

THE SHARIAH CONCEPT OF KHULA AND THE JURISDICTION OF COURT

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ABSTRACT

Therefore, according to the family laws of the Qur'an and Sunnah, if a marital matter comes to court, the first priority of the judge should be reconciliation between the spouses. If she is not ready for the husband, then the wife should make some transactions and persuade the husband to divorce. This is called khula. If none of these measures are effective and the wife states a reason from the Shari'ah which is the cause of the distinction and the judge is convinced to some extent that it is true in the light of facts and evidence then A Muslim judge has the right to discriminate with special conditions. In short, the consent of both spouses is required for khula. If neither of them agrees, then khula will not take place. After the separation, her 'iddah is three months.

Key Words: Khula, Nikah, Mahar, Shariah, Court

INTRODUCTION

One of the ways to end a marriage contract in Shari'a is khula. If a woman does not agree to stay with her husband, she has the option to get khula by giving back her dowry or some property as ransom. According to the Holy Qur'an and the Hadith of the Prophet PBUH, khula is performed when both spouses agree on it. Khula is not permissible, if a husband's wife is divorced by an individual, an institution, or a court without her permission and consent, it is null and void according to Shari'ah, this woman is still married to her husband, A woman who has been divorced by an institution or individual without the consent of her husband, she is still in her husband's marriage. The second contract is invalid. She will always live a sinful life if she marries in another place. She will have to suffer the consequences in this world and in the hereafter. In addition, the institution, the individual, the court, and the legislator are also complicit in the sin of legislating and ruling against Shariah.

The judge may also annul the marriage on his own accord under certain circumstances. Mufti Muhammad Taqi Usmani, explains this: Distinguish between spouses which is a decree of divorce and this divorce is done by the ruler without the permission of the husband, such as missing persons, insane, immature, etc. The husband's affairs are detailed in all the books of jurisprudence It is appropriate to do so. The situation is that the rights of a woman which are obligatory on a man are of two kinds; one is the rights that are legal and which are necessary for achieving the legal purposes of marriage, such as bread and alimony and marriage benefits, etc. These are the rights which can be obtained from the husband by force of court and if the husband is unable to pay them then he is legally obliged to divorce the wife. On the other hand, there are certain rights of marriage which must be paid

honestly to the husband, but they are not legal nor can they be obtained by force, as in the case of good behavior and good morals with the wife, obviously. That these rights cannot be enforced by law, unless the husband has in his heart the fear of God and concern for the Hereafter, no court of the world can administer them and when such rights do not belong to the court. He does not even have the power to annul the marriage in case of loss of rights. It is important to note here that the court's position is to do justice to the parties and this is possible only if the court is not inclined towards one side of the case, but under the influence of Western propaganda, this principle seems to have been established here. In the case of khula, men are always oppressors and women are always innocent and oppressed. That is why almost 100% of khula decisions are made in favor of women. Once the principle has been established, one can wonder how the decision weighs on the scales of justice and how it can be enforced and effective according to Shari'ah, and how a woman can be haraam for the first husband and halal for the second.

Islam is a balanced and moderate religion and wants moderation in every aspect of life. And a glimpse of it can be seen in the family laws of Islam. If the relationship becomes difficult for the spouses, then Islam has taken care of the rights of both men and women. If it is becoming difficult to live, then when the wife is neglecting to pay the rights, then the man has been given the option of divorce.

Religious scholars say that marriage is like a matter, so the matters in it should be done by mutual consent. The court has certain powers in this matter whether it can pronounce the decree of divorce or the woman has to live with him until the man agrees. In this article, the arguments for making the husband's consent mandatory even in judicial divorce have been analyzed to what extent the husband's consent is necessary? Can it be done?

Or the possibility of another opinion is also possible. May Allah help us to reach the right thing.

هو إزالة ملك النكاح المتوقفة على قبولها بلفظ الخلع أو ما في معناه.²

On this topic, first of all, let's examine the basic definition of khula and its jurisprudential meaning of it so that its full meaning is clear.

Termination of property and marriage through the word khula or its synonym is called khula, which is suspended upon the woman's acceptance.

خلع امرأته وخالعها إذا اقتدت منه بمالها فطلقها وأبانها من نفسه، وسمى ذلك الفراق خلعاً؛ لأن الله تعالى جعل النساء لباساً للرجال، والرجال لباساً لهن.¹

According to the *Ahnaf*, the essential thing for Khula must be the word Khula or a word with the same meaning, because if these words are not used, then there will be no difference between divorce with property and Khula, although the rulings of both of them are different. It is important to take care of the words in Khula so that there is a difference between the two. And there is a moratorium on the woman's acceptance because she has to give in return, so her consent is also necessary.

He disrobed the woman and she disrobed when the woman pays her *fidya* (فدية) through her property and the man divorces her and separates her from himself, then this separation is called dissociation because Allah has made the man and A woman has been made a dress for each other. "

Allah Ta'ala has described the marital relationship of man and woman in a very beautiful way that He has likened them both to each other's clothing, just as clothing protects a person from heat and cold, gives him beauty, and covers him and his dignity. In the same way, husband and wife help and support each other in their sorrows, secrets, and sufferings.

FIQH-E- MALIKI

In *Mukhtsar Khalil*, it has been written:

جاز الخلع وهو: الطلاق بعوض وبلا حاكم
وبعوض من غيرها إن تأهل.³

Khula is permissible and it is the name of divorce without compensation and without a ruler and taking compensation from someone other than the wife and he is eligible for it.

According to *Malikiya*, the first thing is that having a ruler in Khula is not necessary, and the second thing is that it is necessary to have a reward or return (عوض).

TERMS MEANING

The jurists and authors of the famous schools of thought (Hanafi, Maliki, Shafi'i and Hanbali) have given different definitions of Khula according to their points of view.

Hanafi jurisprudence

Ibn-i-Abidin defines Hanafi *Khula* (خلع) as follows:

SHAFI'I JURISPRUDENCE

Khatib Sharbini defined Khula in these words:

¹ Ibn e Manzoor, Muhammad bin Mukaram Al-Afreeqi (711 AH), *Lisan ul Arab, Dar e Sadir, Beirut, 1414AH, P. 76/8*

² Ibn e Abdeen, Muhammad Ameen, Hashiyah Abn e Abdeen, *Darul Marifah, Beirut, 2011, p. 87-88/ 5*

³ Ibn e Ishaq, Khalil bin Ishaq Malki Misri (776AH), *Al-Mukhtsar, Darul Hadith, Egypt, 2005, p. 211*

هو فرقة بين الزوجين بعوض بلفظ طلاق أو خلع
4-

Khula is the word for separation between spouses in exchange for something.

As if according to Shafi'I school of thought the words in Khula are not so important, they say that the word divorce also causes Khula, and even with the word Khula, it is necessary to have an exchange in it. And they do not differentiate between the words because their There is no difference between divorce and divorce.

Hanbali jurisprudence:

وهو فراق الزوج امرأته بعوض يأخذه الزوج من امرأته أو غيرها بألفاظ مخصوصة.⁵

A husband's divorce from his wife, in return for what he takes from her or from someone else, through specific words, is called Khula.'

From these words of definition, it is known that according to Hanbali jurists, it is necessary to have specific words and reward in Khula.

THE ORDER OF THE DECISION OF THE QAZI (JUDGE) IN KHULA

In Islam, there are disputes which both sides of the issue cannot be resolved by sitting together, then there is a way for them to refer to the court in such a situation. In the history of Islam, the first case that was registered due to domestic differences and in which separation was demanded was the case of the wife of Thabit bin Qais. Even after the death of the Prophet ,ﷺ during the reign of the Caliphs, women continued to bring complaints of domestic

impotence, and sometimes decisions were made to divorce them. Regarding the fact that "help can be taken from the court for divorce" is not a new concept, but according to some jurists such as Saeed bin Jubir, Ibn Sirin According to etc., it is necessary to obtain a decision from the court for divorce. Without it, divorce cannot be done. On the contrary, other jurists are of the opinion that only the consent of the husband and wife is sufficient for divorce, so it is not necessary to have a court. But sometimes the husband does not agree to divorce despite the offer of divorce from the wife and the wife also does not want to live with him, so in this case the wife approaches the court and the court issues the degree of divorce in this case. The husband's consent is not taken into account, will the court's unilateral decision to divorce be valid or not? From here, the discussion started in the academic circles that if the court decides to divorce without the husband's consent, then what will be its Shariah status?⁶

OPINIONS OF INVALIDITY AND THEIR ARGUMENTS

A decision of the Supreme Court of Pakistan regarding divorce in 1967 (⁷) was severely criticized by many scholars of Pakistan and commented that the court cannot issue a decision on divorce without the consent of the husband. The court's decision that "if the court research that the spouses will not be able to maintain the limits of Allah, then the court can divorce without the consent of the husband". It is against and wrong according to Shari'ah" (⁸) Moreover:

⁶ Qurtabi, Abu Abdullah Muhammad bin Ahmad Ansari, *Al-Jamei LiAhkam Al-Quran*, Darul Fikr Beirut, 1995, P. 128/2

⁷ *The all Pakistan legal decisions p.l.d 1967,p. 99*

⁸ Usmani, Mufti Muhammad Taqi, *Islam mi Khula ki Haqeeqat Dar Zimm e Fiqhi Mqalaat*, Memon Publications, 2011. P. 147/2

⁴ Khateeb Sharbeeni, Muhammad bin Ahmad (997AH), *Mughni Al-Muhtaj Ila Marifah Maani Alfaz Al-Minhaj*, Darul Kutub Al-Ilmiyah, 1994, p.430

⁵ Bahooti, Mansoor bin Yunus (1050AH), *Kashaaf Al-Qinaa un Matan Al-Iqnaa*, Darul Ihya Al-Turah Al-Arabi, Beirut, 1990, *Bab ul Khula*

To the extent of our research, almost all jurists of the Islamic Ummah agree, and the arguments of the Qur'an and Sunnah also support this, that divorce is a matter of mutual consent of the parties and no party can force the other. (9)

And the arguments that have been taken into consideration regarding the necessity of the husband's consent in divorce have been argued by the following arguments:

From this description, it becomes clear that there are three sentences in the verse of divorce which imply the consent of both husband and wife:

1. **إلا أن يخافا ألا يقيما حدود الله** Except that the two husbands and wives have the possibility that both of them will not uphold the limits of Allah.
2. **فيما اقتدت به** (in the wealth that the woman gives as ransom)
3. **فلا جناح عليهما** (So there is no sin on both of them) ¹⁰

And apart from these arguments regarding the consent of the husband, this argument has also been mentioned:

وَإِنْ طَلَّقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمْسُوهُنَّ وَقَدْ فَرَضْتُمْ لَهُنَّ فَرِيضَةً فَنِصْفُ مَا فَرَضْتُمْ إِلَّا أَنْ يَعْفُونَ أَوْ يَعْفُوا الَّذِي بِيَدِهِ عُقْدَةُ النِّكَاحِ-¹¹

“And if ye divorce them before consummation but after the fixation of a dower for them then the half of the dower (is due to them)

⁹ Usmani, Mufti Muhammad Taqi, *Islam mi Khula ki Haqeeqat Dar Zimm e Fiqhi Mqalaat*, P. 147/2

¹⁰ Usmani, Mufti Muhammad Taqi, *Islam mi Khula ki Haqeeqat Dar Zimm e Fiqhi Mqalaat*, P. 157/2

¹¹ Usmani, Mufti Muhammad Taqi, *Islam mi Khula ki Haqeeqat Dar Zimm e Fiqhi Mqalaat*, P. 173/2

unless they remit it. Or (the man's half) is remitted by him in whose hands is the marriage tie.”

The words in it are **الَّذِي بِيَدِهِ عُقْدَةُ النِّكَاحِ**. They say that (the person in whose hand marriage is related) refers to the husband according to the words of the Holy Prophet himself, about which the verse made it clear that the relationship of marriage is alone. It is in his hands, so no one can end this relationship except him.

ANALYSIS OF ARGUMENTS

The scholars think that divorce is like a matter and the consent of the parties is necessary in it, no party can force the other in this regard and no third party has the right to interfere in this regard. They argue from the words of the Qur'an that wherever divorce is mentioned, both the husband and the wife are mentioned together, so the consent of both of them is also necessary. All of them are derived from the Qur'anic verses and the hadiths that have come in this regard have not been mentioned. However, to solve any jurisprudential issue, a decision is made only after examining all the aspects keeping in mind the Quranic verses and the hadiths related to it. And this has been described by Professor Dr. Muhammad Munir in these words: "From this statement, it can be concluded that the public jurists, especially the hadiths regarding the husband's consent to the divorce, and to some extent the Holy Qur'an." There is no doubt that the further interpretation of the Quranic verses comes from the incident of Habiba and the decision of the Messenger of Allah ﷺ is a precedent.¹²

ARGUMENT

In the light of the opinion of Ibn Qayyim, regarding the word **افتداء** (Return) that has been used in connection with the redemption of the khula, they argue that **افتداء** occurs when the slave pays the price

¹² Muneer. Professor Muhammad, *Khula ki Haisiat, Shariah Academy International Islamic University IslamAbad, 2017, P. 24*

of his freedom and both parties agree to it, then this matter is settled. Therefore, the consent of both parties, husband, and wife, is necessary here too. Therefore, the matter is settled only with the consent of the parties in افتداء.

ANALYSIS

Here, the consent of the parties doesn't need to be necessary for the renunciation. This word is used at another place in the Qur'an:

إِنَّ الَّذِينَ كَفَرُوا وَمَاتُوا وَهُمْ كُفَّارٌ فَلَنْ يُقْبَلَ مِنْ أَحَدِهِمْ مِلءُ الْأَرْضِ ذَهَبًا وَلَوْ افْتَدَى بِهِ¹³

Verily, those who disbelieved and died while they were disbelievers if one of them were to give a ransom (for redemption from punishment) with gold equal to the weight of the earth, it would never be accepted by them.¹⁴

In this verse, the same word has appeared as in the verse of Khula, but here, on the one hand, it is an expression of willingness to pay compensation, and on the other hand, it is an expression of disapproval. "The matter is settled only with the consent of the parties in *iftada*. And in such a case, the consent of both sides is necessary and the decision cannot be made due to non-consent on the other side, even though only the woman is mentioned there. If there are any of these problems here. It should be submitted that in the above-mentioned verse, there is a declaration of non-consent from the other side and this is not the case in the verse Khula, so the argument is not correct. So, the answer to this problem is that when there was a dispute in *Khula* and If the authorities are also involved in this issue and given the authority to make a decision, then the decision they will make will be satisfactory for one party and the other party will inevitably have to accept it without their consent. Where did the word

of judgment come from and was this incident mentioned in the hadiths related to the judgment? We also get the answer to this from the hadith narrated by Imam Qurtubi with that the matter of divorce was a decision and not a suggestion.

فلما بلغ ذلك ثابت بن قيس قال: قد قبلت قضاء رسول الله صلى الله عليه وسلم.¹⁵

When this matter reached Thabit bin Qays, he said, "I have accepted the decision of the Messenger of Allah, may God bless him and grant him peace."

It is mentioned in the hadith of Hatti that Thabit loved his wife very much and she hated him very much.

فيقال: إنها كانت تبغضه أشد البغض وكان يحبها أشد الحب ففرق رسول الله صلى الله عليه وسلم بينهما بطريق الخلع.¹⁶

So it has been said that she (Sahab's wife) hated her husband deeply and Sahab loved him deeply, but the Messenger of Allah, peace, and blessings be upon him, separated them by divorce.

And the words quoted by Imam Shukani regarding Dar Qutni, he explains that the Prophet ﷺ received the compensation himself and sent Thabit's wife away.

فأخذها له وخلي سبيلها.¹⁷

"So, the Prophet ﷺ took that compensation as proof and left his way."

Now, if this advice or the consent of the second party was so important that the decision could not be made without it, then why did they accept it? I

¹⁵ Qurtubi, Abu Abdullah Muhammad bin Ahmad Ansari, Al-Jamei LiAhkam Al-Quran, P. 129/2

¹⁶ Qurtubi, Abu Abdullah Muhammad bin Ahmad Ansari, Al-Jamei LiAhkam Al-Quran, P. 129/2

¹⁷ Shaukani, Muhammad bin Ali, Nail ul Autaar, Darul Kutub Al-Ilmiyah, Beirut, 1999, Kitab al-Khula, p. 259/5

¹³ Qurtubi, Abu Abdullah Muhammad bin Ahmad Ansari, Al-Jamei LiAhkam Al-Quran, P. 128/2

¹⁴ Quran, Al-Imran, 3:91

was there where the Messenger of Allah (PBUH) said to Barira that they should not break the marriage with *Mughyith*, but he did not agree because the Prophet (PBUH) had advised him here and Barira had the authority to keep the relationship or not.¹⁸

ARGUMENT

In the same way, it has been argued from the words of Fala *إيلاء* that, with a little thought, it can be understood that the words have a clear meaning of the consent of both the husband and the wife.

ANALYSIS

If it is said regarding this argument that it is not necessary that a matter where two persons are mentioned together, there should be the consent of both of them. It is not a general rule that the two parties who are mentioned together always include the consent of both of them in this matter.

Both the husband and the wife don't need to be meant in this case of divorce, it is possible the wife may be just as the husband is prevented from taking compensation in the previous verse, this question may come to mind here. Is it permissible to give compensation to the wife or not, then the answer to this question is that the wife can give, but if there is a chain going on, then the husband has also been mentioned in it. There are such examples in the Qur'an, for example, Musa. (AS) and the mention of the young man who was with him on a journey and when he reached a certain place he forgot the fish, but Allah has referred to both of them in relation to forgetting them (¹⁹) They both forgot the fish."

Ibn Kathir writes in the commentary of this verse:

¹⁸ *Ibn e Majah, Muhammad bin Yazeed Qazweeni (273AH), Al-Sunan, Darul Risalah Al-Almiyah, 2009, p. 223/3, Hadith no. 2075*

¹⁹ *Quran, Al-Kahaf, 18:61*

ونسب النسيان إليهما وإن كان يوشع هو الذي نسيه.²⁰

Both of them are attributed to forgetting, although it was Joshua who forgot.²¹

Argument

Apart from these arguments *أَلَّذِي بِيَدِهِ عَقْدَةُ النِّكَاحِ*, It was argued that the husband is the one in whose hands the relationship of marriage is, so no one else can terminate this relationship without the consent of the husband.

Analysis

This argument is not definite and conclusive because many commentators have interpreted this verse as referring to the guardian. In addition, a third party has the right to terminate this marriage.

Jurisdiction of Court

The jurisdiction of the Islamic court is not limited, but the jurisdiction of the court in the Islamic state is wide. Allah Almighty says:

لَقَدْ أَرْسَلْنَا رُسُلَنَا بِالْبَيِّنَاتِ وَأَنْزَلْنَا مَعَهُمُ الْكِتَابَ وَالْمِيزَانَ لِيَقُومَ النَّاسُ بِالْقِسْطِ.²²

We sent aforetime Our apostles with Clear Signs And sent down with them The Book and the Balance (Of Right and Wrong), that men May stand forth in justice;

When the series of Prophets and Messengers ended, it is now the task of their heirs to establish justice among the people. Al-Kitab means to make decisions according to the Holy Qur'an. What does it mean to uphold justice?

²⁰ *Ibne Kathir, Ismail bin Umar (774AH), Tafseer ul Quran Al-Azeem, Dar e Tayyabah Lilnashr e Wal-Tauzie, 1999, p. 174/5*

²¹ *Tabbri, Muhammad bin Jareer (744AH), Jamei ul Biyan fi Taweel Ayah Al-Quran, Dar e Hijrah Liltbah Walnashr Waltauzie wal-ailan, 2001, p. 322/*

²² *Quran, Al-Hadid, 57:25*

لِيُقِيمَ النَّاسُ بِالْقِسْطِ: أي بالعدل في معاملاتهم.²³

They make people stand on justice, i.e. do justice in their affairs.

If divorce is called a private and personal matter and the court is separated from it, then where will the affected party go and seek justice? I go away. For example, Someone has left an indivisible thing in his inheritance and it is inherited by more than one heir. They don't until that time, it is useless and there is a fear of its being lost. Now, doesn't the Islamic government have the authority to save this thing from being lost and make it usable? Of course, the Islamic government has the right to protect this thing from being lost, in which case it will review the matter itself and urge the heirs to resolve the issue if they do not resolve the issue themselves. If not, the court will decide what it deems appropriate in this matter.

Similarly, in the hadith:

عن عبد الله بن عمر رضي الله عنهما أن رسول الله صلى الله عليه وسلم قال ألا كلكم راع وكلكم مسئول عن رعيته فالإمام الذي على الناس راع وهو مسئول عن رعيته.²⁴

On the authority of Abdullah bin Umar, may Allah be pleased with them, the Messenger of Allah, may God bless him and grant him peace, said: Listen, each one of you is a watcher and he will be asked about his subjects, so the Imam who is appointed over the people is a watcher and he will be asked about his subjects.

In the Holy Qur'an, it is mentioned about Islamic collectivity:

لَا خَيْرَ فِي كَثِيرٍ مِّنْ نَّجْوَاهُمْ إِلَّا مَنْ أَمَرَ بِصَدَقَةٍ أَوْ مَعْرُوفٍ أَوْ إِصْلَاحٍ بَيْنَ النَّاسِ وَمَنْ يَفْعَلْ ذَلِكَ ابْتِغَاءَ مَرْضَاتِ اللَّهِ فَسَوْفَ نُؤْتِيهِ أَجْرًا عَظِيمًا.²⁵

“In most of their secret talks there is no good: but if one exhorts to a deed of charity or justice or conciliation between men (secrecy is permissible): to him who does this seeking the good pleasure of God We shall soon give a reward of the highest (value).”

Most of the whisperings of people are not good except those who order charity or talk about good things or make amends among people and who do this for the sake of Allah's pleasure, then soon We will reward him with a great reward.

When the Islamic court makes decisions in disputes and does justice between them, this is also the work of reforming people and it has more rights in this regard because it also has the force of enforcement and it is also a means of obtaining a great reward.

PRIORITY

When differences arise between husband and wife and they fear the breakup of the marital relationship, first of all, they should solve the problem themselves. A court should be appointed to resolve this issue from the husband's family and one from the wife's family and give them full powers to investigate the matter because Allah says:

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا.²⁶

If ye fear a breach between them twain appoint (two) arbiters one from his family and the other from hers; if they wish for peace God will cause

²³ Qurtabi, Abu Abdullah Muhammad bin Ahmad Ansari, Al-Jamei LiAhkam Al-Quran, P. 260/9

²⁴ Bukhari, Muhammad bin Ismail (256AH), Al-Sahih, Darul Shiab, Egypt, Kitab ul Ahkam, p. 1229, Hadith no. 7138

²⁵ Quran, Al-Nisa, 4: 114

²⁶ Quran, Al-Nisa, 4: 35

their reconciliation: for God hath full knowledge and is acquainted with all things.

And the court should decide in the light of their recommendations because Allah says:

فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا
أَفْتَدْتُمْ بِهِ²⁷

“If ye (judges) do indeed fear that they would be unable to keep the limits ordained by God there is no blame on either of them if she give something for her freedom.”

But the court should also take a decision only after a complete investigation, lest a case be filed and the court pronounces a decision without investigating and informing the husband.

If a case comes before the judge, then the judge should order the husband to divorce her. Because the Prophet ﷺ also ordered this thing to Thabit bin Qais. And it is necessary to obey the ruler's order. Imam Shoukani writes:

قال في الفتح : هو أمر إرشاد وإصلاح لا إيجاب
ولم يذكر ما يدل على صرف الأمر عن حقيقته²⁸

It is written in Fath al-Bari, that the words of the Prophet (peace and blessings of Allah be upon him) were for peace and advice and not for obligation (Shokani) but Ibn-e-Hajar did not mention the reasons that divert the words of obligation from their reality.

And further writes:

وظاهر أحاديث الباب أن مجرد وجود الشقاق من
قبل المرأة كاف في جواز الخلع²⁹

The words of the hadiths mentioned in the related issue are clear that the mere occurrence of a dispute by a woman is sufficient for the justification of divorce.

That is, according to Imam *Shoukani*, if the husband is offered divorce, accept he must it because the words of the hadiths are authoritative and it is necessary to accept it, and only the fear of a quarrel on the part of the woman is sufficient for the justification of divorce. And if the husband does not believe this, then the judge should differentiate between them using his powers: طلقها، فارقها، خل سبيلها، ففرق بينهما، فأخذها له وخلي سبيلها. Divorce her, separate her, leave her way, the Messenger of Allah ﷺ made a distinction between the two of them and the Messenger of Allah ﷺ took that wealth to prove it and left her way. I also have room for it. So that we can follow this situation.

OTHER REASONS FOR PREFERENCE

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

²⁷ Quran, Al-Baqarah, 2: 229

²⁸ Shaukani, Muhammad bin Ali, Nail ul Autaar, Darul Kutub Al-Ilmiyah, Beirut, 1999, Kitab al-Khula, p. 261/5

²⁹ Shaukani, Muhammad bin Ali, Nail ul Autaar, Darul Kutub Al-Ilmiyah, Beirut, 1999, Kitab al-Khula, p. 261/5

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

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

3. There is a jurisprudential rule in Islamic jurisprudence

الضرر الأشد يزال بالضرر الأخف.³⁰

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

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

RESEARCH FINDINGS

Some scholars have a strong disagreement regarding judicial khula and they are not in favor of giving the Qazi any authority in the matter of khula. They say that divorce is a matter between husband and wife, and no one else has any right to interfere in it. Whatever decision is made in divorce, the consent of both will be considered. The decision to divorce cannot be made without consent. And they argue that in the matter of divorce, Allah *Ta'ala* has mentioned both of them together, so no decision can be made without the will of one of them. Similarly, they say that the first divorce in Islam was decided according to the consent of the husband.

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

³⁰ Ali Haider, *Durarul Hukkam sharah Mujallah Al-Ahkam, Al-Maktabah Al-Arabiah, Kansu Road Quetta, p. 40/1*

decision himself. The decision of eviction was announced.

RECOMMENDATIONS AND SUGGESTIONS

The primary responsibility of the government is to play its role in creating such a society in which families become sympathetic to each other. To spread such teachings that become the basis of a righteous and strong family.

Before establishing the relationship of marriage, husband and wife should be informed about their rights and duties.

If there is ever a conflict between husband and wife, then they should try to solve this problem themselves. And if the matter is not being resolved by both of them, then the knowledgeable and sensible members of both families should try to resolve this issue.

It is the responsibility of the court to listen to the parties and not make any decision in haste without research.

The court should appoint one person from both sides to resolve this matter, and give them full authority to investigate and make a decision in the light of their investigation and recommendations.

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