

## **Khula Between Family Code Modified by Order 05/02 and Islamic Jurisprudence**

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### **ABSTRACT**

*Just as a man can resort to divorce when he does not love his wife, the Islamic Law (Sharīa 'h) gives the woman the right to end her marriage, if she does not love her husband. However, she will have to repay her the dowry paid to her unless there are circumstances in which a judge could force his husband to pronounce Ṭalaq without compensation from his wife. The Family Code puts an end to an abuse of the rule by judges who demanded the consent of the husband. She asserted that the demand for Khula' was no longer conditional on the husband's acceptance. As a result, the expression "without the consent of the husband" was introduced in 2005, in Article 54 of the Family Code.*

**Keywords:** Ṭalaq , Sharīa 'h, Khula' , Family Code, Article 54

## 1. INTRODUCTION

Islamic law (Sha' ria) has focused on the family as the basic cell of society. It stated provisions that control ties and regulate the relationship between spouses and between children and assets and all siblings. Allah said:

"وَاللّٰهُ جَعَلَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا وَجَعَلَ لَكُمْ مِنْ أَنْفُسِكُمْ بَيْنًا وَحَقْدَةً وَرَزَقَكُمْ مِنَ الطَّيِّبَاتِ ؕ أَفَبِالْبَاطِلِ يُؤْمِنُونَ وَبِنِعْمَتِ اللّٰهِ هُمْ يَكْفُرُونَ."

"And Allah made for you mates of your own nature, and made for you out of them sons and daughters and grandchildren"<sup>1</sup>

The more cohesive the building is between members of a family, the stronger the community is issued of it. However, this relationship may be distorted, and make life almost impossible, which leads individuals sometimes to infringe on the sanctity of Allah. The reconciliation between the spouses is then initiated to preserve the family structure if the schism intensified. But if all attempts to reconcile failed, the husband has the right to terminate this marital bond with his own will within the limits of Allah's law. The woman may also request the termination of this association by filing a claim for divorce for the damage she suffers, while receiving a sum of money as compensation for it.

On the other hand, woman may hate the continuation of the marital relationship. It is Allah's mercy to them having prescribed Khula' against a sum of money paid to the husband. Nevertheless, the scholars' views differed as to whether Khula' is dependent on the husband's acceptance or not.

Indeed, the Algerian legislator dealt with the issue of Khula' in article 54 of Law No. 84/11 according to the opinion of jurists who say that the husband's consent is necessary and this article is yet still very vague did not specify the subject of Khula' or its nature. This opinion remained until the early of the nineties where judicial resolutions revealed the point of view in connection with the Khula' and issued decisions of the Supreme Court to remove without the consent of the husband. This was the beginning of change and preparation for the amendment of the family code, especially after Algeria ratified the SIDAW. This led the Algerian legislator to amend the code by issuing the order 05/02, where it authorized women to divorce without the husband's consent, while preventing the husband from blackmailing her by asking for a certain amount of money as allowance.

Article 54, Order No. 05/02 of 27 February 2005 stipulates: A wife may, without the consent of the husband, have the right to repudiate herself against a

financial compensation. If the couple does not agree on the payment of the divorce, the judge shall make a judgment that won't exceed the value of the Mahr or dowry at the time of the verdict.

Despite this amendment, the Algerian legislator did not address the substantive provisions of the Khula', and this refers us to the original source of personal status legislation which is the Qur'an and the Sunnah of the Prophet Muhammad, as it is not possible to understand its provisions well without reference to Islamic law. All Algerian constitutions since independence until the last amendment in 2016 adopted that Islam is the religion of the state. Article 222 of the family code states also: all that is not mentioned in the text of this law ought to be referred to the Islamic law provisions.

The importance of the subject is due to its impact on the ground through the high percentage of marital disconnection through Khula', which still raises the interest of those interested in Islamic jurisprudence, legal and sociologists, as if Khula' is the cause of high divorce rate and not the religious, legal, economic and social system is responsible about family instability.

To this end, the following problem arises:

To what extent the Algerian legislator in the organization of Khula' in accordance with the provisions of Islamic law as the real and official source of it?

We divided the research into two requirements:

**The first Subtitle: the definition of Khula', its legitimacy and its provisions**

- 1- Definition of Khula' literally and terminologically
- 2- Judgment of Khula' and the reason from legislating it

**The second Subtitle: the legal adjustment of the Khula' and distinguish it from other systems**

- 1- The legal adjustment of the Khula'
- 2- Distinguishing Khula' from other similar systems

**Hypotheses**

**First Hypothesis**

The Khula', this right of the wife to divorce (to repudiate) of her husband is a possibility granted by the Moslem right through the Koran, in particular surah 2-229, but Muslim jurists demanded the consent of his husband.

## **Second Hypothesis**

The new amended Family Code 05/02 gave women more right, Khula‘ does not depend on the husband's acceptance.

### **2. First Subtitle: the definition of Khula‘, its legitimacy and its provisions**

#### **1- Definition of Khula‘ literally and terminologically**

##### **\*First: Khula‘ literally:**

Khula‘ comes from Arabic: Khal’a which means to remove, some linguists consider it synonymous to this verb, i.e removing an outfit, a shoe. It also refers to repudiate one’s wife, i.e splatted with her or divorced her<sup>2</sup>. Ergo, it is divorce or release from restriction; that is because the woman is the man's dress and vice versa according to what Allah said in the holy Qur’an:

**"they are your garment and you are their garment"** <sup>3</sup> .

" هُنَّ لِيَاْسٌ لَّكُمْ وَأَنْتُمْ لِيَاْسٌ هُنَّ "

##### **\*Second: terminological concept of Khula‘**

The opinion of the Fuqaha’’ is that Khula‘ was used to repudiate the marriage.

##### **The Maliki doctrine:**

This divorce Khula‘ procedure finds its juridico-religious legitimacy in the ancient Maliki law texts which serve as a reference for legal practice.

It is the divorce with compensation, and this is the origin of it, and may be without any compensation if it is with word Khula<sup>4</sup>.

According to Imam Malik, as mentioned by the writer of Dalīl-ul-Sālik ‘Ala Madhhab Al Imām Mālik, (دليل السالك على مذهب امام مالك) is a divorce with a reward, and it is allowed. It is considered as an irrevocable divorce<sup>4</sup>.

##### **The Hanafis doctrine**

And for the Hanafīs doctrine, Khula‘ is defined literally as the removal of the right marriage holding, he meaning the compensation that only the wife is committed to give in return<sup>5</sup>.

##### **\*Third: definition of Khula‘ in Algerian law**

The previous **article in code of 11/84 states:** the woman has the ability to divorce herself from her husband on an agreed sum of money. If they don’t agree on it, the judge shall make a judgment that won’t exceed the value of the dowry at the time of the verdict.<sup>6</sup>

It means that the final decision to accept or not this Khula‘ procedure is up to the husband.

After the amendment of the Family Law by **Order 05/02**: the woman has the ability to divorce herself from her husband, without the consent of her husband, on an agreed sum of money. If they don't agree on it, the judge shall make a judgment that won't exceed the value of the dowry at the time of the verdict.<sup>7</sup>

**\*Fourthly: bases and conditions of Khula‘**

- The following conditions are required so that Khula‘ can be achieved: That the marital relationship is real or valid, otherwise, Khula‘ will not be achieved as in the case of corrupt marriages.

- It should be verbally pronounced indicating redemption, and in this it differs from divorce according to the Ḥanafīs.

- Khula‘ should be against compensation handed by the wife, whether was money or valuable thing. If it is mentioned, there is no problem, but if it is not mentioned, then the intention of the husband is to be consulted. If he intended it Khula‘ then it will be considered Khula‘ and the reward shall be the equivalent of her dowry with her acceptance. Otherwise, if he intends it a divorce, it will be an irrevocable divorce without the woman's approval; but if he had no intention, nothing happens consequently.

- Wife's satisfaction with him if issued by the husband, and husband satisfaction if issued by the wife.

- That the marital relationship is real or valid, otherwise, Khula‘ will not be achieved as in the case of corrupt marriages.<sup>8</sup>

- **The husband**: he is required qualification and not to harm the wife in a way to push her to Khula‘ instead of divorce. The testimony of some trustworthy people would be sufficient to prove the harm. If there is evidence of harming the wife, the judge sentences accordingly divorce instead of Khula‘.

- **The wife**: she must have the conditions of: qualification, mind and maturity; and on her choice not to be constrained<sup>9</sup>.

- **The ransom or the compensation**: it is the money paid by the wife requesting for Khula‘, provided that it is money of which is legally used, with a non-specified amount. The judge, however, has the prerogative to interfere in case of conflict to impose a dowry at the time of the judgment.

- **Condition of compensation paid in Khula‘**:

The compensation in Khula‘ should be among what could be sold and possessed; Khula‘ is not legal with money that is ḥarām or impure; it is stipulated in the compensation for Khula‘ what is required in the Mahr (dowry).<sup>10</sup>

The compensation for Khula' should not lead to an impermissible decision, like when the husband refuses Khula' except when his wife leaves the house she is divorced in then not to dwell it during her time of 'Idda, what makes it a false condition.

- Khula' can also happen through benefits or concession on rights, such as the woman's waiver on alimony or custody, or to commit her to expend on the husband and her son. Or even by allowing her repudiated husband to dwell a house she owns for a determined period of time. The compensation on Khula' is more likely similar to donation because it is in return of the dismissal of the wife, and it is not money, therefore Khula' can occur with a non-specified money, like when she makes Khula' on a car without precisising the brand, or against the profit from a commercial business where the husband may take it if the business is profitable or he gains nothing otherwise, and must divorce as he had approved this money known by Gharar. (رغ)

-The pronunciation or the formula: it is the use of every term that delineate the meaning of Khula', such as what is derived from the word Khula' or ransom or metaphorical like repudiation.

## **2 - Judgment of Khula' and the reason from legislating it**

### **\*Judgment of Khula'**

Evidence of the Khula' from the Holy Qur'an

*Khula' is permitted in Islam, as Allah said: " And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah. But if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allah, so do not transgress them. And whoever transgresses the limits of Allah "*

قال الله تعالى: "وَلَا يَجِلُّ لَكُمْ أَنْ تَأْخُذُوا بِمَا آتَيْتُمُوهُنَّ شَيْئًا إِلَّا أَنْ يَخَافَا أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَإِنْ خِفْتُمْ أَلَّا يُقِيمَا حُدُودَ اللَّهِ فَلَا جُنَاحَ عَلَيْهِمَا فِيمَا افْتَدَتْ بِهِ تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَأُولَئِكَ هُمُ الظَّالِمُونَ" <sup>11</sup>.

And it is not lawful for you (men) to take back (from your wives) any of your Mahr which you have given them, except when both parties fear that they would be unable to keep the limits ordinate by Allah. Then if you fear that they would be unable to keep the limits ordinate by Allah, then there is no sin on either of them if she gives back the Mahr or part of it for her Khula' The evidence is clear in the

verse": then there is no blame upon either of them concerning that by which she ransoms herself"

**In the authentic Hadith:** he Companion, Ibne ‘Abbās (Peace be upon him) said: The wife of Thābit ibne Qays came to Allah’s Messenger (Peace be upon him) and said:

*“O Messenger of Allah! I find no fault with Thābit ibne Qays in his character or religion, but I would hate to act in disobedience to Islam.” The Messenger of Allah (Peace be upon him) said to her: “Will you return to him the garden [that he gave you as a dowry]?” She replied: “Yes.” So Allah’s Messenger (Peace be upon him) said to Thābit: “Accept the garden and divorce her with one pronouncement in another narration, Ibne ‘Abbās said: “He commanded him to divorce her”<sup>12</sup>.*

عن ابن عباس، أن امرأة ثابت بن قيس قالت لرسول الله ﷺ: "يا رسول الله، زوجي ثابت بن قيس ما أعيب عليه في خلق ولا دين، ولكن أكره الكفر في الإسلام أي: أكره عدم الوفاء بحقه لبغضي له فقال رسول الله صلى الله عليه وسلم: أتردين عليه حديقته، وهي المهر الذي أمهرها، فقالت: نعم، قال رسول الله ﷺ لثابت: اقبل الحديقة، وطلقها تطليقة.

**From the Ijmā’:** The scholars and jurists of Islam are agreed that the Khula‘ is legislated and allowed when there is a need<sup>13</sup>.

But if she asks for a divorce for no reason, she will be deprived of the smell of Paradise according to the Prophet: “Every woman who asks her husband to divorce her for no reason, she will be forbidden from the smell of Paradise<sup>14</sup>”.

#### **\*The reason from legislating Khula‘:**

A woman may marry a man with whom she cannot later continue her life for psychological reasons, and she becomes concerned of being unable to set the limits of Allah, so Khula‘ is a way out for her since she cannot divorce herself.

The divorce system in Islam is the perfect example in respecting women's will to continue or terminate the marital relationship.

This measure is only for family stability; because Islam does not allow hypocrisy in family relations, fearing deviation of women from virtuous morality.

Despite the legislation of Khula‘ In Algeria, but it happens that the Khula‘ is used by women in the place of divorce for damage because it allows not to confess, nor consequently to prove, the harm suffered, whether it is the sexual impotence of man, violence, or the abandonment by the husband of the matrimonial home or the marriage with another woman and also because it paradoxically costs less than the divorce for injury;. Khula‘ offers a solution to Algerian women who, suffering

from the prejudicial attitude of their husbands without being able to provide proof, were previously legally incapable of divorce.

Indeed, the most common argument against the Khula' law is to say that women will destroy their homes by using this right to divorce under the influence of emotion, and that they may regret it to the extent that this proceedings entails an irrevocable divorce. Not giving women the right to divorce is therefore the best way to protect them from themselves and the mistakes they may make by using this right inconsistently. The argument that women would misuse the power thus given to them is not new since it is found in many societies to justify male domination

### **Second Subtitle: the legal adjustment of the Khula' and distinguish it from other systems**

1 - The concept of Khula' through judicial decisions:

In this subject, we will attempt to expose the opinions of jurists, their differences about the consensual separation between spouses or not.

There were two trends in the Supreme Court through its decisions: the first decision of 21/12/1988 states: the judge ruled that the husband's acceptance of divorce is obligatory and that the judge has no authority to force the couple.

And the second decision dated 21/11/2000 that does not require the consent of the husband. The Supreme Court decision states: In principle, that the husband's acceptance of the principle of Khula' or the amount requested by him is unconditional in order to prevent extortion and exploitation between the spouses. For this reason, the Algerian legislator had to decide on the case that aroused great controversy among the judges at and it is also possible to ask the following question: Is it permissible for a husband to ask for a Khula' allowance instead of the dowry he has given to her?

As for reference to the family law, we find that he took the Maliki doctrine so that he left the question of determining against the Khula' to the two parties, which have full freedom in estimating the amount. If there is agreement between them, there is no problem, but if there is no agreement between them against the Khula', then he gave the legislator the right to judge. To intervene to resolve this dispute and appreciate it provided that it does not exceed the friendship ideals.

2- Distinguishing Khula' from other similar systems

\* Nature of Khula':

According to the Fuqaha', Khula' is a consensual contract that requires the husband acceptance. Others argued that it is the wife's right requiring no husband's



consent. The Fuqaha' differed also as to whether it was considered as repudiation or a divorce. The Algerian legislator considered the Khula' a one-time irrevocable divorce.

Returning to the stages of Khula' in the Algerian family code, we see that the jurisprudence before 1992 stipulated that the husband's consent to divorce is required. The code of 84 did not state this. However, in the aftermath of 1992, the legal judgment did not require the husband's consent. In the new amendment, in order to avoid any ambiguity, it expressly states that the husband's consent is not to be considered.

**\*The difference between Khula' and divorce:**

It is clear from the above that the Algerian legislator allowed the wife to resort to the Khula' in case she disliked the husband because the Khula' started to hate him, in contrast to the divorce that started to harm.

In order to make a comparison between Khula' and divorce, the common aspects of agreement are:

Both are request for divorce by the wife

Both are made by the judge without the husband's consent

Both are a one-time irrevocable divorce

Both are non-appealable

**\*Aspects of disagreement:**

The wife hands over an amount of money to her husband in Khula', whereas in divorce, she does not pay him, on the contrary, he is obliged to pay a sum of money against the harm she suffered unlike in Khula' where the husband caused no damage to his wife.

**\* Effects of the difference between divorce and Khula'**

Scholars differed regarding Khula' as to be considered as a marriage annulment or a divorce. This difference resulted considering Khula' as repudiation, so that 'Idda (This is the time a woman expects and she is not allowed to marry after the death of her husband or divorce) she will be accordingly with one period to purify the uterus because In a narration Ibne 'Abbās (R.A) said: "The wife of Thābit Ibne Qays took a Khula' from him — so, the Prophet made her 'iddah (waiting period) one menstrual cycle. In this case either, Khula' won't lack the number of divorce times. While the provisions of the Islamic Sharī'a'h that the three menstrual cycles is the waiting period in divorce is that it gives the husband a chance to reconcile. However, Algerian family law considers Khula' a divorce of the same duration, and it is also necessary to follow the procedure of reconciliation between the spouses.

In Khula‘, the rights of both partners are dropped, including further dowry (Mahr) and the mandatory alimony, except the three months alimony of ‘Idda as it took place right after divorce, and it remains in the custody of the husband. The latter must provide accommodation to the two beneficiaries without the negligence maintenance as it is not set in the judgment, and the custody may not be equivalent to Khula‘ and waiver on it is void.

If it turns out that the wife is pregnant, then in every case, the ‘iddah extends up until the baby is born. Once the baby is born, then the ‘idda (waiting period) finishes, and she may re-marry. And, if it was a third Ṭalāq, she may not (of-course) remarry her husband.

#### **4. RESULTS AND DISCUSSION**

That the Algerian legislator has adopted the idea that the separation, which passes through the Khula‘, is considered a divorce; not a dissolution; because Article 54 is found in the chapter on divorce, while the opinions of Muslim jurists divided into two parts.

Khula‘ is considered a form of divorce, and it is an inherent right of the wife. Right is the power to hold anything unconditionally at any time; on this basis, Khula‘ is not a contract between the two partners to unplug the marital bond, it is yet an inherent right to the wife to which she recurs whenever she wants if marital life is impossible against money she pays to the husband. She does not need an official council nor does the husband’s consent according to Ibne Rushd, the woman has the individual willing right in making Khula‘ against a sum of money she pay. This is the culmination of the Supreme Court’s jurisprudence since 1992.

We can note the difference between Islamic jurisprudence and the Algerian family law. Islamic legislation has pointed out all that is related to divorce, while we have noted shortcomings in the **Article 54 of the Family Code, for example:**

- 1 - Algerian legislator did not know Khula‘ as a concept to be given as a right in the hands of the wife, but entered directly to his conditions
- 2 - Algerian law has not been subjected to the conditions that must be provided of validity of the contract of Khula‘ and only stressed the need for an agreement between the spouses has been allocated one article and one of the dislocation, making it ambiguous only by reference to the provisions of the Sharia according to Article 222
- 3 - Did not specify the minimum amount of Khula‘ money
- 4 -The Algerian law does not provide any text to show the effects of Khula‘ However, the Algerian legislator did not consider Khula‘ to be an irrevocable divorce, and did not show what could be alternative to Khula‘ such as the children’s custody and issues related to their rights and this is in the interest of them.

On the other hand, divorce proceedings (Khula‘) are difficult, if not impossible, in other cultural contexts where women are not economically assisted by their families. This

situation led some feminist activists from this country to demand the removal of the financial compensation allowing women to buy back their divorce from their husbands.

## 2. CONCLUSION

The purpose of marriage is to enable spouses to practice Islam well, especially in their marital life. If one of them does not manage to lead this life of a couple in good conditions, then the Koran brings its verdict in verse 229 of Surah 2: *“So if you fear that both cannot comply with Allah's orders, then no grievance against them if the woman frees herself from her marriage by paying some sum”*.

Women in many old societies have no consideration or independent entity. In France, a meeting was held in 586 AD to discuss the question: is the woman human or not?! After a discussion, they decided she was a human being, but she was created to serve men.

. Islam has given women the freedom to decide on the continuation of conjugal life, just like his husbands; because the Islamic law has honored women

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- <sup>5</sup>. Shams Uddine ibne Arafa; Hāshiat-ul-dussūki ala sharḥ al Kabīr; Issa Al - Babi Al - Halabi Press and its Partners; 347 /2. Check with him: Abdur rahman al Jzaeiri; Fiḥ al Madhahib al arb’a; dār Ibn Ḥazm; Bierut; Lebanon; the first Edition 2. p1026
- <sup>6</sup>- عرف الخلع في قانون 11/84 "يجوز للزوجة أن تخلع نفسها من زوجها على مال يتم الاتفاق عليه، فإن لم يتفقا على شيء يحكم القاضي بما لا يتجاوز قيمة صداق المثل وقت الحكم.
- <sup>7</sup> - أما بعد التعديل قانون الأسرة بالأمر 02/05: يجوز للزوجة دون موافقة الزوج، أن تخلع نفسها بمقابل مالي، وإذا لم يتفق الزوجان على المقابل المالي للخلع يحكم القاضي بما لا يتجاوز قيمة صداق المثل وقت صدور الحكم.
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