

# Regulations of Arbitrary Divorce in Light of Islamic Jurisprudence and Algerian Family Law

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## Abstract

This study aims to shed light on the regulations of arbitrary divorce, which can be defined as a divorce initiated by the husband without a legitimate religious or legal justification. Such an action can burden the wife, who may require compensation, especially in light of legal deficiencies and gaps. This is further complicated by the husband's refusal to pay the required compensation. The Algerian legislator has addressed compensation for arbitrary divorce in a single article, Article 52 of the Algerian Family Code. In this article, the legislator has left the determination of the compensation amount to the discretion of the judge, who has broad powers in this regard. To ensure adequate protection, the positive legislator has intervened through Article 222 of the Algerian Family Code, assigning the Family Court judge the responsibility of assessing the harm suffered by the wife. The judge is then authorized to issue a ruling that includes compensation for arbitrary divorce when a dispute arises between the spouses and the judge confirms that the divorce occurred without a legitimate cause.

**Keywords:** Regulations, Arbitrary Divorce, Islamic Jurisprudence, Algerian Law.

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Introduction:

Marriage is the foundation of a stable family and is a practice ordained by God in the universe. Due to its significance, Islamic law has detailed its rules and defined its rulings, starting from the thought of marriage to its completion. It is safeguarded from its beginning to its end, whether through death or otherwise. Islamic law has organized its regulations, placed rules and limits around it, and established it as a source of tranquility, affection, and mercy. However, when the doors of reconciliation close, and all means to restore harmony between the spouses are exhausted, God has permitted divorce as a last resort.

Yet, divorce may be misused inappropriately, becoming a means to serve other purposes or leading to harm and injustice. In such cases, it becomes a tool for causing harm to the wife or achieving unlawful interests. This misuse of divorce contradicts its rightful purpose. Thus, the concept of arbitrary divorce arises. Arbitrary divorce is when a spouse initiates divorce without a legitimate reason, or when divorce is used for an improper cause. This includes situations like a husband divorcing his wife while ill with a terminal illness to deprive her of inheritance, or using his right of revocation after divorce to harm her by prolonging her waiting period (iddah) with repeated revocations and divorces. It also includes cases where the wife seeks to end the marriage through khul' (divorce initiated by the wife) due to harm.

This research will seek to clarify the concept of arbitrary divorce, define its criteria, and explain the discretionary authority of judges in determining compensation for the harmed party. The research raises the following question: How have Algerian legislators and Islamic law addressed the issue of arbitrary divorce?

The objectives of studying this topic are as follows:

- To understand the true nature of arbitrary divorce in Islamic law and Algerian law through an in-depth study of the subject.
- To explore the positions of both Islamic law and Algerian legislators regarding arbitrary divorce.
- To highlight the legislative gaps in this area and propose solutions that align with Islamic principles.
- To enrich knowledge in both Islamic and legal fields by clarifying ambiguities surrounding this matter.

In the study of the regulations governing arbitrary divorce in light of Islamic jurisprudence and the Algerian Family Law, the research employs both the analytical and inductive methods. This

involves analyzing and interpreting the texts of the Algerian Family Code, as well as using the comparative method by comparing relevant legislative rulings with Islamic law.

### 1. Concept of Arbitrary Divorce

#### 1.1 Definition of Arbitrary Divorce

Arbitrary divorce occurs only after all lawful means to preserve the marital bond have been exhausted. As a result, any attempt to dissolve the marriage contract is considered undesirable and repugnant to the soul. This section will first provide a general definition of divorce, followed by a specific definition of arbitrary divorce in the following points:

##### 1.1.1 Divorce in Linguistic Terms

The term "divorce" is derived from the verb "ṭālaqa," meaning "the man divorced his wife." The word "ṭāliq" refers to someone who has been divorced, and "mūṭaliq" or "māṭlaq" refers to the state of being released from a bond. Similarly, "ṭālaq" refers to the act of releasing someone, such as when it is said, "I freed the prisoner" (ṭālaqtu al-asīr), meaning the prisoner was released without restriction. Additionally, the phrase "divorced the woman" means she was released from the marital bond and removed from the husband's authority<sup>1</sup>.

Divorce also signifies abandonment or separation. For example, "He divorced the country" means he left it, or "He divorced the people" means he parted from them<sup>2</sup>.

##### 1.1.2 Divorce in Legal Terms

Legally, divorce refers to the termination of a valid marriage bond, either immediately or eventually, through a specific utterance or equivalent action. The immediate termination occurs in the case of an absolute divorce (bā'in), and the eventual termination happens in the case of a revocable divorce (raj'i). The specific term used is a clear declaration, such as "bā'in," "harām," or "ṭālaq"<sup>3</sup>

The Mālikī school defines divorce as "a legal status that removes the husband's right to enjoy his wife, and if repeated twice, makes her forbidden to him until she marries another man"<sup>4</sup> The Ḥanbalī school describes it as "the dissolution of the marriage bond," and further explains that a revocable divorce (raj'i) occurs when the husband gives his wife one divorce without severing the marriage entirely<sup>5</sup>

##### 1.1.3 Divorce in Legal Terms

The Algerian legislator defines divorce in Article 48 of the Algerian Family Law, amended by Law 84-11 before the amendment, as follows: "Divorce is the dissolution of the marriage contract, and it occurs by the husband's will, by mutual consent of the spouses, or at the wife's request, as stipulated in Articles 53 and 54 of this law." However, after the amendment issued on 27/02/2005,

the text now states, "Subject to the provisions of Article 49 below, the marriage contract is dissolved by divorce, which occurs by the husband's will, by mutual consent of the spouses, or at the wife's request, as stipulated in Articles 53 and 54 of this law." The article does not provide a definition of divorce; rather, it enumerates the various ways the marital bond may be dissolved, but it does not truly define divorce itself <sup>6</sup>

## 1.2 Definition of Misuse

Islamic jurisprudence has addressed the concept of misuse according to the views of different schools of thought. However, I will first discuss its linguistic and then its technical definition as follows:

### Meaning of Misuse in Linguistic Terms

The term "al-Asf" is derived from the root verb "al-Asf" (to stray or deviate from the path). It means to take a wrong turn or to act without guidance<sup>7</sup> It is also used to refer to oppressive or unjust behavior, as in "the sultan's misuse" (al-'Asf al-Sulṭān), which means to oppress. In this context<sup>8</sup>, "al-Asf" refers to the exertion of undue hardship or oppression on someone. In Ibn Manzūr's *Lisān al-'Arab*, the term "عسف" refers to traveling without proper guidance or direction. It also refers to the act of walking or moving in an unplanned and reckless manner. It signifies injustice or oppression, such as when it is said that a ruler misused his power<sup>9</sup>

### Definition of Misuse in Legal Terms

#### Definition of Misuse in Islamic Jurisprudence:

There is no explicit definition of misuse (al-As) in Islamic jurisprudence as a standalone theory. However, it is discussed within the broader framework of topics such as guarantees related to the misuse of legal rights. One example is the issue of preventing a girl from marrying a suitable match by her guardian, which is referred to as "al-'adl" (coercion)<sup>10</sup>

According to Abū Zuhrah, misuse is the "use of a right in a way that harms others, either by exceeding the limits of permissible use or by causing harm greater than the benefit to the person exercising the right"<sup>11</sup>

Al-Darīnī defines misuse as "the contradiction of the intent of the legislator in a lawful act, in accordance with the original intent"<sup>12</sup>

From these definitions, it can be concluded that, according to Abū Zuhrah, harm occurs when the permissible use of a right is exceeded. Al-Darīnī, on the other hand, views misuse as the exercise of a legitimate right in a manner that harms others, thereby contradicting the legislator's intention. Thus, the term "misuse" is sometimes referred to by other terms such as "harm to rights," "abuse,"

or "overstepping," and its essence lies in the contradiction between the legislator's purpose and the actions of the right-holder<sup>13</sup>

#### Definition of Arbitrary Divorce Legally:

The Algerian legislator did not define arbitrary divorce, leaving this task to Islamic and legal jurisprudence. This is because the term "arbitrary divorce" is a relatively new concept that emerged with the development of the theory of arbitrariness. However, the Family Code addresses arbitrariness in divorce in Article 52, which states: "If the judge finds that the husband has acted arbitrarily in divorcing, he shall grant the divorced wife compensation for the harm caused."

There is a difference of opinion in legal scholarship regarding the existence of arbitrariness in divorce. Those who argue that arbitrariness does not exist base their view on the principle that divorce is fundamentally permissible, and that the right to divorce is a unilateral right held by the husband. He is free to exercise this right whenever he wishes.

Conversely, those who argue that arbitrariness does exist base their view on the premise that the default rule for divorce is prohibition, and that it is only permitted in cases of necessity or urgent need. If divorce occurs without such a need, the husband is considered to have sinned according to Islamic law.

From the above, it can be concluded that divorce is among the most detested lawful actions due to the consequences it brings, such as the dissolution of the marital relationship and, in some cases, the potential loss of children if the couple has any. Divorce is generally regarded as a final remedy when all other solutions, such as reconciliation and arbitration, have failed. It represents a severance of the marital bond, and should not be used without necessity, as doing so would be considered arbitrary.<sup>14</sup>

One of the selected definitions of arbitrary divorce is that the husband misuses his right to divorce, a right granted to him by law. He does so without a reasonable cause or a pressing need, thus contradicting the purpose of the law, which is to prevent harm. This action must be justified, and it occurs without any misconduct by the wife, her request, or her initiation. If the husband divorces without a valid and serious reason, he is considered to be acting arbitrarily, with the sole intention of harming the wife. Consequently, he must bear the consequences of his actions.<sup>15</sup> 15)

#### 1.3 Forms of Arbitrary Divorce Divorce in the Illness of Death:

Jurists have disagreed on the definition of the "illness of death," each offering their own perspective. The Hanafi scholars defined it as "the illness in which the fear of death becomes dominant, and the patient becomes unable to manage their own affairs." On the other hand, the Shafi'i scholars defined it as "any condition in which the person prepares for death by turning to

righteous deeds," while some have stated that it is "any condition in which death is imminent." <sup>16</sup>" The Algerian legislation has regarded the illness of death as being equivalent to a will. This is stated in Law 84-11, amended by Law 05-02, which includes the Algerian Family Code, in Article 204: "Gifts made during the illness of death, as well as in serious illnesses or conditions that pose a threat to life, are considered as a will"<sup>17</sup>

Article 776 of Law 75-58, which includes the Algerian Civil Code, stipulates: "Any legal act considered a gift to take effect after death shall be subject to the provisions of a will, regardless of the terminology used to describe such an act."

The second paragraph further adds: "The heirs of the person making the act must prove that the legal act was made by their deceased relative during the illness of death, and they may prove this through any means available."

The third paragraph states: "If the heirs prove that the act was made by their deceased relative during the illness of death, the act will be considered a donation, unless the recipient of the act proves otherwise"<sup>18</sup>

Therefore, if a husband divorces his wife during the illness of death with the intention of depriving her of inheritance, his action will be treated as contrary to his intent, and she will inherit from him as long as she is within the waiting period (iddah).<sup>19</sup>

Furthermore, she will inherit from him even if the divorce is irrevocable (bā'in), as stated by the Maliki scholars. The Malikis even assert that, should she remarry, she would still inherit from him<sup>20</sup>

Although the Algerian legislator did not define the illness of death, Algerian judicial practice has defined it as "the illness that invalidates legal acts, which is the final, serious illness that leads to death, during which the person loses consciousness and discernment. The judge must verify this at the time the act is made"<sup>21</sup>

It can be said in this regard that medicine is the determinant in distinguishing between diseases that are curable and those that lead to death, and whether the disease is the cause of death or not<sup>22</sup>

#### Divorce of an Apostate

Article 138 of the Algerian Family Code states: "Lian (the oath of disavowal) and apostasy exclude one from inheritance"<sup>23</sup>. Order 84-11, previous reference. This is in line with Islamic jurisprudence. If a wife apostasizes from her husband, she is divorced from him, and neither inherits from the other. However, some scholars have equated this to the illness of death, as the

husband's action of divorcing his wife is seen as contrary to his original intent, aimed at preventing his wife from inheriting.

#### Divorce During Menstruation

Jurisprudence is unanimous that this form of divorce is an innovated divorce (bid'i). However, it does not distinguish between divorce during menstruation and divorce during purity (tuhr). It is narrated in the Sunnah of the Prophet Muhammad (PBUH) that Umar ibn al-Khattab (RA) divorced his wife while she was menstruating. The Prophet (PBUH) instructed him to take her back until she became pure. The husband's intention in divorcing his wife while she was menstruating was to lengthen her iddah (waiting period), so that the menstrual cycle in which the divorce took place would not be counted<sup>24</sup>

#### Divorce Without a Justifiable Reason

Some scholars believe that if a husband divorces his wife without a legitimate need or necessity, he is acting arbitrarily. His action causes harm to his wife, children, and even his family. Therefore, this behavior contradicts the objectives of Islamic law, which permits divorce only when necessary<sup>25</sup>

Muhammad al-Zuhayli argues that it is not possible to establish a fixed standard for the justification or legitimate reason for divorce. The reasons for divorce can be objective in some cases, but are often subjective, such as a lack of understanding or compatibility between the spouses. These personal reasons are often dominant, and they cannot be precisely regulated or subjected to clear standards. Therefore, in his view, divorce is limited to specific circumstances<sup>26</sup>.

#### 1.4 Criteria for Arbitrary Divorce

The Algerian legislator has not explicitly defined the criteria for arbitrary divorce. However, Islamic jurisprudence has addressed them. Arbitrary divorce is defined as a set of criteria that helps determine whether a divorce is arbitrary when the right to divorce is used for either a lawful or unlawful purpose. The importance of these criteria lies in proving facts before the judicial authorities in case of a dispute<sup>27</sup>

However, the Algerian legislator has not specified particular criteria for arbitrary divorce in the Algerian Family Code. Instead, the law addresses the right to divorce in general terms in the provisions of Article 124 bis of the Civil Code. The article mentions examples of the misuse of rights, stating: "The misuse of a right constitutes an error, particularly in the following cases:

- If it is done with the intention of harming others.
- If the benefit gained is disproportionate to the harm caused to others.
- If the aim is to obtain an unlawful benefit."

Through the interpretation of this legal article, it becomes clear that misuse refers to the abuse of the right in a way that deliberately causes harm or aims to gain minimal benefits or unlawful goals<sup>28</sup>

## 2. Criteria for Arbitrary Divorce:

### Subjective Criterion:

This criterion is derived from examining the psychological factors that motivate the husband's will to divorce. These factors lead him to contradict the legitimate purpose of divorce, resulting in an arbitrary use of his right. Under this criterion, we find:

#### Criterion of Divorce with the Intent to Harm the Wife:

In this case, the husband's intent is to harm his wife. This occurs when he divorces her with the purpose of causing her harm, such as divorcing her while he is on his deathbed in order to deprive her of inheritance. This criterion pertains to the intention, meaning that the sole motive behind the divorce must be to harm. This has been expressed by some researchers as the sole intention to harm as a standard of arbitrariness<sup>29</sup>.

#### Criterion of Divorce for Purposes Other Than Those for Which It Was Permitted:

The legitimate purpose of divorce is to resolve serious marital conflicts that have hindered the continuation of the marriage or made it unbearable. If the purpose of the divorce is an unlawful one that harms the wife, this is considered arbitrary. Some scholars have referred to this as the misuse of the right of divorce for purposes other than its lawful intent<sup>30</sup>

### Objective Criteria:

These criteria are drawn from balancing the benefit of the one who holds the right to divorce (the husband) and the harm caused by exercising that right. If the harm is equal to or greater than the benefit, it falls under the following:

#### Criterion of Imbalance Between Conflicting Interests (Between the Husband's Interest in Divorce and the Wife's Interest in Maintaining the Marriage):

This criterion is applicable when the husband divorces his wife without acceptable reasons, without justification, or without proper motives. For instance, if the husband is married to four women and wishes to marry another, but cannot because the law allows him only four wives, he might divorce one of them in order to marry another. In doing so, he harms his wife, and the damage caused to her could outweigh the benefit he seeks from the divorce. Hence, the divorce would be considered arbitrary<sup>31</sup>

#### Criterion of Severe Harm:



This criterion is based on the idea that if a husband causes his wife severe harm, whether intentionally or unintentionally, it is prohibited. The harm contradicts the intention of the legislator in granting the right to divorce. Such a contradiction is seen as arbitrary. This is particularly true if there is no valid reason for the divorce, no issues that made marital life unbearable, or if the wife is elderly and the husband is her sole provider for marital expenses<sup>32</sup>

Criterion of Using the Right to Divorce with Justification, When an Alternative Achieves the Same Purpose

An example of this is when a husband divorces his wife because she only gives birth to daughters. In this case, the divorce would be considered arbitrary. This is because the husband could have kept his wife in marriage and married another woman simultaneously. Therefore, other options exist that would have achieved the husband's desired purpose without resorting to divorce, in accordance with the principle "There should be no harm and no reciprocating harm"<sup>33</sup>

### 3. Compensation for Arbitrary Divorce

Compensation can be defined as a sum of money paid by the husband to his divorced wife over a period of time, as compensation for the material harm caused to her. This payment is intended to provide her with a dignified life and emotional well-being, as she is deprived of the warmth, stability, and security of married life<sup>34</sup>

There is a disagreement among scholars regarding the permissibility of compensating for arbitrary divorce. Some argue against it, claiming that there is no clear evidence in the Quran or the Sunnah mandating compensation for divorce, unlike the lawful rights of the divorced woman. They also argue that the principle of divorce in Islam is generally prohibited, except in cases of necessity<sup>35</sup>

On the other hand, proponents of compensation argue that if a husband divorces his wife without a valid Islamic justification, the wife has the right to financial compensation. The family court judge should determine the amount of compensation, as divorce results in the loss of the wife's future stability. This view parallels the compensation (mut'ah) given to a divorced woman in Islamic law<sup>36</sup>

The Basis for Compensation for Arbitrary Divorce : I will address the basis for compensation for arbitrary divorce as follows:

#### The Jurisprudential Basis for Compensation for Arbitrary Divorce

The jurisprudential basis for compensation for arbitrary divorce is based on what is known as "mut'ah" (compensation), which is a form of compensation for divorce. It is defined as the

amount of money that the husband is obligated to pay his wife upon divorce or its equivalent. This amount is not fixed and varies according to time, place, and custom<sup>37</sup>

Islamic jurists have differed on the ruling regarding mut'ah and to whom it is due. The Maliki school of thought holds that mut'ah is recommended, except in cases where the wife has not been consummated, in which case only the agreed dowry is due, and mut'ah is not applicable. They defined it as "what the husband is instructed to give the wife as compensation for divorcing her"<sup>38</sup>

The Hanafi school views mut'ah as obligatory in cases of divorce before consummation if there was no specified dowry. In other cases of divorce, it is recommended. They define it as "what is due after divorce, before consummation, in a marriage where no dowry was specified, as a replacement for the dowry that would have been due prior to the divorce, as an alternative to the husband's right over the woman in both cases"<sup>39</sup>

#### The Legal Basis for Compensation for Arbitrary Divorce

Article 52 of the Algerian Family Law states, "If the judge determines that the husband has acted arbitrarily in divorce, he shall rule in favor of the divorced wife for the harm caused to her." Therefore, the legal reference for arbitrary divorce is the text of this article. However, the Algerian legislator has not addressed the basis for compensation upon which the judge relies in making his ruling. In the absence of a legal text, the matter is referred to the application of Article 222 of the Family Law<sup>40</sup>.

#### The Discretionary Power of the Judge in Compensation for Arbitrary Divorce

The issue of determining compensation for arbitrary divorce varies from case to case, depending on the facts and circumstances of each case. Thus, the judge's ruling differs according to his perspective on the case and his discretionary powers.

#### The Scope of the Judge's Discretionary Power in Compensation for Arbitrary Divorce

There is no specific provision in the Algerian Family Law that defines the scope of the judge's discretionary power regarding compensation for arbitrary divorce. However, the concept of arbitrariness is based on the absence of a legitimate or reasonable justification for the divorce. Even though divorce is a right for the husband, he must justify the use of this right. The judge should, in his ruling, rely on his professional conscience<sup>41</sup>.

The Algerian legislator has granted the judge discretionary power to rule for financial compensation if the judge determines that the husband has acted arbitrarily in divorce. However, the law does not specify how this compensation should be paid, whether in a lump sum or in installments, as is the case in some Arab legislations<sup>42</sup>

Thus, the issue of determining compensation for arbitrary divorce is tied to the facts of the case. This leads to variations in the amounts of compensation from one case to another because harm is presumed in divorce unless there is a valid reason. Divorce is intended to alleviate harm, not to cause harm to the wife<sup>43</sup>

[vii] From this standpoint, it can be said that the judge, in determining compensation for arbitrary divorce, considers several factors, such as the husband's bad faith, the personal circumstances of the divorced wife, the husband's income and living conditions, the degree of arbitrariness in the husband's actions, and the length of the marriage<sup>44</sup>.

#### The Supreme Court's Oversight in Determining Compensation for Arbitrary Divorce

Any actions taken by the judges of the trial court when ruling on compensation for arbitrary divorce are subject to the oversight of the Supreme Court. Occasionally, the Supreme Court reviews the amount of compensation, while at other times, it examines the elements used to determine compensation. In many cases, the two are confused. The first issue concerns a matter of fact, which is based on the extent of the harm caused by the husband to his wife. However, how the law is applied to the facts is what comes under the Supreme Court's scrutiny, especially in terms of the judge's adherence to the standards set by the legislator to arrive at an amount of compensation commensurate with the harm. Therefore, the judge must provide a reasoned decision in all cases to avoid a ruling being flawed due to a lack of justification.<sup>45</sup>

In one of the Supreme Court's rulings, it was stated, "Determining compensation for arbitrary divorce is a matter of discretion, falling under the jurisdiction of the trial court judges. When a judge rules on compensation for harm caused by arbitrary divorce, they must explain the reasons that led to setting the amount of compensation, especially if the decision deviates from what is customary. For instance, if the marriage has lasted for many years, the judge must provide a justification for the amount awarded. Whether the compensation is higher or lower than usual, the judge is still required to provide reasoning for their decision; otherwise, the ruling would be considered flawed due to a lack of reasoning. The determination of compensation owed to the divorced wife is within the authority of the judge handling the divorce case."<sup>46</sup>

#### Conclusion:

At the end of this article, and based on the study of the subject of the rules of abuse in divorce in light of Islamic jurisprudence and Algerian Family Law, I have reached several conclusions and recommendations, which are as follows:

#### First : Conclusions

1. Divorce is a right granted to the husband based on marital authority. However, he is not permitted to abuse this right according to the rulings of Islamic law and Algerian Family Law.
2. Arbitrary divorce is considered a matter that has become a phenomenon requiring legal and regulatory treatment with clear and explicit controls.
3. No specific definition of arbitrary divorce is provided, neither in Islamic law nor in the legal framework. Furthermore, the term "abuse" is a modern term that was not used by classical jurists in their works.
4. Arbitrary divorce involves several criteria, including the objective and subjective standards, which are important in determining whether the divorce causes harm or not.
5. The Algerian legislator has not addressed the basis for compensation for arbitrary divorce, which the judge relies on during their ruling. In such cases, reference can be made to Article 222 in the absence of a legal text.
6. In the matter of determining compensation for arbitrary divorce, the Algerian legislator has not clarified how compensation should be paid or the grounds that the judge should rely on in making such a ruling.

#### Second : Recommendations

1. The preparation of specialized judges, in line with the principle of preventing loopholes and closing the door to deceitful practices, especially since divorce is one of the most serious actions that can dismantle an entire family.
2. The establishment of legal and procedural provisions related to arbitrary divorce, based on detailed jurisprudential principles and legal legislation, with clear regulations and precautionary measures for its implementation.
3. Raising awareness among community members, particularly couples, on how to handle such matters when implementing divorce, and explaining its legal implications as well as the dangers of manipulating one of the most hated lawful actions in the sight of God Almighty.
4. The legislator should amend Article 52 of the Algerian Family Law, which is currently stated in general terms, to clarify how compensation for divorce should be assessed.
5. We suggest amending Article 52 of the Algerian Family Law as follows: "If the judge determines that the husband has abused the right to divorce, the judge shall grant compensation to the wife, considering the financial conditions of the spouses and ruling based on the extent of harm caused to the wife."

6. The legislator should introduce a legal provision that sets the criteria for abuse in divorce, as the general rules on abuse of rights are not entirely suitable for the unique nature of personal status issues.

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