

Khul' as a Mechanism for Realizing Equality in the Dissolution of the Marital Bond Under Algerian Family Law

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Abstract

Islamic law has vested the power of divorce in the husband's hand and granted him the right to dissolve the marital bond according to his will whenever he deems it necessary. Nevertheless, it has not neglected the interests of the wife; rather, it has provided her with two legal avenues to seek release from the marital relationship upon her request when marital life becomes untenable and discord prevails between the spouses.

In a similar manner, Algerian family legislation has been influenced by this principle and has sought to enshrine it through Articles 53 and 54 of the Algerian Family Code, which regulate the dissolution of the marital bond based on the unilateral will of the wife, namely judicial divorce and "khul'".

This is particularly evident in the Algerian legislator's attempt to establish "khul'" as the counterpart to the husband's unilateral right of divorce, while at the same time striving to preserve, to a certain extent, the principles and values derived from Islamic Sharia upon which the legislation is founded.

Keywords: Divorce Authority, Marital Bond, Unilateral Will, Khul', Algerian Family Code.

Introduction

Under the former Algerian Family Code (prior to the 2005 amendment), the power of divorce was vested in the husband, who could dissolve the marriage through his unilateral will. The wife, on the other hand, could only seek judicial divorce through the courts. As for "khul'", it could only be effected with the husband's consent, which was a mandatory requirement. The judge had no authority to override the spouses' agreement in the absence of the husband's approval. Consequently, "khul'" was regarded as a consensual bilateral contract of exchange, typically concluded when the wife offered a sum of money recognized by Islamic law in return for her release from the marriage.

However, the most recent amendment to the Algerian Family Code, introduced by Ordinance No. 05–02 of 27 February 2005, modified the mechanism of “khul” through Article 54. Under the amended provision, the wife may petition the court directly for “khul” in exchange for financial compensation, without requiring the husband’s consent. In other words, “khul” has become the counterpart of divorce, thereby seeking to enshrine the principle of equality between the spouses in the dissolution of the marital bond.

This development raises the following question: **To what extent has the Algerian legislator succeeded in achieving parity and equality between men and women in the dissolution of the marital relationship through unilateral will?**

This research paper seeks to answer this question through four main sections: unilateral divorce by the husband (First), unilateral “khul” by the wife (Second), the transformation of “khul” from a legal concession into an established right (Third), and manifestations of equality between spouses in the dissolution of the marital bond (“Fourth”).

First: Divorce through the Husband’s Unilateral Will

Article 48 of the Algerian Family Code, as amended by Ordinance No. 05–02 of 27 February 2005, provides that a marriage may be dissolved by divorce initiated by the husband, by mutual consent of the spouses, or upon the wife's request within the limits prescribed by Articles 53 and 54 of the same Code.

Article 48 thus recognizes divorce as one of the legal means of dissolving the marital bond without providing a specific definition thereof. This appears to reflect the Algerian legislator’s intention to avoid committing to any particular doctrinal definition advanced by legal scholars, leaving the matter to jurisprudence, as it has done with other issues of Islamic family law. This approach is reflected in Article 222 of the Algerian Family Code, which states:

“In all matters for which no provision is made in this Code, reference shall be made to the rules of Islamic Sharia.

¹

Accordingly, divorce may generally be defined as “the termination of the marital relationship by the unilateral will of the husband”.

²

Accordingly, the ruling on divorce in Islamic Sharia is that it is permissible. Its permissibility is established by both the Qur’an and the Sunnah, and there exists a consensus among the Companions and the jurists who have applied it up to the present day.³

However, granting the husband the right to effect divorce through his unilateral will does not constitute a preference for men over women. Rather, it is based on the assumption that the husband is generally more cautious, deliberate, and inclined to preserve the marital home⁴. This is particularly so because divorce entails significant financial and social consequences for the husband, including obligations such as the deferred dower, maintenance during the waiting period, compensatory maintenance, and other related expenses. Furthermore, the husband loses the financial resources invested in contracting the marriage and may incur additional costs if he chooses to remarry. In contrast, the wife does not ordinarily bear comparable financial consequences arising from divorce that would require her to exercise the same degree of caution and deliberation before seeking its dissolution.⁵

The Algerian legislator has also subjected divorce by the husband's unilateral will to judicial supervision. Article 49 of the Algerian Family Code provides:

“A divorce shall not be established except by a judicial judgment rendered after several reconciliation attempts conducted by the judge ...”

This requirement aims to provide protection for the wife against any abuse by the husband in exercising his right to divorce.

Second: Dissolution of the Marital Bond through the Wife's Unilateral Will (Khul')

Islamic law and consequently the Algerian legislator has granted the wife the right to dissolve the marital bond through “khul'”. This right serves as a counterpart to the husband's right of divorce⁶ and reflects the principle of reciprocity by enabling a woman to free herself from a marital relationship that she can no longer endure. It also prevents her from being compelled to remain in circumstances beyond her capacity to bear. Just as the husband possesses the right to terminate the marital bond through divorce, the wife is afforded a mechanism to secure her release from the marriage, since marital life cannot be founded upon hatred, coercion, and oppression.⁷

A. The Concept of “Khul'”

Jurists, as well as commentators on the Algerian Family Code, have differed regarding the precise definition of “khul'”, each proposing a distinct formulation. Nevertheless, they unanimously agree on its legitimacy and legal validity, while differing to some extent concerning the mechanisms governing its implementation.

1. The Linguistic Meaning of “Khul'”

Linguistically, “khul'” is derived from the Arabic verb “khala'a”, which means “to remove,” “to take off,” or “to strip away.” The term, when pronounced with a dammah on the letter “khā” (“khul'”), refers to the dissolution of the marital bond⁸, while its pronunciation with a fathah (“khal'”) conveys the general meaning of removal or extraction⁹. The expression thus denotes the idea of removing or taking off something in the same manner as one removes a garment.

The term originally refers to removing something that one wears, whether clothing or footwear. This meaning appears in the Divine command addressed to the Prophet Moses (peace be upon him) in Surat Tā Hā:

“Indeed, I am your Lord, so remove your sandals. You are in the sacred valley of Ṭuwā.”¹⁰

When pronounced with a fathah on the letter “khā”, the word constitutes a regular verbal noun used in tangible matters. Thus, it may be said that a person “khala'a thawbahu” (“removed his garment”), meaning that he took it off his body. In a figurative sense, it may also be said that a man “khala'a imra'atahu” (“divorced his wife”), meaning that he terminated the marital relationship. Likewise, a woman is said to have “khāla'at zawjahā” when she secures her release from the marriage through compensation. By contrast, “khul'” with a dammah is an established linguistic form used in both physical and metaphorical contexts, although it is particularly associated with the dissolution of marriage, on the basis that each spouse is considered a garment for the other, as expressed in Islamic teachings.¹¹

Accordingly, it may be said that a man “khala'a thawbahu” (with a fathah), meaning that he removed his garment from his body, whereas a man “khala'a zawjatahu khul'an” (with a dammah) signifies the termination of the marital bond. The term may also refer to the

dissolution of a marriage contract in exchange for compensation paid by the wife to the husband. For this reason, “khul’” is also referred to as “fidā” (redemption), since the wife effectively redeems herself through the consideration she provides to obtain her release from the marriage.¹²

Classical jurists generally agreed, from a linguistic perspective, on distinguishing between “khal’” (with a fathah), which is used in contexts other than the dissolution of marriage, and “khul’” (with a dammah), which is specifically employed in relation to the termination of the marital relationship. On this basis, the use of “khul’” to denote marital dissolution may be understood literally, insofar as each spouse constitutes a metaphorical garment for the other and the dissolution removes this symbolic covering. Conversely, some scholars maintain that the original linguistic meaning of “khul’” concerns only physical removal and that its application to marital separation is metaphorical, based on the analogy between removing a garment and dissolving the marital bond.¹³

2. The Technical (Legal) Meaning of “Khul’”

The concept of “khul’” has been defined in various ways by both Islamic jurists and legal scholars, resulting in a range of doctrinal formulations.

With regard to Islamic jurisprudence, the Maliki jurists define “khul’” as:

A divorce effected in return for compensation, whether such compensation is provided by the wife herself or by another person acting on her behalf, such as a guardian. It may also be effected through the explicit use of the term “khul’”. In other words, it occurs when the wife, or another person on her behalf, offers the husband property or waives a right owed to her by him in exchange for his divorcing her, thereby resulting in an irrevocable divorce.

According to the Maliki school, therefore, “khul’” encompasses marital separation whether effected in exchange for compensation or, in certain circumstances, even without compensation.¹⁴

The Hanafi jurists define “khul’” as the dissolution of the marital bond through the use of the term “khul’” or any equivalent expression, in consideration of compensation undertaken by the wife. It may also be defined as the removal of the marital relationship through the term “khul’” or words carrying the same meaning, in exchange for consideration paid by the wife to her husband.

The Shafi’i jurists define “khul’” as any expression indicating separation between spouses in return for compensation, provided that the conditions governing such compensation are fulfilled. Accordingly, any expression denoting divorce, whether explicit or implicit, may constitute “khul’” and result in an irrevocable divorce.¹⁵

The Hanbali jurists define “khul’” as the separation of a husband from his wife in return for compensation received by the husband from the wife or from another person on her behalf. This separation may be effected through specific expressions that fall into two categories: explicit expressions, such as “I release you through “khul’”,” “I annul the marriage,” and “I redeem you,” and indirect expressions, such as “I discharge you” or “I release you from your obligations.” All such expressions are considered legally sufficient to effect “khul’”.¹⁶

Some legal scholars have further defined “khul’” as:

A consensual, bilateral contract of exchange established for the benefit of both spouses, the purpose of which is to terminate marital life through a judicial decision based on an offer by one spouse and the acceptance of the other in response to the wife's desire to separate. This occurs in exchange for property recognized by Islamic law and paid by the wife, the nature and amount of which may be agreed upon by the parties during judicial proceedings or determined by the judge, provided that it does not exceed the equivalent dowry applicable at the time of judgment.¹⁷

From the foregoing definitions, it may be observed that although they differ in certain details, they converge on the essential notion that “khul’” results in the dissolution of marriage by mutual agreement between the spouses in return for compensation paid by the wife to the husband. In this respect, “khul’” differs from divorce, which is effected through the husband's unilateral will and terminates the marital relationship without compensation.

It is also noteworthy that the aforementioned definitions place considerable emphasis on the principle of mutual consent in “khul’”. However, a closer examination of certain juristic opinions reveals that mutual consent is not necessarily an indispensable requirement. According to some scholars, a wife may obtain “khul’” without her husband's approval if she finds continued cohabitation intolerable, provided that she offers appropriate compensation. This view was notably advanced by Ibn Rushd (Averroes), who based his position on the principles of Islamic Sharia.

This interpretation was subsequently adopted by the Algerian legislator in the most recent amendment to the Family Code through Ordinance No. 05–02. Article 54 may thus be understood as characterizing “khul’” as a compensatory legal mechanism established for the benefit of the wife, enabling her to terminate the marital relationship through her unilateral will and without the husband's consent, in exchange for compensation or a sum of money paid to him.

In this sense, “khul’” differs from divorce, which is exercised through the unilateral will of the husband, as well as from judicial divorce, which may only be sought by the wife upon the existence of one of the grounds expressly provided for in Article 53 of the Algerian Family Code.

No exact equivalent of the institution of “khul’” exists in the legal systems of non-Islamic states, including French law. French family law, however, recognizes what is known as divorce for fault (“divorce pour faute”), whereby a court may grant a divorce in favor of one spouse as a consequence of misconduct committed by the other spouse, such as the abandonment of the marital home. Nevertheless, regardless of the type of divorce involved, French law requires the issuance of a judicial decision, even in cases of divorce by mutual consent.¹⁸

French law also recognizes the institution of “judicial separation” (séparation de corps), which does not result in the dissolution of the marital bond. Rather, it merely brings the spouses' cohabitation to an end. Consequently, the financial community between the spouses also ceases. The spouses may remain judicially separated until the death of one of them, or they may subsequently convert the judicial separation into a divorce.¹⁹

B. The Legitimacy of “Khul’”

The legitimacy of “khul’” derives primarily from the Holy Qur’an and the Sunnah of the Prophet Muhammad (peace be upon him). Its legal basis is established through various Prophetic traditions addressing the subject, in addition to other evidentiary sources relied upon by Islamic jurists.

Article 54 of the Algerian Family Code, as amended, provides:

“The wife may, without the consent of the husband, obtain her release through “khul’” in return for compensation. If the spouses fail to agree on the amount of compensation, the judge shall determine it, provided that it does not exceed the value of the equivalent dowry at the time the judgment is rendered.”

According to the explanatory memorandum accompanying the draft amendment, the purpose of revising this provision was to clarify the legal rules governing “khul’” by codifying the jurisprudence of the Algerian Supreme Court, which had been consistently established in this field since 1997. The amendment further sought to affirm the woman's right to obtain “khul’” without requiring the husband's consent. Nevertheless, the husband retains the right to contest the amount of compensation, in which case the matter is referred to the judge, who determines the compensation without exceeding the value of the equivalent dowry.²⁰

Third: “Khul’” from a Legal Concession to an Established Right

As is well known in both Algerian family law and judicial practice, “khul’” has undergone two distinct stages with respect to its legal characterization.

Initially, “khul’” was regarded as a legal concession granted to the wife, which she could invoke only with the husband's approval. Consequently, the husband's consent constituted an essential condition for the validity of the procedure.

Subsequently, however, “khul’” evolved into an established and autonomous right vested in the wife. Under this modern conception, the wife possesses the exclusive authority to invoke and exercise this right whenever she deems appropriate, without being subject to the husband's consent and without the need to satisfy any additional condition beyond those prescribed by law.

A. The Legal Nature of “Khul’” under the Algerian Family Code

“Khul’” constitutes a lawful mechanism recognized by Islamic Sharia for the benefit of a wife who finds continued marital life with her husband intolerable and seeks release from a marriage that has become impossible for her to maintain. Most Islamic laws and legal systems have followed the approach of Islamic Sharia by recognizing the wife's right to seek “khul’”. Nevertheless, these legal systems differ with regard to the determination of its legal nature. The Algerian legislator is among those whose position evolved through two distinct stages concerning whether “khul’” is based on mutual consent or may be exercised independently of the husband's approval.

1. Law No. 84–11 of 9 June 1984

The legislator did not expressly address the legal characterization of “khul’”, but rather confined itself to a general provision embodied in Article 54, which stated:

“The wife may obtain “khul’” from her husband in exchange for compensation agreed upon between them. If they fail to agree on the amount, the judge shall determine it, provided that it does not exceed the equivalent dowry at the time of judgment.”²¹

Ambiguity surrounded Article 54 of the Algerian Family Code because it did not definitively resolve whether “khul’” constituted a right exercisable by the wife at her discretion or whether it remained dependent upon the husband's consent. The provision merely referred to the possibility of the wife obtaining “khul’” in exchange for a sum of money paid to the husband, without addressing the issue of the husband's approval.

This legislative silence concerning the nature of “khul’” whether as an autonomous right or as a consensual legal arrangement led legal commentators to draw upon the opinions of Islamic jurists, particularly in light of Article 222 of the Algerian Family Code, which refers matters not expressly regulated by the Code to the principles of Islamic Sharia. Consequently, legal doctrine became divided into two principal views.

The First View: “Khul’” as a Consensual Contract

This view was adopted by the majority of legal commentators, who argued that “khul’” is fundamentally based on mutual consent. According to this position, no valid “khul’” can exist without the husband's approval. Thus, “khul’” is regarded as a consensual form of divorce in exchange for compensation provided by the wife to the husband. It is further characterized as a bilateral contract of exchange established primarily for the benefit of the wife, with the objective of terminating marital life through a judicial decision based upon an offer made by one spouse and accepted by the other.

This interpretation may also be inferred from Article 54 of the Algerian Family Code, which suggests that “khul’” is an agreement concluded between the spouses. Typically, the wife offers a specified sum of money to her husband in return for his agreement to divorce her, and the husband accepts both the offer and the divorce. Accordingly, “khul’” is understood as a consensual divorce effected in consideration of compensation paid by the wife to the husband, thereby enabling her to free herself from the marital bond without resorting to litigation, conflict, or adversarial proceedings.²²

The Second View: Non-Consensual “Khul’”

This view was adopted by a minority of commentators on the Algerian Family Code, who maintained that a wife may resort to “khul’” without the consent of her husband. According to this interpretation, Article 54 of the Algerian Family Code focuses solely on the agreement between the parties regarding the compensation to be paid to the husband. In the event of disagreement concerning the amount of compensation, the matter is referred to the judge for determination.

Proponents of this view argue that the dissolution of the marriage contract through “khul’” may be effected by the wife's unilateral will and does not require the husband's acceptance. In their opinion, any agreement between the spouses relates not to the “khul’” itself, but rather to the compensatory consideration paid by the wife in exchange for her release from the marriage. Thus, the only matter subject to agreement is the amount of compensation, not the wife's right to seek “khul’”.²³

As is well known, these competing doctrinal positions significantly influenced judicial decisions and case law until the promulgation of Ordinance No. 05–02, which definitively resolved the controversy by expressly adopting the non-consensual nature of “khul’”. Under the amended provision, “khul’” may be granted upon the wife's request without the husband's consent.

2. Ordinance No. 05–02 of 27 February 2005

Through the amended Article 54 of the Algerian Family Code, this Ordinance expressly recognized the wife's right to seek “khul’” whenever she wishes and without requiring the husband's approval. In doing so, the Algerian legislator rejected the view that “khul’” is a consensual contract whose validity depends upon the husband's agreement.

According to this approach, “khul’” is analogous to (divorce). Just as the husband's exercise of divorce does not depend upon the wife's consent, the wife's exercise of “khul’” should likewise not be conditioned upon the husband's approval. Consequently, the husband's opposition to “khul’” does not prevent its legal effect.

The amended text of Article 54 therefore removed all ambiguity by clearly providing that the husband's consent is not a prerequisite for a wife's request for “khul’”. Had such consent been required, the matter would fall within the category of divorce by mutual consent rather than “khul’”. Accordingly, the interpretation that excludes the necessity of the husband's approval in “khul’” proceedings is regarded as the more persuasive and preferable position. The area of agreement between the spouses concerns only the amount of compensation payable by the wife, not the right to obtain “khul’” itself.

From the foregoing, it is evident that the concept of “khul’” in Algerian family law has evolved from being merely a legal concession available to the wife upon the husband's consent into an autonomous and established right vested in her. She may now invoke and exercise this right whenever she deems appropriate, without the need for the husband's approval or agreement.

B. The Fluctuation of the Algerian Supreme Court's Jurisprudence on “Khul’”: Between a Legal Concession and an Established Right

For a considerable period, Algerian courts regarded “khul’” as a consensual contract, relying primarily on the opinions of jurists who constituted the majority view on the matter. This position prevailed until the emergence of a contrary judicial interpretation that considered “khul’” to be an autonomous right vested in the wife and not subject to the husband's consent. As a result, judicial inconsistency characterized Algerian case law for some time, with conflicting decisions reflecting the divergent doctrinal approaches. This situation persisted until the legislator intervened and definitively resolved the issue. Consequently, Algerian judicial thinking concerning “khul’” underwent a significant transformation. Whereas the courts had previously maintained that the husband's consent was an essential requirement and that granting “khul’” without such consent was contrary to both legal provisions and the principles of Islamic Sharia, judicial practice gradually evolved toward recognizing “khul’” as an inherent right of the wife.

Accordingly, “khul’” ceased to be viewed as a mere concession whose exercise depended upon the husband's approval and came instead to be regarded as an autonomous legal right available to the wife. This interpretation ultimately became the settled jurisprudence of the Algerian

Supreme Court and remained so until the enactment of Ordinance No. 05–02, which removed the ambiguity surrounding Article 54 of the Algerian Family Code and provided explicit legislative confirmation of this position.²⁴

Fourth: Manifestations of Equality between Spouses in the Dissolution of the Marital Bond

From the foregoing discussion, it is apparent that the Algerian Family Code has preserved the husband's right to dissolve the marriage through unilateral divorce, a prerogative derived from the concept of marital authority recognized under Islamic law. This right finds its foundation in Islamic Sharia, which traditionally vests the power to pronounce divorce in the husband. Nevertheless, where such divorce is exercised abusively and without a legitimate justification, it may be regarded as an act of abuse of right, giving rise to the husband's obligation to compensate the wife.²⁵

At the same time, and as a counterpart to the husband's unilateral right of divorce, the Algerian Family Code has granted married women legal mechanisms through which they may dissolve the marital bond. These mechanisms have progressively evolved to the status of established legal rights. Consequently, the wife no longer exercises such remedies merely as concessions dependent upon the approval of either the husband or the courts.

The objective underlying this development is to achieve a degree of parity and correspondence between spouses in matters relating to the dissolution of marriage. In particular, Article 54 of the Algerian Family Code now enables a wife to obtain “khul’” without the husband's consent²⁶. This legislative development suggests a tendency on the part of the Algerian legislator toward treating marriage increasingly as a civil legal relationship in which both spouses enjoy comparable opportunities to terminate the marital bond.

However, this movement toward equality has not been carried to its fullest extent. The model adopted by the Algerian legislator does not correspond entirely to the conception of equality articulated in Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which advocates a broader and more comprehensive principle of equality between men and women in matters relating to marriage and family relations.²⁷

Conclusion

From the foregoing discussion, it is evident that Article 54 of the Algerian Family Code, following its amendment, has been relieved of the ambiguity and uncertainty that previously surrounded it. This was achieved through the addition of the phrase “without the husband's consent,” which expressly reflects the Algerian legislator's adoption of the view that “khul’” constitutes a unilateral legal act exercised by the wife and does not require the husband's approval. Consequently, the judge may compel the dissolution through “khul’” even where the husband refuses the wife's request. In this way, the Algerian legislator settled a long-standing doctrinal controversy that had persisted until the 2005 amendment.

In summary, the Algerian legislator has established an inherent right for the wife to dissolve the marital bond through her unilateral will. Indeed, the legislator went even further by imposing neither restrictions nor conditions on the exercise of this right. Accordingly, “khul’” has evolved from being a mere concession available to the wife when circumstances required it into a substantive and autonomous legal right vested in her. In this respect, “khul’” represents

the counterpart to the husband's unilateral right of divorce. Just as the husband may terminate the marriage when mutual aversion arises between the spouses, the wife is likewise entitled to separate from her husband through “khul’” in exchange for financial compensation agreed upon between them. Thus, both spouses have come to stand on an equal footing with regard to the dissolution of marriage through unilateral will.

The position attained by the wife in this area may, in certain respects, be viewed as surpassing that of the husband and competing with it to a considerable degree. This clearly demonstrates the balanced approach adopted by the Algerian legislator in an effort to preserve internal social and legal equilibrium. Nevertheless, despite these developments, certain criticisms may still be directed at the legislator’s regulation of “khul’”. Among the most significant is the fact that this important subject has been confined to a single legal provision. Moreover, the phrase “without the husband's consent” employed by the legislator may itself be regarded as somewhat ambiguous and lacking precision; it may have been preferable to employ the expression “absence of consent” or “lack of approval.” Furthermore, the Algerian legislator has not expressly provided for the conditions governing “khul’”, limiting itself instead to recognizing the permissibility of divorce through this mechanism.

In addition, it may be argued that the contemporary legal status of women does not necessarily require further reinforcement through demands for absolute equality. Rather, it calls for adjustments consistent with the principle of justice established by God Almighty between the sexes. From this perspective, the assertion that complete equality between men and women is invariably required is considered by some scholars to be inconsistent with human nature and with social realities as they are experienced in practice.

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