

WOMEN'S RIGHT TO DIVORCE: A COMPARATIVE STUDY OF *AL-KHULA`* ON LIBYAN AND MALAYSIAN WOMEN

Sabah Faraj Madi**, *Ruzman Md Noor, *Ali Ali Saged******

***Academy of Islamic Studies. University of Malaya.
50603. Kuala Lumpur. Malaysia.

Email: **ruzman@um.edu.my

Khulasah

Al-khula` merupakan satu fenomena global di seluruh dunia Islam. Selain itu, ia turut mengundang salah faham dalam kalangan wanita Islam. *Al-khula`* sering kali terpaksa dijadikan penyelesaian cepat untuk masalah perkahwinan dan salah satu cara untuk perceraian. Secara umumnya, kelaziman pengamalan *al-khula`* dalam bentuk sebegini telah menjadi penghalang kepada pembangunan masyarakat, terutamanya kerana wanita kini memainkan peranan yang penting dalam pertumbuhan dan pembangunan masyarakat. *Al-khula`* telah menjadi halangan utama kepada pembangunan wanita sebagai pekerja dan juga sebagai asas kepada institusi keluarga dan masyarakat. Penyelidik Libya telah mengenal pasti pengamalan *al-khula`* dalam undang-undang Arab. Walau bagaimanapun, tiada kajian dilakukan mengenai praktik *al-khulu`* di Malaysia dan hal ini boleh menjejaskan kefahaman masyarakat mengenainya. Kajian ini bertujuan untuk membandingkan antara undang-undang *al-khulu`* di Libya dan di Malaysia dengan undang-undang Islam. Perubahan keadaan ekonomi, sosial, dan politik mungkin menjadi penyebab kepada perkembangan praktik *al-khulu`* berbanding talak (perceraian) yang kadangkala boleh mencapai tempoh selama bertahun-tahun. Ia terjadi atas beberapa faktor seperti sikap sesetengah hakim yang mengendalikan kes di samping status sosial wanita yang semakin baik. Namun, terdapat undang-undang konvensional tertentu yang telah mengenakan

beberapa sekatan ke atas hak-hak wanita untuk meminta *al-khulu`* seperti keadaan mereka yang masih menyusukan anak, manakala bagi yang lain pula, mereka gagal untuk memenuhi syarat-syarat bagi menentukan kesahihan permintaan untuk *al-khula`*.

Kata kunci: *Al-khula`*, pembangunan masyarakat, undang-undang Islam, penceraian

Abstract

The major problem with *al-khula`* is that it becomes a worldwide phenomenon especially throughout the Muslim world. Besides that, it leads to a general misunderstanding among Muslim women. *Al-khula`* is often resorted to a quick fix solution to marital problems and a mean of divorce. The prevalence of *al-khula`* practiced in this manner generally has become an obstacle to the development of the society, especially since women are now playing an effective role in the growth and development of society. The proliferation of *al-khula`* has become a major obstacle in the advancement of women as a worker as well as the foundation of the family institution and community. Libyan researchers have identified the practices of *al-khula`* in the Arab laws whereas there are any research on the practices of *al-khula`* in the Malaysian context that will lead to detrimental in the understanding of *al-khula`* among Malaysian society. Therefore, this study aims to compare between *al-khula`* practices in Libyan and Malaysian laws and *al-khula`* in Islamic law. The potential causes such as changing economic, social, and political conditions, speeding up the practices of *al-khula`* compared to *talaq* (divorce) that may extend for many years due to the intransigence of some judges without reaching a quick solution, as well as the improvement of social status of women. However, certain conventional laws unduly impose some restrictions on women's rights to request to *al-khula`* such as when they are still breastfeeding their child, while others fail to impose

conditions to determine the legitimacy of the request for *al-khula`*.

Key words: *Al-khula`*, society development, Islamic law, divorce.

Introduction

Some may wonder what is the relationship of *al-khula`*, as a kind of division between the husband and wife, to the comprehensive development and advancement of women as a worker and as a fundamental actor in family and social institutions? One may answer this question by referring to the possibility that certain factors may damage marriage rendering it a source of misery, and turning the couple's life into an unbearable hell. These conditions may vary from age to age and from one place to another. Social, economic, and political changes might affect family life and make it difficult and stressful for the couple to remain together.

As a result, this may encourage a woman to take urgent and crucial decisions and to request for a divorce. One means of achieving this in a relatively speedy manner in order to alleviate the pain and suffering she is enduring as a wife, is to request for separation via means of *al-khula`* in return for compensation or to waive part of her dowry. Some Muslim countries like Malaysia, Egypt, Pakistan, and Iran experience high rates of marital separation spouses. Malays experiencing high rate of separation as compare to other ethnic groups.

In order to facilitate the *al-khula`* request, the wife must be separated. It is obligatory for separated wife to make *al-khula`* request by stating that "she hates living with her husband and fears disbelief in Islam", without reference to the credibility of this statement. This statement has been playing a vital role to create a broken family in Muslim societies. A woman means family and family means society. As such, the success of women in her married life entails positive advancement in all areas.

Islam sought to honour and protects women and her rights. To this end, Allah said that means, "*When the female (infant), buried alive, is questioned*" (al-Takwīr 81:8). She was given her freedom after once being traded like commodities, "*O ye who believe! Ye are forbidden to inherit women against their will*" (al-Nisā' 4:19). She was made equal with men in terms of humanity dignity, in addition to securing her rights, "*And women shall have rights similar to the rights against them, according to what is equitable...*" (al-Baqarah 2:228).

Among the ways Islam honours women is through its view of marriage as a partnership between spouses to achieve the lofty goal of creating pure communities, filled with love and compassion. In this regard, we see that Islam emphasizes the marriage contract as a solemn covenant, "*And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts)*" (al-Rūm 30:21). Islam advocates marriages filled with love and compassion, and cooperation and intimacy between couples, and dislikes divorce and makes it the most odious of permissible acts. The Prophet (PBUH) said, "The most hateful permissible thing (*al-halāl*) in the sight of Allah is divorce"¹.

The researchers selected *al-khula`* as a research topic because of its importance in the contemporary period, as it touches on the reality of the family, which is the first building block of a community. Furthermore, despite being a topic of interest among jurists in the past, in our estimation it requires study by contemporary research styles due to changes in living conditions.

¹ Abū Dāwūd, *Sunan Abū Dāwūd*, ed. Shu`ayb al-Arna'ūt *et. al.* (n.p.: Dār al-Risālah al-`Ālamiyyah, 2009), Hadīth 1863.

The Research Problem

- i. What are the reasons for the spread of *al-khula`* in Libya and Malaysia in addition to the general misunderstanding of Muslim women of *al-khula`*? Furthermore, what makes women refer to it as a quick fix to separate from husband? This problem requires appropriate solutions, for which this research is aimed.
- ii. How are the provisions of *al-khula`* applied in Muslim countries, especially in Libyan and Malaysian laws?
- iii. Why is there a disparity between present practices and past practices of *al-khula`*, i.e. in the era of Islamic law? The researchers will see that economic, social, and political reasons contributed to the high rate of *al-khula`* in the Muslim world.
- iv. How does contemporary practice of *al-khula`* constitutes an impediment to the overall development process among Malaysian women?

The Reasons for Choosing the Topic

- i. The importance of *al-khula`* as a cause of division between the spouses, especially in the present time;
- ii. The importance of studying the approach of early Muslim jurists and their disciples who constituted a reference for later Muslim jurists;
- iii. The importance of studying the role played by some of the laws of Muslim countries in their application of the provisions of *al-khula`* in terms of similarities and differences;
- iv. The marked increase in cases of *al-khula`* as a cause of divorce between spouses, thereby contributing to the high rate of divorce and the decline of the family.

Research objectives

- i. Curb the spread of *al-khula`* in the Muslim world, in addition to promoting a better understanding of *al-khula`* among Muslim women. The spread of *al-khula`* has become an impediment to the overall present development and productivity of women.

- ii. Promote the clear and accurate application of the provisions of *al-khula`* in both Libya and Malaysia. It seeks to amend these provisions and offer alternatives better suited to women in attempt to lessen her recourse to this option.
- iii. Identify the causes of separation in the modern era, such as economic, social, and political causes, which form the legal basis for separation in Libyan and Malaysian law.
- iv. Consolidate current practices of *al-khula`* with past practices during times of Islamic law.
- v. Determine the success of the legal application of *al-khula`* as a solution to family problems in Malaysia.

Research Methodology

This research deductively examines *al-khula`* in Libyan and Malaysian laws context. This study based on two strands. First strand is Libyan and Malaysian law. It will perform a comparative study of the disparity between present and past practices of *al-khula`* and that of Libyan and Malaysian law. The second strand is previous research on *al-khula`* issue.

Previous Studies

Saeed Mohammed al-Khalidi, a professor at the University of Al Fateh in Libya, referred to *al-khula`* in his *Aḥkām Usrah fī al-Zawāj wa Ṭalaq* (Provisions of the Family in Marriage and Divorce) published in 1986. In this work, al-Khalidi explained the provisions of the family in the Personal Status Law of Libya. He discussed in general terms the provisions of marriage and divorce in Libya by referring to Law No. 10 of 1984 concerning the law of marriage and divorce in Libya. However, he did not comment on the provisions of *al-khula`* in Libyan law and simply mentioned the legal texts relating to *al-khula`*, despite the issues surrounding it.

Juma Mohammad Bashir in his *al-Aḥwāl al-Shakhsiyyah al-Zawāj wa al-Ṭalaq wa Atharihimā fī al-*

Qānūn al-Lībī (Marriage, Divorce and Their Effects in Libyan Law) published in 2009 focused on the relationship between Libyan personal and marriage and divorce. It mentions some of the schools of Islamic jurisprudence that discussed *al-khula`*. However, the study failed to compare Libyan law with the schools of Islamic jurisprudence or the implications associated with the narrow scope of Libyan law in its understanding of certain legal issues, especially *al-khula`*.

Furthermore, Ismail Mohammed Albraishi published a study titled *al-Khula` al-Qaḍā'ī bayn al-Fiqh al-Islāmī wa al-Qānūn al-Aḥwāl al-Shakhṣiyyah al-Urdūniyyah* ("Al-khula` between Islamic Jurisprudence and Jordanian Personal Law") in the refereed Jordanian Journal of Islamic Studies, Al al-Bayt University, No. 547. This study examined the legal roots of *al-khula`* by examining the evidences and reasoning of the different schools whilst explaining which opinion he believes is preferable over Jordanian personal law. This study is however limited in that it focuses on a review of Jordanian law only. Furthermore, it does not offer any suggestions or remedies to curb the spread of *al-khula`* in Muslim society as a whole.

In addition to above, Zurina Abdul Khalid's study entitled *al-Ṭalaq: Mushkilatuh wa Mu`ālahatuh fī al-Sharī`ah al-Islāmiyyah* (Divorce: Problems and Treatment in Islamic Law) focused on the legal aspects of *al-khula`* in Malaysian states of Wilayah Persekutuan and Perlis as found in their respective personal status law for 1992, and the state of Kedah for 1979. Interestingly, the study did not address the issue of *al-khula`* in Islamic law in order to access to the extent to which it conforms or differs from the principles of Islamic law.

Moreover, Mohammed Zaki Razali conducted his master thesis with the title *Aḥkām al-Khula` fī al-Fiqh al-Islāmiyyah wa Dawrahā fī Hill al-Mushkilah al-`Uṣriyyah:*

Dirāsāt al-Qānūn al-Aḥwāl al-Shakḥsiyyah bi Wilayah Pinang (The Provisions of Khula' in Islamic Law and Its Role in Solving Family Problems: A Study of the Personal Status Law of the State of Penang). It focused solely on Penang and did not compare with other states in Malaysia nor was there a comparison with Islamic law.

There is therefore a need to compare *al-khula`* between legal codes. To this end, this research selected Libya to examine the compatibility of *al-khula`* with Islamic law and Malaysian law in terms of their applications of *al-khula`* and its impact on the role of women in Muslim society.

The Concept of *al-Khula`* in Islamic Law

There are many definitions of *al-khula`*. Muslim jurists have their reasons for accepting certain definitions and rejecting others. The researchers will introduce in this section the technical definition of *al-khula`*, as well as the reasons for requesting *al-khula`* in Islamic law.

The Technical Definition of *al-Khula`*

Muslim scholars have defined *al-khula`* differently. Among the Hanafite, al-Zayla`ī defined it as, "accepting money for dissolving marriage by using the term *al-khula`*."² Ibn al-Hamām defined *al-khula`* as, "dissolving marriage by using the term *al-khula`*."³ Ibn Najm defined it as, "dissolving marriage by using the term *al-khula`* or a term with a similar meaning."⁴ It is clear from the above definitions that the intended meaning of *al-khula`* among Hanafite scholars is to dissolve marriage by using the word *al-khula`* and accepted by both parties.

² Fakhr al-Dīn al-Zayla`ī, *Tabnī al-Ḥaqā`iq Sharḥ al-Daqāiq* (Cairo: Maṭba'ah al-Kubrā al-Amiriyya, 1313 H), vol. 2, 266.

³ Muḥammad ibn `Alī Muḥammad al-Shawkānī, *Fatḥ al-Qadīr*. (Beirut: Dār al-Fikr), vol. 3, 199.

⁴ Muḥammad Amin Ibn `Abidīn, *Sharḥ al-Abidin* (Beirut: Dār al-Fikr li al-Tibā'ah wa al-Naṣr 421 H), vol. 4, 77.

Among the Malikite, Ibn Shas defined *al-khula`* as, letting go of her inviolability through compensation from the wife or another party.⁵ Al-Rassa' defined it as, "a legal judgement that alleviates the pleasures of the wife for compensation."⁶ Muḥammad Ibn Jadhī al-Gharnati defined *khulu'* as "being for a wife or another party to give the husband money to divorce her."⁷ Here we note that the Malikite assert that *al-khula`* does not count unless the husband has been compensated for divorce or by her waiving her dowry or it's like in return for divorce.

Among the Hanbalite, Ibn Quddāmah defined *al-khula`* as, "a husband separating from his wife for compensation."⁸ Al-Fatūḥī defined it as, "the husband divorcing his wife for compensation paid by the wife or by other parties through the use of specific terms."⁹

Among the Shafiite, al-Rafī'ī defined *al-khula`* as, "in Islamic law, *al-khula`* is interpreted as sperating for compensation to the husband."¹⁰ Al-Khatīb al-Sharbīnī defined it as, "in Islamic law it is to separate between spouses for compensation to the husband through the use of the terms divorce or *al-khula`*."¹¹

⁵ Ibn Shas, Jalāl al-Dīn, *Aqd al-Jawāhir al-Thamīnah* (n.p: Dār al-`Arab al-Islāmī, 616 H), vol. 2, 137.

⁶ Muḥammad Alīsh, *Sharḥ Manh al-Jalīl `alā Mukhtaṣar Khalīl* (1409 H), vol. 2, 182.

⁷ Ibn Jadhī al-Gharnati, *Qawānin al-Aḥkām al-Shar'iyyah* (Riyadh: University Malik Sa'ud, n.d), 257.

⁸ Yūsuf ibn `Abdullāh Al-Kāfī, *Al-Kāfī fī Fiqh Ahl al-Madīnah* (Beirut: Dār al-Kutub al-`Ilmiyyah, 1407 H), vol. 4, 405; Al-Ba'`lī, Abū `Abdullāh, *Al-Mutali `alā Abwāb al-Muqni`* (Beirut: al-Maktab al-Islāmī, 1421 H), 331.

⁹ Maṣṣūr ibn Yūnus Al-Bahūṭī, *Muntahā al-`Irādāt* (Mu'assasah al-Risālah, 1421H), vol. 5, 355.

¹⁰ Al-Rafī'ī, Abī Qāsim, *Al-`Azīz Sharḥ al-Wajīz* (Beirut: Dār al-Kutub al-`Ilmiyyah, 1417), vol. 8, 394.

¹¹ Shams al-Dīn Al-Sharbīnī, *Mughni` al-Muhtāj Ma'rīfah al-Fadh al-Minhāj* (Beirut: Dār al-Ma'rīfah, 1418 H), vol. 3, 362.

From the above, we can see that in its entirety, *al-khula`* consists of necessary compensation to the husband in return for divorce and an end to the marital relationship. Based on the above definitions of *al-khula`*, despite the variance in definitions, the central message is one and the same, namely to separate between spouses for compensation by the wife to her husband. In the Qur'an, Allah says that means, "...there is no blame on either of them if she give something for her freedom" (al-Baqarah 2:229). *Al-khula`* does not take place except with compensation from the wife to the husband to end marital life.

The Religious Reasons for Requesting *al-Khula`*

Islamic law has laid the general principles for a healthy family in an Islamic society. This family is the first institution in the Islamic world. However, there are times when the family institution lacks love and compassion between the spouses, which are replaced with hatred causing an imbalance in the marital relationship.

Allah entitled the husband with the right to divorce based on his personal discretion, and to bear the consequences of his divorce such as to complete the remainder of the dowry, pay alimony and others. Allah also provided the wife - as opposed to the right of the husband in a divorce - the right to seek *al-khula`* when she can no longer live with him. This is approached by compensating to her husband in return for divorce. Among the important reasons for *al-khula`* are:

First: If a wife dislikes certain of her husband's qualities and is certain that she can no longer live with him. In the era of the Prophet (PBUH), al-Ḥākim¹² reported in his *Mustadrak*, that Ikramah said: Ibn `Abbās used to say:

¹² Muḥammad ibn `Abdullāh Al-Ḥākim, *Al-Mustadrak* (Beirut: Dār al-Kutub al-`Ilmiyyah, 1411H), vol. 2, 210; Jalāl al-Dīn al-Suyūṭī, *Tabaqāt al-Huffāz* (Beirut: Dār al-Kutub al-`Ilmiyyah, 1403H), 410.

The first case of *al-khula`* in Islam is that of the sister of `Abdullāh Ibn Ubay: that she went to the Messenger of Allah (PBUH) and said: "O Messenger of Allah we never agree on anything, and I dislike him". Her husband said: "O Messenger of Allah, I gave her the best of my wealth, namely my garden, if she could return my garden". The Prophet (PBUH) said, "What do you say?". She said, "Yes and extra if he so wishes". Thus they were divorced.

Second: If a wife hates her husband for reasons including his severity and frequent anger, sexual abandonment, or physical abuse. This is indicated by a narration by al-Ṭabarī that Ḥabībah bint Sahl was married to Thābit Ibn Qays who hit her and broke her shoulder. She went to the Messenger of Allah (PBUH) after dawn and complained to him. The Prophet (PBUH) called Thābit and said, "Take some of her wealth and divorce her".¹³ There is no difference between physical or psychological abuse if she is hurt from a male and is both afraid and loathes him. Ibn Rushd says, "*al-khula`* was awarded to a woman if hurt by a man."¹⁴

This is supported by a narration by al-Bayhaqī¹⁵ in the hadith regarding Thābit divorcing his wife, "A woman went to the Prophet and said that I hate my husband and want to divorce him. He (PBUH) said, "Will you return to him the garden he gifted you?" She said, "Yes, and more".¹⁶

Third: If you do not award her right to cohabitation including the usual kindness towards her, or if he curses or ignores her, then she is legally entitled to request *al-khula`* in accordance with the verse that means, "*Ye are never able*

¹³ Al-Ṭabarī, *Tafsīr al-Ṭabarī: al-Musammā Jāmi' al-Bayān fī Ta'wīl al-Qur'ān*, vol. 4 (Dār al-Kutub al-Ilmiyah, Beirut, 1997), 556. New edition published in 12 volumes.

¹⁴ Ibn Rushd, Muḥammad, *Bidāyah al-Mujtahid* (Beirut: Dar Ibn Hazen, 1995), 2:41.

¹⁵ Al-Bayhaqī, Aḥmad, al-Sunan al-Kubrā, ed. M. A. `Ata (Beirut: Dār Al-Kutub Al-Ilmiyah, 1994), 7.

¹⁶ Al-Bayhaqī, *Sunan al-Bayhaqī*, vol. 7 (Makkah: Dar al-Bar, n.d), 313.

to be fair and just as between women, even if it is your ardent desire..." (al-Nisā' 4:129).

Fourth: If she fears falling into sin or the disobedience and violation of her husband's orders who she does not love. In a narration by al-Bukhārī: "The woman of Thābit ibn Qays came to the Messenger of Allah, peace be upon him, and said, "O Messenger of God, I am neither pleased with Thābit ibn Qays in his character nor religion, but I hate disbelief in Islam". He (PBUH) said, "Will you return to him his garden?" She said, "Yes". The Messenger of Allah (PBUH) said, "Accept her garden and divorce her".¹⁷

Fifth: If the husband is found wanting in religion such as missing prayers, contributing to social disunity, invalidating his fast during Ramadan without a valid excuse, committing adultery, being drunk, engaging in prohibited amusements, or failing to properly provide for her while able to do so, then she has the right to request *al-khula`* and terminate the marital relationship.

Al-Khula` in Libyan law

The Libyan Personal Status Law states in Article (48/A-B) of Law No. 10 of 1984, that¹⁸:

"A- *Al-khula`* is mutual divorce in return for compensation from the wife with the use of the terms *al-khula`* or divorce; B- The validity of *al-khula`* depends on the wife's ability to compensate and the husband's ability to welcome the divorce in accordance with the provisions of Article 32 of this law; C- The compensation can be the right to custody or alimony or dowry or otherwise."

¹⁷ Muḥammad bin Ismā'īl al-Bukhari, *Sahih al-Bukhari*, translated by M. Muhsin Khan, Volume 7, Book 63, Number 197, (n.p.: n.p., n.d.) 1182.

¹⁸ Muhammad Mustafa Abeed Al-Huni, *Law of Marriage and Divorce* (Libya: Dar al-Fadeel li al-Nashr wa al-Tawzi', 2008), 2-3.

Based on this article, *al-khula`* is divorce that occurs as a result of mutual agreement between husband and wife on the basis of compensation to the husband. It is not a divorce from a single party. This article permits divorce through mutual consent with the use of the terms *al-khula`* or divorce. This article has been stipulated in paragraph (b) of the validity of *al-khula`* for the wife to be properly eligible with complete control of her faculties. Similarly, it is also authorised in paragraph (c) of the same article for the compensation to be the return of alimony or dowry or otherwise, in addition to waiving the right to custody. We will discuss this in detail by commenting on commenting on the provisions of *al-khula`* in Libyan law. Among the reasons for the spread of *al-khula`* are as follows:

Commentary on the Provisions of *al-Khula`* in Libyan Law

Libyan Law No. 10 of 1984 provisions for marriage and divorce.¹⁹ The source of this legislation is the rules and provisions from the sources of Islamic law. The goal is to codify these provisions into contemporary legal formats and templates so that they constitute clear and unambiguous provisions for which judges are obliged. However, the application of the articles of this law on lawsuits show that this law requires some changes in some of its texts that are unfair toward the rights of certain family and community members.

First, with regard to paragraph (A) of Article 48 of the Family Code, which includes the definition of *al-khula`*, "*Al-khula`* is divorce through mutual consent of both spouses for compensation to the husband with the terms *al-khula`* or divorce." The Supreme Court suspended this article in January 1980, saying:

¹⁹ Muhammad Mustafa al-Huni, Marriage and Divorce Act., Official newspaper No. 17, 1983, Libya, 92.

"The implication of the text of Article (48/A) of Law No. 10 of 1984 on the provisions for marriage and divorce, that *khulu'* is the consensus of both spouses to divorce with due satisfaction with the contract, then the divorce is valid."²⁰

The question that should be asked here is what if both parties did not agree to *al-khula`*? Or if the husband is not satisfied with the compensation, whilst the wife no longer wishes to live with her husband, or fears transgression if she continues to be married to him, what will the wife do based on the text of this article that provisions mutual agreement between both spouses, is it possible to seek divorce through some alternate means, or does the matter stop there? Upon further investigation, it becomes evident that mutual agreement from the very beginning is not a valid condition as the wife has the right to request *al-khula`*.

If we consider the text of Article (48/A), then the wife must first acquire her husband's consent prior to going to the court to raise her claim. And in the case of her husband's refusal of her request for *al-khula`*, then the wife is not permitted to recourse to the court based on this article due to not having mutual agreement. This is a violation of the rights of women given to her by God and ordered by the Holy Prophet (PBUH) when he ordered Qays Ibn Thabit to accept the compensation from his wife for divorce.

This paragraph indicates either divorce or *al-khula`* through mutual agreement, which is only one form of *al-khula`*. As for the divorce by agreement stipulated in the Libyan Family Law No. 10 of 1984, which is entirely different from *al-khula`*, as separation based on mutual agreement constitutes a normal divorce, whereas *al-khula`* is when the wife asks for divorce without the necessary

²⁰ Personal status law No. 2/26 s, session: 28/02/1979 AD, Muhammad Mustafa al-Huni. Marriage and Divorce Act, 81.

agreement of her husband. As such, according to us the correct text we propose is "*al-khula`* is where the wife requests divorce for compensation to the husband".

Secondly, in relation to custody: we note in paragraph C of Article 48, Law No. 10 of 1984, which states the following: "It is permissible for the compensation to be in the form of the right to custody, alimony, or dowry or otherwise." For scholars, custody means, is maintaining a child's wellbeing by a person who has the right to do so.²¹ A child is naturally in need of those who will take care of him and provide him education, care, and takes care of his interests. Doubtless, the mother, especially in the first phase of one's life, is most compassionate towards her child, and is most ready to endure hardships for the sake of his wellbeing.²²

Accordingly, is it permissible for a woman to request *al-khula`* from her husband in exchange for ceding custody of her children, and if approved by the court, can the father or guardian replace a mother's care for her child, her guidance and education? We do not find a single Qur'anic text or prophetic tradition suggesting that women may have to give up custody of their children, whether they are infants or otherwise in exchange for *al-khula`*. Thus we understand that the compensation offered by women in return for *al-khula`* is something material and does not entail sacrificing the custody of her children because the husband may take advantage of this.

Accordingly, we believe that when applying the provisions of Article (48) these issues must be taken into account. If the wife waives custody of her children for *al-khula`*, then court should rule in favour of the validity of the *al-khula`* along with the invalidity of the condition. This

²¹ Shams al-Dīn Al-Dusūqī, *Hāshiyah al-Dusūqī `ala Sharḥ al-Kabīr*, vol. 2, 526.

²² Al-Alim, Abd al-Salam al-Shareef, *Marriage and Divorce in Libyan Law* (Libya: Dar al-Fadeel li al-Nashr wa al-Tawzi', n.d), 308.

principle is not limited to the provisions of Article (39) alone, but extends to other rulings as it a matter of rights. One observes some of the legislation in Muslim countries have drafted and codified this principle. It is stipulated in the Arab Bill²³ that unifies the personal status in Article 102 that: It is not permitted to give up custody of children in return for *al-khula`*, nor to give up any of their rights, and if it took place then the *al-khula`* is valid whilst the condition is not.

The foregoing shows that Libyan Law can force the wife to waive her right to custody of her children in return for *al-khula`*. Here the law has treated children and the right of custody as an exchangeable commodity like any property or money and does not treat them as human beings. As such, the matter requires modification in that the third paragraph of Article 48 should omit the words (custody) and replace it with the following proposed text, "It is not permitted to condition *al-khula`* on a wife waiving her right for custody of her children or anything related to their rights, and if it was to take place then the *al-khula`* is valid and the condition invalid."

Reasons for the Spread of *al-khula`* in Libya

There are many factors that may impede a woman's development and her role in society, whether in Libya or any other country, despite the fact that women are instrumental for a nation's success. We have dedicated this study to the issue of *al-khula`* as an impediment to the overall development of women for the following reasons, which does not differ significantly from one Muslim country to another.

First: *al-khula`* has currently become a quick solution employed by woman to terminate the marital life. As such, presently *al-khula`* is a double-edged sword used by women as they please. Since the divorce process is time

²³ Legal Sciences Magazine, No. 1, 195.

consuming when referred to the courts, women recourse to *al-khula`* to expedite the divorce process. But *al-khula`* is an impediment to women's progress²⁴. Family success means a woman's success, and the success of the family means the success of the community and its development and progress.

Second: Life's problems, especially economic problems²⁵ and their impact on the family do not offer women the opportunity to take things slowly, as was the case in the past. Husbands used to go for *jihād* and leave their families for several months' even years on end, in which case she assumes his responsibilities until his return. Women may suffer from deteriorating economic and living conditions and therefore resort to *al-khula`* or to remarry as quick solutions to all kinds of temptations.

Third: On the social level, it is noticed that sometimes women urgently seek *al-khula`* without valid reasons²⁶. In such cases we recommend her to wait and to ensure that this right is not abused simply to switch husbands or not wanting to take care of husbands in times of illness or need. Some women are no longer patient in trying to fit in with her husband's family and request *al-khula`* for which they often regret the decision.

Fourth: Women have a kindled passion kindled and are highly sensitive inflating the smallest of matters. For the

²⁴ Margot Rogers et.al., "Women and Separation: Managing New Horizons," <http://www.relationships.org.au/relationship-advice/publications/pdfs/women-and-separation-pdf>

²⁵ Jeff Landers, "Study Shows Divorced Women Have Less Economic Security than Women Who Stay Married," *Forbes*, <http://www.forbes.com/sites/jefflanders/2011/11/01/study-shows-divorced-women-have-less-economic-security-than-women-who-stay-married/#2715e4857a0b321631939b6a>

²⁶ Kanchan Srivastava, "Women are Firm, Quick Decision Makers When it Comes to Divorce: Study," *Dnaindia.com*, <http://www.dnaindia.com/india/report-women-are-firm-quick-decision-makers-when-it-comes-to-divorce-study-2067105>

reason, in most cases Allah gave the family stewardship to men over women with certain legal conditions. As Muslims, as judges, legislators, scholars, and clerics we must never forget this. Allah says that means, "*Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means*" (al-Nisā' 4:34).

Accordingly, Islam awards the right of divorce to men, because when compared with women, is less hasty in deciding and more prone to wisdom in decision-making. Such is the difference between the natures of men and women, Allah says that means, "...and get two witnesses, out of your own men, and if there are not two men, then a man and two women, such as ye choose, for witnesses, so that if one of them errs, the other can remind her" (al-Baqarah 2:282). This Qur'anic verse is evidence that women do not possess sufficient wisdom to make important decisions in her life, such as termination of the marital life i.e. the termination of family life.

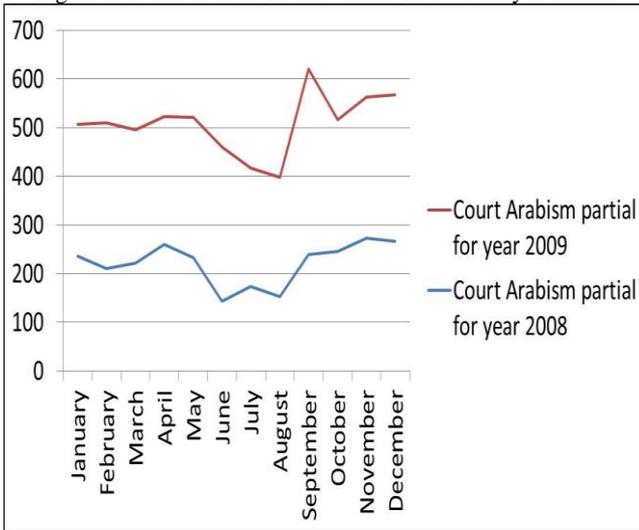
Fifth: On the political level, we find that some countries award women important decision-making positions. In most cases, this significantly affects marital life. In some Islamic countries, women are in charge of the judiciary in some, as is the case in Libya. How can a woman be fit for such positions after having referred to her emotional disposition? In such cases, the family is victim to circumstance. Furthermore, a woman in such a position may be partial to women requesting *al-khula`* without first attempting to mend relations, especially if she herself suffers from such a problem.

The verse means, "...but men have a degree (of advantage) over them..." (al-Baqarah 2:228) denotes that the men are more capable than women in life matters. As such, how can we award women the right to make fateful decision that significantly impact on the family and the individual without prudence and verifying the veracity of

her words and emotions to ensure she has decided objectively, especially in cases of divorce whereby *al-khula`* has been characterised as an easy and speedy approach.

Below are the statistics from two Personal Status Court in Libya, particularly in the city of Benghazi from January to December for the years 2008 and 2009²⁷ for the number of *al-khula`* cases.

Figure 2. Number of *al-Khula`* Cases in Two Libyan Courts



The graph shows proportional highs and lows in the number of *al-khula`* cases. The difference in number is likely due to differences in populations whereby the population surrounding the Urubah Court is more than the population surrounding the Juziyyah Court but not by much. Furthermore, there has been a slight but gradual increase in the number of *al-khula`* cases, especially in the

²⁷ North Benghazi District Court, the Department of Personal Status, the Civil Registry for the year 2008; South Benghazi District Court, the Department of Personal Status, the Civil Registry for the year 2009.

months of November and December, despite the recent legislation of *al-khula`* in Libya.

***Al-Khula`* in Malaysian Family Law**

It should be noted that the personal status law or family law as they call it in Malaysia varies from state to state²⁸. Perhaps the reason for this is due to the multiplicity of religions and races in Malaysia, along with various degrees of Islam's presence in each state.²⁹ Researching the personal status law for all these states is beyond the scope of this research. As such, we focus on the legislation of *al-khulu`* in Malaysia in general in view of it being a Muslim country with special focus on Islamic family law in the state of Selangor. There are no clear differences between Malaysia and other Muslim countries regarding the legal provisions for marriage and divorce. The Malaysian family law has awarded to Muslim women the right to request *al-khula`*.

Al-khula` in its correct sense has only recently been introduced in Malaysia. The reasons for its introduction in Malaysia do not differ greatly from the case of Libya in terms of customs, traditions, and awareness. *Al-khula`* did not appear in any practical sense in Malaysian courts until the end of the last century.³⁰ There are many reasons for its spread in Malaysia, but first we explain the reasons for requesting *al-khula`* by Malaysian women and its provisions.

First: Item No. 27 of the Personal Status Law No. 505 of the Malaysian federal jurisdiction of 1993 states that *al-*

²⁸ Abdul Bari bin Awang, *The Marriage Contract and its Effects: A Comparative Study between the Islamic Family Law in Kuala Lumpur (act 1976, 2005)*, 18, 26.

²⁹ Maznah Mohamad, "Dossier 5-6: Islam, the Secular State and Muslim Women in Malaysia", WLUMML, <http://www.wluml.org/node/259>.

³⁰ Nik Nuraini Nik Badli Shah, "Polygamy not a God-given Right to Muslims," *Malaysiakini*, <https://www.malaysiakini.com/news/132369>.

khula` is specifically for those who wish to separate upon proof beyond doubt of corruption or dishonesty of the other party to the marriage.

Second: Wives recourse to *al-khula`* in the case of negligent husbands, and due to lengthy divorce proceedings in the Shari`ah courts, in addition to the high legal costs of the courts in Malaysia.

Al-Khula` in Malaysian Law

- i. If a wife hates the morality or character of her husband, and due to this hatred she is afraid of transgressing Allah's laws.
- ii. If both spouses agree to separate, because the husband or the wife is threatened with death or she is not receiving her monthly expenses.

Conditions for *al-Khula`* in Malaysian Law

- i. For both spouses to be in a valid marital relationship.
- ii. For the husband be mature and of sound mind.
- iii. For the wife to be mature and of sound mind.
- iv. To use the term *al-khula`*.
- v. To mutually agree to *al-khula`*.
- vi. There must be compensation from the wife to her husband.
- vii. There must be some reason or damage/threat³¹ from the husband to the wife *al-khula`* to be valid.

The Amount of Compensation by the Wife to the Husband for *al-Khula`*

There is no issue in cases where both parties agree to the amount, however, if they do not agree to the amount, the court can decide the amount of compensation in consideration of the material status of the wife. However, scholars disagree over the amount of compensation.³²

³¹ Bodily, mental, or harm to her wealth.

³² Al-Nawawī, Muḥy al-Dīn, *Al-Majmū' Sharḥ al-Muhadhab* (Beirut: Dār Al-Fikr, n. d), 8:17.

The first opinion is that it is not permitted for a husband to ask an amount greater than her dowry. The second opinion is it is less than her dowry. The third opinion is the opinion of the majority of scholars that the husband can request an amount equal to or greater than the dowry. This is the opinion of Imams Mālik and Abū Ḥanīfah based on the argument that *al-khula`* is a compensation contract whereby if a wife requests a high dowry then the husband is in a position to request a high compensation.

We find this opinion acceptable. The Malaysian law agrees with this opinion, and added that if the pair did not agree on the amount, then the court can appoint an arbitrator or jury to decide. Similarly, compensation can take the form of some benefit if both sides agree. For example, the husband agrees to *al-khula`* if the wife agrees that she will breastfeed his son for up to two years, or if the wife accepts to spend on their children for a certain period.³³

The reasons for requesting *al-khula`* in Malaysia do not differ greatly from the reason in Libya in terms of the social, economic, and political conditions. Similarly, *al-khula`* in Malaysia is sometimes the result of Malaysian women making rush decision without patience or prudence, in addition to the complicated divorce process in Malaysian courts. As such, Malaysian woman prefer to request for *al-khula`* than divorce, because divorce takes a long time and is often expensive. Under such circumstances, there is a kind of compulsion as the wife may be harmed by her husband in which case if she requests divorce she will receive her rights in full while if she requests *al-khula`* for a speedy separation, then she forfeits some of her rights.

Furthermore, what has contributed to the spread of *al-khula`* in Malaysia is pursuing this course of action without due consideration for its consequences. Malaysia has

³³ Law No. 2 of the State of Selangor for the year 2003 AD, Articles: 48, 38, 39

provisioned clear laws and procedures to facilitate *al-khula`*.³⁴ Similarly, living and economic conditions are factors for deciding to pursue *al-khula`*.

In recent years, the number of divorce cases in Malaysia continues to increase. The Minister for Women, Family and Community Development, Datuk Rohani Abdul Karim,³⁵ stated that between January to June this year, the number of divorce cases in Kuala Lumpur reached 22,306. From this number, 22,165 were divorces among Muslims. In 2012, the number of Muslim divorce cases was 41,779, in 2011 it reached 13,743, and in 2010 it was 38,000. This is evidence that change in economic, social and political conditions effect family life and stability.

The Impact of *al-Khula`* on the Role of Malaysian Women in Development

As we have previously argued, *al-khula`* has become a quick fix for many Malaysian women to end their marital relationship. The law and the judiciary have introduced procedures to facilitate *al-khula`*. Such is the case in many Muslim countries. However, we argue that *al-khula`* is a double-edged sword.

Sometimes it is the ideal solution for wives suffering from the neglect or abuse of their husbands, as legislated by the verse that means, "*It is not lawful for you, (Men), to take back any of your gifts (from your wives), except when both parties fear that they would be unable to keep the limits ordained by Allah. If ye (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them if she give something for her freedom. These are the limits ordained by Allah. so do*

³⁴ Abu Bakar. "Kawin Paksa: Problem Kewenangan Wali dan Hak Perempuan dalam Penentuan Jodoh," *Al-Ihkam: Jurnal Hukum & Pranata Sosial* 5.1 (2013): 81-98.

³⁵ Asiaone, "Malaysia Sees Surge in Domestic Abuse against Men," <http://health.asiaone.com/health/body-mind/malaysia-sees-surge-domestic-abuse-against-men>.

not transgress them if any do transgress the limits ordained by Allah, such persons wrong (Themselves as well as others)." (Al-Baqarah 2:229).

The meaning of this verse is that if a wife fears transgressing the limits of Allah, then it is permissible in this case to seek for divorce by compensating the husband. This is the positive aspect of *al-khula`*. As for the negative aspect, it is when the wife has no good reason to request *al-khula`*. Often her request is the result of a dispute or the husband refusing her certain things which the wife considers to be enormities whilst others consider them trivial matters. We have already made mention of how in Libya women are overtly passionate to the extent that her emotions dominate her ability to reason and make measured decisions.

A woman's decision to request *al-khula`* entails many consequences among which are: she is the mother and nurturer of the next generation, and with *al-khula`* she may potentially put the future generation at risk. In order for a working woman to efficiently and productively contribute to the society, they must also be successful in the home and family. It is not possible to be successful when one comes at the cost of the other. Islamic history testifies to the successful role of women in the community and at home.

For example, Khadija the wife of the Prophet (PBUH) was a mother and wife beside other works. Similarly, Khawlah bint al-Azwar³⁶ was part of the Muslim cavalry, and Asma' bint Abu Bakr³⁷, was a righteous wife who helped her husband farm etc. There are numerous examples of successful women in the home and in society. How then can women succeed in nurturing the future generations while successfully contributing to the comprehensive

³⁶ Khawlah bint al-Azwar was a prominent woman during the life of the Islamic prophet Muhammad.

³⁷ Asma' Bint Abu Bakr was the daughter of Abū Bakr al-Ṣiddīq and was the elder sister of 'Ā'ishah, the mother of the believers.

growth of the society, if Malaysian women are suffering from marital and family problems? Is the judiciary has made it easy for them to divorce through *al-khula`*, we believe that this is a major impediment to the overall development of Malaysian women, especially if the judiciary decides on the matter of *al-khula`* in a single session. This was argued by Zuliayha, a judge in Selangor's courts, in her book on *Al-khula`*.

Despite all this, Malaysia is trying to advance its society in which Malaysian women play an important role in the overall development of the nation. Kuala Lumpur has hosted a conference on the issue of personal status laws in Arab and Muslim countries under the One Malaysia initiative in which nearly 200 women from all over the Islamic world attended. The conference focused on highlighting all matters relating to personal status laws, and the role of women in bringing about change.

When the divorce rate in Malaysia increased to 32%, the decision was made that no one may get married until after attending courses on marital and family life in which they are taught about the objectives of family planning for married life, the psychology of spouses, the management of family problems, and budgeting. After ten years of implementing this initiative, the divorce rate dropped to 17%. Perhaps this encouraged the Emirates to introduce a similar initiative.

Similarities and Differences in *al-Khula`* in Libyan and Malaysian law

This section discusses certain provisions of *al-khula`* that may be alike or differ between the personal status laws of Libya and Malaysia. First, the similarities between the Libyan and Malaysian divorce laws are discussed followed by a discussion of the differences between the two laws.

The similarities between *Al-khula`* in Libya and Malaysia are, first, Libyan law is consistent with Malaysian law in that *al-khula`* is decided by the judge. Second,

Libyan law is consistent with Malaysian law in that *al-khula`* is an irrevocable divorce, as stated in paragraph (5) of Article (49) in Libyan law that "*Al-khula`* divorce is irrevocable." i.e. that *al-khula`* is irreversible. Third, the laws are consistent in the reasons for *al-khula`* as sourced from Islamic law. Fourth, the laws are consistent in terms of the ease and speed of procedures. Fifth, in the absence of an agreement between husband and wife, both laws legislate that a judge may appoint an arbitration committee to resolve the dispute. Sixth, both laws legislate mutual agreement, i.e. that the husband must agree with the compensation.

Whilst, the differences between *al-khula`* in Libya and Malaysia are, first, Malaysian law requires mutual agreement as well as to prove any treat or harm caused by the husband for *al-khula`* to be valid. In contrast, Libyan law only requires mutual agreement, and it is sufficient for the wife to simply state in front of the judge that she fears transgressing the laws of Allah. Second, Libyan law explicitly permitted relinquishing custody of her children in return for *al-khula`* in paragraph (C) of Article 48 of Law No. 10 of 1986, "it is permissible for the compensation to be the right to custody or alimony or dowry or otherwise." Unlike the Malaysian law which considers the right to custody a common right and that a husband cannot force his wife to relinquish custody of her children in any way.

Third, Malaysian law is contrary to Libyan law in that the term *al-khula`* must be used. Libyan law considers the terms *al-khula`* and divorce synonymous in this regard and pays little attention to this issue, despite the major difference between divorce and *al-khula`*, as *al-khula`* is an irrevocable divorce while divorce is of different types. In the minor divorce, the husband has three months to reconcile with his wife. If *al-khula`* is similar to this type of divorce then the husband may reconcile with the wife after

having accepted the compensation in which case it would be unjust to the wife.

Recommendations

Before proceeding to the conclusion of this research, the following recommendations are offered:

- i. Libyan courts should consider the terms used to effect *al-khula`* and toe explicitly state that the request of for *al-khula`* not divorce, as opposed to the current practice of sometimes recording it as divorce and other times recording it as *al-khula`*. This is in order to differentiate between the two forms of divorce.
- ii. Malaysia should standardise the personal status and family law across states within the framework in Islamic law. This will make it easier for researchers and scholars to compare between the personal status and family law in Malaysia and other countries.
- iii. We recommend women not to hastily request *al-khula`*, and not to recourse to *al-khula`* except under the most pressing circumstances. This will help preserve the family and social institutions. Furthermore, this will assist women in their role for comprehensive national development, as women are at the centre of both institutions.

Conclusion

The research concludes with the following results:

- i. *Al-khula`* is form of separation between spouses that is permitted by both the Qur'an and the Sunnah. It is the right of women to use when she can no longer bear living with her husband and fears transgressing the laws of Allah due to her aversion for her husband.
- ii. *Al-khulu`* as legislated by Allah is the right of women to seek divorce with certain conditions such as to have valid reasons for such a request such as fear of transgressing Allah's laws, or fear of disbelief, i.e. that *al-khula`* is not pursued for simple desires.

- iii. The study has demonstrated that there exists a disparity between the practice of *al-khula`* in the past and present in terms of changing economic, social and political conditions, in addition to a general deterioration in faith and religiosity.
- iv. The ease and speed of processing *al-khula`* in Malaysian and Libyan courts is a major factor encouraging women to pursue this course of action.
- v. *Al-khula`* in Malaysia does not differ greatly from *al-khula`* in Libyan law, except in regards to proving the case of harm and requiring the use of the term *al-khulu`* as is the case in Malaysia, and waiving the right to custody as is the case in Libyan law.
- vi. *Al-khula`* is an important key factor in influencing the progress of women in realising comprehensive development in society and at home. The family institution is central to progress in all other areas.

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