stays in the husband's house for a minimum period of 3 months.²⁵

In this case, it is wrong for the Court to demand a refund of all that has been given to the wife as gift.

(4) **RAHINATU SAMAILA V. AHMADU KAFINTA²⁶**

The wife sought for divorce from her husband on the following grounds:-

- (i) Lack of maintenance
- (ii) Husband's neglect of his religion (i.e. prayer)
- (iii) Cruelty and ill-treatment.

These allegations the wife could not prove. The husband denied all the allegations and alleged that it was her former husband, Abdurahman who was instigating her to sue for divorce because he had divorced her irrevocably i.e. 3 talaqs at a time, and wanted a way out. The issue of

instigation by Abdurahman, the former husband, could not be established. There were several rooms given to them for reconciliation but it failed. The husband demanded ₦30,000 as *Kbul'* consideration from the wife, since she has just spent 30 days in his house. The wife admitted receiving ₦1,200 as dowry and ready to return the same. The two sides were represented by counsels each justifying his claim as stated by the parties in the case. The Court finally agreed at ₦1,200 as the *Kbul'* money for the wife to redeem herself.

The decision in the above case seems just and may be attributed to the fact that there was representations by counsels. This should have been the practice by the judges not to allow the award of *Kbul'* money more than what has been paid as dowry.

(5) LAWAL ALH. AMINU V. HADIZA ISYAKU²⁷

This is an appeal case from the decision of trial Area Court I, Zaria City. There the wife sued for a divorce on grounds of cruelty and ill-treatment. Two women testified to that effect and the marriage was dissolved. The husband appealed to the Upper Area Court I, G.R.A. Zaria and his grounds of appeal were that:-

- (i) The marriage was dissolved without the court awarding anything to him, despite the fact that he spent ₦6,500 on the marriage.
- (ii) Their marriage lasted for just 3 months and 16 days without the marriage been consummated, hence the cause of the trouble.
- (iii) The two witnesses of the wife who testified for her could not establish the cruelty and ill-treatment i.e. beating.

He prayed the Court to set aside the judgement and allow the marriage to continue. The wife, who was represented by a counsel argued inter alia that to allow the marriage to continue will be dangerous in a situation where the couple could not live in peace, he was entitled to nothing because the marriage was dissolved on grounds of cruelty, and that she had stayed in his house for more than 3 months and had discharged the burden on her, the onus was on him to discountenance her claims, which he has not done so. The Court held that based on S.9(i) (B) Area Court Edict of 1967, the decision of Area Court I, Zaria has been quashed because it was wrongly decided and ordered a retrial by the Area Court II, Zaria City.

It was at this juncture that settlement was effected by the wife paying ₦4,000 as 'consideration to regain her freedom which was accepted by the husband.

CONCLUSION

The above are few cases out of many in which the role of the Courts in determining *Khul'* consideration is nothing to go by, but arbitrariness, injustice and hardship meted out to the wives. This defeats the very essence of why the doctrine of *Khul'* is allowed in Islam, that is to be resorted to in cases of necessity by a wife to regain her freedom.²⁸

Women who think that it is an avenue for them to obtain separation from marriage bonds without any reason and regard *Khul'* as something to toy with, have been referred to as hypocrites.

"A woman who obtains a separation from her husband, without any misbehaviour on his part, stands cursed by Allah, by Angels and humanity, women who make *Khul'* a play thing are hypocrites."²⁹

The right of separation given by the doctrine of *Khul'* to the spouses, especially the woman, is to be exercised with reasonableness and restraints. The success depends largely on the integrity and good conscience of the person exercising such right.

REFERENCE NOTES

This disciplinary course has three phases:

- (i) *kind exhortation.*
- (ii) *temporary abandonment or boycott in bed or deliberate abstinence from the usual sexual intimacy and*
- (iii) *symbolic beating without inflicting any physical harm or injury. (The husband should allow sufficient time intervals and move from one step to the next only after having tried in earnest the previous one and found it of no avail). See also Holy Quran Chapter 4 V. 34.*

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I am privileged and conversant with the facts of the case of Balaraba Magaji Shika V. Magaji Isa Giwa, because I am a Counsel in the case in an appeal pending before the Upper Area Court I, G.R.A., Zaria.

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