

RESEARCH  
ARTICLE**Issues of Compensation for Arbitrary Divorce and Divorce consolatory benefit in Algerian Family Law and Islamic Sharia**

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**Abstract**

The relationship between compensation for arbitrary divorce and consolatory benefit is among the issues that have sparked, and continue to spark, significant controversy, particularly before the courts as one of the financial consequences of divorce. This controversy stems from the overlap between the two concepts, both in legislation and jurisprudence. At times, they have been treated as a single right, while at other times they are considered distinct rights. This has led to ongoing efforts to clarify the nature of the relationship between compensation for arbitrary divorce and consolatory benefit, in order to define their respective legal characteristics.

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**Introduction**

Since divorce is a legitimate right intended to protect and honor human dignity, Allah Almighty has sanctioned divorce, as stated in the Holy Qur'an:

“And if they resolve on divorce, then surely Allah is All-Hearing, All-Knowing” (Surah Al-Baqarah, 2:227). He further regulated it with a set of rulings and established various consequences—both moral and financial. This approach has been reflected in various positive legislations, particularly in Arab countries. For example, the Algerian legislator provided in Article 47 of the Family Code that: “The marital bond is dissolved by divorce or death.” Such dissolution entails consequences such as the waiting period, maintenance, the dowry, household furnishings, compensation for arbitrary divorce, and the consolatory benefit among others.

The subject of compensation for arbitrary divorce and the consolatory benefit, especially regarding the relationship between the two, has long been the focus of extensive scholarly debate—a debate that continues to this day. Some scholars advocate for combining both, while others oppose the idea, especially given the absence of a clear and consistent stance by the Algerian legislator on this matter. This ambiguity has led us to select this topic for study, not only because of its intrinsic importance, but also to explore the respective scopes of compensation for arbitrary divorce and the consolatory benefit in accordance with Islamic Sharia and Algerian Family Law, based on the following central question:

**What is the nature of the relationship between compensation for arbitrary divorce and the consolatory benefit? Are they two sides of the same coin, or are they distinct legal concepts? If they are distinct, what are the points of difference between them?**

To answer this question, we will address the subject through three main axes as follows:

### **First Axis: The Rules Governing Compensation for Arbitrary Divorce**

#### **1) Definition of Arbitrary Divorce.**

Arbitrary divorce is what is known in Islamic jurisprudence as reprehensible divorce or forbidden divorce<sup>1</sup>. This is because, in principle, divorce is prohibited and disapproved. As narrated by Kathīr ibn ‘Ubayd, from Muḥammad ibn Khālid, from Ma‘rif ibn Wāṣil, from Muḥārib ibn Dithār, from Ibn ‘Umar, from the Prophet (peace and blessings be upon him): **“The most detestable of permissible things to Allah is divorce”**<sup>2</sup>.

The exception to this rule is when divorce is allowed due to a need supported by a legitimate cause. Otherwise, it would constitute arbitrary use of the right, hence an arbitrary divorce<sup>3</sup>.

Accordingly, arbitrary divorce refers to the husband’s decision to terminate the marital bond without any valid reason justifying its dissolution, which may result in Forbidden to the wife. This is the meaning inferred from Article 52 of the Algerian Family Code, which states:

**“If the judge establishes that the husband acted arbitrarily in pronouncing the divorce, he shall rule for compensation to the divorced woman for the Forbidden caused to her”.**

#### **2) Criteria for Arbitrary Divorce.**

In order to determine whether the husband acted arbitrarily in pronouncing divorce, certain criteria must be met in his conduct. These are the same criteria established in Islamic jurisprudence and adopted by the Algerian legislator in Article 124 bis of the Civil Code<sup>4</sup>.

##### **Forbidden to others:**

Here, the “other” refers to the divorced wife. Any divorce in which the husband intends to Forbidden the wife by pronouncing it would be deemed an arbitrary exercise of his right. It is well known that intention is an internal matter that is not easy to prove. Therefore, it becomes necessary to rely on material criteria to establish it<sup>5</sup>.

##### **Imbalance of interests:**

This occurs when the benefit the husband gains from exercising his right to divorce is minimal compared to the significant Forbidden caused to the wife.

##### **Illegitimacy of purpose:**

If the husband uses his right to divorce for a purpose other than what is legally permitted, such use is considered arbitrary.

#### **3) Forms of Arbitrary Divorce.**

Arbitrary divorce may take several forms, including divorce without legitimate grounds.

<sup>1</sup> Asiya Boukhatem, *The Financial Rights of a Divorced Woman Between Islamic Sharia and Algerian Family Law*, Master's thesis, Faculty of Law, University of Abou Bekr Belkaid, 2006-2007, p. 42.

<sup>2</sup> Abu Dawud Sulayman Ibn al-Ash'ath al-Sijistani al-Azdi, Sunan Abi Dawud, (edited by: Muhammad Muhyi al-Din Abd al-Hamid), Book: Divorce, Chapter: Dislike of Divorce, Hadith No.: 2178, Vol. 2, Al-Maktaba al-Asriya, Lebanon, (no year of publication), p. 255.

<sup>3</sup> Al-Hussein Belhassani, *The Principle of Compensation for Arbitrary Divorce in Islamic Jurisprudence and the Personal Status Code*, Al-Mayadeen Magazine, Mohammed I University, Issue 3, 1409 AH - 1988, p. 217.

<sup>4</sup> Order No. 75/58 dated 20 Ramadan 1395 AH corresponding to 26 September 1975, including the Civil Code (O.R.G.J. dated 24 Ramadan 1395 AH, No. 78, p. 990), amended and supplemented by Order No. 07/05 dated 25 Rabi' al-Thani 1428 AH corresponding to 13 May 2007 (O.R.G.J. dated 25 Rabi' al-Thani 1428 AH corresponding to 13 May 2007, No. 31, p. 3).

<sup>5</sup> Saleh Hamilil, *Expenses of Enjoyment and Compensation between Jurisprudence, Law and Judiciary*, Al-Haqiqa Magazine, University of Adrar, Issue 4, 2004, p. 41.

### **Divorce without legitimate grounds:**

The Algerian legislator granted the husband the right to dissolve the marital bond unilaterally, as stipulated in Article 48 of the Family Code. However, this right is linked to the wife's right to claim compensation whenever such divorce is arbitrary and lacks any legitimate basis. Among the reasons that may indicate arbitrariness in pronouncing divorce are social and natural causes. Since the focus of this study is not on the causes of divorce, we will mention only one social cause: whenever the husband pronounces divorce for such a reason, his action is deemed arbitrary<sup>6</sup>.

**The First Case: Independent Housing** Pronouncing divorce because the wife demanded her right to independent housing for herself and her children is considered an arbitrary divorce. This is because requesting independent housing does not constitute a legitimate reason that would justify the husband's request for divorce, especially since this is a right guaranteed to her under Sharia law. This principle was upheld by the Supreme Court in its decision issued on 13/05/1997<sup>7</sup>.

From this decision, it is clear that the husband cannot lawfully pronounce divorce for this reason, particularly since such a condition had not been stipulated in the marriage contract. Therefore, by pronouncing divorce for this reason, the husband would be acting arbitrarily.

### **3) Arbitrary Divorce and Compensation.**

Arbitrary divorce entails material consequences for the party against whom it is pronounced, primarily in the form of compensation. Before clarifying its conditions and how it is assessed, it is important to note that scholars have agreed that no compensation is due in the absence of arbitrariness. However, they have differed on whether compensation is obligatory in the opposite case—that is<sup>8</sup>, when arbitrariness exists.

One view permits compensation in cases of arbitrariness, while another view denies compensation even when arbitrariness is present. Each view is based on specific grounds:

The first view bases its justification for awarding compensation on the principle that divorce is essentially prohibited, that it is a unilateral act, and that both contractual and tort liability provide grounds for compensation. Finally, it emphasizes the husband's abuse of his right to divorce<sup>9</sup>.

The second view, which denies compensation, is grounded on the husband's right to divorce, the absence of the necessary elements of liability for compensation, and the fact that the Forbidden resulting from divorce does not affect the woman alone. They also argue that there is no clear evidence to support compensation, and that awarding it could lead to various negative consequences<sup>10</sup>.

#### **A) Conditions for Compensation for Arbitrary Divorce.**

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<sup>6</sup> Masouda Naima Elias, *Compensation for Harm in Some Matters of Marriage and Divorce, A Comparative Study*, PhD Thesis, Faculty of Law and Political Science, Abu Bakr Belkaid University, 2009-2010, p. 160.

<sup>18</sup> For more details, see Salah Eddine Zidane, *The Financial Rights of the Divorced Woman, A Comparative Study between Islamic Jurisprudence and Algerian Family Law*, Master's Thesis, Faculty of Fundamentals of Religion, Sharia and Islamic Civilization, Emir Abdelkader University of Islamic Sciences, 2005-2006, pp. 160 ff.

<sup>7</sup> See, M. A., G. A. Sh., May 13, 1997, File No. 159732, M. Q., 1997, Issue 2, p. 100.

<sup>8</sup> Dr. Jamil Fakhri Muhammad Janim, *Mut'ah for a Divorced Woman and Its Relationship to Compensation for Arbitrary Divorce in Islamic Jurisprudence and Law*, Dar al-Hamed, Jordan, 2009, 1st ed., pp. 209 ff.

<sup>9</sup> For further details, see Dr. Muhammad al-Zuhayli, *Financial Compensation for Divorce*, Dar al-Maktabi, Syria, 1998, 1st ed., pp. 8 ff.

<sup>10</sup> For more details, see Salah Eddine Zidane, *The Financial Rights of the Divorced Woman, A Comparative Study between Islamic Jurisprudence and Algerian Family Law*, Master's Thesis, Faculty of Fundamentals of Religion, Sharia and Islamic Civilization, Emir Abdelkader University of Islamic Sciences, 2005-2006, pp. 160 ff.

1) The Husband's Abuse of the Right to Divorce, This occurs when there is a complete absence of any legitimate, rational, or logical interest, such as when a husband divorces his wife solely to marry another woman, or when he divorces her because she refused to prepare food for his drunken friends<sup>11</sup>.

When discussing arbitrariness in divorce, it would be expected that reference be made to specific cases that have been customarily recognized as constituting arbitrariness. However, no specific cases defining such situations have been identified in Algerian law, apart from those established by Islamic jurisprudence and classified as arbitrary divorce. Examples include divorcing a wife during her menstrual period, during postpartum bleeding, during a purity period in which he had intercourse with her, or pronouncing triple divorce at once<sup>12</sup>.

2) The Wife Sustaining Forbidden as a Result of Divorce, This Forbidden may be material or moral. Moral Forbidden is generally established without dispute, as it is invariably reflected in the deterioration of the psychological state of the woman arbitrarily divorced. The difficulty arises with material Forbidden, as the wife is required to provide evidence supporting her claim. An example of material Forbidden is when a wife leaves her job in order to manage family affairs and raise children as part of her marital commitment<sup>13</sup>.

3) Divorce Occurring Without the Wife's Consent, This is an implicit condition that can be inferred from the previous two conditions, particularly the first. The husband's arbitrariness and his unilateral initiative in pronouncing the divorce indicate that the wife is compelled to accept the divorce against her will.

These conditions are derived from Article 52 of the Family Code.

#### B) **Assessment of Compensation for Arbitrary Divorce.**

The legislator did not specify in the provisions of the Family Code how such compensation is to be assessed. However, in practice, this matter is left to the discretionary authority of the judge<sup>14</sup>, who takes into account various factors. According to Article 131 of the Civil Code:

**"The judge shall assess the extent of compensation for the damage suffered by the injured party in accordance with Articles 182 and 182 bis, taking into account the surrounding circumstances. If it is not possible at the time of judgment to determine the extent of compensation definitively, the judge may reserve the right for the injured party to request a reassessment within a specified period".**

This is because determining the amount of compensation for either material or moral Forbidden remains a relative matter, which should not depend solely on the husband's income or financial status, but rather on the extent of the Forbidden itself and the individual affected—both of which may vary depending on the circumstances<sup>15</sup>.

4) Method of Paying Compensation for Arbitrary Divorce, The legislator did not clarify how compensation is to be paid, nor did it specify whether the compensable Forbidden should be material, moral, or both. It appears that the intent was to cover both types of Forbidden, as is the case regarding compensation for material and moral Forbidden resulting from breaking an engagement<sup>16</sup>. Therefore, the provisions of the Civil Code must be applied to fill this legislative gap. According to Article 132 of the Civil Code:

**"The judge shall determine the method of compensation depending on the circumstances; it may be paid in installments or as a periodic annuity..."**

#### **Second Section: Provisions of the Consolatory Benefit.**

It should be noted that the provisions of the Algerian Family Code are almost devoid of explicit regulations on the consolatory benefit. Therefore, relying on Islamic jurisprudence and the relevant provisions of Maghreb legislation—such as the Moroccan Family Code and the Mauritanian Personal Status Code—which do recognize the consolatory benefit, we will seek to address this legislative gap.

<sup>11</sup> Abdel Aziz Saad, Marriage and Divorce in Algerian Family Law, Dar Houma, Algeria, 1996, 3rd ed., p. 306.

<sup>12</sup> 20 Dr. Mabrouk Al-Masry, Divorce and Its Effects in Algerian Family Law: A Comparative Study, Dar Houma, Algeria, 2010, p 234.

<sup>13</sup> Abdel Aziz Saad, op. cit., p. 306.

<sup>14</sup> See, M.A., G.A.S., 12/07/2006, File No. 368660, M.M.A., 2006, Issue 2, p. 483.

<sup>15</sup> Abdul Aziz Saad, op. cit., p. 306.

<sup>16</sup> This is in accordance with the provisions of Article 5, Paragraph 3 of the Civil Code, which states: "...if withdrawing from the engagement results in material or moral harm to one of the parties, compensation may be awarded to them."

### Firstly: Definition of the Consolatory Benefit and Evidence of its Legitimacy.

#### A) Definition:

Linguistically, consolatory benefit is derived from consolatory benefit ‘, meaning benefit or enjoyment. It is said: “I provided the divorced woman with something because she benefited from it.”<sup>17</sup>

Accordingly, the consolatory benefit for a woman is what is granted to her after the divorce, by which she derives benefit.<sup>18</sup>

#### - In Islamic law:

One of its definitions is: “That which the husband gives his wife after the dissolution of the marriage, in the form of clothing or its equivalent, as a means of comforting her and compensating for the loneliness resulting from the separation.”<sup>19</sup>

#### - In law:

The Maghreb legislations that adopted the consolatory benefit did not define it explicitly, but they established it as a right of the divorced woman. For example:

Article 84 of the Moroccan Family Code:

**“The entitlements of the wife include: deferred dowry (if any), maintenance during the waiting period and consolatory benefit..”**

Article 84 of the Mauritanian Personal Status Code:

**“In all cases, the divorced woman may claim her rights arising from the divorce, including maintenance, consolatory benefit, and others...”**

#### 2) Evidence for the Legitimacy of the Consolatory Benefit

The legitimacy of the consolatory benefit is established in several places in the Qur’an, including: Allah Almighty says:

**“There is no blame upon you if you divorce women you have not touched nor specified for them an obligation. But give them [a gift of] compensation—the wealthy according to his means and the poor according to his means—a provision according to what is acceptable, a duty upon the doers of good. And if you divorce them before you have touched them and you have already specified for them an obligation, then [give] half of what you specified—unless they forgo it or the one in whose hand is the marriage contract forgoes it. And to forgo it is nearer to righteousness. And do not forget graciousness between you. Indeed Allah is Seeing of what you do”**<sup>20</sup>.

And He also says:

**“And for divorced women is a provision according to what is acceptable—a duty upon the righteous”**<sup>21</sup>.

In another verse:

**“O Prophet, say to your wives: If you should desire the worldly life and its adornment, then come, I will provide for you and give you a gracious release”**<sup>22</sup>.

And: **“O you who have believed, when you marry believing women and then divorce them before you have touched them, then there is not for you any waiting period to count concerning them. So provide for them and give them a gracious release”**<sup>23</sup>.

#### - From the Sunnah:

It is narrated from Hamza ibn Abi Usayd, from his father Abu Usayd (may Allah be pleased with him), who said:

<sup>17</sup> Abu al-Husayn Ahmad ibn Faris ibn Zakariya, Mu’jam Maqayis al-Lughah (edited by Abd al-Salam Muhammad Harun), Chapter: Mīm and Ta’ and what comes after them, entry: Mut’ah, Vol. 5, Dar al-Fikr, (no country of publication or year), p. 293.

<sup>18</sup> D. Ahmed Fathi Bahnassi, Mut’ah Between Sharia and Law, Dar Al Sharq, (no country of publication), 1988, 1st ed., p. 25.

<sup>19</sup> Al-Habib bin Tahir, op. cit., p. 102. Dr. Othman Al-Takroui, Explanation of Personal Status Law, Dar Al-Thaqafa Library, Jordan, 2004, 1st ed., pp. 123-124.

<sup>20</sup> Surah Al-Baqarah, verses 236-237.

<sup>21</sup> Surah Al-Baqarah, verse 241.

<sup>22</sup> Surah Al-Ahzab, verse 28.

<sup>23</sup> Surah Al-Ahzab, verse 49.

"We went out with the Prophet (peace and blessings be upon him) until we reached a garden called Al-Shawt. When we came to two gardens, he sat between them and said: 'Sit here.' He entered, and a woman from the tribe of Al-Jawn had been brought and placed in a house among the palm trees. She was with her wet nurse. When the Prophet (peace be upon him) entered upon her, he said: 'Offer yourself to me.' She said: 'Does a queen offer herself to the commoner?' He then extended his hand to calm her, but she said: 'I seek refuge in Allah from you.' He said: 'You have sought refuge in One who gives refuge.' He then went out to us and said: 'O Abu Usayd, give her two garments and send her back to her family'"<sup>24</sup>.

Scholars have differed on the obligation of the consolatory benefit. No unanimous consensus has been established on this matter<sup>25</sup>.

#### - Wisdom of the Consolatory Benefit:

The legislation of the consolatory benefit fulfills a profound wisdom: to console the divorced woman and ease the pain, regret, and sorrow that may result from the divorce<sup>26</sup>. It also helps dispel suspicions and doubts that might surround her due to the divorce, acting as a form of testimony affirming her integrity and that the divorce was not due to any fault of her own<sup>27</sup>.

#### Secondly: The Amount of Consolatory Benefit and How It Is Assessed.

As is clear from the aforementioned verses and hadiths, there is no specific fixed amount for consolatory benefit, which led to differing views among jurists on this matter:

**1) Hanafi jurisprudence:** According to them, consolatory benefit should not be less than five dirhams nor exceed half of the appropriate dowry. They stipulated that it should include a dress, a head covering, and an outer garment<sup>28</sup>. Among their evidence is the saying of al-Sha'bi (may Allah have mercy on him): "Her clothing in her home is a dress, a head covering, and an outer garment."<sup>29</sup>

**2) Maliki jurisprudence:** It was narrated from Imam Malik that he said: "There is no known limit for consolatory benefit in our view, neither minimum nor maximum. It depends on the means of both the husband and the wife."<sup>30</sup>

**3) Shafi'i jurisprudence:** It is recommended according to them that consolatory benefit be in the form of a servant, a head covering, or thirty dirhams<sup>31</sup>. However, this opinion was criticized—for example, Imam Shams al-Din al-Sarakhsi deemed it incorrect since the term consolatory benefit does not encompass dirhams.

**4) Hanbali jurisprudence:** They have differing narrations. In one, the maximum is a servant if the husband is wealthy, while if he is poor, consolatory benefit consists of clothing: a dress, a head covering, and a garment suitable for prayer. Another narration leaves its estimation to the judge due to the absence of a fixed amount in Shari'a, requiring judicial discretion as in other differing ijtihad-based rulings.

- As for the method of assessing consolatory benefit, it generally does not depart from the following possibilities: It may be assessed based on the husband's financial condition, whether affluent or needy, and according to what is customary. This is the view of Maliki and Hanbali jurists<sup>32</sup>, based on Allah's words:

<sup>24</sup> Abu Abdullah Muhammad ibn Isma'il al-Bukhari, Sahih al-Bukhari, Book: Divorce, Chapter: Who Divorces and Should a Man Confront His Wife with the Divorce? Hadith No.: 5255, Bayt al-Afkar International, Riyadh, 1419 AH - 1998, p. 1039.

<sup>25</sup> Abu Muhammad ibn Ibrahim ibn al-Mundhir al-Naysaburi, Consensus, Dar al-Athar, Cairo, 1425 AH - 2003, 1st ed., p. 101.

<sup>26</sup> Wafaa Mutawaq Hamza Farash, The Moral and Financial Effects of Divorce in Islamic Jurisprudence: A Comparative Study, Master's Thesis, Faculty of Sharia and Islamic Studies, Umm Al-Qura University, 1405 AH - 1985, p. 258.

<sup>27</sup> Dr. Ahmad Muhammad Al-Momani and Dr. Ismail Nawahda, Personal Status: Jurisprudence of Divorce, Annulment, Separation, and Khula, Dar Al-Masirah, Jordan, 2009, 1st ed., p. 63.

<sup>28</sup> Atef Mustafa Al-Barawi Al-Tatar, The Wife's Financial Rights in Islamic Jurisprudence, Compared to Palestinian Personal Status Law, Master's Thesis, Faculty of Sharia and Law, Islamic University, 2006, p. 72.

<sup>29</sup> Salah Al-Din Zaydan, op. cit., p. 151.

<sup>30</sup> Abu Al-Walid Al-Baji, Sulayman ibn Khalaf ibn Sa'd ibn Ayyub Al-Baji, Al-Muntaqa Sharh Muwatta Malik (edited by Muhammad Abd Al-Qadir Ahmad Atta), Vol. 5, Dar Al-Kutub Al-Ilmiyyah, Lebanon, 1420 AH - 1999, 1st ed., p. 355.

<sup>31</sup> Abu Ishaq Al-Shirazi, Al-Muhadhdhab fi Fiqh Al-Imam Al-Shafi'i (edited by Dr. Muhammad Al-Zuhayli), Vol. 4, Dar Al-Qalam and Dar Al-Shamiya, Damascus - Beirut, 1417 AH - 1996, 1st ed., p. 222.

<sup>32</sup> Abdul Aziz bin Abdullah Al Rajhi, Solving the Knot in Explaining Al Umda, Vol. 1, Dar Al Tawhid, Riyadh, 1432 AH - 2011, 1st ed., p. 987. 41 Surah Al Baqarah, verse 236.



"But give them [a gift of] compensation—the wealthy according to his means and the poor according to his means—a provision according to what is acceptable."<sup>33</sup>

In addition to the husband's condition, the Hanafis considered the wife's status as well. They justified this with examples such as:

"Considering only the husband's condition would obligate him to provide equal consolatory benefit to both a noble and an ordinary wife if he had married two women. This is rejected by people's customs and morals and is not known among them."<sup>34</sup>

Among Shafi'i jurists, some said consolatory benefit should be assessed considering both their conditions, others based only on the husband's status, while a third view considered only the wife's condition<sup>35</sup>.

➡ As for the preferred opinion: Some preferred the first possibility<sup>36</sup>. However, the researcher favors the second possibility, which does not consider the husband's condition alone, but also takes into account other circumstances such as the wife's condition, custom, and standard of living, as this achieves greater fairness. For example, relying solely on the status of a poor husband without considering a wealthy wife is not the same as considering both their conditions despite poverty or wealth.

- From a legal perspective:

Neither Moroccan nor Mauritanian law set a specific amount for consolatory benefit. In Moroccan law, the judge considers the husband's wealth or poverty, the length of the marriage, the reasons for divorce, and the degree of the husband's arbitrariness in initiating divorce. The Mauritanian legislator did not specify these details, as is evident from Articles 84 of both the Moroccan Family Code and the Mauritanian Personal Status Code mentioned earlier.

### Thirdly: Divorced Women and Their Right to Consolatory Benefit.

has been a subject of juristic disagreement—some scholars made it obligatory, while others considered it recommended. Accordingly, we will address the ruling on divorced women's entitlement to consolatory benefit as outlined by jurists:

1- Divorce before consummation where no dowry was specified:

Based on Allah's words: **"It is a duty upon the righteous"**<sup>37</sup> and **"a duty upon the doers of good"**<sup>38</sup>, the Malikis held that consolatory benefit is recommended and not obligatory. In their view, had it been mandatory, Allah would have made the two verses absolute without restricting them to categories like the righteous and the doers of good<sup>39</sup>.

By contrast, the Shafi'is, Hanafis, and Hanbalis stated that consolatory benefit is obligatory<sup>40</sup>, citing Allah's words:

**"There is no blame upon you if you divorce women you have not touched nor specified for them a dowry. But provide for them—the wealthy according to his means and the poor according to his means—a provision according to what is acceptable, a duty upon the doers of good"**<sup>41</sup>.

2- Divorce before consummation where a dowry was specified:

Based on Allah's words:

**"And if you divorce them before you have touched them and you have already specified for them a dowry, then [give] half of what you specified—unless they forego the right or the one in whose hand is the marriage contract foregoes it"**<sup>42</sup>, the divorced woman is entitled to half the dowry by consensus of jurists<sup>43</sup>.

<sup>33</sup> Surah Al Baqarah, verse 236.

<sup>34</sup> Abu Bakr Ahmad ibn Ali al-Razi al-Jassas, *Ahkam al-Qur'an* (edited by Muhammad al-Sadiq Qamhawi), Vol. 2, Dar Ihya' al-Turath al-Arabi and the Arab History Foundation, Lebanon, 1412 AH - 1992, p. 143.

<sup>35</sup> Shams al-Din al-Sharbini, *Mughni al-Muhtaj ila Ma'rifat Ma'ani Alfaz al-Minhaj* (The Guide to the Meanings of the Words of the Approach), op. cit., pp. 318-319.

<sup>36</sup> Malika Qabzili, *The Rights of the Divorced Woman between Islamic Jurisprudence and Algerian Family Law*, Master's Thesis, Faculty of Islamic Sciences, University of Algiers, 2003, pp. 103-105

<sup>37</sup> Surah Al-Baqarah, verse 241.

<sup>38</sup> Surah Al-Baqarah, verse 236.

<sup>39</sup> Dr. Omar Suleiman Al-Ashqar, *Marriage Rulings in Light of the Qur'an and Sunnah*, Dar Al-Nafasah, Jordan, 1997, 1st ed., p. 271.

<sup>40</sup> Hassan Ali Al-Sammi, *A Concise Guide to Personal Status*, Vol. 1, on marriage, divorce, waiting period, and mutual compensation, and related provisions, with all legal texts governing personal status matters appended to it (no publisher or country), 1998-1999, p. 546.

<sup>41</sup> Surat Al-Baqarah, verse 236.

<sup>42</sup> Surat Al-Baqarah, verse 237.

However, they differed regarding consolatory benefit between those who considered it obligatory, recommended, or not due <sup>44</sup>:

The Shafi'i school in its later position and the Hanbali school held that the consolatory benefit is obligatory. The Hanafi school, in one opinion, considered it recommended. In contrast, the earlier Shafi'i position and the Maliki school – and this is the predominant view – stated that no consolatory benefit is due. This is based on the saying of Allah the Almighty: **"And if you divorce them before you have touched them and you have already specified for them an obligation [dowry], then [give] half of what you specified—unless they forgo the right or the one in whose hand is the marriage contract forgoes it."**<sup>45</sup>

3- Divorce after consummation, whether or not a dowry was specified:

Here too, jurists differed: One view held consolatory benefit to be obligatory, as in the new school of the Shafi'is and one narration from Ahmad <sup>46</sup>, the evidence for this is the Almighty's saying: **"And for divorced women is a provision according to what is acceptable—a duty upon the righteous."**<sup>47</sup>

Another view held it is not obligatory, as in the Maliki school and the old school of the Shafi'is <sup>48</sup>. They argued that the divorced woman is entitled to the full dowry in this case, whether it was specified during or after the contract or she receives the appropriate dowry if no dowry was specified at all <sup>49</sup>, based on Allah's words:

And the evidence for this is the saying of Allah the Almighty: **"And if you intend to replace a wife with another and you have given one of them a great amount [in gift], do not take [back] from it anything. Would you take it in injustice and manifest sin? And how could you take it while you have gone in unto each other and they have taken from you a solemn covenant"**<sup>50</sup>.

When comparing Islamic jurisprudence and the law, we find that although the Moroccan and Mauritanian legislators have limited the cases in which a divorced woman is entitled to the equivalent dowry or half of it, they have not specified the timing for entitlement to the consolation gift. This is because Article 84 of both legal codes was drafted in general terms without restriction. The question therefore remains: Is the consolatory benefit obligatory for a woman who initiates divorce by compensation, who chooses to divorce, or when the divorce is due to her fault?

The jurists agreed that consolatory benefit is not imposed in the following cases: A woman who obtained divorce<sup>51</sup>; A woman divorced due to a defect in her; A woman whose marriage was annulled by judicial decision after li'an (mutual cursing); A woman who apostatized; A woman divorced before consummation where a dowry had been specified <sup>51</sup>.

In conclusion, Based on this study, we favor the view of the majority of jurists and avoid positions subject to significant disagreement. Thus, consolatory benefit is due only to a woman divorced before consummation and without a specified dowry.

### Section Three: The Relationship Between Compensation for Arbitrary Divorce and Consolatory benefit .

It is worth noting that the disagreement regarding the relationship between compensation for arbitrary divorce and consolatory benefit—which was initially a juristic dispute—extended to become a legal one, with personal status legislations failing to reach a consensus. This led to several positions: A position that provides compensation for

<sup>43</sup> Dr. Maryam Ahmad Al-Daghistani, *The Implications of Divorce in Islamic Law: A Brief Comparison with Other Laws*, Al-Amal Company, (no publisher or country), 1994, 1st ed., p. 101.

<sup>44</sup> Al-Wasit in Explaining the New Personal Status Law, Marriage and Divorce, Dar Al-Thaqafa, Jordan, 2012, 1st ed., pp. 319-

320. Maryam Saleh, *Financial and Social Effects of Divorce*, An-Najah University Journal for Research (Humanities), Al-Quds University, Vol. 20, No. 1, 2006, p. 320.

<sup>45</sup> Surat Al-Baqarah, verse 237.

<sup>46</sup> Abu Ishaq al-Shirazi, previous reference, p. 200. Muwaffaq al-Din Ibn Qudamah, Vol. 8, previous reference, p. 49

<sup>47</sup> Surat Al-Baqarah, verse 241.

<sup>48</sup> Abu Ishaq al-Shirazi, op. cit., p. 200. 57 Dr. Wahba al-Zuhayli, *Islamic Jurisprudence and its Evidence*, Vol. 7, Personal Status, Dar al-Fikr, Damascus, 1985, 2nd ed., p. 288.

<sup>49</sup> Rabah Abdelmalek, *Dowry in Algerian Family Law: A Comparative Study*, Master's Thesis, Faculty of Law and Administrative Sciences, University of Algiers, 1996, p. 88.

<sup>50</sup> Surat An-Nisa, verses 20-21.

<sup>51</sup> Ahmed Ibn Ma'joud, *Family Provisions in Islamic Law According to the Personal Status Code*, Vol. 1, Al-Najah New Press, Casablanca, 1998, p. 311.



arbitrary divorce without consolatory benefit, as adopted by Tunisian law<sup>52</sup>; A position that grants only consolatory benefit, such as Mauritanian and Egyptian law<sup>53</sup>; A position that treats consolatory benefit and compensation for arbitrary divorce as the same, supported by Professor Belhaj Al-Arabi; A position that sometimes treats them as distinct and at other times as the same—this is the situation in Algerian and Moroccan jurisprudence due to the lack of legislative uniformity and consistent judicial interpretation, as seen in rulings we will mention when addressing the stance of Algerian law.

#### First: The Difference Between Compensation for Arbitrary Divorce and Consolatory benefit

After our study of the rulings related to compensation for arbitrary divorce and consolatory benefit, we conclude that there are points of overlap as well as points of difference between them, summarized as follows:

##### 1) Points of Similarity.

Entitlement to either does not preclude the divorced woman from obtaining her other financial rights, as she is entitled to both in addition to those rights<sup>54</sup>.

In both cases, the divorce occurs without the wife's will or initiative.

In assessing both, consideration is given to the circumstances of both the husband and the wife, along with other relevant factors.

##### 2) Points of Difference.

- Compensation for arbitrary divorce is decided by the judge, so its source is the law. As for pleasure, its source is Islamic law<sup>55</sup>.

- Compensation is granted to a woman whose husband divorces her arbitrarily, whereas consolatory benefit is due upon the mere occurrence of divorce, whether arbitrariness is established or not<sup>56</sup> - though its extent varies from one divorced woman to another-

\_ In compensation, there is no distinction between a divorce before or after consummation; the same applies in the case of consolatory benefit.

- Although the aim of both is to redress Forbidden, the Forbidden in the case of arbitrary divorce gives rise to compensation for both material and moral damage, whereas consolatory benefit is limited to redressing moral Forbidden only. Accordingly, the scope of compensation for arbitrary divorce is broader than that of consolatory benefit.

This is confirmed by Professor Abdelaziz Saad, who pointed out that the term consolatory benefit is narrower than the term compensation, since consolatory benefit is intended to soothe the woman's feelings, whereas compensation is intended to redress any Forbidden resulting from an unlawful act<sup>57</sup>.

Compensation may be awarded to either of the spouses, husband or wife, whereas consolatory benefit is awarded exclusively to the wife, as is evident from the Quran.

This point refutes some views that have called for replacing the term compensation with consolatory benefit or even for omitting the term "arbitrary" altogether<sup>58</sup>.

<sup>52</sup> Chapter 31 of Order 56/13 containing the Tunisian Personal Status Code.

<sup>53</sup> 61 Articles 29 and 84 of the Mauritanian Personal Status Code; Article 18 bis of the Egyptian Personal Status Law

<sup>54</sup> Dr. Jamil Fakhri Muhammad Janim, *The Divorcee's Pleasure and Its Relationship to Compensation for Arbitrary Divorce in Islamic Jurisprudence and Law*, Dar Al-Hamed, Jordan, 2009, 1st ed., p. 234.

<sup>55</sup> Mohamed Lati, *Financial Disputes Between Spouses in Islamic Sharia and Algerian Family Law*, Master's Thesis, Faculty of Law, Abu Bakr Belkaid University, 2001-2002, p. 72.

<sup>56</sup> Malika Kabzili, *op. cit.*, p. 126

<sup>57</sup> Abdelaziz Saad, *op. cit.*, p. 309 et 311.

<sup>58</sup> Dr. Mabrouk Al-Masri, *op. cit.*, p. 238.

## Second: The Position of Algerian Legislator on Compensation for Arbitrary Divorce and Consolatory benefit .

The Algerian legislator's position is clear in adopting compensation for arbitrary divorce, as stipulated in Article 52 of the Family Code, although it merely sets out the conditions required for the divorced woman to be entitled to such compensation.

As for consolatory benefit , the provisions of the Family Code are devoid of it, except as stated in Article 222 of the Code, which provides for the application of the rules of Islamic Sharia in matters not covered by the Code. Based on this, Algerian courts, through their various rulings, have awarded consolatory benefit to divorced women, which has negatively affected the understanding of the meaning of Article 52, as evidenced by the contradictory jurisprudence of the Supreme Court. At times, the Court has considered compensation and consolatory benefit as one and the same, while at other times, it has regarded them as distinct:

The Supreme Court decision of 29/12/1986 ruled that:

"If the provisions of Islamic Sharia stipulate that the wife divorced by her husband is entitled to consolatory benefit , granted to ease the pain of her separation from her husband, and this in itself is considered compensation, then any ruling contrary to this principle constitutes a violation of the provisions of Islamic Sharia.

Therefore, the decision that awarded the divorced wife a financial amount as consolatory benefit and another amount as compensation must be annulled"<sup>59</sup>.

Similarly, the Supreme Court decision of 07/04/1986 stated:

"According to the provisions of Sharia, the wife divorced arbitrarily is entitled to alimony during the waiting period, neglect alimony, consolatory benefit , and also compensation that may be awarded to her as a result of arbitrary divorce"<sup>60</sup>.

In contrast to the Algerian judiciary, the Moroccan legislator explicitly provided for consolatory benefit , as shown in Article 84 of the Family Code mentioned above. The legislator considered consolatory benefit and compensation for arbitrary divorce as two sides of the same coin. This was confirmed by the Minister of Awqaf and Islamic Affairs during the discussion of the Family Code bill before both houses of parliament, after he was proposed to replace the term compensation with consolatory benefit . He did not accept this proposal, reasoning that replacing the term consolatory benefit with compensation was unnecessary, as consolatory benefit is the appropriate Quranic term, signifying compensation and representing a better expression of honoring the woman<sup>61</sup>.

However, court rulings overturned this balance and affirmed the opposite; sometimes awarding only consolatory benefit to the divorced woman, and at other times awarding both consolatory benefit and compensation<sup>62</sup>.

Based on this, we conclude that the Algerian legislator's approach suffers from the following:

In the matter of arbitrary divorce, it lacks clarity regarding the determination of compensation amount and its payment method, as well as failing to clarify the type of Forbidden warranting compensation or whether the divorced woman was consummated with, treating both cases alike. Therefore, it would be better to amend Article 52 of the Family Code to give it greater clarity and remove ambiguity, as leaving the matter open may not align with the principles of equality and justice.

This is similar to what the Tunisian legislator did in Article 31 paragraph 4 of the Personal Status Code:

"... Compensation shall be awarded to the spouse Forbidden, male or female, for the material and moral damage resulting from the divorce in the cases set out in the second and third paragraphs above. For the woman, compensation for material damage shall be by a pension paid to her after the waiting period on a monthly basis, according to the standard of living she was accustomed to... or by a court order paying the amount in one lump sum..."

This provision specifies the cases in which compensation is due, the method of payment, and the reasons for its cessation. However, it fell short in leaving the method of payment open, which contradicts the purpose of compensation, as clarified in the final paragraph of this article:

<sup>59</sup> Voir : Cour suprême algérienne, arrêt du 29/12/1986, dossier n° 43860, Recueil des arrêts, 1993, vol. 2, p. 41.

<sup>60</sup> Voir : Cour suprême algérienne, arrêt du 07/04/1986, dossier n° 41560, Recueil des arrêts, 1989, vol. 2, p. 69.

<sup>61</sup> Muhammad Al-Shafi'i, *Divorce et répudiation dans le Code de la famille*, Imprimerie Al-Waraq Al-Wataniya, Marrakech, 2010, 1ère éd., p. 64.

<sup>62</sup> Judgment issued on June 21, 2006, No. 1105, File No. 1517/2005, unpublished; also judgment issued on March 7, 2006, No. 37/35/06, File No. 3026/05, unpublished. See, Muhammad al-Shafi'i, *op. cit.*, pp. 65-66.

“... and shall continue until the separated woman dies or her social status changes through remarriage or by acquiring means making her self-sufficient...”.

As for consolatory benefit, the legislator's position is marked by inconsistency between adopting it and disregarding it.

### Conclusion:

In conclusion, based on the various points of difference between compensation for arbitrary divorce and consolatory benefit, and in order to close the door to conflict between legal texts and judicial interpretations – and to achieve the intended wisdom behind consolatory benefit – it would be preferable for the Algerian legislator to introduce a specific and explicit provision stipulating consolatory benefit in addition to compensation for arbitrary divorce, as they remain two separate rights.

Compensation for arbitrary divorce would thus be due to any divorced woman whose husband acted arbitrarily in divorcing her, while consolatory benefit would be due to a woman who was divorced before consummation without a dowry specified, as held by the majority of jurists. This would be the only solution that would put an end to the contradictory judicial rulings that have persisted to this day.

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