

Grounds for *Khul'* in Islamic Law: A Critical Examination of Nigerian Case Law and Practice

By

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Abstract

Islamic law has been facing criticisms from people who knew nothing about the religion of Allah, especially on matters relating to women. The fact that talaq is the right of man to determine the fate of the marriage contract between him and the wife. Islamic law gives a woman the right to seek for release from a marriage tie whenever there is no harmony between her and her husband. Khul' is a form divorce initiated by the wife under Islamic law after having paid or refund the mahr to the husband and is recognised by Nigerian's courts. This article critically examines the concept of khul' discusses the distinction between khul' and talaq. The article highlights the rights of a woman under khul'. The article analyses key cases that were decided by Nigerian courts on khul' stressing on the grounds upon which can be granted. Doctrinal methodology was adopted in this article. It is the finding of this article that a woman can redeem herself from a marriage tie by paying consideration, if there is no harmony between the parties or where the wife established shiqaq (discord) or darar (harm). It is therefore among others recommended that awareness should be created for women to know that they have the right of release from a marriage tie.

Keywords: *Khul'*, Marriage, Right, Husband, Wife

1.0 INTRODUCTION

The contract of marriage is to last forever until death takes either the husband or the wife. But when the relations between the husband and the wife become so strained that the continuation of the union becomes strained, the husband and the wife are allowed to terminate the marriage. The marriage can be dissolved either by the husband on his own initiative or at the instance of the wife or by mutual agreement. Generally, the husband reserves the right to pronounce divorce in case the wife is guilty of breach of the implied contract that the marriage will subsist for life-time.

If it is the wife that wants termination of the marriage she has, as a rule, to compensate the husband. This termination of the marriage at the instance of the wife is known as *khul'*. It is one of the means of dissolving marriage and it has been well recognised and followed from the early

period of Islam. The Glorious Qur'an states: "And women have rights similar to those against them in a just manner, and men are a degree above them, and Allah is Might, Wise".¹ This verse shows that men and women have similar rights. Man has been given the right of divorce but the woman has not been deprived of the right to separation in case of necessity.² This right has been given to her by the doctrine of *khul'*.³

The article examines the concept of *khul'* and its practice under Islamic law and in Nigeria. This is due to the fact that there is a slight addition in the concept and practice of *khul'* in Nigeria. The doctrine is being used to dissolve marriages without just cause or sometimes, it is maliciously used to separate spouses because some of the Area/Sharia courts judges lack full knowledge of *khul'* is all about or they follow their heart desires in handling cases on *khul'*.

Islamic law required a party to provide witnesses to establish his or her case, some women who have no genuine reason why they want to separate from their husbands, they resort to *khul'* and some courts incline to their wishes based on what they presented to the court. The concept is also not properly understood by some of the judges manning the Area/Sharia courts that adjudicate on Islamic personal matters before appeal.

This article analyses the concept of *khul'* and discusses when it is necessary to resort to *khul'* to dissolve marriages. Some Nigerian cases on *khul'* were as well examined.

2.0 CONCEPT OF *KHUL'*

The word *khul'* in its literal sense means to draw off or dig up. It connotes an agreement between the husband and wife with a view to dissolve the contract of marriage tie in lieu of compensation paid by the wife to her husband.⁴ There are scholars who disagreed that the word *yamin* (agreement) should be used. They held the opinion that the use of *yamin* (agreement) has led to misconception that it is only on an agreement between the parties that a marriage can be dissolved by *khul'*, while referring to *khul'* they have not used the word *yamin* (agreement) and they have stated that *khul'* means the relinquishment of the ownership of marriage at the instance

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¹ Qur'an chapter 2 verse 228

² KN Ahmed, *The Muslim Law of Divorce (Kitab Bhavan New Delhi, 1981)* 219

³ Ibid,

⁴ Muhammad Iqbal Siddiqi, *The Family Laws of Islam*, (International Islamic Publishers, Delhi, 1998)

of and on payment of a consideration by the wife.⁵ According to Abu *Hanifah*, *khul'* is a conditional agreement on the part of the husband and compensation on the part of the wife, but according to Abu Yusuf and Muhammad b. Al – Hassan, it is agreement from both of them.⁶

In Maliki jurisprudence, *khul'* is a form of irrevocable divorce initiated by the wife in exchange for compensation, usually the return of her *mahr* (dower). Abu *Hanifah* maintained that the dissolution of marriage for consideration with the consent of the wife is called *khul'* irrespective of the fact that the word *khul'* has or has not been used. According to *Shafi'i* every word which brings about a separation between husband and wife for a consideration is *khul'*.⁷ Imam Ahmad *Hanbal* says according to one version, that *khul'* is a separation of the husband in lieu of some consideration realised by him. According to another version, it is a divorce.⁸

The Glorious Qur'an expressly supported *khul'* form of remediation. The Qur'an states: "And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep (within) the limits of Allah. But if you fear that they will not keep (within) the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allah, so do not transgress them. And whoever transgresses the limits of Allah, it is those who are the wrong doers".⁹

In other words, it means that when the husband and the wife have reason or reasons to apprehend that the ends of the marriage are not likely to be achieved by the continuance of the marriage, the wife needs not hesitate to release herself by offering such compensation as may induce the husband to liberate her. There is nothing wrong in the husband's acceptance of such compensation, nor in the wife's giving it when the husband and wife are not having in harmony.¹⁰ Another verse in the Qur'an states that: "If a woman fears ill-treatment from her husband or desertion, it is no sin for them to part in twain, if they make terms of peace between

⁵ *Al-Fatawa Al-Hindiyah*, (Kanpur, 1349 A.H.), Vol. II, p. 118

⁶ *Ibid*,

⁷ *Akmal al-Din, Al-Inayah ala'l-Hindiyah*, (Cairo, 1356 A.H.), Vol. III, p. 199

⁸ *Ibn Qudamah, Al-Mughni*, (Cairo, 1367 A.H.) Vol. VII, p. 57

⁹ Qur'an Chapter 2 verse 229

¹⁰ *Hamudah Abd'ul Ati, The Family Structure in Islam*, (American Trust Publication, 1977) p. 134

themselves, peace is better. And avarice is met within the minds (of men). If you do good (to the other) and keep your duty. Lo! Surely Allah is aware of what you do.”¹¹

There are two famous Hadiths of Prophet Muhammad (SAW) about *khul'*. The first Hadith is in respect of *Jamilah*, the daughter of Abdullah bin *Ubayy* bin *Salul* and wife of *Thabit Ibn Qays*. It was narrated that one day; *Jamilah* went to the place of Prophet Muhammad (SAW) and said, “O Messenger of Allah! I and *Thabit* can never live together. I saw him coming from the other side with some men. I found that he had the smallest stature was the blackest and highest amongst them; I swear by Allah that I do not dislike him on account of any religious or moral turpitude, but I dislike him on account of his highness. I swear by Allah that if I did not fear Allah, I would spit on his face when he comes to me (meaning that she hated his very sight). O Messenger of Allah! You can see how beautiful I am while *Thabit* is an ugly person. I do not blame him for any depravity in his religious practices or morality, but I fear that I may be guilty of transgression of the injunctions of Islam”. The prophet (SAW) asked her if she would return the orchard given by *Thabit* to her as dower. She replied, “Yes: and if he demands more, then I am ready to give him more than that”. The Messenger of Allah (SAW) said, “No; not more than what he had given to you.” He then asked *Thabit* to take back the orchard and to release her from the marriage tie by divorcing her which he did.¹²

The second Hadith is in respect of another wife of *Thabit* whose name is *Habibah*, the daughter of *Suhail*. It was narrated as well that one early morning, when the Prophet (SAW) came out of his house, he saw *Habibah* waiting outside. The Prophet (SAW) asked her what the matter was and why she was standing there. *Habibah* said that she could not pull on with *Thabit*. When *Thabit* came there, the Prophet (SAW) said to him, “Here is *Habibah*, daughter of *Suhail*. She has complained against you”. *Habibah* said, “O Messenger of Allah! I have still got all that *Thabit* had given me for dower”. The Prophet (SAW) then ordered *Thabit* to take it and to release her, that is, to divorce her.¹³ It may be observed here that *Habibah's* grievance was

¹¹ Qur'an Chapter 4 verse 128

¹² *Al-Bayhaqi*, *Al-Sunan Al-Kubra*, (Hyderabad Deccan, 1353 A.H.) Vol. VII, pp. 313-314

¹³ *Abu Dawud*, *Sunan*, (Kanpur, 1346 A.H.) Vol. 1, p. 149

similar to *Jamilah's* own because it was also due to ugliness of *Thabit*. *Habibah* too had used the same words as used by *Jamilah*, viz; "I will spit on his face if I did not fear Allah".¹⁴

It is clear from the two above Hadiths that both *Jamila* and *Habibah* stated their reasons for the self-redemptions. Islamic law does not allow a wife to seek for her release from the marriage-tie or divorce without a just cause. There must be legitimate grounds in absolutely unbearable conditions. Thus, there are Hadiths of the Prophet (SAW) which state that a woman who seeks divorce from her husband without any excess on his part will be cursed by Allah and His Angels.¹⁵ Women who make a play of their divorce rights are hypocrites.¹⁶

These warnings and moral exhortations are intended to discourage women from disturbing their marriages. The purpose of *khul'* is to enable a wife to get release from the marriage –tie when she finds that the ends of marriage are not likely to be achieved by a continuance of the marriage or when she suffers ill-treatment from her husband or when she finds that it is not possible for her to live with her husband in harmony and peace.¹⁷

Apart from *khul'*, there is another means of divorce which is akin to *khul'* but it does not require consideration. It is a form of termination of marriage by mutual consent, as a result of mutual aversion or disagreement, it is called *mubaraat*. Under Maliki School, the cornerstone of a valid *mubaraat* is true, uncoerced mutual agreement to separate. The marriage is terminated at the desire of both the husband and the wife; no consideration is to be paid in such a case by the wife to the husband.¹⁸ Maliki jurists require at least two witnesses for the dissolution of the marriage to be legally recognise.

The word *khul'* has been loosely used by some jurists. They have stated that a stranger can obtain a *khul'* from the husband by offering him a consideration. But obviously this will not amount to a *khul'*. If this should be allowed, people will be encouraged to induce another man to divorce his wife to enable them to marry her. Though, some Muslim jurists hold that this will amount to *khul'*.¹⁹ As earlier stated, *khul'* is based on a verse in the Qur'an which says that when the

¹⁴ *Ibn Majah, Sunan, (Lucknow, 1315 A.H.)* p. 149

¹⁵ *Al-Bayhaqi* (n¹²)

¹⁶ *Al-Bayhaqi* (n¹²)

¹⁷ *Ibn Qudamah* (n⁸)

¹⁸ *Ibn Qudama* (n⁸)

¹⁹ *Ibn Qudama* (n⁸)

husband and the wife are apprehensive that they cannot live within the limits of Allah, then there is no harm in the wife's giving some consideration to the husband to induce him to divorce her. In the verse, apprehension of the husband and the wife that they cannot live within the limits of Allah; it is the wife who seeks a separation from the husband and it must be the wife who is to pay the compensation.²⁰

3.0 THE DISTINCTION BETWEEN *KHUL'* AND *TALAQ*

There is a clear difference between *khul'* and *talaq* (divorce). The following characteristics of *khul'*:-

- i- A divorce is pronounced by the husband at his own initiative. A *khul'* is however given at the instance of the wife when she has an invincible aversion for her husband.
- ii- In divorce the husband becomes liable for the immediate payment of the wife's dower, but in *khul'* it is the wife who makes a payment to the husband in order to induce him to release her from the marriage bond and the consideration may consist of the dower itself.
- iii- A divorce can be given only certain specified conditions. Thus a husband cannot divorce his wife when she is in a state of impurity, that is, during her menstrual period or in the period of purity in which he has been intimate with her. But a *khul'* can validly be given in such circumstances.²¹

Another difference that exists between *khul'* and *talaq* is that the marriage is dissolved in *talaq*.²² By the use of the word "*talaq*" but this word is not used in the case of *khul'* and the word *khul'* or some equivalent word is used in the case of *khul'*. Among the features of *khul'* is that dower shall generally be extinguished but not in the case of *talaq bi-iwad al-mal*.²³ Another feature of *khul'* is that if the consideration be unlawful, the divorce shall be irrevocable in the case of *talaq bi-iwad al-mal*.²⁴ There is also difference between *talaq* and *mubarah*. The difference between *talaq* and *mubarah* is that in case of *mubarah* the marriage is dissolved with the mutual consent

²⁰ See Qur'an Chapter 2 verse 229

²¹ *Ibn Abidin, Radd al-Mukhtar*, (Cairo, 1318 A.H.) Vol. 11, pp. 571-572

²² This form *talaq* includes *talaq-bi'iwad al-mal* which denotes the sale of the ownership of the marriage or right of divorce by the husband to the wife or the purchase of the same by the wife. See *Ibn Abidin*, Ibid.

²³ *Ibn Qudama* (n⁸)

²⁴ *Ibn Qudama* (n⁸)

of both the husband and the wife. But *talaq* is given by the husband on his own initiative and desire without any reference to the wife.²⁵

4.0 THE RIGHT OF THE WIFE UNDER *KHUL'*

There is no clear authority in the Qur'an or the *Sunnah* about the rights and obligations of the husband and the wife under *khul'*. There are various views of the jurist in this regard, because some of the jurists have described *khul'* as an agreement between the husband and the wife gets a release from the marriage tie. The word agreement has led to the notion that a *khul'* can be effected only when the husband agrees to it and not otherwise.²⁶ However, this view seems to be incorrect based on the cases decided by the Prophet (SAW) on *khul'*. By its very nature, the dissolution of a marriage by the court at the instance of the wife for a consideration to be paid by her to the husband shall amount to a *khul'*, even if there is no agreement between the husband and the wife. The cases of dissolution of marriage under the doctrine of *khul'* can arise under the following circumstances:

4.1 By Mutual Consent: If both the husband and the wife want separation, there can be no difficulty. They can mutually agree to the termination of the marriage and the husband can divorce her subject to such terms if any, as may be agreed upon between them. In the same vein, if it is the wife who wants a *khul'* and the husband agrees to dissolve the marriage on certain conditions agreed upon between them then too there will be no difficulty.²⁷ In these cases, it would not be necessary for the parties to have any recourse to the court.²⁸

4.2 Husband Refusal to *Khul'*: In this case, it is only the wife who is desirous of the termination of the marriage. If the husband refuses to agree to *khul'* or if the parties cannot agree to the terms on which the marriage is to be dissolved, the question arises if anything can be done in such a case.²⁹

If the husband refuses to *khul'*, the only option left for the wife is to seek the assistance of the court since the wife cannot divorce herself. This is in line with the cases decided by the Prophet

²⁵ *Ibn Abidin* (n²¹)

²⁶ *Abu'l-A'la Mawdudi, Huquq Al-Zawjayn*, (Lahore, 1961) p. 69

²⁷ *Ibid*

²⁸ *Ibid*

²⁹ *Al-Kasani, Bada'i al-Sana'i*, (Cairo, 1327 A.H) Vol. III p. 323

(SAW). Therefore, there is no any instance where a woman divorced herself under the doctrine of *khul'* or even informed the Prophet (SAW) that she has divorced herself by way of *khul'*. Nevertheless, in the *Thabith* and other cases that formed the basis for *khul'*, the wives sought for the intervention of the Prophet (SAW). This establishes the law that a wife cannot dissolve her marriage under *khul'* by herself, she has to get it done by the court.³⁰ Moreover, *khul'* of necessity involves the payment of a consideration by the wife to the husband. The consideration is not restricted to the dower paid or to be paid by the husband but may be something different or in addition to that.³¹ When the husband does not agree to *khul'* or to the consideration offered by the wife, the question of the amount and the nature of the consideration does not arise because the wife cannot fix it herself. This shows that it is necessary that there should be a third party who can decide the matter.³²

As earlier stated, a husband is not entitled to exercise the power of divorce unless there is some valid grounds to do so. In the same vein, the wife is not entitled to get her marriage dissolved under the provisions of *khul'* unless there are some genuine grounds for the same. It is only in cases where it is impossible or very difficult for the wife to live happily with her husband and when there is no hope for reconciliation, that *khul'* is permissible.³³ The unscrupulous use of *khul'* has been strongly condemned in Islam.³⁴ A wife must therefore ask her husband for a *khul'* only when there is justification for it.³⁵

4.3 Consent of the Husband and the Court's Power

The point to be made here is whether the husband's consent is a condition precedent to the dissolution of marriage under the principle of *khul'* or has the court the power to separate the parties even against the wishes of the husband, when he is satisfied that the parties cannot live "within the limits of Allah"?³⁶ It would be unreasonable to assume that Islamic law prefers that a marriage shall not be dissolved even when the wife cannot live within the limits of Allah and may transgress the limits enjoined on a wife from the bond of marriage. If in spite of the wife's

³⁰ Ibid

³¹ Ibid

³² *Al-Sha'rani, al-Mizan al-Kubra*, (Cairo, 1279 A.H) Vol. II p. 135

³³ Ibid

³⁴ Ibid

³⁵ Ibid

³⁶ See Qur'an Chapter 2 verse 229

unhappiness, the husband refuses to give her a release, he shall be guilty of not complying with the ordinance of Allah. So, the marriage shall become liable to be dissolved on the basis of the husband's defiance of the sacred ordinance.³⁷ To put it another way, the wife shall be entitled to the dissolution of the marriage if it is proved to the satisfaction of the court that harmony is not possible between the husband and the wife. In this regards, it would be that it should be seen if the husband is at fault in any way, but what would be seen is whether harmony is possible between the husband and the wife; the cause which results in the disharmony between the husband and the wife is immaterial.³⁸ The court shall grant relief to the wife by ordering the husband to divorce the wife and on the husband's failure or refusal to do so the court shall become competent to divorce the wife on behalf of the husband.³⁹ It is pointed out that the very fact that an unscrupulous use of *khul'* by the wife is strongly condemned by the Prophet (SAW) shows that she does possess a legal right to it in appropriate cases.⁴⁰ If she did not possess such a right then there could have been no necessity to condemn its unscrupulous use by the wife.⁴¹

Nonetheless, the fact that the husband may possibly be put to hardship in such a case, there are two general rules of law that shall be applicable here. The first is that the law cannot help the wrong-doer or a transgressor; and the second is that party shall be helped by law which is less at fault of the two.⁴² So, it is necessary for the court to take these various matters into consideration when adjudicating on case of this nature. If the court finds that the husband is not at fault and the marriage has to be dissolved on account of the wife, the court shall order the wife to compensate the husband by paying such compensation to the husband as the court may deem reasonable.⁴³ However, if the court finds that the wife is bent on the dissolution of the marriage, on account of the husband's fault, the court may compel the husband to divorce the wife in which case the husband shall have to pay the dower of the wife.⁴⁴

The most important thing to note is whether the husband and the wife can be said to be living within the limits of Allah in any particular case in view of that it is necessary to see if the aims

³⁷ Al-Kasani (n²⁹)

³⁸ Al-Kasani (n²⁹)

³⁹ Roland Wilson, *Anglo- Muhammad Law*, Calcutta, P. 154

⁴⁰ Ibid

⁴¹ Ibid

⁴² Al-Kasani (n²⁹)

⁴³ Mawdudi (n²⁶)

⁴⁴ Mawdudi (n²⁶)

and objects of marriage are being achieved or if they have been frustrated. It is obvious that the failure of the objects of marriage does not necessarily give a cause for its dissolution in some other cases, while the failure of a single object may be sufficient for a separation in some other cases. Therefore, every case has to be decided on its particular facts.⁴⁵

5.0 CONDITIONS FOR *KHUL'*

It is important to as well discuss certain conditions which must be fulfilled before *khul'* can be affected. These conditions are considered to be essential for *khul'*.

5.1 Subsistence of Marriage

Subsistence of marriage is an essential condition of *khul'* that the parties must stand to one another as husband and wife. The marriage between the parties must be subsisting at the time of *khul'* it is immaterial whether the marriage has or has not been consummated. The marriage must be valid. A wife whose marriage is *batil* (void) or *fasid* (irregular) cannot exercise a *khul'* because a void or irregular marriage does not create the relationship of husband and wife between a man and a woman.⁴⁶ If a wife pays consideration to her husband for obtaining *khul'* and it happens subsequently that the marriage was void or invalid then he is bound to return the consideration received by him from the wife as he was not entitled to it.⁴⁷ As a result, there can be no *khul'* if a man and a woman do not stand to one another as husband and wife at the time when *khul'* is exercised. More so, if a wife is divorced by an irrevocable divorce or one of the parties apostatizes, the marital relationship ceased and *khul'* is not then permissible.⁴⁸

5.2 Proposal and Acceptance

It is a necessary condition of *khul'* that there must be a proposal by one party and its acceptance by the other party. Nevertheless, it is not necessary that the proposal for *khul'* should emanate from one of the parties to the marriage. It can be made by the guardian of a minor. According to some jurists, a third party may persuade the husband to give *khul'* to his wife for a

⁴⁵ *Ibn Abidin* (n²¹)

⁴⁶ *Ibn Abidin* (n²¹)

⁴⁷ *Ibn Qudama* (n⁸)

⁴⁸ *Ibn Qudama* (n⁸)

consideration agreed to be paid.⁴⁹ The husband's consent to a proposal for *khul'* may be express or implied as when he accepts the consideration for a proposed *khul'* without expressly giving his consent to it.⁵⁰

The acceptance of a proposal for *khul'* must be expressed in the same terms as the proposal. The acceptance cannot introduce a new or different consideration or a different condition. When the wife delivers the consideration demanded by the husband without expressly giving her consent to the husband's proposal, it shall be deemed to be an implied consent and the *khul'* would be effected.⁵¹

Similarly, it is not necessary that the husband should expressly give his consent to the wife's proposal. Such assent may be inferred from his conduct.⁵² Thus, where a wife seeks *khul'* for a specified consideration and the husband accepts the same, his consent shall be presumed and *khul'i* shall be effected as soon as the husband accepts same.⁵³ The marriage shall be dissolved on the acceptance of the consideration even when the husband does not divorce the wife.⁵⁴

5.3 Free Will or Intention

Intention or free will is necessary condition of *khul'* because the amount of consideration of the *khul'* cannot be settled when the husband has no intention to release the wife in lieu of a specified consideration.⁵⁵ In a situation where the husband forces his wife to exercise *khul'* and she does so, a divorce shall be effected, but the payment of the consideration shall not be incumbent on her.⁵⁶ More so, if the husband forces his wife to seek for *khul'* under coercion as by threatening to kill her or beating her or by starving her then a divorce shall not be incumbent on the wife.⁵⁷ The divorce in such a case shall be *raja'i* (revocable).⁵⁸

⁴⁹ Muhammad b. *Abil 'Abbas*, *Al-Ramli, Niha'yat Al-Muhtaji*, (Cairo, 1357 A.H.) Vol. V p. 399.

⁵⁰ *Ibid*

⁵¹ *Ibid*

⁵² *Al-Sha'rani* (n³²)

⁵³ *Al-Sha'rani* (n³²)

⁵⁴ *Al-Sha'rani* (n³²)

⁵⁵ *Ibn Nujaym, Al-Bahr Al-Ra'if*, (Cairo, 1311 AH.) Vol. IV, p.90

⁵⁶ *Ibid*

⁵⁷ *Ibid*

⁵⁸ *Ibid*

However, *Maliki*, *Shafi'i* and *Hanbal* do not accept the validity of a divorce under compulsion. The same principle of law will naturally apply in the case of *khul'*.⁵⁹ Furthermore, it is held that the husband who is competent to give divorce can also give *khul'* but if he is not competent to give divorce then he cannot give *khul'* but if he is not competent to give divorce then he cannot give *khul'* as well.⁶⁰ *Maliki*, *Hanbal* and *Shafi'i* Schools hold that *khul'* under compulsory is not valid.⁶¹

5.4 Consideration for *Khul'*

The consideration to be paid for *khul'* must satisfy certain requirements. There must exist aversion in the wife for her husband and it should not be the husband who should have an aversion for her. If the aversion is on the part of the husband, it would be abominable in the husband to take anything at all from the wife.⁶² This is based on the principle laid down the Glorious Qur'an: "And if you wish to have (one) wife in the place of another and you have given one of them a heap of gold, take nothing from it."⁶³

In addition, if *khul'* is due to ill-treatment by the husband the husband cannot lawfully take any consideration from the wife because Allah has enjoined on the husband not to take back anything from the wives on separation as stated in the above verse. If the husband has realized it, it shall be considered to be *makruh* (dislike) Prophet.⁶⁴

In another verse, Allah says: "Then if you fear that they (husband and wife) cannot keep within the limits of Allah there is no blame on them for what she gives to become free thereby."⁶⁵ This verse is also applicable. The husband is given the option to accept consideration even when it is the husband who bears malice for the wife and is himself the aggressor.⁶⁶ It has been explained that the first verse shall be applicable when the husband is at fault and happens to be the aggressor. The second verse shall apply when the husband is not at fault.

⁵⁹ *Ibn Abidin* (n²¹)

⁶⁰ *Al-Ramli* (n⁴⁹)

⁶¹ Muhammad b. Ahmed, *Jawahir Al-Uqud*, (Cairo, 1374 A.H.) Vol. II, p.114

⁶² *Al-Marghinani*, *Al-Hidayah*, (Delhi, 1380 A.H.) Vol. II, p.387

⁶³ Qur'an Chapter 4 verse 20

⁶⁴ *Ibn Abidin* (n²¹)

⁶⁵ Qur'an 2 verse 299

⁶⁶ Muhammad b. Ahmad (n⁶¹)

It has also been stated there that this preposition of law is supported by *Ijma* (consensus of *Ulama*) besides the above, there is a third verse in the Glorious Qur'an wherein the Muslims have been enjoined "to retain them not for injury."⁶⁷ It has been stated further that it will be unlawful for the husband under the circumstances to take any consideration from the wife.⁶⁸ But it has been held by the jurists that in strict law the husband can take compensation from the wife even when the aversion or cruelty is on the husband's part.⁶⁹ The jurists hold the view that it will be good in law though bad in religion. They also hold that it would be lawful for the husband to take more than what he had given to the wife or settled upon the wife by way of dower.⁷⁰ Some jurists are of the view that to take more consideration is disapproved of even when the wife is at fault. If it is the husband who is at fault, he should not take any consideration at all, although in strict law, he can do so.⁷¹

Therefore, it is obvious that this opinion slightly go against verse 231 of chapter 2 of the Glorious Qur'an. The Hadith of *Thabit b. Qays*, where the Prophet (SAW) asked *Jamilah* if she was willing to return the orchard given to her by *Qays* by way of dower and she said, "yes, and even more than that." The Prophet (SAW) then said, "No, not more than that." This in junction established very clearly that a husband cannot lawfully take from the wife more than what he had given to her by way of dower. Perhaps, these in junctions must be followed and fully adhered to in preference to the rules down by the jurists.⁷²

5.5 Effect of *Khul'*

The marriage is dissolved as soon as *khul'* is given or the proposal is agreed to by the other part.⁷³ As soon as a release has been agreed to by both parties, the wife is completely separated from her husband, even though no compensation has been paid as yet.⁷⁴

5.6. Nature of the Divorce

⁶⁷ Qur'an Chapter 2 verse 231

⁶⁸ Al- Maghinani (n⁶²)

⁶⁹ Al- Maghinani (n⁶²)

⁷⁰ Al- Maghinani (n⁶²)

⁷¹ Ibn Abidin (n²¹)

⁷² Al-Suyuti, Al-Durr Al-Manthur, (Bagdad, 1377 A.H.) Vol. I, p.280

⁷³ Qadi Khan, Fatawa Qadi Khan, (Kanpur, 1310 A.H.) Vol. II, p. 256

⁷⁴ Ibid

The jurists hold divergent views on the nature of divorce by *khul'* under the Maliki law, the dissolution of marriage by *khul'* constitutes an irrevocable divorce.⁷⁵ While under the *Hanafi* law, the dissolution of marriage by the use of word *khul'* or its equivalent words amounts to an irrevocable divorce as well.⁷⁶ If the marriage is dissolved by the use of the word *talaq* in lieu of consideration, this is called *talaq ala'l mal* and shall amount to an irrevocable divorce.⁷⁷ Under *Shafi'i* law, there are two views about the law laid down. According to one view, *khul'* results in *fasikh* or cancellation of the marriage. According to the second view and later opinion, *khul'* result in *fasikh* or cancellation of the marriage. According to the second view and later opinion, *khul'* amounts to irrevocable divorce. This is usually regarded as the correct view.⁷⁸

Meanwhile, the *Hanbali* school is of the view that if the marriage is dissolved by the use of the word *khul'* it shall amount to an irrevocable divorce. However, if it is dissolved by the use of the word "*talaq*". There are two opinions expressed by Imam Ahmad *Ibn Hanbal*. According to one opinion, it shall amount to a *faskh* or cancelation of the marriage, but according to the other, it shall be deemed an irrevocable divorce.⁷⁹

The parties or one of the parties can against another person to give or receive *khul'i* divorce on his or her behalf. Even a minor can act as an agent or representative for the purpose.⁸⁰ Although, the agent or representative is not personally responsible for the payment of the consideration unless he undertakes to pay its⁸¹

5.7 Time of *Khul'*

A *khul'* divorce can be given at any time during the substance of marriage. It can be given even during the period of the wife's *iddah*, if it be incumbent, for instance, when she has been divorced by a revocable divorce because in such a case the marriage continues during the period of *iddah*.⁸²

⁷⁵ Muhammad b. Ahmad (n⁶¹)

⁷⁶ *Abidin* (n²¹)

⁷⁷ *Ibn Abidin* (n²¹)

⁷⁸ *Al-Fatawa al-Hindiyah* (n⁵)

⁷⁹ *Al-Fatawa al-Hindiyah* (n⁵)

⁸⁰ *Akmal Al-Din* (n⁷)

⁸¹ *Akmal Al-Din* (n⁷)

⁸² *Ibn Abidin* (n²¹)

If a wife gets *khul'* while the husband is suffering from *marad al-maut* (anticipation of death), the wife shall not be entitled to her right of inheritance if the husband happens to die in his sickness.⁸³ Similarly, the wife can obtain a *khul'* divorce while she is suffering from *marad al-maut* (antiapariion of death).⁸⁴ Under the Maliki School the husband shall not inherit her because he has personally divested himself of his rights.⁸⁵

5.8 Observance of *Iddah*

By the nature of *khul'*, is a divorce and brings about termination of marriage. Therefore, it is incumbent on the wife to observe *iddah* for the same period of time as in the case of divorce, namely for three terms of menstrual discharge or for three months if the wife is not subject to them. But the predominant and most acceptable ruling based on *Sunnah* is that the *iddah* is one menstrual cycle. This is the view of Maliki School as well.⁸⁶

5.9 Capacity of the Wife

For obtaining *khul'* the wife must possess capacity, that is, she must be adult and sane and must possess understanding. It is necessary if her marriage has been consummated that she must be pure, that is, free from monthly cause at the time of *khul'* and no intercourse must have taken place during that period of purity unless she is a minor or post child bearing age or the husband is away, or she is pregnant.⁸⁷ Hence, the *khul'* of a woman is valid even when intercourse has taken place with her if she is a minor or past the child bearing age or she is pregnant. However, if the marriage has not been consummated or the husband is absent then *khul'* can be given when she is not in a period of purity. *Khul'* of pregnant woman is valid.⁸⁸ It is also necessary that she must have an aversion for her husband. Hence, *khul'* would not be valid if given when there is harmony between the parties.⁸⁹

6.0 Brief Analysis of Cases

⁸³ *Ibn Abidin* (n²¹)

⁸⁴ *Ibn Abidin* (n²¹)

⁸⁵ *Ibn Abidin* (n²¹)

⁸⁶ *Ibn Qudama* (n⁸)

⁸⁷ *Al- Suyuti* (n⁷²)

⁸⁸ *Al- Suyuti* (n⁷²)

⁸⁹ *Al- Suyuti* (n⁷²)

Having examined and discussed the principle of *khul'* and its position in Islamic law, it is observed that the application of *khul'*, for instance, in Plateau State has no difference with the provision. The only slight difference is the emphasis the Nigerian courts placed on *khul'* in Nigeria, where the wife seeking dissolution of marriage tie by way of *khul'* has to establish husband's non-maintenance or proof of *darar* (harm) or that efforts to reconcile the parties have failed. Regardless of the court's decisions, husband and wife may privately agree to dissolve their marriage tie peacefully.

As earlier stated, a wife seeking divorce by way of *khul'* must not go beyond stating that she wants divorce by *khul'*. No proof or evidence should be required from her based on what has been discussed above and the authorities which form the basis for the principle of *khul'*.

In the case of *Safiya v. Ibrahim*,⁹⁰ the court required proof from the wife who was seeking dissolution of her marriage by *khul'*, to establish harm. The court highlighted the challenges wives face in proving grounds for divorce.

In *Ummu v. Usman*,⁹¹ the court is seen to have considered a husband's non-maintenance of the wife as a factor in granting *khul'*, this shows flexibility in applying Islamic principles to protect wives rights. This position may be considered as a restatement that Islamic law. It is organic and developmental. It grows with the society. It is humane and comprehensive. It takes care of all and sundry. It outlaws high handedness and oppression. It establishes justice and peace in the society.⁹²

In addition, the court in Nigeria gives regard to reconciliation in the case of *khul'* in *Aisha v. Abubakar*,⁹³ the court stressed the importance of attempts at reconciliation before granting *khul'* aligning with Islamic law's emphasis on preserving marriages in line with the provision of encourage reconciliation. This decision is based on the provision of the Qur'anic verse which states: "If you fear a breach between the two (i.e. husband and wife) then appoint two arbitrators,

⁹⁰ (2013) 14 NWLR (PART 1373) 255 AT 269

⁹¹ (2015) 18 NWLR (part 1489) 1 at 39

⁹² *Wapanda v. Wapanda* (2014) 2 SQLR (Part III) 385 at 425

⁹³ (2007) 3 NWLR (Part 1022) 389 at 425

one from his family and one from her family. If they both wish for peace Allah will cause their reconciliation. Indeed, Allah is ever all-Knower, Well-Acquainted with all things.”⁹⁴

The courts in Nigeria has been using the above verse in adjudicating over cases of *khul'* where the *hakamaini* would be appointed by the court in a marriage marred with dispute and disaffection. Some scholars have argued that this verse is not applicable in the case of *khul'*.⁹⁵

7.0 Conclusion

It is the finding of this articles that *khul'* is based on the mutual agreement the husband and the wife, recourse to the court is only in situation where agreement is not reached. The case of *Thabit b. Qais* was settled by the Prophet (SAW). It is also not necessary that the husband must agree. The Prophet (SAW) did not ask *Thabit b. Qais* whether he agreed with his wife's reasons for wanting a release. In fact, it is very clear that no useful purpose will be served where the wife is forced to remain with a husband that she has lost love.

Therefore, it should be the duty of the court to stress that a wife have right to seek for divorce by way of *khul'* if she becomes apprehensive that she is not in harmony with the husband. The law allows her to redeem herself from the marriage tie by giving up whole or some part or equivalent to the dower agreed to be paid to her by the husband before their marriage contract was effected.

However, it seems to be a tradition that whenever a man has proposed to marry a woman, the man would be made to provide boxer gilled with clothes and other clothing materials for the woman. They call it *kayan lefe* in Hausa. Failure to provide it by the husband to be, the marriage would not hold. In view of that in my opinion, this forms part of the dower given to the woman by the man. This position can be undertaken as further study to examine whether same should also be given back or not.

⁹⁴ Qur'an chapter 4 verse 35

⁹⁵ *Akmal Al-Din* (n⁷)