

The Economics of Marriage: Recent Legal Developments in *Khula* and *Haq Mehr* in Pakistan

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In Islam, the institution of marriage has been imagined as a contract rather than a sacrament, making economic transactions a significant part of marital relationships. This paper argues that this particular understanding of the nature of marriage as a contract has resulted in a peculiar ordering of marital rights and obligations, where almost every aspect of marriage – sex, child rearing, the husband’s obligations et cetera – has been attached a monetary value, leading to the development of a particular ‘economics of marriage’. This is predicated on the understanding of women as distinct legal and economic entities within a marriage, owing certain duties to the marital relationship in exchange for economic and social security. Limiting this study to economic transactions in cases of *khula*, this paper traces the development of the principle whereby courts weigh the amount of *haq mehr* to be returned against the wife’s contribution to the marriage, through her services as primary care-giver and home-keeper. Arguing that this is one way of recognizing women’s previously invisible labor within marriage as ‘work’, this paper contends that there is room within the legal framework of Islamic Family Law for progressive, pro-women developments.

Introduction

In Islam, the institution of marriage has been conceived in contractual terms, rather than as a holy sacrament – a circumstance that has significant implications for the way marital relationships are subsequently ordered. This particular understanding of marriage as contract has resulted in a peculiar ordering of marital rights and obligations, where almost every aspect of marriage – sex, child rearing, the husband’s obligations et cetera – has been attached a particular cash value, leading to the development of a particular ‘economics of marriage’.¹ While this has generally led to a commodification

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of women's bodies, where marriage is considered an exchange of women between groups of men, the intrusion of cash contracts typical of the marketplace into the domain of personal relationships may have made it possible for women to challenge the ideal of an autonomous and hierarchical patriarchal household. This is made possible by the establishment of a distinct legal and economic personality for the woman within the framework of a Muslim marriage, a situation that is paralleled in few other religious jurisprudential systems, where the wife is usually subsumed within the legal personality of her husband. This paper seeks to explore the significance of this conceptualization of marriage, focusing particularly on how the recognition of the wife's distinct existence in law subsequently manifests in the Muslim concept of *khula*, i.e. the dissolution of marriage by a wife. This paper further focuses on the implications of this particular economic understanding of marriage when it comes to the laws that govern such dissolution, specifically the factors that come into play when deciding upon the repayment of dower in circumstances of *khula*. It seeks to establish that the monetization of marriage may, particularly within the context of Pakistani courts, be leading to progressive developments in case law. In light of these developments, women's work in, and contributions to, a marriage may be considered as having an economic value – a development that would be highly significant in its potential to allow for a reimagining of marriage.

Marriage in Christianity and Hinduism: A Comparative Framework

Since Muslim marriage has been uniquely understood in contractual terms, this makes economic transactions a significant part of marital relationships. The validity of marriage depends upon the mutual consent of the parties; the contract is open for additional, but legitimate, conditions and its terms are, within legal bounds, capable of being altered; it is dissoluble if there arise grievances leading to an irreconcilable break in the marital relations.² The event of marriage, therefore, is understood as creating mutual rights and obligations between the parties – a conception of marriage which is entirely different from that of Christianity and Hinduism.

In Christianity, the institution of marriage has been regarded as a sacrament, with its concomitant doctrine of indissolubility of the conjugal bond. Once entered into and consummated, the marriage is considered

¹ Yossef Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge University Press 2005) 51-69.

² Hammudah Abd Al Ati, *The Family Structure in Islam* (American Trust Publication 1977) 59.

complete, and the parties are treated as ‘ministers of the sacrament’.³ The marital bond has been considered as an indissoluble solemn union entered into by the parties for life, so as to prevent fornication on the part of unmarried individuals. Before the advent of Reformation, a marriage could only be dissolved either on the death of one of the parties, or by a decree of the ecclesiastical court. Such annulment meant that the marriage never existed; the assumption being that either the marriage was valid forever or never. Since the bond was ordained by God, the law of marriage, in Christianity, was beyond the pale of human agency.⁴

Similarly, in Hinduism, the marital bond is conceived as an immutable union – a union for all lives to come – between a man and a woman. Since it is a union that outlasts mortal lifespans, the wife can never ask for a divorce, or seek another husband, even if her husband is ‘a lunatic, impotent, a leper, a deserter, a chronic patient of venerable diseases, or even a dead man’.⁵ The wife’s position is that of the mother of her husband’s legitimate children, of *patrani*, and of the chief housekeeper, meaning thereby that, by entering into this permanent bond of servitude, the woman practically surrenders her personhood in favor of the husband.

Marriage in Islam: A Contractual Relationship

As mentioned above, the Islamic conception of marriage is almost entirely different from the Christian and Hindu understanding, inasmuch as it makes room for the parties to negotiate mutual rights and obligations. In Islam, the instance of marriage is considered to be an exchange of woman’s services, sexual and otherwise, for a certain amount of money, or any other lawful object having economic value – the *haq mehr*. This particular conception of marriage was adopted by the Lahore High Court in *Shahida Parveen v Sami Ullah*,⁶ where the court held that marriage – while not a contract in the sense that the Contract Act 1872 applied to it – was a special type of contract, the latter assertion affirming the contractual understanding of the marital bond. Similarly, in *Abdul Kadir v Salima*,⁷ the court asserted that like a civil contract, the marriage becomes complete upon the acceptance of an offer made by the other party or their guardians before competent witnesses. Analogizing the marital bond with a sales contract, the court held that once the offer of marriage is accepted, the woman is bound to fulfill her conjugal

³ Paras Diwan, *Law of Marriage and Divorce* (Universal Law 2002) 20.

⁴ *Ibid*, 22.

⁵ *Ibid*, 19.

⁶ PLJ 2006 Lah. 1215.

⁷ *Abdul Qadir v. Salima* (1886) ILR 8 All 149.

obligations; in the instance where she refuses to do so, her body is to be restored to the husband – the rightful owner of her person. However, this case has been subsequently decried as a misunderstanding of the Islamic conception of marriage, inasmuch as it regarded it as a sales contract; instead of regarding it as an exchange of commodities, it might be more accurate to consider marriage as a service contract – an exchange of the woman’s sexual services for the *haq mehr*.

Understanding marriage as a contractual rather than a sacred, immutable union has several implications for the way marital relationships are subsequently structured. It also leads to a conceptualization of these relationships – and the subsequent rights and obligations – in peculiarly monetary terms. Thus, the wife is entitled to the dower; the husband must maintain her as well as the children – *nafaqa*; the husband occasionally has to pay *muta’a* to lessen the woman’s difficulties upon divorce; and the wife has to compensate the man in order to terminate the marriage by exercising her right to *khula*. All of these aspects of the marital relationship have been assigned some cash value, leading to the development of a particular ‘economics of marriage’.⁸ In contrast to previous Western understandings of marital economics where the married couple was a single, unified economic unit, the Islamic monetization of marriage where it is a complex business partnership quite often lead to litigation.⁹ Such understanding has thus made room for the creation of the wife’s own legal and economic identity, and delineated her contribution to the marital relationship as conceptualized by Islam. This has been done by quantifying her obligations and rights in a marriage, e.g. by making the dower and maintenance her absolute financial right – a right that vests in her rather than her husband or father. This understanding of the woman as a separate legal and economic entity is unique to Islamic law and quite the counterpart to the traditional Christian understanding (or lack thereof) of women’s property rights within a marriage: the idea of ‘what’s hers is mine’.¹⁰

The Muslim Wife as a Distinct Legal Person within Marriage

The creation of this separate legal identity, emerging from the contractual nature of Muslim marriage, has important implications for women inasmuch as it provides them with avenues to exercise their agency. While the idea of

⁸ (n 1).

⁹ Ibid, 68.

¹⁰ Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur’an, Hadith, and Jurisprudence* (Oneworld Publications 2016) 1-23.

female bodies being commodified, or made subjects of contracts, is an especially distasteful one, such monetization of marriage also allows for the existence of avenues that then challenge the ideal of an autonomous and hierarchical patriarchal household. Islamic law, by conceiving marriage as a contract for the delivery of woman's services in exchange for *haq mehr* that vest solely in her person, assumes the existence of two distinct legal and economic personalities which are capable of entering into a valid contract, i.e., have distinct personhoods. And, especially since the marriage is a voluntary contract between two separate legal personalities, not an immutable union as conceived in Christianity and Hinduism, it is evident that this bond is susceptible to dissolution by either party: the woman is given the right to *khula*, while the husband may exercise his absolute right of divorce. The high rate of female-initiated divorce in Ottoman and other medieval Muslim societies provides an interesting example of how the right of *khula* has played a key role in allowing women to exercise their agency in subverting the power relationship within patriarchal households.¹¹

The agency of women's distinct legal personality, as produced by the contractual understanding of marriage, is most clearly manifested in the woman's right to *khula*. According to the traditional conception of *khula*, the wife could terminate her marriage contract by procuring the husband's consent and providing him with some compensation from her personal property. While this compensation has usually been understood as some part of the *haq mehr*, according to the *Hedaya*, 'whatever is lawful as dower, or capable of being accepted as dower, may lawfully be given in exchange of *khula*'.¹² In this respect, some Muslim countries such as Egypt have gone so far as passing statutes to provide that even an outstanding right of the wife is a valid object that could be surrendered in exchange for *khula*.¹³ It must be noted here that this particular right of *khula*, providing women with the agency to terminate their marriage contract, is peculiar to the Islamic conception of marriage since, for instance, in Christianity the marital bond is considered to be of permanent nature, dissoluble only at the death of either party or by the decree of the ecclesiastical court.¹⁴ This peculiar agency afforded to Muslim women has been an inevitable consequence of the Islamic understanding of marriage as a service contract, with rights and

¹¹ Madeline C. Zilfi (ed), *Women In the Ottoman Empire: Middle Eastern Women in the Early Modern Era* (Brill 1997) 264-5.

¹² Charles Hamilton (trs), *The Hedaya: A Commentary on the Islamic Laws* (Kitab Bhavan 1994) 114.

¹³ Lynn Welchman, *Women and Muslim Family Law in Arab States* (Amsterdam University Press 2007) 112.

¹⁴ (n 3).

obligations understood in economic terms, entered into by two distinct legal persons, and dissoluble at the instance of either party.

Khula in the Pakistani Courts: Progressive Interpretations

Working within the theoretical framework of marriage as a service contract, and the monetization of subsequent rights and obligation, the courts in Pakistan have interpreted the law regulating *khula* in a fairly progressive manner. Traditionally, as mentioned before, the consent of the husband was an essential precondition for the wife's ability to exercise her right of *khula*. In *Moonshee Buzloor Ruheem v Shumsoonnissa Begum*,¹⁵ the court held that the wife's right to *khula* is contingent upon the consent of her husband. However, *Balqis Fatima v Najam ul-Ikram Qureshi*¹⁶ and *Khurshid Bibi . Baboo Muhammad Amin*¹⁷ overruled the *Moonshee Buzloor Ruheem* case, and declared that the right to *khula* is the wife's right which could be availed through a court of law. The court, in the *Khurshid Bibi* case, held that the spouses are put on the same footing with respect to their rights and obligations. The judgment equated the husband's right to *talaq* with a wife's right to *khula*, concluding that in the case of dispute regarding dissolution of marriage between spouses, the courts have jurisdiction to decide the matter. The wife could, therefore, approach a court of law in order to seek a decree of dissolution by exercising her right of *khula*, as is granted by the Holy Qur'an. The immediate consequence of this particular development has been that only the economic, transactional part of the procedure for *khula* has been left relevant: the requirement of asking for a husband's consent has been reduced to a formality; and the wife can, therefore, have her marriage contract terminated only by providing some compensation to the husband.

This conceptualization of marital obligations in economic terms has also led to further progressive development in Pakistani case law. With regard to the requirement that the wife is obliged to pay compensation to the husband to get out of the wedlock, the court, in *Shams Ali v Additional District Judge*,¹⁸ held that if the dissolution is caused by the cruel conduct of the husband, he is not entitled to the return of dower. The husband's conduct is, therefore, quantified by assigning it a monetary value and he is penalized by depriving him of the return of the dower. For his behavior, the husband faces a financial detriment; for the wife's suffering, she is allowed a financial

¹⁵ [1867] UKPC 22.

¹⁶ PLD 1959 Lahore 566.

¹⁷ PLD 1967 SC 97.

¹⁸ PLD 2012 Lahore 183.

advantage. By conceptualizing marital relationships in monetary terms, the courts have given them material weight, dis-incentivizing cruel conduct by something more than mere societal disapprobation. The wife is allowed monetary relief, even though it is she who is initiating the divorce – a development which is a significant step forward in the development of the Islamic understanding of marriage.

The disentitlement of the husband from compensation is accompanied by the potential for further development. In several cases, when discussing the amount of dower to be returned in circumstances where the husband's cruelty has compelled the wife to file for *khula*, the Court also mentions the services the wife has rendered during the subsistence of the marriage. When deciding the question of whether the husband is entitled to the return of dower, the courts have considered it important to examine the domestic functions the wife has performed, such as her domestic and child rearing duties. If the wife is considered to have devoted a large part of her life to such duties, the courts – seemingly assigning a cash value to the performance of such duties – have shown a tendency to allow her to retain the *haq mehr* that she was otherwise obliged to return. In doing so, the courts have gone as far as holding that the restoration of dower is not an indispensable condition for granting *khula*. If the court finds that the husband and wife cannot live within the limits prescribed by God, a decree of *khula* must follow. The factum of benefits that the wife may have to return will be decided subsequent to such a decree in light of reciprocal benefits received by the parties. Such a finding would only create civil liability on the wife and will not have any effect on the decree of *khula*.¹⁹

To this end, in *M. Saqlain v Zaib un-Nisa*,²⁰ the court held that while deciding upon the compensation to be provided at the instance of *khula*, reciprocal benefits received by the husband should be taken into account. The court held that continuous living together, bearing and rearing of children, housekeeping etc., could also be counted as benefits thereby offsetting the benefits that the wife has to return. While seized with a similar question, the court in *Abdul Rashid v Shahida Parveen*²¹ observed that the life spent by the wife with her husband can also be taken as consideration for *khula*. In this case, the wife had lived with the petitioner for sixteen years and had performed all of her marital obligations during the time. The court observed that in doing so, the wife had spent the most precious time of her

¹⁹ *Dr. Akhlaq Ahmed v Mst. Kishwar Sultana* PLD 1983 SC 169, 172; *Aurangzeb v Mst. Gulnazar* PLD 2006 Kar 563, 567.

²⁰ 1988 MLD 427.

²¹ PLD 2009 Pesh 92.

young age with the husband; therefore, all these factors should be taken into consideration when adjudicating upon the repayment of dower. In some cases, the courts have even neglected to draw primarily on the requirement that the husband's cruelty have compelled the *khula*, relying solely on the argument that the wife's services during the marriage constitute sufficient basis for denying the return of the *haq mehr*. For instance, in *Nasir v Rubina*,²² the court, without even referring to the cruelty of the husband, simply awarded a wife half of the *haq mehr* on the basis of her services in the marriage. Similarly, in *Aurangzeb v Mst. Gulnazar*,²³ the court held that the life spent by the wife with the husband can be treated as sufficient reciprocal benefits received by the husband for a dower of Rs. 42, 000.²⁴

Even though most of these observations have formed the *obiter dicta* of the respective judgments, they illustrate a distinct tendency to measure marital obligations and rights in cash value. Thus, not only is the husband's cruelty penalized by depriving him of dower, there has also been a move to value women's domestic work within the home in monetary terms. This tendency might allow the women filing *khula* cases in the future to argue that their domestic services have economic value and should, therefore, be weighed against the compensation that they are obliged to pay as a means of ransoming themselves from the wedlock; and, conversely, if the benefits received by the husband are found to outweigh the benefits received by the wife, the court may even direct him to compensate the wife for the respective benefits.

Conclusion

The Islamic understanding of marriage as a contractual relationship – as opposed to an indissoluble holy union – has produced significant avenues for women to exercise their agency. In light of this understanding, almost every aspect of marital life has been assigned cash value which can be claimed through a court of law. Such monetization of marital rights and obligations have not only led to the creation of a distinct economic and legal identity for Muslim women, but has also provided them with such rights that challenge the conventional understanding of a hierarchical, patriarchal household. The right of *khula*, for instance, is one such tool that Muslim women have historically utilized to subvert the power relationships in traditional households. A critical analysis of the development of this right and its

²² 2012 MLD 1576.

²³ PLD 2006 Kar 563.

²⁴ *Ibid*, 567.

subsequent implications in the context of Pakistan reveals a distinct progressive tendency among the Pakistani courts to monetize the domestic services rendered by the wife during the subsistence of marriage. This tendency may allow Muslim women seeking to dissolve their marriage through *khula* to argue that their domestic services should be weighed against the compensation that they are obliged to pay upon such dissolution – a development that may lead to the reimagining of the gendered power relationships within traditional sub-continental households. The contractual nature of marriage in Islam, therefore, makes room for a woman’s work within the home to be quantified in monetary terms – a progressive and pro-woman leap that has been made entirely within the framework of Islamic, rather than secular law.