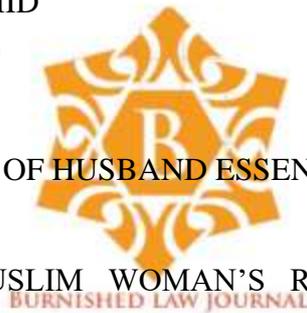


BURNISHED LAW JOURNAL**Puligedda Sailasri****Third-year student BBA-LLB****Symbiosis Law School, Hyderabad****TOPIC- KHULA; THE FORGOTTEN RIGHT OF WOMEN TO DIVORCE UNDER
MUSLIM LAW.****ABSTRACT:**

Islam is one such religion which has provided for the concept of divorce since time immemorial unlike the Hinduism where the concept came into existence only after the codification of the customary rules. Yet, the concept of Muslim divorce has always been a matter of conflict and discussions due to its preferences as leaning towards a male-dominated society, but the ancient sources of Muslim law, explain that apart from the Talaq form of divorce, there exist a number of other forms such as Ila, Mubarat, Khula etc. The reasoning behind the lack of knowledge on these other forms of divorce is that they were not accepted and preached in the development process. Hence, today a lot of rumours surround the Islamic religion and question it for its preaching, even not knowing what exactly their religious text consists of. In this paper, I would like to go through the detailed analysis of how Khula form of divorce works and its positioning in today's legal system in various nations. As, primary understanding of Khula reveals that the divorce in this form is initiated by the women.

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RESEARCH OBJECTIVES:

In today's world, Muslim Laws are highly questioned on humanitarian grounds to be inhumane towards women for not providing them a right to initiate divorce proceedings. But, very few know that the Ancient Muslim Law provides for such forms of divorce where a woman can divorce her husband sometimes even without his consent. So, this paper would concentrate on why the concept of Khula has not been developed and encouraged as such as Talaq by the developing societies.

RESEARCH QUESTIONS:

- Legal positioning of KHULA in today's Indian legal system.
- How is Khula observed in Islamic Oriented Nations and their analysis.

OUTCOME AND PROBABLE IMPACT ON TODAY'S SOCIETY:

In today's legal systems, we find that Muslim women are fighting for their right to initiate divorce as since Talaq is the mostly accepted form of divorce around the world. While the legal systems are tilted towards the personal laws on these sensitive issues to deal with rather than having a uniform code to apply which is a question of practicality in today's scenario, this research would help such arguments from the view of personal laws as why the Muslim women should be given a right to divorce within the vicinity of Muslim Laws.

RESEARCH METHODOLOGY:

The methodology to be used to meet the objectives of this research would be preliminarily doctrinal and will be based on various articles and books written interpreting the concept of Khula by the academicians, non- doctrinal approach would be on a necessity basis to know the position of Khula in today's India among citizens.

INTRODUCTION:

The Religion of Muslims is widely known and referred as ISLAM, which forms one of the largest beliefs of the world. The roots of Islam go back to 7th century as to be believed to be originated in Mecca. The traditional Islamic law is protected in the writings of Quran, which is considered to be the actual wordings of the god himself. Death of Muhammad, in Seventh

Century led to interpretations and analysis of Muslim laws. And it was widely developed in the 10th Century awarding the century as the Islam's Golden Age.

The legal system of Islam is spread as SHARIA. It is a code which guides a person of how to live an ideal Islamic life, also the law is well-known for its serious punishments so as to ensure that no evil lives in the society.¹

CONCEPT OF DIVORCE UNDER MUSLIM LAW:

The word 'divorce' is taken from the Latin word 'divortium' which explains itself as 'to divert from or separate from' which implies that the husband is diverted from his wife and vice-versa.²

Divorce has not been a new concept to Muslims, like it was to Hindus at the time of codification. In Islamic law, today's 'irretrievable break-down of marriage' theory i.e., when there is no probability in given circumstances that the husband and wife would reasonably adjust and continue to live together as husband and wife fulfilling their marital obligations³; has been existent since ages. The Quran in itself states that matrimonial cases should not be encouraged to be discussed in the courts and any issues between the husband and wife should be solved by them privately without interference of any third person so as to ensure their free will to live with their spouse throughout.

Hence, unless there is no other way out courts were not approachable for the matters of divorce. Prophet in many instances stated that Divorce has been thought of only when there is no possible circumstance where the husband and wife can live together peacefully, he also has quoted that

".....of all the things which have been permissible to men, Divorce is the most hated by Allah...."

¹ THE CHANGES IN THE LAW OF DIVORCE UNDER MUSLIM LAW, http://shodhganga.inflibnet.ac.in/bitstream/10603/124142/13/13_chapter%206.pdf

² Concept of Marriage and Divorce under Personal Laws in India, http://shodhganga.inflibnet.ac.in/bitstream/10603/54472/8/08_chapter%201.pdf

³ Irretrievable Breakdown of Marriages, Himani Sharma and Chetan Bagdi, Legal Services India.

“ . . . And their husbands have greater right to take them back in the period, if they wish for reconciliation....”⁴

These wordings taken from the Holy Quran propagate that divorce is not encouraged by either Allah himself or the Prophet. Also, whenever a couple thinks of getting separated a certain period is provided for them so that they can decide and chose to live together back again by solving issues between them, on failure of which the separation would be allowed so that no one is bind by something which he or she is not interested in.

In Neorbibi Vs. Pir Bux⁵, a land mark judgement of Kerala HighCourt, the court recognized the principle of irretrievable breakdown of marriage and granted divorce on the grounds of incompatibility.

WOMEN’S RIGHT TO INITIATE DIVORCE UNDER MUSLIM LAW:

BY WIFE-

○ TAFWEEZ

Under Islamic law, though Talaq is the much developed and well- known form of divorce, there exists equal modes of divorce which are either initiated or taken forward by women. Also Prophet in a situation uttered to his wife that *‘if you want to part your ways from me, then you can do so’*. One such mode of divorce is TAFWEEZ or TAWHID or TALAQ-I-TAFWEEZ which is also known as ‘delegated divorce’. The basis of this mode can be found in **Chapter 33, Verse 22, 23 of Quran**. The concept of tafweez explains that the husband and wife at any time either before or after the marriage can enter into an agreement which states that the husband delegates his power to divorce to wife on happening of certain specific events. This delegation of power doesn’t take away the husband’s power to divorce.

Certain well known jurists opine that though the divorce is made by the wife, it is not the concept that the wife is divorcing her husband, but it should be understood that the wife is divorcing herself from her husband through the power delegated to her under the agreement.

In Sainuddin VS. Latifunnessa, the husband under an agreement delegated his power of divorce to his wife in case he marries someone else without her permission. Later on, the husband married again without the permission of his first wife and so the wife has divorced

⁴ Divorce under Islamic Law, Mir Mehrajuddin.

⁵ AIR 1971 Ker 261.

her husband. This divorce was upheld to be valid under Muslim Law and hence the marriage was held to have been dissolved.⁶

MUTUAL CONSENT -

○ KHULA

The word Khula means redemption. In Quran, **Chapter 2, Verses 2-9** talk about Khula. The concept of Khula is the separation in return of payment. The husband let goes his wife by taking a payment from her which is generally Mehr/ dower which is either Prompt dower i.e., amount paid to her at the time of Nikah or deferred dower i.e., the amount which is yet to be paid to her which the wife forgoes or any amount which is as agreed by both husband and wife.

The basic verse explains that

“And it is not lawful for you (men) to take back (from your wives) any of your Mahr (bridal-money given by the husband to his wife at the time of marriage) which you have given them, except when both parties fear that they would be unable to keep the limits ordained by Allaah (e.g. to deal with each other on a fair basis). Then if you fear that they would not be able to keep the limits ordained by Allaah, then there is no sin on either of them if she gives back (the Mahr or a part of it) for her Al-Khul‘(divorce)”⁷

So, as the verse explains the payment of money by wife to husband is not mandatory. Also, that the husband should take back whatever he has given to his wife as gift only if there is atleast a slight possibility that they might cross the restrictions set by Allah because of the presence of those gifts with the wife.

But, the concept of Khula has been mis interpreted by many jurists as a form of divorce wherein the wife BUYS the divorce as the offer of separation goes from the wife to husband in lieu of her dower amount.

○ CONSENT OF HUSBAND; ESSENTIAL OR NOT?

⁶ (1918)46 Cal 141, R.K. Sinha- Muslim Law, 5 edn. 2003, p.93, Central Law Agency, Allahabad.

⁷Khula’: definition and how it is done, <https://islamqa.info/en/answers/26247/khula-definition-and-how-it-is-done>

The question whether the husband has to accept the offer of wife regarding divorce or does he has an option to reject / refuse it has not been answered in Quran, while the answer for the same can be related from Hadith.

The prophet by his words meant that the husband's consent is not required for a woman to obtain divorce through Khula, she can approach courts who will have to grant the divorce n paper indeed without even going into the reasons for the same inorder to ensure the privacy of the matters between the husband and the wife.

“The wife of Thaabit ibn Qays ibn Shammaas came to the Prophet and said, “O Messenger of Allaah, I do not find any fault with Thaabit ibn Qays in his character or his religious commitment, but I do not want to commit any act of kufr after becoming a Muslim.” The Prophet said to her, “Will you give back his garden?” Because he had given her a garden as her mahr. She said, “Yes.” The Prophet said to Thaabit: “Take back your garden, and divorce her.”⁸

In the case of *Bilquis Ikram Vs. Najmul Ikram*⁹, the court explained that ‘ the wife is entitled to Khula as a matter of right if she satisfies the court that making her live with her husband will be forcing her into a hateful union.’

In *Mohammad Khan v. Shahmai*¹⁰, the husband and wife before getting married entered into an agreement wherein the husband agreed to be a house husband and to pay certain amount of money to his father-in-law incase he leaves the house. The husband left the house without paying the money, the wife hence hereby exercised her right to divorce through Khula. The court held it to be a valid talaq.

- **MUBARAT**

The concept of divorce through Mubarat is that both the parties i.e., wife and husband wish to be separated from each other wilfully. The major difference of mubarat with that of Khula is that in Khula the process of divorce is initiated by the wife, while in mubarat it can be initiated by either husband or wife. The concept of Mubarat differs slightly in Sunni and Shia laws.

⁸ Supra 4.

⁹ (1959) 2 WP 321.

¹⁰ AIR 1972 J&K 8.

Under Sunni laws, when mubarat form of divorce is obtained the rights and obligations of the parties end mutually. While the Shia law provides that the parties should find it as a baggage to stay with each other and the relation between them has been toxic and so they have come to a mutual agreement to separate from each other by divorce. Shia laws are also specific regarding the procedure of divorce and require the pronouncement of talaq along with clear expression of intention to obtain divorce. While the Shia and Sunni laws differ in certain areas both of them mandate the iddat period to be followed by the wife alongside the rule that mubarat is irrevocable unlike certain other forms of divorce which are revocable. In the whole process there is no court intervention other than to officialise the divorce.¹¹

RECOGNITION OF MUSLIM WOMAN'S RIGHT TO DIVORCE UNDER INDIAN LEGAL SYSTEM:

The codification of the personal laws led to a drastic change in many customs prevalent before the codification, some of the rights were created while some were lost. One such thing is the concept of Khula. Indian Legal System in its raw form does not imbibe the concept of Khula but has provided many other similar procedures and reasoning's through which women can realize their right to divorce.

The first attempt to codify the Muslim law was in 1937 by enactment of Sharia Application Act. But, the law did not prove to be useful as the law deviated widely from the practices of the Muslims and so was not functioning effectively.

The next try to codification was Dissolution of Muslim Marriage Act, 1939. The act though allowed a Muslim man to divorce his wife at his discretion, recognised nine grounds on basis of which a Muslim woman can divorce her husband.

- **DISSOLUTION OF MUSLIM MARRIAGE ACT, 1939¹²**

According to Sec.2, of the act, a woman can divorce her husband if his whereabouts are not known for four years. As, when the question arose before prophet of how much time should a woman wait for her husband whose information is not known in a dark hope that he will return, after consulting respectable persons of the then existing society, it was agreed that a woman can wait to a maximum of four years after which she will lose the relation and the feelings that she had for her husband.

¹¹ Divorce by Mutual Consent in Muslim Law – MUBARAT, Arjun Gupta.

¹² Dissolution of Muslim Marriage Act, 1939.

Regarding maintenance, if husband fails to maintain his wife for two years then she can initiate divorce proceedings against him. Here, maintenance would include food, lodging and clothing as well.

Also, if a husband is imprisoned for either seven years or more in a final decree, then his wife can obtain divorce.

Wife can obtain divorce on the ground that her husband has failed to perform marital obligations for 3 years. As, one of the main reasons behind the institution of marriage is to perform marital obligations as to procreation of children, non-fulfilment of these obligations forms a ground for divorce.

If the husband is impotent at the time of marriage and later. Also, if the husband has been insane for 2 years or is suffering from leprosy or venereal disease.

OPTION OF PUBERTY: if the girl is married before attaining the age of 15 years, then she can repudiate her marriage any time before attaining 18 years, provided that the marriage has not been consummated between the husband and wife.

A Muslim wife can divorce her husband in case he acts in cruelty to her. The word 'cruelty' under the act would not only include physical but also mental cruelty. Also, if he associates her with a women of evil reputation or forces her to lead an immoral life or if he disposes / forces her to dispose her property.

Women can also initiate divorce proceedings in case her husband obstructs her from performing religious practices or if he has more than one wife and is not treating all of them equally as explained in Quran.

Apart from the above mentioned specific grounds, Muslim women can obtain divorce on any other valid ground under Muslim Law.

COMPARITIVE ANALYSIS OF KHULA BEFORE AND AFTER CODIFICATION:

The concept of Khula has been and its scope has been explicitly wide under the Muslim law when compared to that in the codified laws. Under Muslim law, the concept of Khula worked in a way where the women only had to forgo their dower or return it back in order to get divorce from their husband's while the act prescribes nine certain and specific grounds for

her to claim divorce, thus limiting her right to divorce while the same act does not prescribe any grounds or limitations for the men's right of divorce under the concept of Talaq.

Also, many legal systems around the world have recognised Talaq and more interestingly Triple Talaq as valid forms of dissolution of marriages for Muslims, at the same time holding Khula or for that sake Mubarat and tafweez are declared to be absolute legally.

MUSLIM WOMAN'S RIGHT TO DIVORCE: ANALYSIS AND INTERPRETATIONS UNDER DIFFERENT LEGAL SYSTEMS.

Sofar, we have discussed how the concept of Khula is treated in India and how the women's right to divorce is positioned as per Muslim law in India. Though there are fewer Islamic based nations existing now, some of them have been liberal in interpreting and identifying the rights of woman while the rest have been taking a slower step towards woman independence.

Pakistan, our neighbouring nation, dominated by muslims provides for the requirement of the husband for the wife to unilaterally dissolve marriage without taking defence of any of the grounds specified under Dissolution of Muslim Marriages Act, 1939. This has been explained for the first time in the Balqis Fatima Case as

*"The Quran does not envisage the continuance of a married life in case of a breach and provides for dissolution in such a case even without restoration of benefits, the claim of the wife to a khula as of right becomes stronger."*¹³

In Saleem Ahmed v Government of Pakistan¹⁴, the Federal Shariat Court the court deviated from the Hanafi Jurisprudence and the right of khula of a muslim woman was identified without the consent of their husband by taking references from Quran and Sunnah.¹⁵

Hence, in Pakistan, The Supreme Court has ruled in many cases that in case of khula, it is not the husband's wish but the wife's choice which should be considered.

In Saudi Arabia, if a woman wants to opt for khula as the mode of divorce, apart from paying compensation to her husband she needs to give up her child custody rights.

¹³ <https://wrcaselaw.wordpress.com/2012/12/13/199/>.

¹⁴ PLD 2014 FSC 43.

¹⁵ A Woman's Right to Unilateral Divorce under Islamic Law- Salman Ijaz

In Iran, Khula is highly discouraged and is not well accepted by the society and woman as well do not prefer khula as the society still blames the woman for breakdown of marriage.

In other nations such as Egypt and Nigeria as well, the right of khula of a woman has been recognised and developed as law, but the woman needs to go under the grounds as specified under Sharia law and should be able to pay compensation to her husband in most of the cases.¹⁶

KHULA UNDER ISLAMIC SHARIA COUNCIL:

The Islamic Sharia Council, based in London, is an authorised body in itself to grant divorce through established procedures of either Khula / Talaq. The council is a registered charitable trust and grants divorce if at least one of the parties approaches the council for judgement. A very nominal fee is collected by the council for the proceedings and a certificate of marriage is issued in case divorce is granted.

The council does not prescribe grounds for dissolution as such but, the most common grounds are where there is violence against the woman from her husband, or when the husband has a physical defect as to procure children, adultery etc. A period of maximum one year is provided for the parties to put the case on hold in case they wish to reconcile and solve their issues after the case is registered in the council.

Once the wife approaches the council for divorce under khula, the husband is sent a notice to informing about the same and asking him to appear before the council within a month or two. Unless the husband does not want to the interference of the council, the parties are met by scholars of the council to know the whole issue, and then a joint meeting is held to let know each other's complains and they are left to decide whether they would want to proceed with the divorce proceedings or not. The meeting in no way tries to make them reconcile it is more of an arbitration procedure. If the parties still wish to break the marriage, the council will grant them divorce, and also provide a certificate for the same.¹⁷

CONCLUSION AND SUGGESTIONS:

As per the above analysis we can come to a conclusion that women under Islamic Law are given enough opportunity to avail their right of divorce through Khula in case she has a valid

¹⁶ <https://thewire.in/gender/muslim-women-triple-talaq-khula-right-to-divorce/amp/>

¹⁷ <http://www.islamic-sharia.org/khula/>

reason to get separated from her husband. But, through the development of the society, the law has been interpreted in such a way that it is in consonance with the patriarchal society.

Now, coming into this 21st century is when people started to open up on the uplifting of women in the society and also to realize and recognize their rights which are available through customary laws which are often made the victims for the lower standard of women in the society without knowing that these customary laws actually provide equal footing for both men and women and have always upheld the rights and dignity of women in the society.

Hence, there is a need for the present day legal systems to give legal recognition to these customs which ensure the equal footing of women in the society than to hold them absolute as it is strongly believed as per majority that it would not be possible practically at this stage of the circumstances available in the country to enforce a common code applicable to everyone deviating from the customary laws.

LITERATURE REVIEW:

- 
- Women's right to unilateral no-fault based divorce in Pakistan and India - Muhammad Zubair Abbasi
The article compares the development of concept of Muslim Divorce as law in the countries of Pakistan and India and the differentiating opinions of the legal systems on the concept of women's right to divorce.
 - The position of Women in Islam: A progressive view - Syed Mohammed Ali
The book talks about how Quran and Hadith position women in the society. It talks about their positioning in a Muslim family and on the concept of dissolution of marriage.
 - UNDERSTANDING THE ISLAMIC LAW OF DIVORCE - Furqan Ahmad
The article talks about the concept of divorce under Islamic law keeping in mind the Indian System and its outlook.
 - Modes of Divorce- Muslim Personal Laws – legal Services India

The article explains briefly the concepts of dissolution of Muslim marriage as per Quran and the how they are perceived along with the conditions and circumstances of applying each form of divorce.

- **KHULA – Islamic Sharia Council**

The article explains the concept of Khula and its procedure as per Sharia laws.

- **Ban Instant Talaq, But also ensure Muslim Women’s Right to use Khula – Naz Asghar**

The article talks about the take of Indian judiciary on Instant Triple Talaq and also the need to recognize Khula legally in India today. The article consists of case studies from some Islamic Nations to support the same.

- **Divorce by Woman; Khula – Burhan**

The article is a clarification on the procedure of Khula and how can a wife seek for divorce under Islam.

