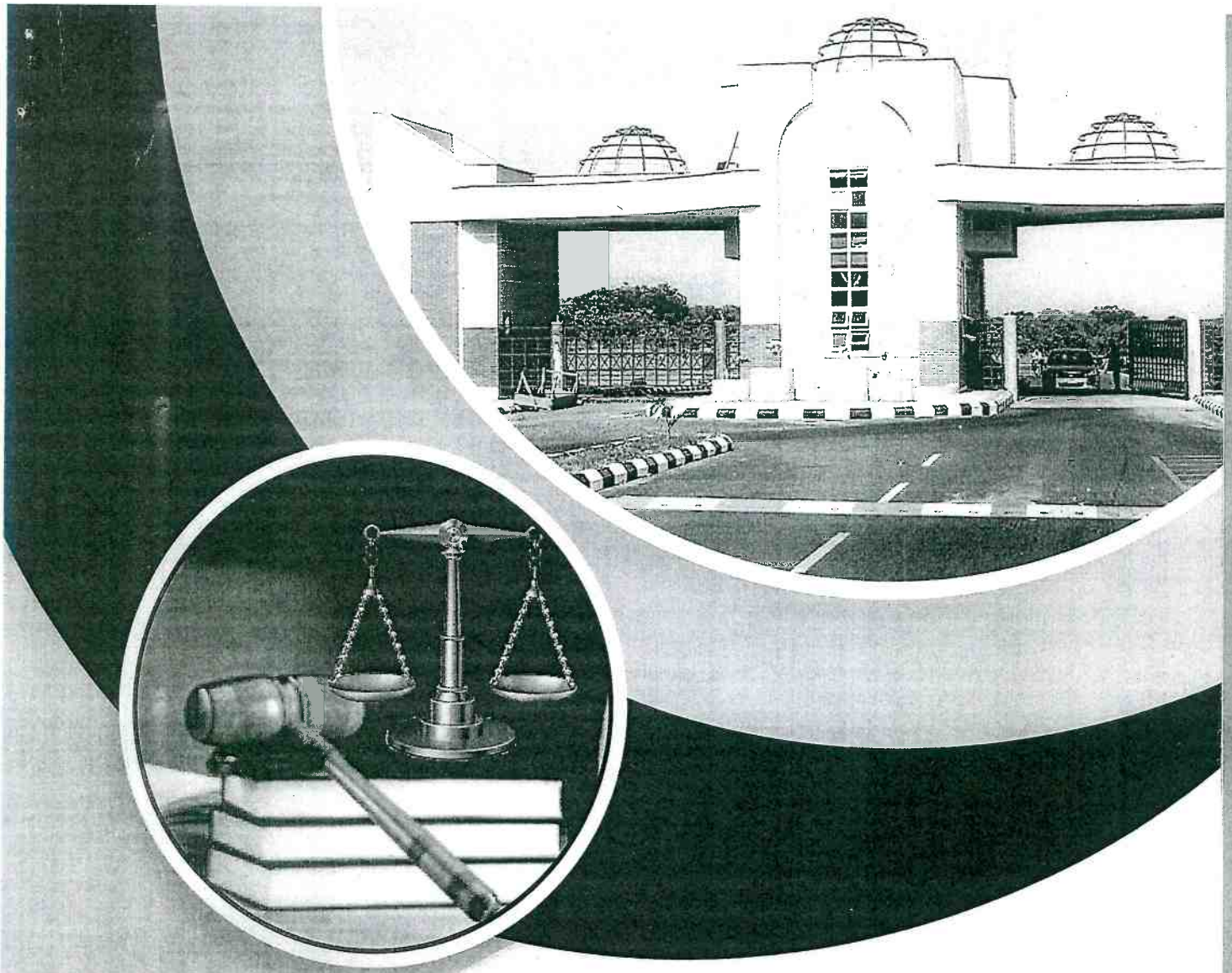


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Analysis of Misconception of Nature of Dissolution of Nikāḥ at the Instance of Wife under Islamic Family Law

ELESIN, AbdulWahab Muhammad Jamiu*

Abstract
Apart from death, wedlock (nikāḥ) may come to an end through separation which also takes different methods under Islamic family law such as separation by way of consent between the parties (khul'u) otherwise known as "dissolution of marriage at instance of the wife". However, reading through some court decisions, it is observed that true nature of khul'u is misconceived. Identifying nature of khul'u therefore becomes significantly momentous as it guides the courts, legal practitioners, lecturers, students of law as well as other stakeholders in drawing legal opinion or decision. The paper reviewed opinions of major schools of fiqh as well as judicial decisions on the subject matter of study. The research consulted Qur'ān, Sunnah, fiqh manuals, tafsīr books and academic literature. Research findings revealed that, confusion within Muslims occurs in the mix-up of true nature of khul'u. The recommended that experts in Islamic family law review opinions of the jurists on the subject.
*Keywords: wedlock management, **dissolution of marriage, nature of khul'u, misconception of law***

1. Introduction

Wedlock (nikāḥ) is expected to last until the death of either spouses. However, an unhappy wife will never be forced to remain/return to her husband. Unlike English law where neither of the parties have the power of granting divorce and it is in the hands of the judge, Islamic law puts the power in the hands of the man or the woman as the case may be depending on the type of separation used.[1] Among many methods to discontinue nikāḥ under Islamic family law is separation by way of consent between the spouses wherein husband agreed to grant his wife request for separation. This is otherwise called dissolution of wedlock at instance of the wife (khul'u).[2] In other words, khul'u takes place when the husband consents to his wife's request for a divorce. Furthermore, khul'u itself takes different forms based on the term used during process. The jurists unanimously agreed that if the term "talāq" is used for khul'u by the husband, then it is talāq. However, the opinion of jurists differ if different term is used whether it is talāq or faskh. Those who held that khul'u is talāq in the either way further exercised divergent opinions on whether it is single irrevocable divorce (talqatun bāinatun) or single revocable divorce (talqatun raj'iyyatun).[3]

It is observed that, confusion within Muslims occurs as a result of the mix-up in identifying and understanding true nature of khul'u, whether it is divorce (talāq) or rescission (faskhun-nikāḥ). The mix-up occurs when people use the term khul'u for everything that is not the talāq given by the husband when that is clearly not the case. Some Muslim scholars as well as some Sharī'ah courts' ruling use the terms

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[1] Az-Zuhayli Wahbah (nd); *Al-Fiqhul-Islami wa Adillatuhu,* Damascus, vol. 9, p. 453, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), *Al-Mawsuatul Fiqhiyyah*, vol. 19, p. 234-.

[2] Al-Qadi Al-Baghdadi; Abu Muhammad; AbdulWahab ibn Aliy, (d. 422 AH), *At-Talqin fil-Fiqh Al-Malikiy*, ed. Abu Uwais Muhammad At-Tatwani, darul-Kutubi Al-Ilmiyyah, 1st edition, (1425/2004), p. 124-130.

[3] Ibn Juzay; Muhammad ibn Ahmad, Abu Al-Qasim (d. 741 AH), *Al-Qawaninu Al-Fiqhiyyah*, (nd), p. 150-156.

incorrectly and interchangeably.[4] Not only does this mean incorrect usage of the terms, it also means that people then have the incorrect understanding of the consequences.[5]

This was reflected in Mabruka Amin v. Aminu Sanusi, where the Upper Shari Court held as follows: "She will do three monthly periods".[6] This court decision would be correct based on the opinion which regard khul'u as divorce (talāq), but incorrect according to the popular opinion of Malikiy School.[7]

This article studied khul'u, its nature and rites. After this background, part two defined khul'u while part three discussed the nature of khul'u whether it is divorce (talāq) or rescission (faskh). It discussed whether waiting of divorcee through khul'u ('iddatu al-mukhtali'ah) is mandatory and the period. Part four summarised the paper, drew conclusion and recommendations. The paper used analytical method and presented a concise overview on the khul'u. It also discussed some decided cases at the Sharī'ah court.

2. Conception Definition of Khul'u

Other than a divorce unilaterally effected by the husband, a marriage may be dissolved by the wife literally paying her husband for her freedom (*fidyah*), under the Qur'ānic ruling to be found in *sūratul-Baqarah*; Qur'ān 2, v. 229.

Khul'u, morphologically has its root from "khala'a", "yakhla'u", "khal'an", "khul'an", meaning: "taking off cloth", "undressing", "to pull out", "to divorce or repudiate one's wife", "conditioned divorce".[8] In general, technical definition, khul'u is: "divorce initiated on the part of the wife", or "dissolution of nikāḥ at the instance of the wife". It refers to "a lady's right of cancellation of her marriage".[9] Just as a man can divorce if he has genuine objection, similarly, a lady also have a khul'u if she has a genuine excuse, with or without refunding the bridal gift (mahr or ṣadāq).

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[4] See Mabruka Aminu vi. Aminu Sanusi, unreported judgment (CASE NO 144/015) (SUIT NO 110/015) Date: 17-06-2015, delivered by his Lordship, Justice Malam Ibrahim Korau, Upper Sharia Court Dandume.

[5] Al-Qadi Al-Baghdadi; Abu Muhammad; AbdulWahab ibn Aliy, (d. 422 AH), *AT-Talqin fil-Fiqh Al-Malikiy*, ed. Abu Uwais Muhammad At-Tatwani, darul-Kutubi Al-Ilmiyyah, 1st edition, (1425/2004), p. 124-130, Ibn Juzay; Muhammad ibn Ahmad, Abu Al-Qasim (d. 741 AH), *Al-Qawaninu Al-Fiqhiyyah*, (nd), p. 150-156.

[6] See Mabruka Aminu v. Aminu Sanusi, unreported judgment (CASE NO 144/015) (SUIT NO 110/015) DATE: 17-06-2015, delivered by his Lordship, Justice Malam Ibrahim Korau, Upper Sharia Court Dandume.

[7] Ibn Abdul-Barr (d. 463 AH), *Al-Istidhkar*, ed. Abdur-Razaq Al-Mahdiy, daru Ihyaut-Turath Al-Arabiy, Beirut, Lebanon, 1st edition (1421/2001), vol. 5, p. 83-84-90, Al-Baji Al-Qadi Abu Al-Walid Sulayman ibn Khalaf (d. 494 AH), *Al-Muntaqa Sharhu Muwatta Malik*, ed. Muhammad Muhammad Tamir, maktabatut-Thaqafah Ad-Dininyah, Cairo, (nd.), vol. 5, p.303-305, Ashi-Shirazi Abu Ishaq Ibrahim ibn Aliy (d. 476 AH), , ed. Shaykh 'Adil Ahmad A. and Shaykh Aliy Muhammad A. darul-Ma'rifah, Beirut, Lebanon, 1st edition, (1424/2003), vol. 3, p. 5-6, Al-Hafiz Ahmad ibn 'Aliy ibn Hajar (d. 852 AH), *Fatḥul-Bāriy*, ed. AbdulQadir Shaybat Al-Hamd, 1st edition (1421/2001), vol. 9, p. 307-308, 314, Ash-Shawkani, Muhammad ibn Aliy (d. 1255 AH), *Naylul Awtar*, ed. Wahbah Az-Zuhayli, daurl-Khayr, 1st edition (1416/1996), vol. 3, part 6, p. 675, Ibn Uthaymin, Muhammad ibn Salihu, *Ash-Sharhul Mumti'*, daru Ibn Jawzi, 3rd edition, 1433 AH, vol. 12, p. 451, 467-471, Az-Zuhayli Wahbah (nd); *Al-Fiqhul-Islami wa Adillatuhu*, Damascus, vol. 9, p. 453, 476, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), *Al-Mawsuatul Fiqhiyyah*, vol. 19, p. 237.

[8] Ar-Raghib Al-Asfahani; Abu Al-Qasim Al-Husain ibn Muhammad (d. 502 AH), *Al-Mufradat fi Gharibil-Qur'ān*, ed. Muhammad Khalil 'Aytani, darul-Ma'rifah, Beirut, Lebanon, 1st edition, (1418/1998), p. 161, Ar-Razi Muhammad ibn Abi Bakr (d. 660 AH), *Mukhtaruṣ-ṣiḥāḥ*, (nd), p. 185.

[9] Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), *Al-Mawsuatul Fiqhiyyah*, vol. 19, p. 234.

Shaykh Wahbah Az-Zuhayli defined khul'u as: "Putting an end to wedlock at the instance of the lady with the word khul'u or its equivalent".[10] In Aminu Sanusi v. Mabruka Aminu, the learned judge defined khul'u as: "Occurrence of divorce whereby the husband agrees upon demand and/or request to release his wife from the marital bond, with or without the payment of compensation by the wife."[11]

In other words, khul'u means the separation of the wife in return for a payment known as compensation ('iwaḍ). The husband takes the payment and lets his wife go, whether this payment is the mahr which he gave to her, or more or less than that.[12] The compensation (al-'iwaḍ) in khul'u may be from the wife, father or guardian (waliyyu) of the either parties or a third party paying it for valid interest. The Maliki jurists held that compensation is not a condition for validity of khul'u.[13]

This writer suggests khul'u is "a procedure through which a lady can give a divorce to her husband under Islamic law, with or without refunding the bridal gift (mahr) or something else that she received from her husband, as agreed by the spouses or court's decision depending on the circumstances".

3. Legal Category of Redemption [Māhiyatu al-Khul'u]

Having defined khul'u, this part discussed the nature of khul'u and its legal implications. Under this rubric, nature and legal category of redemption (khul'u) whether it is divorce (talāq) or rescission (faskh). It also discussed legal implications of status of khul'u specifically, whether it is incumbent upon the divorced lady through khul'u to observe waiting ('iddatu al-mukhtali'at).

3.1. Redemption: A Divorce or Rescission [Khul'u talāqun am faskhun]

Opinions of the jurists differ about the nature and legal category of redemption, whether it is redemption (khul'u) or rescission (faskh) or divorce (talāq). Where khul'u occurred with the word "talāq" which is direct term for divorce, or where indirect word is used but "talāq" is intended, the Muslim jurists agreed that khul'u in this case it "talāq". But where khul'u occurred with other than the word "talāq" while "talāq" or its equivalent is not intended, the opinions of the jurists differ on whether khul'u is divorce (talāq) or rescission (faskh).[14]

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[10] Az-Zuhayli Wahbah (nd); *Al-Fiqhul-Islami wa Adillatuhu*, Damascus, vol. 4, p. 642, vol. 9, p. 453.

[11] Aminu Sanusi v. Mabruka Aminu, unreported judgment (CA/K/266/S/2016), delivered by his Lordship, Justice Massoud AbdulRahman Oredola (JCA), at the Court of Appeal, Kaduna Division, on Tuesday, the 22nd day of August, 2017.

[12] Az-Zuhayli Wahbah (nd); *Al-Fiqhul-Islami wa Adillatuhu*, Damascus, vol. 4, p. 642, vol. 9, p. 453.

[13] Ibn Uthaymin, Muhammad ibn Salihu, *Ash-Sharhul Mumti'*, daru Ibn Jawzi, 3rd edition, 1433 AH, vol. 12, p. 454-459, Az-Zuhayli Wahbah (nd); *Al-Fiqhul-Islami wa Adillatuhu*, Damascus, vol. 9, p. 453, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), *Al-Mawsuatul Fiqhiyyah*, vol. 19, p. 234-.

[14] Ibn Abdul-Barr (d. 463 AH), *Al-Istidhkar*, ed. Abdur-Razaq Al-Mahdiy, daru Ihyaut-Turath Al-Arabiy, Beirut, Lebanon, 1st edition (1421/2001), vol. 5, p. 83-84-90, Al-Baji Al-Qadi Abu Al-Walid Sulayman ibn Khalaf (d. 494 AH), *Al-Muntaqa Sharhu Muwatta Malik*, ed. Muhammad Muhammad Tamir, maktabatut-Thaqafah Ad-Dininyah, Cairo, (nd.), vol. 5, p.303-305, Ashi-Shirazi Abu Ishaq Ibrahim ibn Aliy (d. 476 AH), *Al-Muhadhab fi Fiqh Al-Imam As-Shafi'iy*, ed. Shaykh 'Adil Ahmad A. and Shaykh Aliy Muhammad A. darul-Ma'rifah, Beirut, Lebanon, 1st edition, (1424/2003), vol. 3, p. 5-6, Al-Hafiz Ahmad ibn 'Aliy ibn Hajar (d. 852 AH), *Fatḥul-Bāriy*, ed. AbdulQadir Shaybat Al-Hamd, 1st edition (1421/2001), vol. 9, p. 307-308, 314, Ash-Shawkani, Muhammad ibn Aliy (d. 1255 AH), *Naylul Awtar*, ed. Wahbah Az-Zuhayli, daurl-Khayr, 1st edition (1416/1996), vol. 3, part 6, p. 675, Ibn Uthaymin, Muhammad ibn Salihu, *Ash-Sharhul Mumti'*, daru Ibn Jawzi, 3rd edition, 1433 AH, vol. 12, p. 451, 467-471, Az-Zuhayli Wahbah (nd); *Al-Fiqhul-Islami wa Adillatuhu*, Damascus, vol. 9, p. 453, 476, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), *Al-Mawsuatul Fiqhiyyah*, vol. 19, p. 237.

3.2. Khul'u: A Revocable or Irrevocable Divorce

The majority of jurists agreed that khul'u amounts to talāq (divorce). This is a well-known and popular opinion in the Hanafiy and Malikiy Schools, and the new opinion of Imam Shafi'i and a narration in Hambali School.[15] According to these schools, khul'u is one irrevocable divorce (talqatun bāi'natun).

This is also opinion of 'Umar ibn Khattab, 'Uthman ibn 'Affan, Ali ibn Abi Tali, Abdullaha ibn Mas'ud (RA) among the companions. Al-Hafiz Ibn Hajar seems to have supported this opinion.[16] In the contrary, Shafi'is, Hambalis and Dawud held that khul'u is rescission (faskhun). This is also opinion of Abdullah ibn Abbas (r.a.) among the companions. Imam Ash-Shawkaniy extensively argued to support and establish that khul'u is rescission not divorce. It was also related from Imam Shafi'iy that khul'u is an indirect declaration of intent; if he intends thereby a divorce it amounts to a divorce, otherwise it is a rescission.[17]

The reason for drawing distinction between being talāq or faskh is whether the number of repudiations in it is taken into consideration. The majority of those who considered it as a divorce deem it irrevocable divorce (talāqun bāi'nun), for, had the husband possessed the right to take her back in the waiting period ('iddah), the provision of ransom would have been futile.[18]

Those who considered it to be a divorce argued that rescission usually arises from causes of separation that do not depend upon the husband's discretion, but this relates to his discretion and it is, therefore, not a rescission. Those who did not consider it to be a divorce argued that Allāh, the Glorious and Exalted has laid down in His Book that: "Divorce must be pronounced twice, and then a woman must be retained in honour or released in kindness.[19]" Allāh then mentioned ransom (iftidā'u), and said: "And if ye hath divorced her (a third time), then she is not lawful unto him thereafter until she hath wedded another

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[15] Al-Qudduriy Abu Al-Hasan Ahmad ibn Muhammad (d. 428 AH), *Mukhtasarul-Qudduriy fil-Fiqh Al-Hanafiy*, ed. Kamil Muhammad M. A. daurul-Kutubil Al-Ilmiyyah, Beirut, Lebanon, 1st edition (1418/1997), p. 163, Al-Kasani 'Alaud-Din A. (d. 587 HA), *Bada'iuṣ-ṣana'iu fi Tartibisha-Shara'ii*, darul Ihyait-Turath Al-Arabi, Beirut, Labanon, 2nd edition (1419/1998), vol. 3, p. 229, Ibn Abdul-Barr (d. 463 AH), *Al-Istidhkar*, ed. Abdur-Razaq Al-Mahdiy, daru Ihyaut-Turath Al-Arabiy, Beirut, Lebanon, 1st edition (1421/2001), vol. 5, p. 83-84-90, Al-Baji Al-Qadi Abu Al-Walid Sulayman ibn Khalaf (d. 494 AH), *Al-Muntaqa Sharhu Muwatta Malik*, ed. Muhammad Muhammad Tamir, maktabatut-Thaqafah Ad-Dininyah, Cairo, (nd.), vol. 5, p.303-305, Al-Hafiz Ahmad ibn 'Aliy ibn Hajar (d. 852 AH), *Fatḥul-Bāriy*, ed. AbdulQadir Shaybat Al-Hamd, 1st edition (1421/2001), vol. 9, p. 306, 308, Az-Zuhayli Wahbah (nd); *Al-Fiqhul-Islami wa Adillatuhu*, Damascus, vol. 9, p. 453, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), *Al-Mawsuatul Fiqhiyyah*, vol. 19, p. 234, 237.

[16] Al-Kasani 'Alaud-Din A. (d. 587 HA), *Bada'iuṣ-ṣana'iu fi Tartibisha-Shara'ii*, darul Ihyait-Turath Al-Arabi, Beirut, Labanon, 2nd edition (1419/1998), vol. 3, p. 227-228, Ibn Abdul-Barr (d. 463 AH), *Al-Istidhkar*, ed. Abdur-Razaq Al-Mahdiy, daru Ihyaut-Turath Al-Arabiy, Beirut, Lebanon, 1st edition (1421/2001), vol. 5, p. 83-90, Al-Baji Al-Qadi Abu Al-Walid Sulayman ibn Khalaf (d. 494 AH), *Al-Muntaqa Sharhu Muwatta Malik*, ed. Muhammad Muhammad Tamir, maktabatut-Thaqafah Ad-Dininyah, Cairo, (nd.), vol. 5, p.303-305, Al-Hafiz Ahmad ibn 'Aliy ibn Hajar (d. 852 AH), *Fatḥul-Bāriy*, ed. AbdulQadir Shaybat Al-Hamd, 1st edition (1421/2001), vol. 9, p. 314, Ibn Uthaymin, Muhammad ibn Salihu, *Ash-Sharhul Mumti'*, daru Ibn Jawzi, 3rd edition, 1433 AH, vol. 12, p. 450-463, 467-471.

[17] Ashi-Shirazi Abu Ishaq Ibrahim ibn Aliy (d. 476 AH), *Al-Muhadhab fi Fiqh Al-Imam As-Shafi'iy*, ed. Shaykh 'Adil Ahmad A. and Shaykh Aliy Muhammad A. darul-Ma'rifah, Beirut, Lebanon, 1st edition, (1424/2003), vol. 3, p. 5-7, Ash-Shawkani, Muhammad ibn Aliy (d. 1255 AH), *Naylul Awtar*, ed. Wahbah Az-Zuhayli, daurl-Khayr, 1st edition (1416/1996), vol. 3, part 6, p. 673-678, Ibn Uthaymin, Muhammad ibn Salihu, *Ash-Sharhul Mumti'*, daru Ibn Jawzi, 3rd edition, 1433 AH, vol. 12, p. 450-463, 467-471.

[18] Ibn Rushd Abul-Walid Ahmad M., (d. 595 AH), Bidāyatul-Mujtahid wa Nihāyatul-Muqtaṣid (The Distinguished Jurist's Primer), tr. Prof. Imran Ahsan K. Nyazee, rev. Prof. Mohammad Abdul Fauf, Garnet Publishing Ltd. Uk, 2010, vol. 2, p. 81-82, Ibn Uthaymin, Muhammad ibn Salihu, *Ash-Sharhul Mumti'*, daru Ibn Jawzi, 3rd edition, 1433 AH, vol. 12, p. 471-474.

[19] Qur'ān 2: 229.

husband.[20]" Thus, if redemption (khul'u) had been divorce, the last mentioned divorce, which makes his wife unlawful for him, except after marrying another husband, would have amounted to a fourth divorce. According to these jurists, rescission (faskh) takes place with consent, on the analogy of rescission in sales (iqālah). The opponents viewed that the verse includes the rule of ransom (ḥukm iftidā'u), as a factor that is linked to all kinds of divorces, not that it is something other than divorce. It is therefore suggested that the reason for this juristic disagreement (sababu ikhtilāf) is whether the association of compensation with this kind of separation (khul'u) removes it from the category of separation caused by divorce to a category of separation caused by recession.[21]

Imam Ibn Uthaymin; the erudite Hambaliy jurist submitted that: "the opinion which views khul'u as faskhun is more likely to be correct. However, the wordings of the Messenger of Allah (s.a.w.) to Thabit ibn Qays (r.a.) in Bukhari which reads: "aqbil al-ḥadīqah wa talliqha tatlīqatan"; i.e. "collect the garden (mahr) from her, then give her one divorce" supports that khul'u is divorce (talāq). But the reporters of ḥadīth disagreed in reporting this particular ḥadīth. It seems that Bukhariy considers the ḥadīth which reads: "talliqha tatlīqatan" as mursalu not muttaṣilu[22]. While the other tradtions (aḥādīth) read: "faqbil al-ḥadīqah wa fāriqhā"; i.e. "collect the garden (mahr) from her, then disengage her or leave her". If this last wording is considered to be the most authentic, then khul'u is rescission (faskh) as it was held by Abdullah ibn Abbas (r.a.) and those who support him. But if the former wording "talliqha tatlīqatan" is considered most correct and authentic, then it is very obvious that khul'u is divorce (talāq) not rescission (faskh). This opinion becomes undeniable and indisputable, in this case, the latter wordings "faqbil al-ḥadīqah wa fāriqhā" would be construed to mean talāq definitely.[23]

It should be noted that faskhu-nikāḥ here means "rescission of marriage" not "judicial dissolution of marriage". Faskhu-nikāḥ that means "rescission of marriage" is a mutual agreement between the spouses to uproot the marriage. It is another term used for redemption (khul'u) by some jurists. However, those jurists who held that khul'u is divorce (talāq) opined that khul'u is suspension of nikāḥ. It is submitted that whether it is rescission (faskh) which means "uprooting of marriage" or it is divorce (talāq) which means "suspension of marriage, the end effect is that each of them is irreversible or irrevocable".

It is humbly summated that the reported juristic disagreement about whether khul'u is divorce (talāq) or rescission of marriage (faskhu nikāḥ) is theoretical disagreement (ikhtilāfun lafziyun). This is so because, the end result of both opinions is the same; i.e. khul'u is "irrevocable and no waiting is required".[24]

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[20] Qur'ān 2: 230.

[21] Al-Kasani 'Alaud-Din A. (d. 587 HA), *Bada'iuṣ-ṣana'iu fi Tartibisha-Shara'ii*, darul Ihyait-Turath Al-Arabi, Beirut, Labanon, 2nd edition (1419/1998), vol. 3, p. 227, Ibn Rushd Abul-Walid Ahmad M., (d. 595 AH), Bidāyatul-Mujtahid wa Nihāyatul-Muqtaṣid (The Distinguished Jurist's Primer), tr. Prof. Imran Ahsan K. Nyazee, rev. Prof. Mohammad Abdul Fauf, Garnet Publishing Ltd. Uk, 2010, vol. 2, p. 82-83, Ash-Shawkani, Muhammad ibn Aliy (d. 1255 AH), *Naylul Awtar*, ed. Wahbah Az-Zuhayli, daurl-Khayr, 1st edition (1416/1996), vol. 3, part 6, p. 673-678.

[22] Ḥadīth Mursalu is where the name of the companion has been dropped in the chain of narrators. It is categorised among the deficient aḥādīth. The ḥadīth musnad is one with complete chain of narration, it is a perfect ḥadīth. AbdulKarim Murad and AbdulMuhsin Al-Abbad, Min Atyabi Al-Minaḥ fi 'Ilmi Al-Muṣtalaḥ, Islamic University, Madinah, KSA, 13th edition (1420), p. 8, p. 27, 46.

[23] Ibn Uthaymin, Muhammad ibn Salihu, *Ash-Sharhul Mumti'*, daru Ibn Jawzi, 3rd edition, 1433 AH, vol. 12, p. 470-471. See also, Ash-Shawkani, Muhammad ibn Aliy (d. 1255 AH), *Naylul Awtar*, ed. Wahbah Az-Zuhayli, daurl-Khayr, 1st edition (1416/1996), vol. 3, part 6, p. 673-678, King Fahd Complex for Printing of the Glorious Qur'ān, Al-Fiqh Al-Muyassar fi Daw'il-Kitabi was-Sunnah, (1424 AH), p. 310, See also Aminu Sanusi v. Mabruka Aminu, unreported judgment (CA/K/266/S/2016), delivered by his Lordship, Justice Massoud AbdulRahman Oredola (JCA), at the Court of Appeal, Kaduna Division, on Tuesday, the 22nd day of August, 2017.

[24] That is "talāqun bāi'nun lā raj'ah fīhi wa lā 'iddah".

Also, khul'u can validly take place at any time and/or any condition whether during or outside menstrual period.[25] Notwithstanding, it was suggested that, whether khul'u occurs with the word "khul'u" or "talāq", legal draft should read:[26] "he redeemed his wife for consideration of sum of so and so".[27]

Those jurists who held that khul'u is talāq (divorce) further agreed that it is one irrevocable divorce "talqatun bāi'natun". They argued that, since the husband owned the compensation (badal), she is entitled to control herself in return, and she can only achieve this only when it is "talqatun bāi'natun". It follows that the husband has no right to call her back during 'iddah since she is no longer his wife.[28] The reason behind this juristic disagreement (sababu ikhtilāf) is whether the presence of consideration ('iwaḍ) in khul'u moves it from the category of divorce (talāq) to the category of rescission (faskh).[29] Those jurists who viewed khul'u as faskh claimed that it equivalents to revocable divorce (talāqun rja'iyun). It follows therefore that the husband has the right to call her back during the 'iddah since she remains wife during the 'iddah.[30]

4. Waiting of Divorcee via Redemption ['Iddatul-Mukhtali'ah]

Another legal implication linked to mix-up of true nature of khul'u is whether observation of waiting period is mandatory upon a divorced wife through khul'u and the period. According to Qur'ān 33: 49, there is no 'iddah if the marriage was not consummated.[31] After consummation, the Qur'ān prescribes a three purification or menstruation (qurū') cycle waiting known as 'iddah (mandatory waiting period) for a divorced Muslim lady.[32] The divorced lady is not permitted to re-marry during the period of the 'iddah. However opinions of jurists differ about the 'iddah of a lady divorced by khul'u whether it is the same as

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[25] See Ash-Shawkani, Muhammad ibn Aliy (d. 1255 AH), *Naylul Awtar*, ed. Wahbah Az-Zuhayli, daurl-Khayr, 1st edition (1416/1996), vol. 3, part 6, p. 673-677-678, Az-Zuhayli Wahbah (nd); *Al-Fiqhul-Islami wa Adillatuhu*, Damascus, vol. 9, p. 453, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), *Al-Mawsuatul Fiqhiyyah*, vol. 19, p. 244.

[26] That is "khāla'a zawjatahu 'alā 'iwaḍin qadruhu kadha wa kadha";

[27] Ibn Uthaymin, Muhammad ibn Salihu, *Ash-Sharhul Mumti'*, daru Ibn Jawzi, 3rd edition, 1433 AH, vol. 12, p. 451.

[28] Al-Qudduriy Abu Al-Hasan Ahmad ibn Muhammad (d. 428 AH), *Mukhtasarul-Qudduriy fil-Fiqh Al-Hanafiy*, ed. Kamil Muhammad M. A. daurul-Kutubil Al-Ilmiyyah, Beirut, Lebanon, 1st edition (1418/1997), p. 163, Al-Kasani 'Alaud-Din A. (d. 587 HA), *Bada'iuṣ-ṣana'iu fi Tartibisha-Shara'ii*, darul Ihyait-Turath Al-Arabi, Beirut, Labanon, 2nd edition (1419/1998), vol. 3, p. 227-228, Ibn Abdul-Barr (d. 463 AH), *Al-Istidhkar*, ed. Abdur-Razaq Al-Mahdiy, daru Ihyaut-Turath Al-Arabiy, Beirut, Lebanon, 1st edition (1421/2001), vol. 5, p. 83, al-Qadi Abdulwahab, Abu Muhammad al-Baqhdadi, *At-Talqin fil-Fiqhl Malikiy*, ed. Muhammad S. S. al-Gani, darul-Fikr, Beirut, 1405 AH / 1995, p.328-330, Ashi-Shirazi Abu Ishaq Ibrahim ibn Aliy (d. 476 AH), *Al-Muhadhab fi Fiqh Al-Imam As-Shafi'iy*, ed. Shaykh 'Adil Ahmad A. and Shaykh Aliy Muhammad A. darul-Ma'rifah, Beirut, Lebanon, 1st edition, (1424/2003), vol. 3, p. 3, An-Nawawi, Yahyah Abu Zakariyah, *al-Majmu'u Sharhu Al-Muhadhab*, ed. Muhammad N. M. daru Ihyait-Turathil Arabi, Beirut, (1422/2001), vol. 18, p.104, Ibn Uthaymin, Muhammad ibn Salihu, *Ash-Sharhul Mumti'*, daru Ibn Jawzi, 3rd edition, (1433), vol. 12, p. 455-463, 467-471.

[29] Ibn Abdul-Barr (d. 463 AH), *Al-Istidhkar*, ed. Abdur-Razaq Al-Mahdiy, daru Ihyaut-Turath Al-Arabiy, Beirut, Lebanon, 1st edition (1421/2001), vol. 5, p. 83-84-90, Al-Baji Al-Qadi Abu Al-Walid Sulayman ibn Khalaf (d. 494 AH), *Al-Muntaqa Sharhu Muwatta Malik*, ed. Muhammad Muhammad Tamir, maktabatut-Thaqafah Ad-Dininyah, Cairo, (nd.), vol. 5, p.303-305, Az-Zuhayli Wahbah (nd); *Al-Fiqhul-Islami wa Adillatuhu*, Damascus, vol. 9, p. 453, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), *Al-Mawsuatul Fiqhiyyah*, vol. 19, p. 237.

[30] Al-Qadi Al-Baghdadi; Abu Muhammad; AbdulWahab ibn Aliy, (d. 422 AH), *At-Talqin fil-Fiqh Al-Malikiy*, ed. Abu Uwais Muhammad At-Tatwani, darul-Kutubi Al-Ilmiyyah, 1st edition, (1425/2004), p. 124-130, Ibn Juzay; Muhammad ibn Ahmad, Abu Al-Qasim (d. 741 AH), *Al-Qawaninu Al-Fiqhiyyah*, (nd), p. 150-156.

[31] Al-Hafiz Ahmad ibn 'Aliy ibn Hajar (d. 852 AH), *Fatḥul-Bāriy*, ed. AbdulQadir Shaybat Al-Hamd, 1st edition (1421/2001), vol. 9, p. 313, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), *Al-Mawsuatul Fiqhiyyah*, vol. 29, p. 306.

[32] Qur'ān 2: 228.

that of a lady who did not instigate or initiate the divorce or not. It is noteworthy that 'iddah during pregnancy lasts until delivery or the pregnancy ends. If the lady divorced by khul'u is pregnant then her 'iddah lasts until she gives birth, according to scholarly consensus on the authority of the Qur'ān 65: 4.[33] But if she is not pregnant, opinions of scholars differed concerning her 'iddah. Majority of Muslim scholars held that the 'iddah for khul'u is the same as talāq, which is three purification or menstrual cycles or three months. In other words, she should wait for three purification or menstrual cycles or three months as the case may be. This is the opinion of majority of companions (jumhūr Ṣaḥābah) and majority of jurists (jumhūr fuqahā') including Hanafis, Malikis, Shafi'is, Hambalis, Sa'id ibn Al-Musayyib, Muhammad ibn Shihabu Az-Zuhriy, Sufyan at-Thawriy and the jurists of Kufa and Imam Malik. Shaykh Ibn Uthaymin, a great popular Hambali jurist supported this opinion.[34] The reliance of this opinion is the general meaning of the Qur'ān 2: 228.

The second opinion holds that no 'iddah is mandatory on a divorced lady through khul'u, what she do is waiting for ascertainment (istibrā'u). Abu Dawud, Tirmidhi and Ibn Majah have narrated traditions (aḥadīth) that the Prophet (SAW) prescribed 'iddah of one month only for khul'u.

The correct opinion is that a lady divorced by khul'u shall wait for one purification or menstrual cycle otherwise known as "istibrā'u". This is an opinion from Imam Ahmad ibn Hambal.[35] Imam Ishaq argued for this opinion,[36] Imam Ibn Uthaymin, the erudite Hambaliy jurist supported and argued for this opinion saying no 'iddah is mandatory upon a divorcee through khul'u but "istibrā'u", when she menstruated once she becomes free. This is the decision of 'Uthman ibn 'Affan (RA).[37] This opinion takes its authority from

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[33] At-Tirmidhiy Abū 'Isa, (d. 297 AH), *Sunanut-Tirmidhiy*, ed. Ahmad M. Shakir et al, Cairo, 2nd edition, (1395/1975) vol. 3, p. 483, Ibn Abdul-Barr (d. 463 AH), *Al-Istidhkar*, ed. Abdur-Razaq Al-Mahdiy, daru Ihyaut-Turath Al-Arabiy, Beirut, Lebanon, 1st edition (1421/2001), vol. 5, p. 83-87-90, Al-Baji Al-Qadi Abu Al-Walid Sulayman ibn Khalaf (d. 494 AH), *Al-Muntaqa Sharhu Muwatta Malik*, ed. Muhammad Muhammad Tamir, maktabatut-Thaqafah Ad-Dininyah, Cairo, (nd.), vol. 5, p.303-305, Qurtubīy M. A. (d. 671 AH), *al-Jāmi'u li Ahkāmil-Qurān; Tafsīru Qurtubīy*, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 3, p. 175, vol. 18, p. 165, Ash-Shawkani, Muhammad ibn Aliy (d. 1255 AH), *Naylul Awtar*, ed. Wahbah Az-Zuhayli, daurl-Khayr, 1st edition (1416/1996), vol. 3, part 6, p. 673, Ibn Uthaymin, Muhammad ibn Salihu, *Ash-Sharhul Mumti'*, daru Ibn Jawzi, 3rd edition, 1433 AH, vol. 12, p. 451, 467-471-474, 481.

[34] At-Tirmidhiy Abū 'Isa, (1395/1975), *Sunanut-Tirmidhiy*, ed. Ahmad M. Shakir et al, Cairo, 2nd edition, vol. 3, p. 483, Ibn Abdul-Barr (d. 463 AH), *Al-Istidhkar*, ed. Abdur-Razaq Al-Mahdiy, daru Ihyaut-Turath Al-Arabiy, Beirut, Lebanon, 1st edition (1421/2001), vol. 5, p. 83, 87, 89, 159, Qurtubīy M. A. (d. 671 AH), *al-Jāmi'u li Ahkāmil-Qurān; Tafsīru Qurtubīy*, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 3, p. 175, vol. 18, p. 165, Ibn Uthaymin, Muhammad ibn Salihu, *Ash-Sharhul Mumti'*, daru Ibn Jawzi, 3rd edition, 1433 AH, vol. 12, p. 451, 467-471-474, 481, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), *Al-Mawsuatul Fiqhiyyah*, vol. 19, p. 252-253, vol. 29, p. 337.

[35] Az-Zuhayli Wahbah (nd); *Al-Fiqhul-Islami wa Adillatuhu*, Damascus, vol. 9, p. 453, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), *Al-Mawsuatul Fiqhiyyah*, vol. 19, p. 252-253.

[36] At-Tirmidhiy Abū 'Isa, (1395/1975), *Sunanut-Tirmidhiy*, ed. Ahmad M. Shakir et al, Cairo, 2nd edition, vol. 3, p. 483, Ibn Abdul-Barr (d. 463 AH), *Al-Istidhkar*, ed. Abdur-Razaq Al-Mahdiy, daru Ihyaut-Turath Al-Arabiy, Beirut, Lebanon, 1st edition (1421/2001), vol. 5, p. 83-87-90, Al-Baji Al-Qadi Abu Al-Walid Sulayman ibn Khalaf (d. 494 AH), *Al-Muntaqa Sharhu Muwatta Malik*, ed. Muhammad Muhammad Tamir, maktabatut-Thaqafah Ad-Dininyah, Cairo, (nd.), vol. 5, p.303-305, Qurtubīy M. A. (d. 671 AH), *al-Jāmi'u li Ahkāmil-Qurān; Tafsīru Qurtubīy*, ed. Ahmad B. and Ibrahim A. dārul-Kutubil-Misriyyah, Cairo, 2nd edition, 1384 AH / 1964, vol. 3, p. 175, vol. 18, p. 165, Al-Hafiz Ahmad ibn 'Aliy ibn Hajar (d. 852 AH), *Fatḥul-Bāriy*, ed. AbdulQadir Shaybat Al-Hamd, 1st edition (1421/2001), vol. 9, p. 313, Ash-Shawkani, Muhammad ibn Aliy (d. 1255 AH), *Naylul Awtar*, ed. Wahbah Az-Zuhayli, daurl-Khayr, 1st edition (1416/1996), vol. 3, part 6, p. 673-678, Ibn Uthaymin, Muhammad ibn Salihu, *Ash-Sharhul Mumti'*, daru Ibn Jawzi, 3rd edition, 1433 AH, vol. 12, p. 467-470-471.

[37] Ibn Uthaymin, Muhammad ibn Salihu, *Ash-Sharhul Mumti'*, daru Ibn Jawzi, 3rd edition, 1433 AH, vol. 12, p. 471.

the tradition (ḥadīth) where the Prophet (s.a.w.) instructed the wife of Thābit ibn Qays (r.a.) when she divorced him by khul'u, to observe 'iddah for one menstrual cycle. This prophetic decision was reported by Ibn Abbas (r.a.),[38] and Ar-Rubayyi'i bint Mu'awwidh ibn 'Afrā' (r.a.).[39]
Al-Hafiz Ibn Abdul-Barr reported that, that was the decision of the Messenger of Allah (s.a.w.) in case of Jamilah bint Ubay ibn Salul as well as Habibah bint Sahl.[40] It was also the decision of of 'Uthman ibn 'Affan (r.a.) as reported by Imam an-Nasai.[41]

What could be considered as contradiction between the traditions and the Quran was settled by saying that the reported traditions (aḥādīth) refer to khul'u specifically as divorce, whereas the Qurān 2: 282 quoted above speaks of divorce in general.[42] The position of law is that, where different texts arise on same subject matter one is general and the other is specific, the specific takes preference.[43] Therefore, the texts that prescribe three menstruation cycles for a divorcee would be applied in the actual revocable divorce (talāqun raj'iyun), but restricted in the case of divorcee through khul'u. In other words, the specific traditions (aḥādīth) that prescribe one menstruation cycle for a divorced lady via khul'u restrict the generality of the verse of 'iddah.[44] Abu Dawud reported from Abdullah ibn 'Umar through Imam Malik that 'iddah of a divorced lady through khul'u is one menstruation cycle.[45] This is also the personal opinion (fatwa) of Abdullah ibn Umar. It was also a reported opinion from Abdullah ibn Abbas.

[46] It is therefore submitted that no 'iddah is mandatory on the divorcee through khul'u but istibrā'u by one menstruation cycle according to the legal maxim that: "upon whom revocation is not mandatory, waiting is not mandatory either but istibrā'u by one menstruation cycle".[47]

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[38] Abu Dāud Sulaiman S. (d. 275 AH), (nd), *Sunanu Abī Dāud*, ed. Muhammad M. A. al-Maktabatul-'Asriyah, Beirut (nd); vol. 2, p. 269, no. 2229, at-Tirmidhiy Abū 'Isa, (1395/1975), *Sunanut-Tirmidhiy*, ed. Ahmad M. Shakir et al, Cairo, 2nd edition, vol. 3, p. 483, no. 1185.
Al-Hakim Abu Abdullah Muhammad ibn Abdullah An-Naysaburi (d. 405 AH), authenticated the ḥadīth in his *Al-Mustadrak 'ala ṣaḥīḥayn*, ed. Mustapha AbdulQadir A. darul-Kutubi Al-'Ilmiyyah, Beirut, 1st edition, (1411/1990), vol. 2, p. 224, no. 2825. Imam Adh-Dhabi supported this grading.
Al-Bani M. N., (d. 1420AH) also authenticated the ḥadīth in his "*Irwaul-Ghalili fi Takhriji Aḥadīth Manaris-Sabil*", ed. Zuhair S. al-Maktaul-Islami, Beirut, 2nd edition (1405/1985), vol. 7, p. 102, no. 2036, Al-Bani M. N., (d. 1420AH), *ṣaḥīḥu Abi Dāwūd*, Muassasatu Ghirasi, Kuwait, 1st edition, (1423/2002), vol. 6, p. 428, no. 1931.

[39] An-Nasai A. S. (d. 303), *Sunanun-Nisaiy*, ed. Abdulfattah A. Halab, 2nd edition, (1406/1986), vol. 6, p. 186, no. 3497, at-Tirmidhiy Abū 'Isa, (1395/1975), *Sunanut-Tirmidhiy*, ed. Ahmad M. Shakir et al, Cairo, 2nd edition, vol. 3, p. 483, no. 1185.
At-Turayfi, AbdulAziz ibn Marzuq authenticated the ḥadīth in his *At-Taḥjīl fi Takhrīj mā lam yukharaj minal-Aḥādīth wal-Athār fi Irwāil-Ghalāl*, Maktabatur-Rushd, Riyadh, 1st edition, (1422/2001), p. 399-400.

[40] Ibn Abdul-Barr (d. 463 AH), *Al-Istidhkar*, ed. Abdur-Razaq Al-Mahdiy, daru Ihyaut-Turath Al-Arabiy, Beirut, Lebanon, 1st edition (1421/2001), vol. 5, p. 87088, Al-Baji Al-Qadi Abu Al-Walid Sulayman ibn Khalaf (d. 494 AH), *Al-Muntaqa Sharhu Muwatta Malik*, ed. Muhammad Muhammad Tamir, maktabatut-Thaqafah Ad-Dininyah, Cairo, (nd.), vol. 5, p.303-305, Az-Zuhayli Wahbah (nd); *Al-Fiqhul-Islami wa Adillatuhu*, Damascus, vol. 9, p. 453, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), *Al-Mawsuatul Fiqhiyyah*, vol. 19, p. 237.

[41] An-Nasai A. S. (d. 303), *Sunanun-Nisaiy*, ed. Abdulfattah A. Halab, 2nd edition, (1406/1986), vol. 6, p. 186, no. 3498.

[42] Ash-Shawkani, Muhammad ibn Aliy (d. 1255 AH), *Naylul Awtar*, ed. Wahbah Az-Zuhayli, daurl-Khayr, 1st edition (1416/1996), vol. 3, part 6, p. 673.

[43] Nazee, Imran Ahsan Khan, *Islamic Jurisprudence (Uṣūl al-Fiqh)*, New Delhi, India, 2012, p. 145-147.

[44] Ibn Uthaymin, Muhammad ibn Salihu, *Ash-Sharhul Mumti'*, daru Ibn Jawzi, 3rd edition, 1433 AH, vol. 12, p. 471-474.

[45] Abu Dāud Sulaiman S. (d. 275 AH), (nd), *Sunanu Abī Dāud*, ed. Muhammad M. A. al-Maktabatul-'Asriyah, Beirut (nd); vol. 2, p. 269, no. 2230.

[46] Ibn Abdul-Barr (d. 463 AH), *Al-Istidhkar*, ed. Abdur-Razaq Al-Mahdiy, daru Ihyaut-Turath Al-Arabiy, Beirut, Lebanon, 1st edition (1421/2001), vol. 5, p. 88, Al-Baji Al-Qadi Abu Al-Walid Sulayman ibn Khalaf (d. 494 AH),

Istibrā'u under this topic is known as: "istibrā'u fi an-nasab"; i.e. seeking certainty of true lineage. Lik 'iddah, istibrā'u is a mandatory waiting to ascertain that a lady is not pregnant. Istibrā'u is done by on menstrual cycle because menstruation connotes absence of pregnancy. It could also done by waiting for sufficient period that will confirm absence of pregnancy or by birthing. However, unlike 'iddah which i mandatory religiously irrespective of conditions or circumstances of the lady, istibrā'u is required onl where condition of lady's womb requires certainty. One menstruation (ḥayḍah) suffices in istibrā'u unlik 'iddah.[48]

From the above discussion, it is submitted that decision of the Upper Shari Court held decisded ir Mabruka Amin v. Aminu Sanusi, where it held that: "She will do three monthly periods"; that the divorced Mabruka shall observe a three monthly is objectionable.[49]

5 Conclusion and Recommendations

Summarily, this paper studied khul'u, its nature and rites. The paper defined khul'u and discussed the nature of khul'u whether it is divorce (talāq) or rescission (faskh). It studied whether waiting of divorcee through khul'u ('iddatu al-mukhtali'ah) is mandatory and the period. The paper used analytical method and presented a concise overview on the khul'u. It also discussed some decided cases at the Sharī'ah court and the procedure provided under the Islamic family law for ladies to exercise these rights of separation Having studied the available legal texts, the opinions of companions and jurists of various schools of fiqh about khul'u, findings of the research revealed that khul'u is: "dissolution of nikāḥ at instance of the wife with or without 'iwaḍ (compensation)". That as regards its nature, khul'u is one irrevocable divorce (talqatun bā'inatun), and that no 'iddah is mandatory upon the divorcee (al-mukhtali'ah) through khul'u but special waiting of one menstrual cycle or one month called "istibrā'u". The paper recommends that courts, legal practitioners, academia, researchers, students of law and other stakeholders are advised to review juristic opinions and relate them to the original texts.

Al-Muntaqa Sharhu Muwatta Malik, ed. Muhammad Muhammad Tamir, maktabatut-Thaqafah Ad-Dininyah, Cairo, (nd.), vol. 5, p.303-305, Az-Zuhayli Wahbah (nd); *Al-Fiqhul-Islami wa Adillatuhu*, Damascus, vol. 9, p. 453, Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), *Al-Mawsuatul Fiqhiyyah*, vol. 19, p. 237.

[47] "man lā raj'ata 'alayhā, lā ta'taddu ilā biḥayḍatin"; see Ibn Uthaymin, Muhammad ibn Salihu, *Ash-Sharhul Mumti'*, daru Ibn Jawzi, 3rd edition, 1433 AH, vol. 12, p. 471-474.

[48] Ministry of Endowment and Islamic Affairs, Kuwait, (1420/2000), *Al-Mawsuatul Fiqhiyyah*, vol. 3, p. 167, 169-170.

[49] See Mabruka Aminu v. Aminu Sanusi, unreported judgment (CASE NO 144/015) (SUIT NO 110/015) DATE: 17-06-2015, delivered by his Lordship, Justice Malam Ibrahim Korau, Upper Sharia Court Dandume,