



KEY MONEY (BADL AL-KHULU): AN ISLAMIC PERSPECTIVE

Md. Habibur Rahman & Noor Mohammad Osmani

Senior Lecturer, School of Finance and Banking
Faculty of Economics and Management Sciences
Sultan Zainal Abidin University (UniSZA)
Terengganu, Malaysia

habiburrahman@unisza.edu.my, hrnizamee@yahoo.com

Associate Professor

Dept of Qur'an and Sunnah Studies, IRKH
International Islamic University Malaysia

, abusajid@yahoo.com abusajid@iiu.edu.my

Abstrak

The key money (badl al-khulu) refers to the amount that one pays to the other who forgoes his/her right to enjoy the usufruct of the real estate like house, shop and others. This paper intends to study the legal status of exchanging key money from the perspective of Islamic law. The study is qualitative in nature and an analytical method is employed to accomplish the study based on both classical and modern references of the topic. The study finds that the exchange of key money could be between the tenant and the landlord or between the current tenant and the subsequent tenant, or among all these three parties. If the exchange of key money is made during the lease period then it is permissible. However, if it is made after expiry of lease period then it is invalid because after termination of the right of tenant the landlord is more entitled to his/her possessions and he/she may do whatever wishes. Nevertheless, if the landlord consents to the exchange of key money, and the tenant makes a new lease agreement with him, then the exchange of key money is valid despite the expiry of the lease period.

Keywords: *Perspective, Key Money, Khulu, Badl al-Khulu, Islamic Law*

A. Introduction

Key Money is one of the important issues in contemporary life and thus uncovering its ruling from Islamic perspective has become

indispensable. It is permissible in customary practice albeit the conventional law does not allow it. The general law does not permit to receive the key money which the tenant pays to the owner at the commencement of lease agreement as an addition to the rental. Usually the court judges the landlord must return it to the payer, if the tenant sues the landlord and claims that he receives the key money from him. Therefore, it is essential to know the legal ruling of receiving the key money in Islamic law. It could be considered, as some assume, prohibited, illegal earning, eating up other's wealth unjustly, knowing that most of the time the volume of key money becomes bigger than the total rental amount that the tenant pays to the owner throughout the leasing period. This issue becomes complicated after the occurrence of housing crisis, when the amount of key money becomes larger and costly. Particularly, when the tradesmen start to crowd in some streets where the shops locate in a strategic position for trade and other purposes. These streets have become preferred to the offices rented for business and other independent professions with numerous activities in modern life. Thus, this paper endeavors to study the issue of key money from Islamic perspective, whether it is accepted in Islamic law or not, and to what extent it would be permitted.

2. Literature Review

Classically Ibn Ammar (d.1069AH) has discussed *khulu* by writing a short treatise namely '*Mufidat al-Husna li Daf' Dhann al-Khulu bi al-Sukna*'. This is one of the initial discourses that have been written in this topic. In this small book basically the author refutes the opinions of those

of Hanafi scholars who validate the exchange of *khulu*. The author opines the invalidity of the exchange of *khulu* and rebuts the derivation of its validity from the texts of Hanafi School. However, in this discourse the author focuses on the *khulu* of endowment properties (*awqaf*) only and there is no discussion made on the *khulu* of private properties and others. Similarly, al-Gharqawi (d. 1101AH) authored another short book on *khulu* namely '*al-Tanbih bil Husna fi Manfa'at al-Khulu bi al-Sukna*'. In this book the author discussed some issues related to *khulu* from the perspective of Maliki School.

At the contemporary time the Islamic Fiqh Academy of Jeddah (1988) has discussed the topic of *khulu* and resolved that the exchange of key money could be concluded between the tenant and the landlord, or between the existing tenant and the new tenant, or among all the three parties. The resolution of the Academy mentions that the exchange of *khulu* could be at the commencement, or in the middle, or after ending of the lease period. The discussion of the Academy concludes that if the exchange of *khulu* is made at the beginning or in the middle of the lease period, then it is permissible. But, if such exchange is made after termination of the lease tenure, then it is invalid because after expiry of the right of the tenant the landlord more deserves to do with his possessions whatever he/she wants. The contemporary scholar Zuhayli (1988) validates the exchange of key money if it is made during the lease period with the owner landlord while after expiry of the lease period forgoing the benefit and taking compensation for that is not permissible except with the consent of the landlord and concluding another agreement with the new tenant.

Al-Ashqar (1988) classifies the exchange of key money into three scenarios as it would be taken by the landlord from the tenant, or vice versa, or by the existing tenant from the subsequent tenant. In all these three cases the exchange of key money is valid if it is made during the original contractual period, while after the expiry of contract period receiving key money would be impermissible. Jamal (1988) mentions that the earlier scholars validated key money based on deferred transaction, or advance and delayed dowry (*mahr*) in the marriage, or based on sale by installment. But, the background of *khulu* at that time is different than that of *khulu* in the modern time. The previous scholars validated the exchange of *khulu* considering this amount included in the rental and thereafter the tenant pays monthly or yearly rental less than the actual rental. Thus, Ibrahim al-Dibu (1988) concludes that it is not permissible for the landlord to take any additional amount from the tenant by the name of key money. This is because he does not have any legal justification to receive such an extra amount for nothing and accordingly it would be deemed invalid income and consuming other's property unjustly.

3. Definition Of Key Money

The Arabic term for key money is '*badl al-khulu*'. *Khulu* is the verbal noun from *khala*, which means to vacate the place or vessel. In terminological sense it means isolation, privacy, etc. which is known as '*khalwah*'. In the later *fiqhi* books it has been used for usufruct of the *waqf* property which the tenant owns against the money he pays to the administrator of *waqf* for the renovation of *waqf* asset while there is no other fund available to renovate the *waqf* estate. The tenant will enjoy a

specific portion of the usufruct of *waqf* asset such as half, one third, etc., and the rental coming from the rest of the usufruct will be distributed among the beneficiaries of *waqf* (*Mawsu'ah Fiqhiyyah*, 1990:19/276). Al-Zurqani says that '*khulu*' refers to any kind of benefit in general, which is owned by the party who pays money in return for it (al-Zurqani, 6/127).

Al-Zuhayli (1988) defines key money as an amount of money which one pays to the other who waives his/her right to utilize the usufruct of real estate like land or house, store, shop and others. Al-Ashqar (1988) says in the term of scholars and jurists it is common that the word '*khulu*' refers to the usufruct itself which is owned by the person who makes the payment to the owner or to the previous tenant to get the right of settlement in the property. So, the word '*badl al-khulu*' refers to the amount equivalent to this usufruct. Ibrahim al-Dibu (1988) defines it as '*sirqafaliyyah*' which is a Persian word. It means, what is known nowadays, that the tenant forgoes some of his/her rights in the leased premises which he/she occupied, such as leasing that to the third party and earning some amount of money against it, pursuant to the mutual consent of both parties. It might be known as '*al-khulu*' derived from '*takhliyyah*' (*kh. l. w.*) which means to let what has in one's custody for others.

4. The Related Words Of *Khulu*

Hakr: *Hakr* means storing the food to get the higher price. Ibn Sayyidah says: *ihthakar* means accumulating the food, etc. which is eatable and holding that to sell when the price raises (*Lisan al-Arab*). Concerning the lease contract, *ihthakar* and *istihkar* refers to retain the land for

construction and/or plantation (Ibn Abidin, 5/20; *Murshid al-Hayaran*, 590). However, *hikr* means the retained property. According to the later scholars, it refers to the rental fixed for the *waqf* property which will be taken from the one who has construction or plantation in the property. If the property is transferred from one hand to another hand, then *hikr* would also be transferred, and the proceeds of that would be disbursed among the beneficiaries of *waqf* (*Mawsu'ah Fiqhiyyah*, 19/277).

Faragh and Ifragh: As per the usage of the Muslim jurists, these two words refer to relinquish the right obtained from the job that has remuneration from the *waqf*, etc. (Ibn Abidin, 3/386). They also mean that the owner gives up the right of key money for others with compensation. Although this is the sale of usufruct, it is named as '*faragh*' to differentiate from the unconditional form of sale which refers to the sale of ownership. Perhaps it is called '*faragh*' because its owner does not possess the ownership of the land, but rather he/she owns the right to hold the property and to enjoy some benefits thereof (Ilish, 2/250).

Jadik or Kadik: Mostly it means something that the tenant installs in the shop permanently like the construction, etc. It also refers to something which is installed temporarily like the racks, shelves, and so on. Also, it refers to the benefit acquired in return for the money that the benefit holder pays to the owner or caretaker of *waqf* to rebuild the *waqf* estate while no other fund is available to accomplish the renovation. In this case the financier may stipulate a portion of benefit and the right to settle for him in the rented property, and this is named '*khulu*' as

mentioned above. The difference between *jadik* and *khulu* is that the owner of *khulu* owns a portion of the benefit of *waqf* and does not own the assets that are installed in the shops of *waqf* with the fund of the tenant because they have been installed as *waqf* assets. But, *jadik* refers to the assets which are owned by the tenant of the shop (Ibn Abidin, 4/17; *Murshid al-Hayaran*, 596).

Kirdar: This is what the farmer or tenant makes in the *waqf* lands, such as construction, plantation, reformation of the land by supplying the soil, etc. with the consent of the creator or caretaker of *waqf*, and then it remains in his hand. So, *kirdar* refers to the assets owned by the tenant in the farming land (*Mawsu'ah Fiqhiyyah*, 19/278).

Mursad: This means renting out the house or shop of *waqf* and then allowing the tenant to construct or renovate the *waqf* property by his own fund while the *waqf* authority neither has necessary fund to build it, and nor finds someone who rents it with paying the rental in advance that would be enough to construct it. So, the tenant constructs it from his own fund intending to get it back from *waqf* assets or deduct it from the rental. Nevertheless, the construction that the tenant builds would not be his possessions rather it is for *waqf*. Hence, it cannot be sold out and the tenant also is not permitted to sell the debt incurred for construction. However, if the tenant intends to get out from the *waqf* shop he is allowed to get his debt back from the new tenant, and he enjoys the same right as the previous does. So, *mursad* refers to this debt established in the liability of *waqf* in this way. The difference between *mursad* and *khulu* is that the

owner of *khulu* has the right of ownership in the benefit of *waqf* while the owner of *mursad* has specific debt receivable from *waqf* (*Mawsu'ah Fiqhiyyah*, 19/279).

5. The Ambit Of Utilizing The Rented Premises By The Tenant

The Lease arrangement renders incomplete ownership. The tenant owns the benefit of the leased object throughout the lease period in return for the rental he pays to the owner. Scholars unanimously agree that what the tenant owns by the lease contract is the usufruct of the rented asset since they define lease (*ijarah*) as 'the contract which transfers the ownership of the usufruct against the compensation'. Hence, the tangible asset, such as the sold object, is not exchanged by the lease arrangement (Nawawi: 5/211).

In a lease arrangement the landlord is required to enable the tenant to utilize the leased object. Hence, if the object is the house then the owner has to surrender it and renovate it if necessary (*Murshid al-Hayaran*: 637). Utilization by the tenant means exploiting the benefit of the object in customary limit, taking care of the object, and at the end of the utilization giving it back to the owner (*Murshid al-Hayaran*: 654). So, the question is, If the leased premises is real estate, such as house, shop, etc. and the tenant wants to rent it to any third party without consulting the landlord, is he allowed, from shari'ah perspective, to do that or not?

The tenant is permitted to enjoy usufruct of the rented asset absolutely by himself or by third party. If the asset is the house, then he has the right to reside there alone or with others. Likewise, he may let others to dwell in the house through lease or lending, with or without

compensation. Also, he is allowed to put the baggage and other things in the house as long as it does not cause any harm for the house. Thus, since the tenant owns the benefit of the house, he is allowed to rent it out to others, with or without compensation (Ibn Rajab: 210; al-Sarakhsi: 15/130).

There are two scholarly opinions concerning the lease of the property by the tenant with more than the rental amount he has rented with. First, it is permissible absolutely, irrespective of whether the tenant adds to the leased asset something from his own fund or not. This is because the usufructs are in the same ruling of the physical assets, and hence by the contract it will be the possession of the tenant and it is handed over to him by surrendering the house. Thus, it will be like someone who buys something and owns it, and thereafter sells it and makes profit on it. This profit is valid for him because he earns it out of his valid possessions. This is the view of Shafi'i School (al-Sharbini: 2/350) and the correct stand of Hanbali School as well (Ibn Rajab: 210). Second, the tenant is not allowed to lease the asset with more than the amount he rented with. If he does so, he has to give out the extra amount as charity. But, if he fixes or adds anything thereof, then the extra amount will be valid for him. This is because the usufruct is not included in the liability of the tenant though he possesses the rented premises. Thus, if the rented asset is destroyed the tenant is not to compensate this. So, such profit would be earned without taking any risk and liability, while the Prophet (pbuh) forbade the profit without risk and liability. This is the stand of Hanafi School (al-Sarakhsi: 15/130) and one of the stands of Hanbali

School as well (Ibn Rajab: 210). However, the author prefers the earlier opinion for the argument mentioned above.

6. The Shari'ah Ruling Of Key Money

6.1 Receiving Key Money by Landlord from the Tenant:

Basically the rental is sufficient to enable the tenant to utilize the leased property. However, in some cases the tenant needs to pay key money and mostly its amount is many times more than monthly or annual rental amount. Furthermore, the landlord does not let the tenant to take over the property unless he pays key money. Currently it is a common practice in many countries in leasing shops, etc. that are suitable for business and industry. Nevertheless, this is not applicable in leasing properties intended for private housing although in some countries it is also common to pay key money in leasing the houses, etc. It is to be noted that the exchange of vacant space (*khulu*) could be made for various reasons, as follows:

First Reason: The case where the reason of receiving key money is that the landlord may need fund to prepare the land. Hence, he takes key money in advance from potential tenants so that he would be able to construct, provided that the tenant who pays key money will have a specific shop thereof. In this case both parties agree on a rental amount either monthly or annually, beyond key money, which will be often less than the market rental by half or more or less. The parties may also agree that the tenant will have the right to settle in the shop for a certain period which is in most cases long time such as fifty or sixty years. The custom

may also require that the tenant will be entitled to get the right to stay forever, though the tenure is not stipulated in the contract.

The majority like Hanafi, Maliki, and Hanbali Schools of Islamic law validate the key money, which the tenant pays to the landlord, considering it as the sale of a fraction of a benefit merely. The later scholars of Hanafi School permit key money and validate the practice, though the basic ruling of this School is that the usufruct is not to be exchanged alone because it is mere a right. Ibn Abidin states, many opine that the exclusive custom is to be considered. Therefore, key money of shops would be considered as an absolute right of the tenant. Hence, the owner of the shop is neither allowed to let him out from the shop, and nor to lease it to any third party. It has occurred in the shops of *al-Jamlun* at *al-Ghuriyyah*. When Sultan al-Ghuri built the shops he let the traders occupy them against key money, and specified for each shop such amount taken from them, and then registered them with the endowment fund (4/14-16; Ibn Nujaym, 114). Moreover, Abd al-Rahman al-Imadi opines that the amount which the tenant pays to the landlord to book the shop is permissible. Hence, the owner is neither allowed to let the tenant out from the shop, and nor to lease it to others (Ibn Abidin: 4/17).

The later scholars of Maliki School permit this type of key money. Shaykh Nasir al-Din al-Laqani is asked about the opinions of shari'ah scholars regarding key money of the shops which has become a norm among the people. People spend huge money in that until in some market the value of the shop reached at four hundred gold dinars. So, if the person dies and he has legitimate heirs do they deserve key money of his shop, pursuant to the custom? If a person, who does not have any

inheritor, dies, does the public treasury deserves it or not? If a person dies and owes a debt and he did not leave behind anything to settle this debt, will it be settled from key money of his shop? He replied: yes, if a person dies and has a legitimate heir he/she deserves the key money of his shop pursuant to the custom. If one dies without leaving behind any inheritor public treasury deserves it. Lastly, if one is indebted and dies without leaving behind anything to settle the debt in that case debt will be settled from key money of his shop. Shaykh Ilish and Shaykh al-Zurqani state that this is the reliable fatwa in this issue (*Fatawa Ilish*, 2:249/250). Al-Himawi said: there is no text in this issue from Imam Malik and his companions. Concerning this the reliable source is the fatwa of al-Laqani which is well accepted and practiced (1/137). Al-Gharqawi said: "This fatwa is issued based on the texts and its practice is approved unanimously. Also, it has become known in the east and west and being practiced".

Shaykh al-Bahuti opines that if the shops are booked with key money it will be owned by purchasers jointly, because it may happen that one buys half of the benefit, for example. However, the leasing of the vacancy of the shop is not valid, though selling, donating and settling the debt from key money is valid (Matalib Uli al-Nuha: 4/370).

Fiqhi Adaptation of this Exchange of Vacant Space (khulu):

While discussing *waqf*, al-Adawi of Maliki School mentions in his commentary on *al-Kharshi* that: say originally the rent is thirty dinars per annum, and then if *waqf* administrator charges key money he may fix it at fifteen, while the usufruct of the shop would be shared between the tenant

and the authority of *waqf*. The tenant will enjoy the space (*khulu*) of the shop, and the right of partnership would be shared based on the agreement between the tenant and the authority of *waqf* pursuant to their well-being.

Furthermore, al-Adawi states: the vacant space (*khulu*), which is mentioned above, is considered the possession of benefit (*manafa'ah*), and not the acquisition of usufruct (*intifa*). This is because the owner of usufruct enjoys it by himself, and does not transfer it to third party through lease, donation, lending, etc. On the other hand, the owner of benefit enjoys it by himself and also transfers it to other through any of these three ways. So, the vacant space (*khulu*) is considered the possession of benefit and therefore it is subject to the inheritance. Hanbali Scholar al-Bahuti mentions that since the vacant space (*khulu*) is purchased with money it will be considered the possession of (*manfa'ah*) benefit (Matalib Uli al-Nuha: 4/370).

Since the exchange of vacant space (*khulu*) is considered the sale of a fraction of the benefit, those who validate it they confine it to the *waqf*, and thus it would be valid only upon exigency. Moreover, they also validate it in some other specific cases with precise conditions (Ilish: 2/250; al-Himawi: 1/138). However, those who validate the sale of benefit absolutely they do not confine the validity of the exchange of *khulu* to the exigency. This is because the owner enjoys absolute right to undertake anything which he wants in his possessions and thus he has the right to initiate the exchange of *khulu* in his property. Shaykh Ilish (2/252) mentions since the exchange of *khulu* is valid in *waqf*, it would be then valid in the property owned absolutely without any confusion because the

owner is free to undertake whatever he wants in his possessions. The same is also understood from the words of the author of *Matalib Uli al-Nuha* of Hanbali School of law.

To sum up, the legal ruling of this type of *khulu* would be subject to the legal ruling of the sale of mere benefit. Since it is preferred that the sale of mere benefit is valid, the exchange of vacant space (*khulu*) also would be valid, but subject to some conditions as follows:

1. The proportion of each of the parties of the benefit is to be known, such as half for the owner and another half for the tenant. This should be clearly mentioned in the agreement concluded between the parties.
2. The period in which the tenant enjoys the benefit of the *khulu* is to be specified, long or short, but not to be eternal. Moreover, the contract shall not be free from determining the period, so that it does not become eternal, and then after expiration of the term the benefit of the property goes to the owner. Furthermore, the period agreed thereon should not exceed fifty or sixty years, so that the original shall not be forgotten.
3. The *khulu* shall be registered to the property registration office in the page of property per se.
4. The *khulu* shall be subject to the bequest. Selling, making a will and all kinds of valid transactions will be applicable thereto. However, in sale and other contracts the consent of the owner is required because the purchaser of the *khulu* will be the tenant for the rest of the utility. Nevertheless, the owner should not be coerced to lease to whom that does not satisfy him.

Key Money (Badl Al-Khulu): An...

5. The owner more deserves to enjoy the right of preemption in the *khulu* as much as possible, and this is to reduce the disputes between landlords and tenants, (Ibn Abidin 4/18, 5/142).
6. The rent which the tenant pays to the landlord against the portion specified for the landlord from the benefit of the property - namely '*al-hikr*', i.e. ground rent- shall be equal to the market rent. Therefore, it must be adjusted over the years by the experience of the experts, especially in the light of present monetary system where the value of paper money deteriorates constantly (*Fatawa Shaykh Ilish*).

Second Reason: There are certain laws and regulations which specify the right of the owner to rent his property for market rental, but rather for a mandatory price imposed upon him. Perhaps the law specifies his right to remove the resident upon the expiry of leasing period agreed thereon in the lease agreement. This is to enable him to make the deal with new resident, or with the first resident per se, with having full freedom for everyone to make the bargaining freely, which is the fundamental in the exchange contracts. Sometimes it is found that these laws or regulations may adjust the market rental of the property, and most of the time the price increases because of the high inflation rate for the paper currencies. The property owners realize this cost at the commencement of lease, and thus they demand key money from the tenants to obtain a major portion of the expenses that they incur in construction of the properties. In the case of having mandatory pricing for the property rentals, if pricing is less than the market rate then the property owners contrive to take key money to cover the cost partially. It might be hidden from eyes of the authorities,

but the landlords resort to it to recover the loss that they may suffer in most cases because of the mandatory pricing in comparison with the actual cost.

The Legal Ruling of this type of *Khulu*:

The legal ruling regarding the mandatory pricing is that the pricing is not permissible with less than the market rate, in order to achieve justice between the parties. If market rate increases the rental of the properties should be increased accordingly. Nevertheless, in all cases the freedom of the landlord should not be restricted to evacuate the property from the tenant at the end of contractual period. Since in some cases the circumstances require to extend the leasing by the enforcement of law such extension shall not be with less than the market rate.

Moreover, the rental shall be adjusted constantly to match with the market rate at that time; otherwise it leads to injustice to the owner from two sides. First, the proper rental will be decreased. Second, the value of the property will be affected by the rental amount. For instance, if the market rent is one hundred dinar for a property the value of that property will be ten thousands. Hence, if the owner is coerced to take fifty dinars only as rental, and then if he wants to sell the property he will not be able to do that with more than five or six thousands and that will be a big injustice to him.

However, if it is made compulsory to adjust the rental always in the mandatory conditions, the rental would reach at the equal point of the market rent and then the necessity to take this type of key money will be almost disappeared. Nevertheless, in light of the current situations in

Key Money (Badl Al-Khulu): An...

some Muslim countries that restrict the freedom of the owners on the way explained above, in that case what is the ruling if the owner takes the key money in order to enable the tenant to reside? What is the ruling for the tenant to pay that key money? And what are the consequences of that?

Concerning the owner, there is no objection from shari'ah perspective to take that because the property is solely his asset and he has full right to act in this as he pleases, including no entry for anybody in his property without compensation. This compensation can be taken legally as a commission, and it is not required to calculate it in the rental.

Some opine that it is not permissible except if key money is calculated in the rental. For instance, rental of the first year is five thousands dinars, and rental of the each of the subsequent year is one thousand only. So, the additional four thousands in rental of the first year would be considered as key money. The author prefers that it is not mandatory; rather if it is considered as commission just due to facilitate the tenancy it will be permissible. Therefore, it is also permissible for the tenant to pay key money to the landlord and no objection from shari'ah perspective arises thereof. This give and take of key money would result to the followings:

1. commission, perhaps a large amount, except to get the right to stay in accordance with the law operative in the country. In that case it would be binding from shari'ah perspective like the custom, rather it is the strongest.
2. In this scenario the tenant has the right to terminate the khulu and pass it to the subsequent tenant. However, it is not compulsory for the owner if it is after the expiration of the contractual period. Nevertheless, such termination will not be concluded without the

consent of the owner and the owner keeps the right not to permit without any fixed return or a certain percentage of the compensation of the termination.

6.2 Receiving Key Money by Tenant from the Landlord:

It might be necessary for the tenant to charge key money from the landlord due to several reasons.

First, the tenant deserves the *khulu* through legitimate way, such as he establishes the *khulu* with the consent of current or former owner, against the money that he has been paid pursuant to the contract concluded between them, subject to the lawful and common requirements. Also, the tenant may purchase the *khulu* from the former tenant and establishes his *khulu* through a lawful manner. Afterwards, the owner may want to restore the *khulu*, and to remove the tenant from his property by paying a monetary compensation to the owner of *khulu*, while the owner of *khulu* agrees on this. In this case the landlord is permitted to pay and the owner of *khulu* is allowed receiving. This arrangement would be a true and valid sale, irrespective of whether it is with the same amount with which the first tenant purchases the *khulu* or less or more than that, as long as the contracted period remains so that the *khulu* carries a portion of the value, and no problem arises thereof.

Second, the tenant is still in the original contractual period (i.e. before the legal extension required by some laws), hence he keeps the right to adhere to the contract and to refuse to vacate the place except with the compensation he pleases. He charges it from the owner because this

Key Money (Badl Al-Khulu): An...

compensation is in fact the price of selling the rest of the contracted period, and there is no hardship for them. For example, if one buys five heads of sheep and consumes four of them. Thereafter, if the seller wants to get back the fifth one, then the buyer keeps the right not to sell that except with the double of its purchasing price (al-Mughni, 5/438).

Third, the tenant acquires the right to settle in the property with mere legal status, where no shari'ah injunction is available, in a way that the tenant continues to stay in the property despite the disagreement of the owner and the termination of the original contractual period, which is named (the legal extension), and the owner has not taken key money from him at the commencement of lease, and he wants regain the property, then he and the tenant come to an agreement on a sum of money that some may name it as *khulu*. In addition, the mandatory pricing from the authority responsible could also be considered another reason for receiving key money from the landlord, where the price is less than the market rental.

The Legal Ruling of this type of *Khulu*:

According to the majority except Abu Yusuf and Maliki School, the key money which the tenant takes from landlord in order to terminate the lease within the duration of the contract, and to hand over back the rented item to the owner, is considered as invalid and impermissible income from shari'ah perspective. Imam Abu Hanifah opines that the dismissal (*iqalah*) or revocation (*faskh*) of the financial exchange contracts such as the

sale or lease is not valid except with the same price as the contract is concluded thereon, since he considers *iqalah* as revocation regarding the right of the contracting parties and a new sale regarding the right of third party (al-Kasani, 5/306; Ibn al-Humam, 5/247).

According to this view, the dismissal of sale and lease contract will be valid with the initial price. But if the parties in the contract stipulate any condition of increase or decrease, deferment, another genus of counter value, etc. then it will be invalid, irrespective of whether the dismissal is before or after possession. The dismissal is revocation of the contract in the right of the contracting parties. Since revocation is the dissolution of the contract, and the contract is concluded on the initial price, it shall be revoked with initial price and essentially the invalid condition will be void. So, if the contracting parties agree on an item of different genus which is less or more in value than the initial price, only the initial price is required to be settled, nothing else.

Nevertheless, this ruling is also based on the standpoint of Imam Zufar, who opines that the dismissal (*iqalah*) is the revocation of the contract in the right of all people. Moreover, this is also the stand of Imam Muhammad who opines that dismissal is invalidation of contract, except if it is not possible due to the necessity then it would be considered a sale contract. The same is also opined by Shafi'i and Hanbali Schools of law, who resolved that the dismissal is invalid in these cases because of void condition in the sale, lease, etc. Hence, according to them neither any increase nor any decrease is permissible (al-Suyuti, 152; Ibn Qudamah, 4/121).

Key Money (Badl Al-Khulu): An...

Imam Malik opines that the dismissal (*iqalah*) is a new sale, and hence any increase and decrease would be permissible thereof. This is also the view of Abu Yusuf who considers *iqalah* as a new form of sale relating to the contracting parties and others, except if it is not possible to make it sale, then it will be considered revocation (Ibn Rushd, 2/140). Pursuant to this opinion, it will be valid for the owner landlord to pay more than the rental amount received for the tenant who paid that earlier, in return for revocation of lease agreement and regaining back the rented asset.

Nonetheless, upon expiration of the lease contract if the landlord donates willingly some money to the tenant, nowadays which is known to the people as key money, in order to remove the tenant from the rented asset, according to scholarly consensus such action is permissible. This is because the donation is voluntary act and it has been made with free will. However, there is another opinion says that the tenant is permitted to take key money from the landlord if it is pursuant to the law enacted by the decree of the Sultan. The Sultan has the right to impose any action within his decision to ensure the public well-being. If he makes any mistake still the consequences of his decision would be considered valid.

Nevertheless, the author prefers the first opinion which says that receiving key money from the landlord is not permissible for the tenant. It would be considered eating other's property unjustly which violates the precise valid texts of the shari'ah. Also, it violates the established legal maxim that says 'the owner is more entitled to deal in his possessions'. Moreover, injustice is not allowed to the owners by the name of public well-being for the benefit of the tenants. It restricts the urbanization rapidity as the rich may lose the interest to make new constructions.

Consequently, it lessens the housing and causes harm to the landlords and the tenants as well.

6.3 Receiving Key Money by Existing Tenant from Subsequent Tenant:

The common and controversial case is that the tenant takes a portion of key money from a person other than the landlord, in exchange for waving his exclusive right to utilize the usufruct of the real estate in order to replace him in his place in the utilization. This may happen for several reasons as follows:

First, the existing tenant owns the benefit of *khulu* legally, such as he signs a valid agreement on that with the owner, or buys that from the owner through true and valid sale. In this case he has the right to sell it to others against whatever money he wants, little or more, as long as the duration of *khulu* remains. Nevertheless, who takes the key money is valid for him whatever he takes because he owns the benefit of *khulu* with the autonomous legitimate contract, hence he has the right to sell it to whom he wants, and all kinds of legitimate dealings are valid for him thereof (al-Dasuqi, 3/467; al-Zurqani, 7/75; al-Kharshi, 7/79).

Second, the tenant does not have any valid *khulu* in the place, yet he is still in the lease contract, and the duration of the original contract between him and the owner still remain which is concluded by the owner with his full freedom, with being subject to neither mandatory pricing nor legal extension. Hence, if the existing tenant takes money from subsequent tenant to evacuate the shop for him so that he can replace him, this financial compensation, which is known to the public as (*khulu*), is valid

Key Money (Badl Al-Khulu): An...

equally for both who takes and who gives. This is in fact is the sale of remaining duration of the deserved benefit through lease contract (Ilish: 2/250).

Third, the first tenant does not have any valid *khulu* in the shop, and his contract has expired, but he obtained the shop by paying money on behalf of his previous tenant so that it enables him to rent the shop. In this case, if this person wants to give the shop to others he may take money, justifying that he has paid much to the previous tenant. Sometimes public name this money as '*khulu*' whereas in fact it is not that *khulu* which is known as a term. The owner is not required to lease his shop, irrespective of whether with the customary rental, or less or more than that as after expiration of lease contract the owner is free to act in his possession as he pleases. If the person who takes the money cannot convince the owner to sign a contract with the new tenant, he has the right to claim what he has paid from the person takes that as he only paid him to get the benefit while it has not been actualized. On the other hand, if there is specific legal status prevents the tenant to take the *khulu* from the subsequent tenant such law shall be taken into account as it confirms a legitimate right. Moreover, it prevents the tenant from illegal exploitation as it is intended in the laws, which give him the right to stay in the place rented after expiration of contractual period, to remove harm from him, and not to arbitrate in the right of the owner, and not to eat the fruit of his effort unjustly.

The Legal Ruling of this Type of *Khulu*:

It is permissible for the tenant to receive key money from a person other than the landlord owner, in exchange for waving (*tanazul*) his exclusive right to utilize the usufruct of the real estate and to replace that person in such utilization. This is permissible provided that the waving is within the duration of lease contract. If the duration is one year and the tenant spent in the property six months for instance, it is permissible for him to forgo his right of utilization of the rented object and to allow other person to utilize that for the rest of the period agreed upon between the landlord and the tenant.

If the duration of the lease is one year (*per annum*) without specifying a maximum duration, and that is happening nowadays in lease contracts, it is permissible in the opinion of majority of the scholars except the Shafi'i School, yet it will not be obligatory without entering into a new duration or involving thereof. In that case it becomes like the contract of *mu'atad* (sale without uttering the word of offer and acceptance) subject to the occurrence of anything in haggling that indicates their consent to that. In that case it would be permissible for the tenant to forgo the rented object for another period stipulated and identified in the lease contract implicitly or explicitly, in return for a sum of money called nowadays key money. This is because the tenant is the owner of the usufruct of rented object during the period, and he has the right to enjoy fully the usufruct by himself or by others according to scholarly consensus. It means what is known today 'the subletting' is permissible and valid from shari'ah

perspective unlike the conventional law, since in *fiqh* right of the tenant is right in rem where in law it is personal.

Additionally, Muslim jurists validate the relinquishment and giving up the right against monetary compensation. The Hanafi School permits the resignation from jobs against money such as the job of leading the prayers, oratory, calling to the prayer, etc. based on the necessity and customary practice. Moreover, this ruling is given in comparison with the case whereby the administrator of *waqf* is allowed to quit the job in front of the courts in return for monetary compensation (Ibn Abidin: 5/14). The Maliki School also validates the exchange of *khulu* pursuant to the customary practice (al-Rabahi). Also, since the tenant owns the usufruct he has the right to forgo that against compensation such as the lease and without compensation such as (*i'arah*) lending without return (al-Qarafi:1/187). Similarly, the Shafi'i School permits resigning from jobs with or/and without compensation. However, as per the shari'ah, the relinquishment of usufruct of the leased asset by tenant would be subject to the leasing tenure agreed thereon. Thus, after expiration of lease contract if the tenant forgoes his right against compensation for the third party, its validity would be subject to the consent of the owner, as well as to conclusion of a new lease arrangement (Ramli:5/336). The Hanbali School, however, does not allow taking compensation on the right of particulars because these rights are for utilization only. So, none should be allowed to compete with individuals deserve these rights. Nevertheless, the particularization may exist in the prohibited items such as grape juice processed for liquor. It may also exist in the permissible things such as fossilization of the wastelands. However, the relinquishment of tangible

assets or usufructs, which are owned and possessed, is permissible against compensation (Ibn Rajab, 192; al-Mughni, 5/42).

Furthermore, the Islamic Fiqh Academy of Jeddah studied the issue of key money (*badl al-khulu*) and accordingly issued its resolution no (6/8/88) relating to key money. The Academy resolved as follows:

Firstly, the agreement on key money could be concluded in four ways. First, it could be between the landlord and the tenant at the commencement of the contract. Second, the agreement could be between the tenant and the landlord in the middle or upon expiry of lease period. Third, the agreement on key money could be between the existing tenant and the new tenant during or after termination of the lease period. Fourth, the agreement could be of the new tenant with both the landlord and the current tenant before or after end of the lease period.

Secondly, as per the shari'ah, no issue arises if the landlord and the tenant make an agreement that the tenant will pay a specific extra amount added to the regular rental amount, which is known in some countries as *khulu*, provided that this specific amount would be deemed a portion of the rental for the duration agreed thereupon. In the case of revocation the provisions of the rental would be applied to this amount.

Thirdly, if there is an agreement between the landlord and the tenant during the lease period that the owner will pay a sum of money to the tenant in return for forgoing his right of acquisition of the benefit for the rest of the period, such key money is permissible in shari'ah. This is the compensation for the willing relinquishment of the tenant his right in benefit what he has sold it to the landlord. However, if the lease tenure expires and has not been renewed explicitly or implicitly, then the key

money would be impermissible because after expiration of the right of the tenant the owner would be more entitled to his possessions.

Fourthly, if the initial tenant and the new tenant make an agreement during the lease period on relinquishment of the right for the rest of the period, in return for an additional amount to the regular rental amount, such key money is permissible in Shari'ah. Nevertheless, in this case the requirement of the contract concluded between the landlord and the first tenant shall be observed. Also, the requisite of the existing law that is in accordance with the shari'ah shall be taken into consideration. However, if the agreement is made between the existing tenant and the new tenant after expiry of the lease period, then key money would not be valid, because in this case the right of initial tenant in usufruct of the asset is terminated (*Majallat al-Majma*: 1988, 4/2330).

7. Conclusion

The owner has the right to receive key money if he/she initiates *khulu* and starts to sell a portion of benefit of the property explicitly, pursuant to the custom that allows creating *khulu* in the property. In fact, the custom permits the exchange of *khulu* in the shops, not in the residents. Receiving key money is permissible if it is within the lease tenure with landlord owner. If the lease tenure expires, it is neither permitted to relinquish the usufruct nor to receive monetary compensation against it, except with the consent of the owner of property, and entering into another contract with new tenant. Otherwise, receiving the compensation will be unlawful trade and that is prohibited. In this

case who waives the usufruct will be considered usurper and eater of people's wealth unjustly, as well as the aggressor on the right of others.

If the tenant purchases *khulu* from the owner explicitly he will be the owner of that and he shall have the right to inhabit in the property, but he has to pay the rent of other part of benefit. Nonetheless, that rent shall be modified after the end of original contractual period, so that it matches with the customary rental constantly. The tenant has the right to sell his *khulu* to the owner or anyone else, and it can be inherited from him. Moreover, if the shop owner takes money from the tenant, excluding the rent, in order to enable him to get the shop without establishing the right of *khulu* explicitly, this would be the same as the *khulu* that establishes the right to stay. Then the tenant keeps the right to sell the *khulu*, to receive key money and to inherit from him, as long as the custom or the law does not prevent from that.

References

- Al-Ashqar, Muhammad Sulayman.(1988). Badl al-Khulu. *Majallat Majma' al-Fiqh al-Islami*, (1988). Vol. 4, Part: 3.
- Basha, Muhammad Qadri. (1955). *Murshid al-Hayaran ila Ma' rifat Ahwal al-Insan*. Baghdad: Matba'at al-Ma'arif.
- Al-Dibu, Ibrahim Fadil. (1988). Hukm al-Shari'ah fi Badl al-Khulu, al-Sarqafaliyyah. *Majallat Majma' al-Fiqh al-Islami*, (1988). Vol. 4, Part: 3.
- IbnAbidin, Muhammad Amin ibn Umar. (1327AH). *Radd al-Muhtarala al-Durr al-Mukhtar*. Egypt: Mustafa al-Babi al-Halabi.
- Ibn al-Humam, Kamal.(1326AH). *Fath al-Qadir, Hashiyah ala al-Hidayah Sharh al-Bidayah*. Egypt: Al-Matba'at al-Khayriyyah.

Key Money (Badl Al-Khulu): An...

Ibn Ammar, al-Hasan al-Shurunbalali. (1992). *Mufidat al-Husna li Daf Dhann al-Khulu bi al-Sukna*. Beirut: Dar Ibn Hazm.

Ibn Nujaym, Zayn al-Abidin Ibn Ibrahim. (1968). *Al-Ashbah wa al-Naza'ir ala Madhhab Abi Hanifah*. Egypt: Mu'assasat al-Halabi.

Ibn Rajab, Abdur Rahman. *Al-Qawa'id fi al-Fiqh al-Islami*. Egypt: Maktabat al-Kulliyat al-Azhariyyah.

Ilish, Abu Abdullah Muhammad. (1958). *Fath al-Ali al-Malik fi al-Fatwa ala Madhhab al-Imam Malik*. Egypt: Mustafa al-Babi al-Halabi.

Majallat Majma' al-Fiqh al-Islami, (1988). Vol. 4, Part: 3.

Al-Mawsu'ah al-Fiqhiyyah. (1990). Kuwait: Ministry of Awqaf and Religious Affairs.

Al-Nawawi, Muhyi al-Din.(1985). *Rawdat al-Talibin*. Beirut: al-Maktab al-Islami.

Al-Qarafi, Shihab al-Din. *Al-Furuq*. Beirut: Dar al-Ma'rifah.

Al-Sarakhsi, Abu Bakr Muhammad. *Al-Mabsut*. Egypt: Matba'at al-Sa'adah.

Al-Sharbini, Muhammad al-Khatib. (1958). *Mughni al-Muhtaj ila Ma'rifat Ma'ani Alfaz al-Minhaj*. Egypt: Mustafa al-Babi al-Halabi.

Al-Suyuti, Jalal al-Din. *Al-Ashbah wa al-Naza'ir fi Qawa'id wa Furu' Fiqh al-Shafi'iyyah*. Egypt: Isa al-Babi al-Halabi.

Al-Zuhayli, Wahbah.(1988). *Badl al-Khulu. Majallat Majma' al-Fiqh al-Islami*, (1988). Vol. 4, Part: 3.