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The Jurisprudential Choices of the Algerian Family Law – Article 54 as a Case Study

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Abstract :

Islamic Sharia is considered the primary source that the Algerian legislator relied upon when drafting the Family Law, alongside other material sources such as previous Arab legislations. One of the topics addressed in the Algerian Family Law is "khula" (divorce initiated by the wife), which the Algerian legislator included in Article 54. While the reliance on Islamic Sharia as a source of legislation is well-known, the legal choice made by the Algerian legislator in the formulation of Article 54 is not explicitly authorized. Moreover, the use of Arab laws and taking them as sources of legislation is also plausible.

After researching and reviewing some Arab laws, as well as presenting the opinions of the four schools of Islamic jurisprudence on the details mentioned in Article 54, it became clear that the Algerian legislator's legal choice in Article 54 of the Family Law was sometimes in agreement with the consensus, sometimes in disagreement with it, and sometimes in agreement with some jurists but not others. Additionally, we found that what the Algerian legislator included in Article 54 is very similar to what the Moroccan legislator has enacted.

Keywords: Jurisprudential Choices ; Algerian Family Law ; Article 54 ; Khula

Introduction:

The Algerian Family Law No. 84-11, dated June 9, 1984, and amended by Ordinance No. 05-02 of February 27, 2005, was enacted to regulate matters of personal status in Algeria. Among the issues addressed in this law is the concept of khula. Linguistically, khala'a (with an open kha) means to remove or take off—e.g., "he took off his garment"—while khul' (with a closed kha) refers to a type of divorce initiated by the wife in exchange for compensation she offers to the husband. Thus, when a man "performed khula" with his wife, it means he divorced her in return for consideration, and she is then said to be mukhtali'a (a woman who has sought khula)¹.

It is this latter meaning—khula as a form of divorce by mutual compensation—that constitutes the subject of this study. Khula represents one of the legal pathways by which a marriage may be dissolved, and it is addressed in Article 54 of the Algerian Family Law, which states:

"The wife may, without the husband's consent, divorce herself by way of khula in return for financial compensation".

If the spouses do not agree on the financial compensation for the khula, the judge shall rule an amount not exceeding the value of a customary dowry (ṣadāq al-mithl) at the time of the ruling².

The preamble of Draft Law No. 84/11 states the following: 'The committee relied on the following primary sources in drafting these provisions:'

The Holy Qur'an, the authentic Sunnah as accepted by the scholars of Hadith, consensus (ijmā'), analogy (qiyās), and independent reasoning (ijtihād), as well as jurisprudence based on the four major schools of thought—and others in certain matters—were adopted."

Additionally, Article 222 of the Family Law stipulates that:

"Any matter not explicitly addressed in this law shall be referred to the provisions of Islamic Sharia. Thus, Islamic jurisprudence constitutes a fundamental source of Algerian Family Law, as is the case in other Islamic countries.

While it is well known that the Algerian Family Law derives its rulings from Islamic jurisprudence in all its schools, as stated in the preliminary draft of the Algerian Family Law, the question arises: What are the jurisprudential choices made by the Algerian legislator in Article 54 of the Family Law? And are there

other sources, besides Islamic jurisprudence, that the Algerian legislator has drawn upon?

To address this research question, we will follow the structure below:

- Introduction
- Part One: Khula in Legislation
 1. Khula in the Algerian Family Law
 2. Khula in Arab Family Codes and Laws
- Part Two: Khula in Islamic Jurisprudence
 1. The Concept and Ruling of Khula
 2. Financial Compensation for Khula
 3. Disputes Regarding Financial Compensation – Khula According to the Hanbali School
- Conclusion.

THE FIRST TOPIC : Khula in Legislation

First requirement: Khula in the Algerian Family Law:

Before the enactment of the Family Law, prevailing judicial interpretation held that a wife could not request separation through khula without the explicit consent of her husband. Khula was considered a form of divorce initiated solely by the husband's unilateral will.

In this regard, the Algerian Supreme Court stated in its ruling dated March 12, 1969: "Khula, in legal terms, is nothing but a divorce issued by the unilateral will of the husband, in return for compensation offered by the wife and agreed upon by both parties. However, the wife's proposal for khula does not grant her any right, nor does it affect the marital bond if the husband does not consent to it. It cannot be considered a request submitted to the court that requires adjudication. Therefore, this claim is unfounded."

Law No. 11/84 dated 9 Ramadan 1404 AH, corresponding to June 9, 1984, AD, which includes the Family Law, stipulated in Article 54 that: 'The wife may divorce her husband (through khula) in return for compensation agreed upon...' ³

However, the Algerian legislator did not define the legal nature of khula (divorce initiated by the wife), so judicial interpretation had to find a solution. The wife was not entitled to request separation through khula without the explicit

consent of the husband, considering that it is a consensual contract, and the judge could not issue a ruling for it on his own initiative

After the issuance of Decision No. 141262 dated 30/07/1996, published in Judicial Journal No. 1/98, the jurisprudence of the Supreme Court settled on the view that a request for khula does not require the husband's consent, as it stated: It is legally and religiously established that khula is a right granted by Islamic Sharia to the wife to dissolve the marital bond when necessary, and it is not a consensual contract⁴.

Finally, the Algerian legislator settled the matter, closed the door to interpretations, and affirmed that khula is a right for the wife that does not require the husband's consent. This was established in Article 54 of Ordinance No. 25/02 dated 18 Muharram 1426 AH, corresponding to February 27, 2005, which amended and supplemented Law No. 11/84 dated 9 Ramadan 1404 AH, corresponding to June 9, 1984, concerning the Algerian Family Code, as follows: 'A wife may divorce herself through khula without the consent of the husband in exchange for financial compensation.

If the spouses do not agree on the amount of compensation, the judge shall determine an amount not exceeding the value of a customary dowry (ṣidāq al-mithl) at the time of the ruling⁵.

second requirement Khula in Arab Family Codes and Laws:

First section: The Personal Status Law of the Syrian Arab Republic:

Article 95: "For the khula to be valid, the husband must be legally qualified to pronounce divorce, and the woman must be eligible to receive it.

A woman who has not reached the age of majority is not bound to pay the compensation for khula unless approved by her financial guardian."

Article 96: "Either party may withdraw their offer of khula before it is accepted by the other."

Article 97: "Anything that is legally permissible to be obligated may serve as compensation in khula."

Article 98: "If the khula is agreed upon for compensation other than the dowry, that compensation must be paid, and both parties are released from all rights related to the dowry and marital maintenance."

Article 99: "If the spouses do not specify any compensation at the time of khula, both are released from each other's rights concerning the dowry and marital maintenance."

Article 100: "If both spouses explicitly state that there is no compensation in the khula, it is considered a regular divorce and counts as a revocable talaq (divorce)."

Article 101: "The maintenance during the 'idda (waiting period) does not lapse, and the husband is not released from it unless it is explicitly waived in the khula agreement."

Article 102:

"If it is stipulated in the khula that the husband is exempt from paying for the child's nursing, or that the mother will keep the child for a specified period and spend on him, but she later marries or abandons the child, the husband may claim from the wife an amount equivalent to the nursing or maintenance expenses for the remaining period.

If the mother was financially incapable at the time of khula or becomes so afterward, the father is obliged to provide for the child, and the amount will be considered a debt upon the mother."

Article 103: "If the husband stipulates in the khula that the child will remain with him during the custody period, the khula is valid but the condition is void. The child may be taken by their legal custodian, and the father must cover the child's expenses and custodial care fees if the child is in need."⁶

second section: The Moroccan Personal Status Code:

Article 115: The spouses may mutually agree on divorce by khula in accordance with the provisions of Article 114 above.

Article 116: A woman of legal age may perform khula on her own behalf. If a woman below the legal age is divorced through khula, the divorce is valid, but she is not obligated to pay compensation unless approved by her legal guardian.

Article 117: The wife may reclaim the compensation she offered in khula if she proves that the divorce occurred under coercion or harm caused by the husband. Divorce remains valid in all cases.

Article 118: Anything that is legally permissible to be obligated may serve as compensation in khula, provided it is not excessive or unjust.

Article 119: It is not permissible to base khula on anything related to the children's rights or their maintenance if the mother is financially incapable.

If the mother becomes unable to provide for the children after khula, the father is responsible for their maintenance, without prejudice to his right to seek reimbursement from the mother.

Article 120: If the spouses agree on the principle of khula but disagree on the compensation, the matter shall be referred to the court to attempt reconciliation. If reconciliation fails, the court shall authorize the khula and determine appropriate compensation, taking into consideration the amount of the dowry, the duration of the marriage, the reasons for the khula request, and the financial situation of the wife.

If the wife insists on requesting khula and the husband refuses, she may resort to the procedure of judicial separation due to discord (shiqāq)⁷.

Section Three: The Iraqi Personal Status Law:

Article 46: Khula is the dissolution of the marriage bond through the expression of khula or its equivalent, and it is concluded through an offer and acceptance before the judge, in accordance with the provisions of Article 39 of this law.

- For the khula to be valid, the husband must be legally qualified to pronounce divorce, and the wife must be eligible for it. Khula results in an irrevocable divorce.

- The husband may agree to khula with his wife in return for compensation that is either greater or less than her dowry⁸.

Section Four: The UAE Personal Status Law:

Article 110: Khula is a contract between the spouses in which they mutually agree to end the marriage in return for compensation provided by the wife or someone else.

Any form of compensation that is valid as a dowry is also valid in khula.

- It is not permissible to agree to waive the children's maintenance or custody rights.

- If the compensation in khula is not valid, the khula still takes effect, and the husband is entitled to the dowry instead.

- Khula is considered a dissolution (not a divorce).

- As an exception to paragraph (1) of this article, if the husband's refusal is deemed obstinate and it is feared that the limits set by God will not be upheld, the judge may rule for khula in exchange for appropriate compensation.

Article 111: For the compensation in khula to be valid, the one offering it must be legally competent, and the husband must be legally qualified to pronounce divorce⁹.

Section Five: The Kuwaiti Personal Status Law:

Article 111: Khula is the husband's divorce of his wife in exchange for agreed compensation, using the word khula, or divorce, or mubāra'ah (mutual release), or any term with similar meaning. No one other than the spouses or their authorized representatives may perform khula.

Article 112: For the khula to be valid, both spouses must be legally competent to affect a divorce, according to this law.

Article 113: Either party may withdraw their offer of khula before the other accepts.

Article 114: Anything that is legally permissible to be obligated may serve as compensation in khula.

Article 115: The agreed-upon compensation in khula must be fulfilled, and nothing not specified as compensation may be waived as part of it.

Article 116: For the husband to be entitled to the khula compensation, the wife must have initiated the khula voluntarily, without pressure or threat or harm.

Article 117: If the khula agreement stipulates that the mother will breastfeed, care for, or provide for the child for a specific period without payment, and she fails to fulfill this obligation, the father has the right to claim an amount equivalent to the child's maintenance, breastfeeding, or custody costs.

- If the mother is financially incapable, the father is obliged to provide for the child, and the amount is considered a debt owed by the mother.

Article 118: If the father stipulates in the khula that the child remains with him during the custody period, the khula remains valid, but the condition is void. The legal custodian has the right to take the child, and the father must bear the costs of maintenance and custodial care.

Article 119: Khula by a terminally ill woman is valid, and the compensation is considered from one-third of her estate unless approved by the heirs.

- If she dies during the 'idda (waiting period), the husband receives the lesser of the inheritance, the compensation, or one-third of her estate.

- If she dies after the 'idda or before consummation of the marriage, he is entitled to the lesser of the compensation or one-third of her estate¹⁰.

After reviewing the relevant provisions in various Arab laws and considering Article 54 of the Algerian Family Code, the following can be concluded:

The Algerian legislator, in Article 54, addressed the permissibility of khula without the husband's consent in exchange for financial compensation in the first paragraph, and in the second paragraph, he referred to cases where there is disagreement over the amount of compensation.

In contrast, in Arab laws, the Syrian legislator addressed the permissibility of khula for compensation in Article 95, though not as explicitly as the Algerian legislator.

The Moroccan legislator tackled the issue in Article 115 of the Family Code, stating: 'The spouses may mutually agree to divorce through khula in accordance with the provisions of Article 114 above.' Disputes over the compensation were addressed in Article 120, which states: 'If the spouses agree on the principle of khula but disagree on the compensation, the matter shall be referred to the court

to attempt reconciliation. If reconciliation fails, the court shall authorize the khula and determine suitable compensation, taking into consideration the amount of the dowry, the duration of the marriage, the reasons for the khula request, and the wife's financial situation. If the wife insists on the khula and the husband refuses, she may resort to the procedure of judicial separation (shiqāq).'

The Iraqi legislator addressed khula with compensation in paragraph 2 of Article 46. The Emirati legislator mentioned compensation for khula in paragraph 1 of Article 110, and also introduced judicial intervention in cases where the husband is being stubborn, in paragraph 5 of the same article.

The Kuwaiti legislator discussed khula and its compensation in paragraph 1 of Article 111.

From the above, the Algerian legislator's approach is like that of the Moroccan legislator. However, the Moroccan legislator has been more comprehensive, dedicating six legal articles to the topic of khula, addressing various related issues. This level of detail was overlooked by the Algerian legislator, who confined the discussion to a single article, leaving out many important aspects.

Therefore, it is advisable for the Algerian legislator to take inspiration from those legislators who addressed the topic more thoroughly and covered its various dimensions.

THE SECOND TOPIC : Khula in Islamic Jurisprudence:

Considering Article 43 of the Algerian Family Code, we will address the following issues:

- Khula and its ruling
- The financial compensation for khula
- The dispute over the financial compensation for khula

First requirement: Khula and Its Ruling:

First section: Khula and It's Ruling According to the Hanafi School:

According to the Hanafi school, khula is the termination of the marriage contract, which depends on the wife's acceptance, using the term khula or any expression with a similar meaning¹¹ and it is permissible and legally sanctioned.

second section: Khula and It's Ruling According to the Maliki School:

Khula, according to the Maliki school, is a compensatory contract concerning the marital bond, through which the woman gains possession of herself, and the husband gains the compensation¹².

According to the Maliki school, khula is permissible and legitimate. Ibn Rushd states: 'Khula is permissible with mutual consent, if her willingness to give compensation is not due to harm inflicted upon her. It is the wife's right to

separate, and it does not contradict the Sharia. Islam has granted the right of khula, which holds a power equal to the husband's right to ṭalāq (divorce)¹³.

Section Three : Khula and It's Ruling According to the Shafi School:

According to the Shafi school, khula is a separation between the spouses in exchange for compensation, initiated by the husband using one of the expressions of divorce. In their view, khula is valid in both cases of discord and harmony. It is not disliked if it occurs due to discord, or if the wife dislikes living with him because of his bad character or irreligiosity, or if she finds it difficult to fulfill some of his rights¹⁴.

Section Four: Khula and It's Ruling According to the Hanbali School:

According to the Hanbali school, khula is the separation of a husband from his wife in exchange for compensation taken from her or someone else, using specific wording.

As for its ruling, they classify it into three categories:

1- Permissible: When the wife dislikes remaining with her husband due to her aversion to him and fears she may not fulfill his rights or uphold the limits set by Allah.

2- Discouraged (Makrūh): When the wife initiates khula without any valid reason, while the relationship is stable—this is considered frivolous and thus disliked, though the khula still takes effect.

3- Prohibited: When the husband mistreats his wife or unjustly withholds her rights to force her to offer compensation for separation. Khula is also prohibited if it is used as a trick to circumvent an oath of divorce¹⁵.

Jurists unanimously agree that khula is a separation between a man and a woman in exchange for compensation received by the husband, and they also agree on its permissibility. Accordingly, the Algerian legislator's legal choice in the first paragraph of Article 54 aligns with the consensus of the jurists.

second requirement: Financial Compensation for Khula:

First section: Financial Compensation for Khula According to the Hanafi School: The Hanafi discussed the financial compensation in khula and stated: If the disobedience (nushūz) originates from the husband, it is impermissible for him to take anything from her, due to the prohibition of benefiting from her wealth—since he has alienated her by initiating separation, he should not further distress her by taking her money. However, if the disobedience comes from the woman, then it is not disliked for him to take

compensation. This rule applies generally, whether the amount is small or large—even if it exceeds what he initially gave her¹⁶.

second section: Financial Compensation for Khula According to the Maliki School: The Mālikī school holds that it is permissible for the husband to take compensation from his wife in exchange for separating from her, whether the compensation is equal to, less than, or more than what he had given her—so long as both parties mutually agree. This applies whether the compensation comes from the wife herself or someone else, and whether it is the same as the dowry or a different amount, more or less than it¹⁷.

Section Three: Financial Compensation for Khula According to the Shafi School: The Shafi school also holds that it is permissible for the husband to take compensation from his wife in exchange for separating from her, regardless of its value, as long as both parties have mutually agreed upon it¹⁸.

Section Four: Financial Compensation for Khula According to the Hanbali School: The Hanbali school holds that it is not recommended for the husband to take more than what he originally gave her. In fact, it is prohibited for him to take anything if he has mistreated her to force her into offering compensation for separation¹⁹.

The jurists unanimously agree on the permissibility of the husband receiving compensation in general. This is unconditional according to the Maliki and Shafi schools, while the Hanafi school permits it only if the disobedience (*nushūz*) is from the wife. As for the Hanbali school, it is permitted provided that the amount does not exceed what he had originally given her.

The legal position adopted by the Algerian legislator in this regard aligns with the views of the Maliki and Shafi schools.

The third requirement: The Dispute Over Financial Compensation for Khula: The jurists have stated that if the compensation in khula is known, has monetary value, and can be delivered, then the khula is considered valid. However, if the compensation is flawed due to the absence of any of these conditions—such as lack of clarity, lack of monetary value, or inability to deliver—then the khula is considered invalid. In the case of a dispute over the financial compensation of khula, the jurists have provided the following detailed rulings:

First section: The Dispute Over Financial Compensation for Khula According to the Hanafi school: If there is a dispute over the amount, type, immediacy, deferral, or description of the compensation, the Hanafi school holds that the woman's statement is to be accepted²⁰.

second section: The Dispute Over Financial Compensation for Khula

According to the Maliki school: If there is a dispute regarding the financial compensation in khula, the Maliki school holds that the wife's statement is to be accepted upon her oath, because the original right (to initiate khula) is hers, and likewise, the description of the compensation follows the same principle. Moreover, she is denying any increase in the amount or its attributes, so her statement is given precedence²¹.

Section Three :The Dispute Over Financial Compensation for Khula

According to the Shafi school: The Shafi school stated that in this matter, if neither spouse has evidence, or if both have conflicting evidence, then they must both take oaths—just like in the case of a sales dispute—in the manner and order prescribed for such oaths. If the separation occurs and the compensation is not established, then the wife is entitled to a dowry equivalent to that of her peers (mahr al-mithl), even if it exceeds what was claimed, as it is the fallback. However, if one of them has valid evidence, then it takes precedence²².

Section Four: The Dispute Over Financial Compensation for Khula

According to the Hanbali school: If there is a dispute regarding the amount, type, immediacy, deferral, or description of the compensation, the Hanbali school also holds—according to one narration cited verbatim by Abū Bakr from Aḥmad—that the wife's statement is to be accepted. However, in another narration from Aḥmad, it is stated that the husband's statement is to be accepted, because the marital bond is leaving his ownership, and thus he has the right to determine its compensation²³.

Most jurists from the Hanafi, Maliki, and Hanbali schools hold that in the case of a dispute over the value of the compensation, the wife's statement is to be accepted along with an oath in the Maliki school. As for the Shafi, they ruled that both spouses must take oaths, as is done in cases of dispute in sales transactions.

Accordingly, the legal choice of the Algerian legislator—by referring the disputing spouses over the value of the khula compensation to the judge—goes against all the opinions of the jurists.

Accordingly, the legal choice of the Algerian legislator in Article 54 is both composite and eclectic. In the first paragraph, concerning the concept and ruling of khula, it aligns with the consensus of the jurists. In the second paragraph, regarding the financial compensation for khula, it conforms to the opinions of the Maliki and Shafi schools. However, in the matter of disputes over the financial compensation of khula, the legislator's choice diverges from the opinions of all four Sunni legal schools.

Conclusion :

The juristic choice made by the Algerian legislator in Article 54 of the Algerian Family Code was fabricated, fluctuating between consensus at times, agreement with some madhhabs but not others at other times, and even contradicting all juristic opinions in certain cases. We also found that the provision adopted by the Algerian legislator is like that of the Moroccan legislator, whose legislation predates that of the Algerian legislator in this regard, making it one of the sources relied upon in drafting Article 54 of the Algerian Family Code.

However, Article 54 remains deficient, as it does not cover all issues related to khula, such as the conditions for its validity, the possibility of revocation, the conditions of compensation, and the relationship between the compensation and the rights of children. Accordingly, we propose an amendment to Article 54 and the addition of further articles, as follows:"

- Article 54: "Khula is a contract of exchange over the marital bond, by which the woman obtains autonomy over herself, and the husband acquires compensation. The spouses may mutually agree on khula, and for the khula to be valid, the husband must be legally qualified to pronounce divorce, and the woman must be eligible to be divorced."

- Article 54 bis: "The compensation must be known, of monetary value, and deliverable—whether equal to, less than, or greater than what he gave her—so long as both parties have consented. The compensation may come from her or someone else and may be the same as the dowry or something different, whether of lesser or greater value."

- Article 54 bis 1: "If there is a dispute between the spouses regarding the financial compensation for khula, the wife's statement shall be accepted upon her oath."

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- ⁴ - The decision dated April 19, 1994, file number 115118
- ⁵ - Law No. 11-84, amended and supplemented by Ordinance No. 05-02, previously cited, Article 54
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- ⁸ - Personal Status Law of Iraq, No. 188 of 1959, Article 46
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