

Disputes over the Independent Dwelling During the Marital Relationship

BOUASLA FATIMA ZOHRA ¹, FERAL BENDJEDDI ²

¹ Comparative Private Law Laboratory

¹ Faculty of Law and Political Science ; Hassiba Ben Bouali University ,Chlef , Algeria

Email: b.fatimazohra21@gmail.com ; f.bouasla@univ-chlef.dz

² Legislation Laboratory on Environmental Protection, Ibn Khaldoun University, Tiaret

² Faculty of Law and Political Science, Ibn Khaldoun University, Tiaret, Algeria

Email: ferialbendjeddi@gmail.com ; ferial.bendjeddi@univ-tiaret.dz

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Abstract

God has honored the wife and granted her the right to an independent dwelling to reduce disputes arising over it. The wife has the right, both religiously and legally, to reside alone in the dwelling, away from her husband's family. Positive law has followed the provisions of Islamic Sharia and has obliged the husband to provide an independent dwelling for the wife. What is noticeable in the Algerian Family Law is that it suffers from several gaps and legal loopholes concerning the matter of dwelling. Therefore, the legislator must address this issue by regulating the legal texts related to the independent dwelling and specifying the conditions that must be met in it, in order to reduce, even partially, disputes over the independent dwelling during the marital relationship.

Keywords: Wife, right to independent dwelling, disputes, solitude, husband, marital relationship.

Introduction

Islam has honored women in an unparalleled and unique manner compared to any other divine religion. Women have been granted multiple rights whether as mothers, daughters, sisters, or even wives. The latter has been granted by Islamic Sharia the right to an independent dwelling during the marital relationship, in order to preserve her family life and familial bonds.

The independent dwelling has several benefits for the husband, wife, and the family in general; it is a place of security, tranquility, and privacy. The wife has the right to refuse living with the husband's family unless she consents to it. It is the husband's duty to provide an independent dwelling for his wife to preserve her dignity and prevent harm to her. The issue of the independent dwelling has become a concern for most families, and a major difficulty for husbands, especially if the husband has low income and only has a place in his family's dwelling, while the wife insists

on an independent dwelling. This puts him in a dilemma.

The matter becomes more difficult for the husband if he is able to provide an independent dwelling for his wife but does not wish to leave his family by his own will or under his parents' orders. This causes disputes between the spouses and extends to the wife and the husband's family, especially if the husband is the only son of his parents or their provider.

Based on the above, we pose the following problem:

- Does the wife have the right to demand an independent dwelling away from the husband's family?

From this problem, the following sub-questions arise:

- What is an independent dwelling? And when is the wife entitled to it?
- What are the legal procedures for the wife to demand an independent dwelling?
- What are the obstacles preventing the enforcement of a judgment including an independent dwelling?

To answer these questions, we followed the descriptive method and the analytical method, and sometimes we relied on the comparative method when presenting some Arab legislations.

We divided the research plan into:

Chapter One Concept of the independent dwelling.

Chapter Two: Filing a lawsuit to demand the independent dwelling.

The Algerian legislator considered the dwelling as one of the necessities of marital life, and included it as part of the maintenance according to the amended Family Law by Ordinance 05-02. This was stated in Article 78, which reads as follows: "Maintenance includes: food, clothing, medical treatment, dwelling or its rent, and what is considered among the necessities according to custom and habit."

The issue of the independent dwelling is frequently raised in courtrooms and is among the most prominent disputes arising during the establishment of the marital relationship.

Therefore, in this section, we will clarify the concept of the independent dwelling (first requirement), then the obligations and limitations of the wife's right to an independent dwelling (second requirement).

Section One: Concept of the Independent Dwelling

In this requirement, we will address the definition of the independent dwelling (first branch), then refer to the opinions of jurists and the law regarding the wife's right to an independent dwelling (second branch).

Subsection One: Definition of the Independent Dwelling

To define the independent dwelling, we start first by presenting the linguistic definition.

First – Linguistically: The dwelling comes from "sakan," "sakana ila," "sakana fi,"

“yaskunu sukoonan,” and “sakina,” meaning to dwell, to reside, to be still. The dwelling is the place one inhabits or settles in.

As for “independent,” it means solitary, from the verb “farrada,” meaning to be alone or isolated, and to occupy it alone.

Second – Technical/Terminological Definition of the Independent Dwelling:

Professor Mohamed Mostafa Shalabi defined it as the place that includes all that is necessary for residence, such as furniture, bedding, utensils, and facilities, which the family needs, taking into account the financial and social status of the husband and wife.

Professor Ali Hasaballah defined it as the place that the husband prepares as a residence for his wife, fulfilling the Sharia conditions, where she must reside in it.

Thus, the dwelling is a residence suitable for the wife according to the condition of the husband and wife, whether in wealth or poverty according to most jurists, or according to the wife’s condition alone according to the Shafi’i school.

Third – Legal Definition of the Independent Dwelling:

The Algerian legislator did not define or determine the meaning of the independent dwelling in any legal text; it was only mentioned in Article 78 of the Family Law, where it was considered part of maintenance.

We also referred to the provisions of Islamic Sharia according to Article 222 of the Algerian Family Law, which states: “Anything not

specified in this law is referred to the provisions of Islamic Sharia.”

It is also noticeable in Moroccan legislation, Article 51 of the Family Code, which defined marital cohabitation as one of the mutual rights and duties between spouses: marital cohabitation includes sexual intercourse, fairness and equality in polygamy, chastity of each spouse, faithfulness, and the obligation of chastity and preservation of honor and offspring.

As stated in the Jordanian Personal Status Law No. 36 of 2010, in Article 72, that: “The husband prepares the dwelling containing the Sharia necessities according to his condition and at his place of residence or work, and the wife, after receiving her deferred dowry, must follow her husband and reside with him therein, and she must move to any place he desires, even outside the Kingdom, provided that she is safe there, and that the marriage contract does not contain a condition requiring otherwise; if she refuses obedience, her right to maintenance is forfeited.”

Article 73 of the same law also stated: “The dwelling must be in a condition in which the wife can attend to her religious and worldly interests, and be secure in it regarding herself and her property.”

What we notice is that most Arab legislations did not define the dwelling but only addressed its conditions and specifications.

Subsection Two: Opinions of Jurists and the Law Regarding the Independent Dwelling for the Wife:

The opinions of jurists and Imams of the schools of thought varied regarding the subject of the independent dwelling and the wife's right to it during the marital relationship. The Algerian legislator adopted the view of the majority and recognized the wife's right to an independent dwelling, which is clearly shown in several judicial decisions.

In addition, jurists stipulated several conditions for the dwelling, such as it must include all necessary facilities like bathrooms and kitchen, and be equipped with all tools necessary according to his financial condition, wealth, and according to custom and tradition. The Hanafis obligated the wife to reside in a house free from the husband's family, a separate house with closure, facilities, a kitchen, and it is obligatory for the wife to reside in a separate house except for her child who does not understand intercourse and his mother; and if she bears from another according to their condition, such as food, clothing, and a separate house with closure.

The wife is harmed by sharing the dwelling with others, because she cannot secure her belongings, and this prevents her from intimacy with her husband and from enjoyment, unless she chooses this, because she consented to the reduction of her right.

The husband cannot have his wife and mother live in the same house, because he dislikes

intercourse in a house with others; and even if the mother resides in the house of the husband and the wife in another house, there is no alternative.

Al-Khasaf stated that she has the right to say: I will not reside with your parents and relatives in the house, so assign me a separate house.

It is known that the people of the Levantine countries do not reside in a house shared with outsiders, especially among their upper class, except if it is an inherited house among siblings, for example.

As for the Malikis, they supported the wife's right to some extent to refuse residing with the husband's relatives, even parents, in the same house, due to the harm it causes her by their observing her condition and discussing it, except if the marriage contract stipulates that she must reside with them; in that case, she has no right to refuse unless harm occurs.

As for those without that amount (meaning with little dowry), she does not have the right to refuse except for a stipulation or occurrence of harm.

The Shafi'is also followed the opinion of both the Hanafis and Malikis regarding the wife's right to an independent and separate dwelling and that her husband must prepare a dwelling for her according to his capacity and means, according to the saying of God: **“Accommodate them where you dwell ... (6)”**.

Considering that the dwelling is part of maintenance, maintenance is not due to the

woman until she enters upon her husband; if she refuses to enter, no maintenance is due.

From the legal perspective, the Algerian legislator followed the jurists' view regarding the wife's right to an independent dwelling and considered it part of maintenance. It is known that maintenance is obligatory for the husband toward his wife upon entry, according to Article 74 of the Algerian Family Law, which states: "Maintenance is obligatory for the wife upon entry or summoning her thereto with proof, taking into account the provisions of Articles 78, 79, 80 of this law."

The Supreme Court decision dated 16/02/1999 stated: "It is established in Sharia that the wife has the right to demand a dwelling independent from the husband's family, according to Khalil: 'She has the right to refuse to reside with his relatives.'

When it is established—in the case at hand—that the appellant considers the wife disobedient to him and she left the marital house voluntarily, even though obedience of the wife to her husband does not conflict with her right to an independent dwelling, the ruling that the wife's return to the marital house must be to an independent dwelling from the husband's family applied the law correctly."

Another Supreme Court decision dated 06/02/1999 stated: "It is well-established judicially that the wife has the right to an independent dwelling from the husband's family. It was established in the case at hand that the husband did not provide his wife with

an independent dwelling from his family, which causes her to refuse to return to the marital house.

Therefore, the lower court judges, by ruling that the wife was not rebellious, applied the law correctly, which requires the rejection of the appeal."

Section Two: Obligations and Forfeitures of the Wife Regarding the Independent Dwelling

As we previously mentioned, the dwelling is considered part of maintenance; therefore, the same rules of entitlement to maintenance apply to the dwelling.

Accordingly, the conditions for entitlement to maintenance are the same as those for entitlement to the dwelling, which we will present in (First Branch), and the second branch will address the forfeitures of the wife's right to the independent dwelling.

Subsection One: Conditions for the Wife's Right to the Independent Dwelling

Several conditions are required for the wife's right to an independent dwelling, which we will clarify as follows:

First – The Marriage Contract Must Be Valid:

For the wife to have the right to the dwelling, the marriage must be valid. If the marriage contract is invalid or void, the dwelling is not obligatory, because in the case of a defective or void contract, the duty is separation between the spouses; therefore, the wife's retention is not legitimate, and dwelling is not obligatory.

Second – The Wife Must Be Fit to Fulfill the Purpose of Marriage:

For the wife to have the right to the dwelling, she must be capable of fulfilling the purpose of marriage, that is, she must be fit for enjoyment and for fulfilling marital duties. If she is a minor unable to have intercourse or a terminally ill patient, dwelling is not obligatory before consummation because she is not fit to achieve the purposes of marriage.

Third – Consummation with the Wife:

Consummation with the wife refers to correct seclusion with her, whether sexual intercourse actually occurs or not—for example, if impotence of the husband prevents intercourse. The failure of intercourse due to the wife's refusal constitutes disobedience, thus forfeiting her right to the dwelling. Moving the wife to the marital house and secluding with the husband constitutes actual entry, which has Sharia effects, entitling the wife to her full dowry and all maintenance inclusions.

Subsection Two: Forfeitures of the Wife's Right to the Independent Dwelling:

The independent dwelling is a duty on the husband and a right for the wife, but there are several cases that absolve the husband from this obligation, as follows:

First – Contract Invalid or Entered Under Suspicion:

No dwelling is due for a woman whose marriage contract is invalid or entered under doubt, because maintenance is generally for the retention of the wife for the benefit of her

husband, and in this case, the husband must separate due to contract invalidity.

Second – Minor Wife Not Fit for Sexual Intercourse:

No dwelling is due for a minor wife if she cannot be enjoyed and is not fit to serve the husband.

Third – Rebellious Wife:

If the wife leaves the marital house without a legal excuse, or refuses to return to the marital house without an acceptable reason, she is considered rebellious and forfeits her right to maintenance including dwelling.

Fourth – Apostate Wife:

An apostate wife is not entitled to dwelling, as her apostasy causes dissolution of the marriage.

Fifth – Wife with Illness Preventing Intercourse:

Dwelling is obligatory for a wife with a mild illness that does not prevent enjoyment; severe illness that prevents enjoyment and has not reached the level of dispute negates dwelling.

Sixth – Imprisoned Wife:

Even if imprisonment is unjust, the lack of retention negates maintenance generally and dwelling specifically.

Seventh – Kidnapped Wife:

If the wife is kidnapped against her will, which prevents her from being with her husband, her maintenance and dwelling are suspended during the kidnapping because the husband lost his right of retention for reasons beyond his control.

A dispute may arise between the spouses regarding the independent dwelling; the wife may leave her place of residence to her family's house and ultimately resort to the courts to demand an independent dwelling and return to the marital house, while the husband may demand her return, and the wife may counter with a request for an independent dwelling. Below, we will explain **how to demand the independent dwelling (First Requirement)** and then clarify **the judgment for the wife regarding the independent dwelling and how it is executed (Section Two)**.

Chapter Two: Filing a lawsuit to demand the independent dwelling

Section One: How to Demand the Independent Dwelling

The wife can demand the independent dwelling through a lawsuit for return to the marital house (First Branch), and she can also submit a request in response to her husband's request, represented by the independent dwelling as a counterclaim to the return lawsuit, which we will clarify in (Second Branch).

Subsection One: Lawsuit for Return to the Independent Marital Dwelling:

The lawsuit is considered a means of proving the claimed right and is only accepted when a set of conditions is met, which the legislator stipulated in the Code of Civil and Administrative Procedures.

Article 13 of the Code of Civil and Administrative Procedures stipulated the conditions related to the parties to the lawsuit, namely capacity and interest.

Capacity is the right to claim before the judiciary and is based on direct and personal interest in litigation. It must be present in the plaintiff and the defendant and all parties to the lawsuit, whether original or joined in the dispute. The Code of Civil and Administrative Procedures states that the right to litigate is for those with capacity, or those who represent them, whether a lawyer or another person acting by agency.

In family matters, the capacity of the parties to the lawsuit is determined by an extract from the marriage contract registered in the civil status records, according to Supreme Court Decision No. 12529 dated 21/04/1975: "It is legally established that no person may claim the status of spouse unless proven by a contract registered in the civil status register."

The second condition, interest, refers to the benefit achieved by the claimant at the time of resorting to the judiciary. This benefit forms the motive behind filing the lawsuit and the goal of initiating it.

The wife here prepares an initial petition containing all basic data such as name, surname, date, and signature, and submits it to the court registry before the Family Affairs Department, at the location of the marital dwelling.

Here, the wife has both capacity and interest: first, due to her connection with the subject of the dispute, and second, due to the benefit she seeks, namely the provision of an independent dwelling to preserve marital life.

Afterward, the husband is served by the judicial officer and receives the summons to appear. Accordingly, the litigation proceeds before the court, and a judgment is issued granting the independent dwelling to the wife. The Supreme Court decision dated 04/11/1985 stated: “Since it is established in Sharia that the wife has the right to demand from her husband that she be housed separately and independently from his family, even if she did not retain this right when concluding the marriage contract, or previously lived with her husband’s relatives and then complained due to the harm caused to her by them, any ruling contrary to this principle constitutes a violation of the established principles.

Therefore, the decision obliging the wife to resume marital life with her husband in his family home due to the prevailing housing crisis in the capital must be overturned.”

Subsection Two: Claiming the Independent Dwelling as a Counterclaim to the Return Lawsuit:

The husband may file a lawsuit for return to the marital house, and the wife may submit a counterclaim requesting the independent dwelling. It is known that this is a legitimate right for the wife, and it is the husband’s obligation to respond to the wife’s request. The

wife is not considered rebellious here because she has the right, religiously and legally, to reside alone to practice her marital and family life.

This was confirmed by the Supreme Court decision dated 06/02/1999, which stated: “It is well-established judicially that the wife has the right to an independent dwelling from the husband’s family. In the case at hand, it was established that the husband did not provide his wife with an independent dwelling from his family, which caused her to refuse to return to the marital house.

Accordingly, the lower court judges, by ruling that the wife was not rebellious, applied the law correctly, which requires the rejection of the appeal.”

Section Two: Judgment for the Wife for the Independent Dwelling

When the judge issues a ruling granting the independent dwelling in favor of the wife, execution is then carried out by the judicial officers (First Branch). However, sometimes the judicial officer faces difficulties and several obstacles and issues in enforcing the court ruling for the independent dwelling in favor of the wife (Second Branch).

Subsection One: Execution of the Judgment Granting the Independent Dwelling:

According to Article 609, first paragraph, of the Code of Civil and Administrative Procedures, which states: “Judgments and judicial decisions are not enforceable until the expiration of opposition or appeal periods, and

a certificate from the registry of the concerned judicial authority must be provided, containing the official date of service of the judgment or decision to the convicted party, and confirming that no opposition or appeal occurred.”

From this article, it is understood that after the judicial ruling for the independent dwelling is issued and obtains executive formality, the judicial officer drafts the execution report. This is also mentioned in Article 611 of the Code of Civil and Administrative Procedures: “Execution is carried out by judicial officers upon the request of the beneficiary of the executive instrument or their legal or contractual representative.”

Article 612 of the Code of Civil and Administrative Procedures states: “Forced execution must be preceded by official execution of the executive instrument, and the obligated party must be summoned to fulfill what is contained in the executive instrument within 15 days. The provisions of Articles 406 to 416 of this law apply to the official service of the execution summons.”

Meaning that the executive instrument is served to the husband, who has 15 days to implement the content of the ruling, namely providing the independent dwelling for the wife.

After the 15 days allocated for the execution summons, the judicial officer inspects the dwelling with the husband to ensure that all conditions necessary for life are met, then

drafts a report indicating the husband’s compliance with the ruling.

Subsection Two: Obstacles Encountered in Executing the Judgment Granting the Independent Dwelling for the Wife:

Due to the absence of a legal text specifying the conditions required for the independent dwelling, and also the silence of judges on these conditions without clarifying them—while it is customary that housing maintenance includes furnishings, blankets, cushions, and kitchen tools such as bowls and pitchers, which are generally considered part of maintenance except for the Malikis who consider them part of the wife’s dowry, and in contemporary times, necessities such as electricity, water, windows, etc., are considered essential—this has led to difficulty in executing the ruling.

The judicial officer is unable to distinguish between what is suitable for living and what is not, and therefore drafts a report describing the dwelling in full detail to return it to the court president for urgent decision.

Sometimes the husband fulfills his obligation but provides a dwelling not fully separate from his family’s house, and the wife rejects it on the grounds that it is not independent of his family dwelling. She requests a report stating the dwelling is not independent, while the husband requests a report of the wife’s refusal despite the dwelling meeting all living conditions.

Here lies the problem, leaving the judicial officer in a loop and the husband in confusion.

Therefore, it can be said that the independent dwelling is a pure right of the wife that the husband must fulfill during his lifetime.

In light of the above in the research paper on disputes over the independent dwelling during the marital relationship, we conclude that the independent dwelling has several benefits, namely preserving the privacy of the marital relationship and making it more cohesive, and the wife's sole residence provides the family with stability, tranquility, and security.

From our study on disputes over the independent dwelling, we reached the following results:

- The independent dwelling is a religious and legal right of the wife during the marital relationship.
- The legislator considered the dwelling as part of maintenance according to Article 78 of the Algerian Family Law, which is somewhat deficient regarding the dwelling issue; it would have been better to legislate precise legal texts regulating this matter.
- The independent dwelling issue is left to the judiciary and judicial interpretations and their reference to Islamic Sharia, according to Article 222 of the Algerian Family Law.
- Disputes over the independent dwelling have intensified even when the husband is obliged to provide it, as the wife may claim it is unsuitable for living or not completely separate from

his family dwelling, due to the lack of legal text specifying conditions for the independent dwelling.

- No judicial interpretation has been issued regarding the dwelling conditions.

Based on these results, we present the following recommendations:

- Draft new legal texts addressing the issue of the independent dwelling during the marital relationship.
- Specify the conditions of the independent dwelling through judicial interpretation or legal texts to facilitate enforcement of judgments and decisions, and reduce disputes over the independent dwelling, even partially.
- Consider the situation of a husband who has no dwelling other than his family's home, and adjust conditions for benefiting from social housing.

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