

The divorce with the  
consent, and at the



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The Fatwai Alamgiri puts it thus: “ When married parties disagree and are apprehensive that they cannot observe the bounds prescribed by the divine law, that they cannot perform the duties imposed on them by the conjugal relationship, the woman can release herself from the tie by giving up some property in return, in consideration of which the husband is to give her a khula, and when they have done this, a talak-ul-bain would take place”. In an early case the Privy Council said: “ A divorce by khoola is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of bargain are a matter of arrangement between the husband and wife, and the wife may, as a consideration, release her dymohr and other rights, or make any other agreement for the benefit of the husband”.

Thus, when a wife desires a divorce, either on account of her aversion to her husband, or for any other reason, she may obtain a release from him by giving some consideration therefore which is usually her mahr, whole or part of it or it may be some other property. It appears that just as in talak so in khula, the husband must be a person of sound mind and must have attained puberty; the same is true for the wife. A minor, or a person of unsound mind, has no capacity to enter into a khul.

The khul may be entered into by any party or through an agent. Under the Hanafi law, the guardian of a minor wife may enter into a khul on her behalf. In such a case, the consideration will be payable by the guardian, and not by the wife. Even under the Hanafi School, the guardian of a minor husband cannot enter into a khul. It appears that under the Shia law, a minor or

insane wife cannot enter into a khul According to the Shafis, the khul is a personal right, and therefore, wife alone can enter into a khul on her behalf. The Shias insist on a special form of khul and among them khul given under compulsion is not valid. On the other hand, the Sunnis do not insist on any form.

It appears that they recognize a khul obtained even under compulsion. All the schools agree that consent of the husband should be in a definite language. Thus, if a wife says, “ Give me a khul in exchange of my dower”, and the husband replies, “ I do”, a legal dissolution of marriage results. According to the Sunnis, the consent to Khul may be conditional or unconditional. An unconditional khul results in an irrevocable divorce as in talak-ul-bain. When it is conditional, it takes effect on the fulfilment of the condition.

Among the Shias the conditional khul is not recognized. Although consideration for khul is essential, the actual release of the dower, or delivery of the property constituting the consideration for khul is not a condition precedent for the validity of the khul. Once the husband gives his consent to the khul, it results in an irrevocable divorce as in talak-ul-bain. The husband has no power of cancelling the khul on the ground that the consideration has not been paid. His remedy is to sue the wife for it. The consideration for khul may be anything.

Usually it is the mahr whole or part of it. But it may be any other property, though it should not be illusory, i. e., something over which the woman has no right. If compensation is illusory, the Sunni law takes the view that the

husband is not bound to release the wife. “ Whatever is lawful as dower, or capable of being accepted as dower, may lawfully be given in exchange of khul.”“ Since any consideration which is not illusory is valid, a khul may be entered into in consideration of a fraction of the dower.

When this is so, and the wife has not received her mahr, then neither the wife can claim the balance nor can the husband claim the fraction. If she has received the mahr, then she must pay the fraction of the whole dower, if the marriage has been consummated; and if the marriage has not been consummated, then she must give the fraction of half of the dower. It is possible that the Khul may be entered into on consideration to be determined later on. In such a case consideration cannot be more than the amount of mahr unless the wife agrees. It cannot also be less than the amount of mahr, unless the husband agrees. Among the Hanafis and the Ismailis, the khul divorce results in an irrevocable divorce as in talak-ul-bain.

The Shaffis differ inasmuch as they do not require an intermediate marriage if the parties concerned want to remarry. The Ithana Ashari authorities differ among themselves whether or not the Khul results in an irrevocable divorce. However, they agree that once the husband accepts the khul, he has no power of revocation, but the wife may at any time during the idda re-claim consideration, and if she does so, the husband may revoke the khul at his option. According to all the schools of Muslim law, a proposal for khul made by the wife may be retracted by her at any time before it has been accepted by the husband. It also stands revoked, if before its acceptance, she raises from the meeting whether the proposal is made.

A khul with an option to the husband to revoke it cannot be validly entered into. According to the Hanafis, the khul with an option is valid and operates as an absolute divorce, and the option is void. Under the Shia law, both the khul and the option are void.

Most of the textbook writers discuss khul under the title, “ Divorce by Mutual consent”, but it is submitted, since in the khul the desire to separate emanates from the wife, and she has to make her husband agree to it by giving consideration, it would be proper to call it divorce at the instance of the wife.