

# Encyclopedia of Women & Islamic Cultures

## Divorce and Custody: Contemporary Practices: Mauritania and Egypt

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### Article Table of Contents

1. Moorish Women's Agency
2. *Khul'* Versus Repudiation in Islamic Jurisprudence
3. Divorce and Bridewealth
4. *Khul'* in Egypt
5. The Status of Divorced Women in Egypt and in Mauritania
6. Bibliography

### Moorish Women's Agency

Moorish women in Mauritania did not wait for the introduction of a personal status code that guaranteed their right to divorce. The situation of Moorish women in this regard is different from that of Moroccan or Egyptian women who rediscovered this right through the legislative reforms concerning personal status. Thus, in Morocco the reform of the family code of 2004, the "New *Mudawanna*," permits a woman to add a clause to her marriage contract giving her the right to divorce if her husband takes another wife. In Egypt, the personal status code of 2000 gives women the right to divorce, or *khul'*, even without the consent of her husband. It may also be noted that in Egypt and Morocco, legislative

advances most often concern only urban zones and certain social milieus, and are not always implemented, given the weight of tradition and the persistence of certain types of gender relations. By contrast, Moorish women know how to exploit the social importance of their right to divorce, and are well supported by their families.

Almoravids introduced the Mālikī school of jurisprudence into this region in the eleventh century. Moorish society is made up of Bedouin tribes, many of which are now sedentary and concentrated mainly in the capital city of Nouakchott. Their members generally do not have recourse to state tribunals to arbitrate lawsuits, which are settled internally, sometimes by a local judge (*qādī*). Though the French colonization of Mauritania modified the local political landscape, it did not fundamentally change the local judicial structure, especially as it relates to family, where reference to Islamic jurisprudence remained primary. The Mauritanian family code of 2001, based on Islamic jurisprudence, conforms to classical Islamic texts used locally.

Moorish judicial practice, which has long recognized women's right to divorce, contradicts the widespread notion that a society's use of classical Islamic judicial sources must necessarily be detrimental to women. This belief underestimates the importance of the social context in which these texts are used. The knowledge of these sources and local gender relations are the main factors that determine how these legal texts are used and applied in social practice. The Moorish population is familiar with religious texts and not only shows an awareness of the subtleties of Mālikī jurisprudence, but it also reveals a grasp of *'uṣūl al-fiqh*, or the foundations of jurisprudence (that is, how *fiqh* is constructed and applied). Knowledge of the letter of the law and the spirit of the law facilitates the application of the texts in daily life in a dynamic and enlightened manner. Moorish society is a nomadic society in which oral memorization is highly developed, especially in the area of religious knowledge, which is greatly valued. The legal codes related to the obligations of daily life are known through oral tradition by all members of society, including women, as well as by specialists in Islamic jurisprudence, who are called for only in cases of litigation.

Mothers instill in their daughters an awareness of their rights, especially with respect to divorce. In Libya, also, a woman who divorces by *khul'* goes to court with her mother, showing women's own agency to undertake negotiations to recover their freedom. Moorish women display an

understanding, passed down orally from mother to daughter, of certain principles and provisions of jurisprudence as understood in the Mālikī school. This understanding enables them to take initiatives to protect their wishes and interests when contracting and dissolving a marriage.

Their ability to claim these rights is not the result of any local feminist movement but rather a careful balancing of their knowledge of the relevant Islamic jurisprudence related to divorce and of their culture's social realities. Most Moorish women are unaware of the existence of a feminist movement in Islam or in the West. However, they can be seen to engage in daily acts of feminism or "everyday feminism," without the label or necessarily a "feminist consciousness."

In Moorish society, women know how to assert themselves in dealings with men. It is indeed easier for women to make their voices heard in a society, like the Moorish one, in which segregation by gender is not absolute and where women are not threatened by physical violence from men, than in a society in which women are totally excluded from discussion and where the threat of confrontation and coercion by men hangs over them. Also, it is easier for a married woman to consider standing up to her husband when she can count on the support of her own family, as is the case in Moorish society, than if she knows that she has no emotional and financial support outside of her conjugal union as is sometimes the case in other societies. In Moorish society, even a married woman belongs less to her in-laws than to her own family; because she represents their honor, her family will always afford her the protection which is rightfully hers even when, and especially when, she is in conflict with her husband and his family.

In Moorish society there is a certain rivalry between the family giving its daughter and the family receiving her, which means that any conflict between spouses is a cause for conflict between the two families. One must remember that in Mauritania, tension between men and women exists within the context of an equally important structural tension between families united by marriage.

## *Khul'* Versus Repudiation in Islamic Jurisprudence

In Muslim jurisprudence (*fiqh*), the Arabic term for the marriage (*nikāh* or *zawaj*) contract, *'aqd*, which means literally "attachment" is symbolic of

the nature of the conjugal relationship. Furthermore, the Arabic term for repudiation, *ṭalāq*, describes both when a camel is freed from a tether and when a woman is repudiated by her husband. This legal expression shows the close association of divorce and liberation. But at the same time, she is no longer under his protection, including financial protection.

This legal relationship between spouses is not strictly equal. The woman is economically dependent on her husband through the payment of subsistence (*nafaqa*), morally through the punishment for adultery (*zinā*), and matrimonially due to the ease with which he can divorce her. Divorce reveals, in negative, the essence of the marital relationship, which is inherently hierarchical. When she is married, the wife is in a relationship of dependence vis-à-vis her husband; when she is divorced she recovers her complete freedom; that is, she is no longer under the tutelage of her husband, nor is she under the tutelage of her father, from whom she was definitively freed through her first marital union, according to Mālikī law.

Studies on marriage and divorce in Islam generally address repudiation (*ṭalāq*) by the husband, divorce initiated by the wife is much less well-known. This kind of divorce is rare in Muslim societies though it is authorized by the majority of Islamic legal schools, not only by the Mālikī school, for example, but also by other schools of Sunnī Islamic law, Shāfi‘ī, Ḥanbalī, and Ḥanafī as well as by the Shī‘ī. The right to divorce initiated by women (*khul‘*), while generally little known or practiced in Muslim societies, is found in the classical texts of Islamic law (Sharī‘a) which form the legal basis of these societies.

For many jurists (*fuqāhā’*, *‘ulamā’*; *muftī*), the practice of *khul‘* finds its source in the Qur’an (2:229): “It is not lawful for you to take of what you have given them unless the couple fear they may not maintain God’s bounds; if you fear they may not maintain God’s bounds, it is no fault in them for her to redeem herself (*iftadat bihi*)” (Arberry 1980). The Arabic term *khul‘* derives from the verb *khala‘a* meaning “to dispossess”; this legal procedure in effect allows the woman to remove herself from the ties of possession that bind her to her husband. *Khul‘* allows the wife to obtain a divorce from her husband, if he consents, and upon payment of a certain sum. According to Islamic jurisprudence, if the husband accepts the financial compensation offered by his wife to end their marriage, the marriage is dissolved immediately. The legal result of this procedure is irrevocable repudiation (Ibn ‘Āṣim 1958, 323). The most subversive aspect of this legal procedure is that it allows the woman to divorce without

having to provide justification. In contrast to the case in which a woman initiates a divorce for just cause (*ḍarar*), which can include conditions of which the woman was uninformed at the time of marriage (such as a contagious disease or the husband's impotence), the husband's failure to provide for the family, domestic abuse, or the husband's prolonged absence from the home, the woman who initiates divorce by *khul'* is not obligated to state the reasons for her action. While divorce for just cause can be pronounced by the *qāḍī* without the husband's consent, *khul'* does require his consent. The margin of maneuver allowed the wife in this case is not at all comparable to a man's absolute right to repudiate his wife not only without cause but also without her consent. Divorce initiated by the woman is much more restrictive than that initiated by the man. The Qur'an states that divorce by repudiation is purely a male prerogative: "Women have such honorable rights as obligations, but their men have a degree above them" (Arberry 1980).

## Divorce and Bridewealth

Divorce initiated by the man, unlike that initiated by the woman, does not require the consent of the other party and does not necessarily include financial compensation. The Qur'an does mention the possibility of a compensation (*iwad*) given to the repudiated wife by the husband (2:236). The obligations binding the husband in regard to the repudiated wife are designed by Islamic jurists to limit instances of divorce that are considered morally blameworthy (*makrūh*). Very often the man, in agreement with his in-laws, pays only part of the bridewealth agreed upon at the time of the marriage; according to the Qur'anic verse (2: 229) repudiated women have the right to demand the remaining unpaid bridewealth. This measure is a dissuasive factor for the husband, since he must pay the remaining bridewealth if he repudiates his wife.

Bridewealth (*mahr* or *ṣadāq*) is at the heart of marriage. This crucial element of marriage (*'aqd*), which is based on many verses of the Qur'an (4:3, 4:28–29, 4:38, 5:7, 60:10), has so far not been abolished by any Muslim country, as its symbolic value is great. It is essential to marriage under Islamic jurisprudence, and remains so in many societies. The bridewealth is the transfer of goods from the groom's family (or wife-receivers) to the bride's family (or wife-givers) by which a man acquires

the right to a woman's sexuality so that she gives him pleasure and children.

A *ḥadīth* in the *Ṣaḥīḥ* collection of al-Būkhārī (Būkhārī 1993, 2:400, no. 1878) – a collection considered by Sunnī Muslims as the most authentic book after the Qur'an – attests that the Prophet gave a woman the right to divorce in exchange for her returning a part of her bridewealth. According to the narration of Ibn 'Abbās: "The wife of Thābit b. Qays al-Ansārī came to the Prophet and said, 'O Allah's Prophet! I do not blame Thābit for any defects in his temper or his faith, but I am afraid that I may become unthankful for Allah's blessings.' Mahomet said to her, 'Will you give his garden back?' She said, 'Yes.' So she returned the garden and the Prophet told him to divorce her." The sum given to the husband by the wife in this type of divorce is not specified in Mālikī jurisprudence, but it is suggested that it might be equal to the amount of the bridewealth. In this matter, many jurists cite the Prophet's reply to a woman seeking a divorce; he approved her decision on the condition that she returns to her husband the garden she had received as bridewealth.

Everything concerning the bridewealth is extremely important from a judicial point of view as it governs the management of the procreative sexuality of a woman, and from a social point of view as its value constitutes a gauge of prestige between the two families. On the one hand, the value of the bridewealth is indicative of the value of the girl and her family, and the greater it is, the greater their nobility. At the same time, in addition to the amount of the bridewealth, this exchange puts the receiving family in a position of dependency and inferiority toward the family to whom their daughter has been given. On the other hand, for the members of the repudiated wife's family, her repudiation is an opportunity to refuse the remaining bridewealth to which they are entitled, thus demonstrating their superiority and showing that they do not depend economically on the family to whom they had given their daughter.

In Mauritania, if questions of honor prevent the wife – who continues, even married, to represent the honor of her family – from receiving the totality of the bridewealth to which she is legally entitled, these same questions of honor allow her to claim another of her rights, that of initiating a divorce (*khul'*). However, this type of divorce is difficult if not impossible in other cultural contexts where the woman is not supported financially by her family. In Egypt, for example, certain feminists are agitating for the abolition of the financial compensation related to *khul'*. The elimination of

the requirement for financial compensation would remove a significant obstacle encountered by women who seek divorces from their husbands.

The legal procedure of repayment of the bridewealth is also known in a number of other Muslim societies: in Kabylia, the price of repayment, called *lafdi*, usually consists of rendering to the husband the balance of the bridewealth that was not yet paid (Charnay 1965, 53); in Mzab, the woman must return half of the bridewealth, or the entire sum if she has committed a serious fault (Goichon 1927, 182). Traditionally, in Moorish society, the legal term *khul'* is not used, but is replaced by the expression "She gave back the bridewealth" or "She gave back the livestock," as livestock makes up a major part of the bridewealth in this nomadic society.

In contrast to all other types of divorce, in which the wife has the right to take back all of her possessions, in the case of *khul'*, the wife leaves the furnishings she brought when she moved in, the livestock given by her family, and the goods given to her by her husband. In Mauritania, by giving up all her possessions, an act that is the condition of her autonomy, the woman affirms her dignity and her family's honor. A local expression shows that in this case the woman rids herself of everything she owns, including the needle which holds her hair in place: "She points the needle." This warrior-like expression aptly describes the wife's successful challenge to her husband and her in-laws. For in this gesture of complete dispossession, the woman restores honor to her own family and shows that she is not economically dependent on her husband's family.

### *Khul'* in Egypt

A comparison of the Mauritanian and Egyptian cases shows how differently *khul'* can be practiced and interpreted in different societies. In urban Egyptian society, it is the man who must demand that the wife returns the possessions given her during their married life. By contrast, in Mauritanian society, a man would lose his honor, which is defined by generosity, if he were to make this request of his wife, even if she has decided to leave him. Moreover, in Egypt, a woman who does not wait for the husband to present proof of what he has given her, that is, a woman who simply returns it to him immediately is considered depraved, someone who wishes to be rid of her husband as quickly as possible in order to join her lover. But in Mauritania, the same act – a woman who suddenly returns

all the possessions her husband gave her – is giving evidence of her autonomy and the prestige of her family. Furthermore, in urban Egyptian society the woman's family generally does not support her decision to have recourse to *khul'*, as it constitutes social dishonor for them as well as economic impoverishment, since they must reimburse the bridewealth. In Mauritania, the wife's family helps her financially and even encourages her to separate from her husband. By acting this way, the Moor family shows to one and all that they in no way depend economically on the family to whom they had given their daughter.

*Khul'* can take the legal form not only of financial compensation but also of giving up certain rights (Khalīl 1995, 22), such as the woman's right to custody of the children (*haddāna*) or her right to spousal and child support (*nafāqa*). On the other hand, even though extremely rare, it sometimes happens that as a result of this type of divorce the man, whose pride has been injured, demands to keep the children who in principle would stay with their mother. This decision applies mainly to male children, as girls in Moorish society and in Mālikī jurisprudence (Qayrawānī 1968, 199) must remain with their mother until they marry.

Women who divorce according to *khul'* sometimes risk having to renounce certain rights because their husbands make other demands. Egyptian women are protected from this threat by the personal status code, which stipulates that compensation paid by the woman to the husband can be only financial and he cannot require that she obtains a divorce in exchange for renouncing a right such as custody of their children.

Relative though it may be, it is nevertheless this freedom of decision accorded to the woman that made the legal recognition of *khul'* so problematic in a country like Egypt. Practiced for a long time in Moorish society, where this right to divorce is found in classical treatises of Islamic jurisprudence, which serve as legal references, it does not have the subversive connotation that it has in Egypt where it has been legally recognized through the personal status law of 2000.

Though inspired by Islamic jurisprudence, the reform of divorce in Egypt differs from classical law in that the woman has the right to divorce with the judge's consent but without her husband's consent. This divergence from Islamic jurisprudence was a key argument for those who opposed this law in the name of religion and denounced its illegal character, even though Shaykh Muḥammad Tantāwī from al-Azhar University justified the

reform by arguing that it does not contradict the Sharī‘a. The opponents of this reform strongly criticized Shaykh Muḥammad Tantāwī, calling him a non-believer (*kāfir*), because President Mubarak and his wife initiated the reform. The *khul‘* reform that allows a woman to divorce her husband without his consent was imposed by the government and not by the Muslim jurists or civil society.

Other Muslim countries introduced, almost at the same time as Egypt, the same reform in their personal status code. For example, in Jordan in 2002, amendments were added to the law of 2001; these allow women to demand a divorce without any justification and without their husband’s authorization. In Qatar, the law of 2004 about *khul‘* is very similar to Egyptian law. In Pakistan, in 1967, the Supreme Court set a precedent when it gave a woman the right to divorce without her husband’s agreement if they have tried and been unsuccessful at reconciling. In Algeria, in 2005, amendments to the law of 1984 gave women the right to divorce by *khul‘*, that is, by means of a financial compensation without the husband’s consent. Both Tunisia (from 1956) and Morocco (from 2004) went further in the *khul‘* procedure; they allowed women to divorce in the same way men can, without any justification or financial compensation.

The Egyptian law of 2000 granted women the power to divorce, a change that left many men feeling threatened and dispossessed of a prerogative that, until recently, only they had enjoyed. Instead of being hailed as a sign of greater gender equality, the law has been viewed through the hierarchical prism that prevails in Egypt: opponents of this reform affirmed that giving women the right to divorce will result in the destruction of the family. One could criticize the right of men to divorce their wives on similar grounds, but this argument is not discussed publicly because the aim of the opponents to the reform is to question the wisdom of decisions made by women. From their perspective, women are often “irresponsible” and therefore more likely than men to use their right of divorce in the heat of the moment, thus destroying their homes. According to this logic, the best way to protect women from themselves and from the mistakes they could make (by using such a right irrationally) is to not give women the right to divorce. This argument justifies *a contrario* the right of divorce remaining exclusively in the hands of men, who (unlike women) are capable of controlling their emotions.

The argument that women would divorce in an irrational way is not realistic since female divorce, unlike male divorce, is not effective at the

same time it is pronounced, but must proceed through steps, the first one being the attempt to reconcile (*ṣulḥ*) the spouses. and usually mobilizes two relatives or two family friends representing the couple. This practice may be directly inspired from the Qur'an (4:35) which recommends that an attempt at reconciliation be made by the representatives of the spouses' respective families in case of litigation: "And if you fear a breach between the two, bring forth an arbiter from his people and from her people an arbiter, if they desire to set things right" (Arberry 1980). Since it takes courage for a woman to ask for a divorce in a society where it is depreciated, this three-month delay increases the chance that she may renounce her decision, due to the influence of her relatives who do not agree with her divorce among other factors. The fact that this reconciliation period or *talāq* shows that this procedure is designed to influence women's decisions, as if they were less reasonable and more easily influenced than men's decisions. This attempt at reconciliation (called *ṣulḥ*) also exists in Moorish society, where the husband sends mediators to her family to convince her to return to the conjugal home. As the conflict is not limited solely to the spouses but extends to their families, it is necessary to reconcile not only the spouses but also the families related by marriage.

## The Status of Divorced Women in Egypt and in Mauritania

In the Egyptian case, when reconciliation fails, Egyptian jurists state that the woman must formally declare her decision to leave her husband. This declaration is peculiar to Egyptian law and is not required by Islamic jurisprudence. In this declaration, the woman does not have to justify the reasons of her divorce, but she must declare that she dislikes (*ikrāḥ*) her husband and consequently cannot continue to live with him because it could lead her to transgress her duties to God. The wording of the declaration makes implicit reference to the threat of women's adultery, which is the implicit reason for the dissolution of the marriage. It reflects a certain vision of women and of their uncontained sexuality and ultimately reveals the justification according to the point of view of the jurists, that the divorce will prevent women from falling into fornication (*zinā*). Women's divorce appears to jurists like a lesser evil to prevent a greater one, women's adultery.

Egyptian jurists consider that a woman who has an aversion (*karāhiyya*) toward her husband would be tempted to have adulterous sexual relations;

this presupposes a certain idea of women's sexuality – that a woman would inexorably search for sexual satisfaction, even illegally. Thus the idea that a woman who does not like her husband would necessarily take a lover both justifies women's divorce and discredits her for it. This argument casts doubts on women who seek a *khul'* and implies that they want to leave their husbands for their lovers. Given the social condemnation she would suffer, it is difficult for an Egyptian woman to seek divorce. However, the moral condemnation of the woman asking for *khul'* is neither new nor peculiar to Egypt. Famous Muslim theologians have condemned, on moral grounds, women who had recourse to this procedure. This is true of al-Ghazālī (1058–1111), who considered that a woman was in the wrong if she demanded a divorce by repayment and had nothing for which to reproach her husband. In this regard he cited a number of *ḥadīths*, including: “When a woman demands that her husband repudiate her without real grievances she will not breathe the perfumes of paradise,” and “Those who seek *khul'* are those who have only the appearances of true faith” (Ghazālī 1989, 100). The doubts held by certain theologians, as shown in these arguments about the reasons that a woman might resort to this legal procedure, are reflected in part in *shari'ah* to forbid a woman from marrying her lover. This is shown in the following legal principle: “It is strictly forbidden to marry the lover.” In urban Egyptian society, it seems that suspicion concerning a woman who has recourse to *khul'* is omnipresent. In such a context it is difficult for a woman to use this legal procedure without being stigmatized as unfaithful. It is even more difficult for her to remarry after her divorce because such a remarriage would only confirm her bad reputation in the eyes of society.

In this regard, the situation in Mauritania is very different because a woman who has recourse to *khul'* is celebrated by her family and courted by new suitors without her reputation suffering. On the contrary, the fact that a woman uses this procedure demonstrates her strong character, a feminine quality appreciated in Moorish society, unlike many societies that promote the idea of a submissive woman. Moreover, in Moorish society, a divorced woman is not condemned to celibacy, to “secret” marriages or to the status of a second wife. In contrast to men of other societies, Moorish men do not attach much importance to virginity and often prefer to marry an experienced divorced woman rather than an inexperienced virgin.

*Khul'*, far from representing some sort of infamy for the woman, is cause for a ritual of liberation in certain regions of Mauritania. In this ritual, the mother has a crucial role as guarantor of her daughter's right of divorce.

According to the local expression, “The woman leaves to gather money” in a neighboring encampment with her mother and a servant. All of the men of the same age as the woman, including those who are married, offer her gifts and recite poetic quatrains in her honor. The men in her age group, by offering her these gifts, help her to regain her freedom, and show her that she has not lost her powers of seduction. The young men not only contribute to bringing about her divorce, but also declare themselves possible candidates for her future remarriage. The importance and value of the gifts are proof of her nobility and also signify that she is still desirable. All the gifts she collects are taken to the woman’s husband’s place of residence, and delivered to the *qādī*. The *qādī* calls for the husband and asks in the presence of two witnesses if he accepts the sum; his acceptance means that the woman may dissolve the marriage. A husband who agrees to his wife’s divorce receives this payment, but because he cannot use this money without losing his honor, he distributes it to his servants or gives it to his father if he is elderly.

In conclusion, the example of Moorish society in Mauritania shows that the interaction between Islamic jurisprudence and social practice is constantly renegotiated in Muslim societies, especially where questions of gender are concerned. This is seen, for example, in the comparison between *khul‘* in Moorish society and urban Egyptian society. While the woman’s right to initiate divorce is found in the texts of Islamic law to which these societies refer, Moorish society practices it openly whereas Egyptian society has ignored it until recently. Even since Egypt has added this right to the family code, its application has remained problematic and women who invoke it are viewed as morally suspect. Analysis of the situation reveals that the differential use of the same right is essentially a function of the gender relations peculiar to each society.

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