

K **d** : Redemption (*khul'*); Divorce (*talaq*); Islamic jurists (*fuqaha*);
Dissolution (*fasakh*)

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Islam provides numerous remedies to a Muslim woman in cases where harm (*darar*) to her has been established to the satisfaction of a judge. In the subcontinent, under section 2 of the Dissolution of Muslim Marriages Act, 1939 (DMMA), a Muslim women can obtain a divorce in case of her husband's disappearance for four years, non-maintenance of the wife for two years, his imprisonment for seven years or more, failure of a husband to perform his marital obligations for a period of three years, impotency, his insanity or his systematic maltreatment of the wife¹, or any other ground which is recognized as valid for the dissolution of marriage under Muslim Law. The law of Redemption (*khul'*) is conducted under section 2(ix) that is general in nature, which states that any other ground can be recognized as valid under the DMMA 1939 and there is no clear wording for Redemption (*khul'*), which has created confusion. The question: Does a Muslim woman have the right to obtain Redemption (*khul'*) without the consent of her husband or can it be granted by the court on the wife's request without his consent? What is the meaning of the *Qur'anic* verse 2:229?² What is the nature of *khul'*? i.e., is it dissolution of marriage (*fasakh al-nikah*) or divorce (*talaq*)? What is the position of jurists from different schools of thought in Islam regarding *khul'*? Is the ruling in the *hadith*

¹For details of all the grounds available to a Muslim woman to dissolve her marriage, see, section 2 of DMMA, 1939. There are two additional grounds available to a Muslim woman in Pakistan, i.e., that the husband has taken an additional wife in

expressly state that redemption (*khul'*) without the consent of the husband will be effected, however, it may take place after the couple have gone through a lengthy and elaborate procedure at the *Shari'ah* Court⁵. But Redemption (*khul'*) is conducted under separate section of Islamic Family Law Act (Federal Territories) from dissolution of marriage. This research recommends a separate section in the DMMA, 1939, for the law of redemption (*khul'*) in the legal system of Pakistan. Another part of the research discusses the legal position of redemption (*khul'*) under Islamic law and the laws of Pakistan and Malaysia.

K a d Q 'a

The crucial question to be answered in this section pertains to the meaning of the *Qur'anic* verse 2:229. However, before discussing that verse it is imperative to know the meaning of the term redemption (*khul'*) itself. The term redemption (*khul'*), literally, means "extracting oneself"⁶. According to, Alauddin Masu'd al-Kasani, "The redemption (*khul'*) is lexically, "*al-naz*" and "*al-naz*" means to pull out/extract something from something"⁷. Thus "*khala'ha* means that he has removed her from his marriage"⁸. In the technical sense redemption (*khul'*) is used for marital "extraction",⁹ and is the act of accepting compensation from the wife in exchange for her relief from the marital tie. Ibn Hajr defines it as "Separation of the husband from his wife for a money consideration to be given to the husband"¹⁰. According to Ibn Rushd, "The terms *khul'*, *dya*, *sulh* and *mubara'a* all refer to the same meaning, which is a transaction in which compensation is paid by the wife for obtaining her divorce"¹¹.

example, while commenting on this verse which says, "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 "the arbitrators chosen by the judge should see who is the cause of discord and once this is established they should dissolve the marriage through redemption (*khul'*) if the cause is husband"²¹. He further asserts that one arbitrator should be from the man's side and one from the woman's side because they know their problems better. However, "if there is no one from the spouses' people who could be appointed as arbitrators, other suitable persons may be appointed by the judge"²². He argues that the arbitrators should remind them about union and if they agree to remain together as husband and wife, then there will be no separation. But if they refused to stay as husband and wife and "the arbitrators considered it appropriate to decree separation they may decree separation. And a decree of separation by them [arbitrators] is binding for the spouses. And this is so whether it [the decree] coincided with or was against the decree of the local court and whether the spouses delegated them [the arbitrators] the authority to do so or not"²³.

law and that it would rather let the wife adopt an undesirable code of conduct than to dissolve the marriage. The *Qur'anic* duty to keep the couple together with kindness requires that if mutual love cannot work, the husband should release the wife from the bond of marriage⁴⁷.

The *Qur'an* declares: "Women have rights against men, similar to those that the men have against them, according to the well-known rules of equity". It would, therefore, be surprising if the *Qur'an* did not provide for the separation of the spouses at the insistence of the wife, in any circumstances. The *Qur'an* expressly says that the husband should either retain the wife, according to well-recognized custom (*insak-un-bil-ma'roof*) or release her with grace (*tasree-hun-bi-ihsan*). The word of Allah enjoined the husband not to cling to the woman, in order to cause her injury. Another *hadith* declares about Islam. "Let no harm be done, nor harm be suffered in Islam". In certain circumstances, therefore, if the husband proves recalcitrant and does not agree to release the woman from the marital bond, the *qazi* may well intervene to give redress and enforce the *Qur'anic* injunctions⁴⁸.

All schools of Muslim law allow the wife to approach the judge (*qazi*) for a judicial termination of the marriage (*faskh*). There is, however, a considerable divergence of opinion among the schools concerning precisely what grounds afford the court jurisdiction to dissolve the marriage. It is an important question whether a wife has got an absolute right to the dissolution of her marriage on restoring to the husband the consideration paid to him by her, or does the dissolution of marriage depend on the decision of the judge (*qazi*).

Abu Hanifa is the most restrictive of the jurists. According to *Abu Hanifa* a wife cannot get her *khul'* without consent from her husband. *Abu Bakar Jasas*, a *Hana* Jurist, commented on the *Hadith* of *Jamila* as follows:

'If there were permission for the *qazi* to pronounce *talaq* without the consent of the spouses then Muhammad (peace be upon him) would have dissolved the Marriage of *Jamila* and *Abit* without any consultation with him. But he consulted *Abit* and advised him to either *talaq* and get the garden in response'.

In this analysis by *Abubaker Jasas* it is clearly mentioned that the *qazi* has no authority to announce *talaq* without the consent of the spouses even when there is fear that the limits ordained by Allah will not be obeyed. He further elaborates that when there is confusion in any matter, Jurist can give their opinion, but in the case of *khul'* it is clear that *khul'* is like *talaq* that *talaq* is a matter for the husband. *Khul'* will be granted by the husband to the wife. And no other authority can separate the partners⁴⁹.

*Sarakhsi*⁵⁰ elaborates on *Khul'* in *Mabsut*, it is permissible in *khul'* to consult the court and also permissible to terminate *nikah* by mutual consent in home. In *khul'* it is necessary that the two parties will agree on separation. The requirement in *khul'* is that the husband will announce *talaq* and the wife will give compensation⁵¹.

Al Suyoti in *Dar-ul Manshor* cited the saying of *Umar* (r.a): 'Males

should not give *talaq* if their partners want *khul'*. It is proved from this saying of *Umar*(r.a) that *khul'* is not conducted without the consent of the husband. *Umar* (r.a) advised the husbands in society to pronounce *talaq* if their wives demanded *khul'*. *Umar* (r.a) as judge (*qazi*), advised husbands to give *khul'*, since if the authority be with the *qazi* to terminate the Marriage, he (*umar*) would himself dissolve the marriage without consulting the husband⁵².

A verse of the *Qur'an* states that: 'if you divorce them before you have touched them, and you have appointed into them the dower (*mahar*), then pay half of that (*Mahar*), unless they (the women) agree to forgo it, or he the (husband), in whose hands is the marriage tie, agrees to forego and give her full appointed *Mahar*. And to forgive and give (her full *mahar*) is nearer to pious (*taqwa*). And do not forget liberality between yourselves. Truly, Allah is all-Seer of what you do'⁵³. In this verse 'in whose hand is the marriage tie' denotes that the husband has all authority of divorce and separation. No one can interfere in his right of *talaq*. It is clear from the above discussion that *Abu Hanifa* is of the opinion that for *khul'*, mutual consideration is necessary and it is not possible that the court or *qazi* grant *khul'* without the consent of the husband.

There is another verse about the arbitrary council. Does the council have authority to dissolve a marriage without the consent of the husband? 'If you fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation for Allah hath full knowledge, and is acquainted with all things'⁵⁴.

Malik is considered as the most lenient of the Jurists on behalf of *khul'*. Malik is of the opinion that no arbitrators are required and

⁴⁷K.N.Ahmad, *The Muslim Law of Divorce* (Islamabad: Islamic Research Institute, FJIGDIGHGE

⁴⁸*Khurshid Bibi vs. Baboo Mohammad Amin* (1951) 10 JLR 101

⁴⁹Talabani, *Islamic Law of Marriage and Divorce*, p. 101

⁵⁰Muhammad b. Ahmad b. Abi Sahl Abu Bakr al-Sarakhsi was an important jurist, or Islamic scholar of the Hanafi school. He was traditionally known as Shams al-
Shari'ah

⁵¹*Ibid.*

peace' Allah will cause their reconciliation. Indeed Allah is ever All-knower, Well-Acquainted with all things⁶⁰.

It is accepted by the Jurists and Commentators that "you" in the words "if you fear" in the relevant verse refers to the people who have authority to decide (*ulil-amr*), and includes the *qazi*, who represents the community for adjudication of disputes between the parties. It has reference to the verse of the *Qur'an*, which requires that arbitrators representing spouses be appointed in case of *shiqaq* (breach between them), for the purpose of effecting reconciliation if possible and for ordering separation if that be necessary⁶¹. Some of the legalists have described *Hakim* as merely attorneys or arbitrators and not Judges, but others have said that they have full powers to decide as they think fit. Some have held that the arbitrators' opinion is to be submitted to the *qazi* who will decide, in accordance with their opinion. There is also a difference of opinion among the legalists as to whether reference to the Sultan (sovereign) or *qazi* is necessary at all, or not⁶².

Another verse of the Holy *Qur'an* states that 'when if you fear that they will not keep the limits ordained by Allah, then there is no sin on either of them if she gives back (the *mahar* or part of it) for her *Khul'*⁶³. The word 'if you fear' being addressed to the state or judge, they can only mean that the judge is entitled to pass an order even though the husband does not agree⁶⁴. It means in other words that a judge may come to the conclusion that they cannot perform the duties and fulfil the obligations obligatory on them on account of marriage⁶⁵.

There are two *ahadiths* of the Prophet (peace be upon him) regarding *khul'* as the right of a woman and to get divorce without the consent of her husband. These *ahadiths* are mentioned by *Maudodi* in his book '*Huqooq-u-zavjain*'. One Jamila bint Ubi bin Salool^{663.mT10 1 T08.53.mT10 1 TT1 Tm08.5}

only by agreement between the husband and the wife as ordained by the Hana School, or whether the wife can claim it even if the husband does not agree. A Muslim wife has the right to demand the dissolution of her marriage if she dislikes her husband. This was relied on by Maududi⁸⁰; he developed his view from an interpretation of a *Hadith* (saying of Prophet) concerning Jamila and her husband. The words "if you fear" in the verse of the *Qur'an*, the court held, are addressed to the judge. The reference to the judge can only mean that he is to determine if the circumstances are such as to make harmonious married life impossible and that if he so determines, he can pass an order dissolving the marriage even if the husband does not agree [1-5]⁸¹.

An important limitation is imposed such that if the judge apprehends that the limits of Allah will not be observed, that is, in their relation towards one another the spouses will not obey Allah, and that therefore a harmonious married state as envisaged by Islam will not be possible, then he will grant dissolution. The judge (*qazi*) will consider whether the rift between the parties is a serious one though he may not consider the reasons for the rift [6-8]. Is it open to a present-day court to adopt a course different from that laid down by the classical jurists, in this case the Hanafis, and grant, in the words of the court, "to the wife for the first time a right of release from the marital tie", which she did not have under the traditional Hanafi law? The opinion of the full

too did not give the maintenance as ordered. The judge thereupon ordered that two *hakim* to be appointed under Section 90A (1) of the Administration of Muslim Law Enactment 1963. Section 90A (1) of the Enactment states: "Whenever any misunderstanding arises from any decision of the court, as for example, where the husband is asked to divorce his wife but refuses to do so, the court has the power to order both parties to appoint their representatives to find ways of solving the misunderstanding"⁹³.

In this case the court on 6 February 1975 confirmed the appointment of two *hakam* one for each of the parties. The court then briefed the two *hakam*