



Compensation for Redressing the Harm Caused to a Divorced Woman Arbitrarily: Between Constraints of the Legal Text and Authority of the Judiciary

التعويض لجبر ضرر المطلقة طلاقاً تعسفياً: بين ضوابط النص القانوني وسلطة القضاء

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Abstract:

This paper examines the right of divorced women to compensation for arbitrary divorce under Article 52 of the Algerian Family Law. It highlights the gap between the legal text and complexities of judicial practice, which lacks precise standards. Judges often rely on general Civil law rules to establish "arbitrariness," using their discretion to adapting intent to harm and determine compensation. The study finds that the ambiguity of the legislative determination leads to inconsistent rulings, underscoring the need for objective criteria to ensure full redress of both material and moral harm.

Key words: Arbitrary Divorce; Compensation for Harm; Judicial Discretion; Algerian Family Law

ملخص المقال :

عاجلت الورقة البحثية حق المطلقة في التعويض عن الطلاق التعسفي المكرس بالمادة 52 من قانون الأسرة الجزائري، مستعرضة الفجوة الموجودة بين النص القانوني وبين تعقيدات التطبيق القضائي التي تفتقر لمعايير ضبط دقيقة، ويبرز المقال استناد القضاة إلى القواعد العامة في القانون المدني لإثبات "التعسف"، معتمدين على سلطتهم التقديرية في تكييف نية الإضرار وتقدير التعويض لجبر الضرر. وقد خلصت الدراسة إلى أن ضبابية التحديد التشريعي تفضي إلى تباين الأحكام، مما يستوجب وضع ضوابط موضوعية تضمن جبراً كاملاً للأضرار المادية والمعنوية اللاحقة بالمطلقة.

كلمات مفتاحية: الطلاق التعسفي، التعويض، الضرر، السلطة التقديرية للقاضي.

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Introduction

Marriage in Islamic law is a divine sign and solemn covenant meant to endure, surrounded by affection and mercy to ensure family stability. Positive law likewise treats marriage as a legal institution safeguarding rights, dignity, and family interests, where termination without legitimate cause entails accountability and compensation. Divorce, though recognized as a social and legal mechanism, becomes arbitrary when exercised without justification or in bad faith, amounting to abuse of authority. To address this, the legislator introduced compensation as a corrective measure in order to protect the wife and preserve family balance. This study highlights the importance of compensating divorced women, as neglecting such protection harms families and society. Its objective is to evaluate how effectively Algerian legislation secures women's rights against arbitrary divorce, how this is reflected in judicial practice, and to identify legislative gaps, emphasizing that redress is not only financial but a safeguard of dignity and justice.

The main problem addressed is the effectiveness of Algerian legal provisions in compensating women harmed by arbitrary divorce, and the extent to which this is realized in judicial application. To cover the topic, we rely on the analytical method, examining legal texts and judicial precedents, highlighting strengths and shortcomings, with the aim of identifying aspects neglected by the legislator.

Among the hypotheses that may be advanced in relation to our study are the following:

- The expansion of judicial discretion as a result of the ambiguity of legislative standards.
- The inadequacy of the current compensation system in redressing moral harm.

We have adopted a bipartite plan for structuring our subject. In the first section, we address compensation as a means of remedying the harm endured by women subjected to arbitrary divorce. The second section is devoted to the authority of the judge in assessing harm and awarding compensation in cases of arbitrary divorce.

1. First Section: Compensation as a Mechanism for Redressing the Harm of Arbitrary Divorce

Divorce is a reality imposed by circumstances in certain cases, as Islamic law grants the husband the right to pronounce it unilaterally. The Algerian legislator addressed unilateral divorce in Article 48 of the Family Law, Ordinance No. 05-02 of 27 February 2005, stating: *"Subject to the provisions of Article 49, the marriage contract is dissolved by divorce effected at the will of the husband..."*.

The husband may terminate the marital bond by his sole will, without the wife's consent. Yet this right can become a means of harm when divorce is pronounced without reasonable justification or in bad faith, constituting arbitrary divorce.

Arbitrary divorce occurs when the husband dissolves the marriage without legitimate cause or with intent to harm, producing psychological, social, and economic consequences. To prevent such abuse, many modern legal systems, including Algerian legislation, have established mechanisms to compensate the wife, thereby upholding justice and safeguarding rights.

Based on the foregoing, this section will address the concept of compensation for arbitrary divorce and its legal characterization (Firstly), followed by the conditions for entitlement to compensation as redress for the harm inflicted upon women divorced without a just cause (Secondly).

1.1 FIRST REQUIREMENT: The Concept of Compensation for Arbitrary Divorce and Its Legal Characterization

This issue has sparked both doctrinal and legal debate concerning its definition and nature. Accordingly, in this section we shall address its definition (1), followed by its legal characterization (2).

1. Definition of Arbitrary Divorce and Related Compensation

Addressing compensation for arbitrary divorce as a financial right of the woman requires us first to define arbitrary divorce (a), and then to define compensation as a mechanism for redressing the harm endured by women subjected to divorce. (b).

a. Definition of Arbitrary Divorce

Linguistically, divorce, or *talaq* in Arabic, is derived from *italaq* (release), meaning the untying of a bond, the act of setting free, or abandonment after restraint. The **Academy of the Arabic Language, 2005, p. 563** defines it as: “*the dissolution of the marital bond contracted between spouses by specific expressions.*” Although the formulations of the jurists of the various schools differ in their definitions of divorce, they all revolve around the same meaning: the termination of the marital bond, whether immediate or eventual. The Hanafi and Hanbali jurists defined it as the dissolution of the marital bond, immediately or ultimately, by a specific expression (**Al-Kassani, 2003, p. 359**).

As for arbitrariness in divorce, the term *ta'assuf* in Arabic derives from the verb *'asafa*, meaning to deviate, to act without guidance, or to commit injustice. *'Asf* denotes oppression, and *i'tassafa* means to wrong (**Al-Bustani, 1980, p. 408**). A man described as *'asuf* is one who is unjust (**Abadi, 1994, p. 1082**).

In jurisprudential terminology, contemporary scholars (**Al-Durini, 1988, p. 87**) have defined arbitrariness as “contradicting the intent of the Lawgiver in an act that is, in principle, permitted by law.” Arbitrary divorce (**Latif & al-Zibari, 2022, p. 45**) is thus understood as “contradicting the intent of the Lawgiver in dissolving the marital bond, immediately or ultimately, by a specific expression.” It refers to the husband divorcing his wife without legitimate cause or necessity, without justification, or for an unreasonable justification.

In legal terminology (**Taqiyya, 2010, p. 59**), arbitrary divorce is “the divorce pronounced by the husband without reasonable cause, for which the law imposes financial compensation.”

From a legislative perspective, the Algerian legislator does not provide a definition of arbitrary divorce. Instead, it is mentioned in Article 52 of the Family Law, which states: “*If the judge finds that the husband has acted arbitrarily in pronouncing divorce, he shall order compensation for the wife for the harm she has suffered.*” On the other hand, the legislator does not define arbitrariness itself but enumerates its forms in Article 124 bis of the Civil Law (which will be examined and analyzed later).

Based on the foregoing, arbitrary divorce may be understood as the husband divorcing his wife without any legitimate reason or necessity. It may also be referred to as unjustified divorce or liability for divorce, meaning the absence of any recognized or legitimate grounds for dissolving the marital bond. Accordingly, the following definition of arbitrary divorce may be proposed: it is the divorce pronounced by the husband unilaterally, with the intent of causing harm to the wife, and its arbitrariness is subject to the discretionary authority of the family judge.

b. Definition of Compensation as a Mechanism for Redressing the Harm of Arbitrary Divorce

Compensation for arbitrary divorce (Dhabih, 2018, p. 102) is defined as: “the substitute provided for the harm inflicted upon the woman by divorce, where the harm consists in depriving her of a stable marital life, the loss of her provider, suffering from loneliness, the pain of separation, and similar consequences.”

As for harm (darar), it has been defined (Mowafi, 1418 AH, p. 83) as: “the infliction of corruption or injury upon another.” Imam Al-Tufi (Al-Tufi, 713 AH, p. 23) defined it as: “the infliction of corruption upon another in absolute terms.” It has also been described (Al-Daws, 2010, p. 50) as: “the injury that befalls a person in one of his rights or in a legally recognized interest, whether that right or interest has financial value or not.”

Accordingly, harm is of two types:

- **Material harm:** an injury endured by a person as a result of interference with his financial interests.
- **Moral harm:** an injury affecting a person’s intangible being, such as harm to his honor, feelings, emotions, or sentiments (Al-Daws, 2010, p. 50).

2. Jurisprudential and Legal Characterization of Compensation for Arbitrary Divorce

The legal characterization of compensation for arbitrary divorce, or the determination of its legal nature upon which the judge bases his ruling, is among the most debated issues. Some scholars trace it back to the *mut’ah* (consolatory grant) prescribed in Islamic jurisprudence, others ground it in the theory of abuse of rights, while yet others attribute it to tort liability.

a. Characterizing Compensation for Arbitrary Divorce as *Mut’ah* for the Divorced Woman

Some contemporary jurists, such as Wahbah al-Zuhayli and others, have argued that compensation for arbitrary divorce derives from *mut’ah* in Islamic jurisprudence, considering it a juristic development of *mut’ah* and equating financial compensation with this consolatory alimony. Yet a closer examination of the linguistic and technical definitions shows no conceptual link between them. Compensation is a financial sanction imposed on the party causing harm, whereas *mut’a* is not a sanction but a gift offered by the husband to ease the pain of separation.

A distinction may also be drawn between *mut’ah* and compensation in terms of rationale. *Mut’ah* is established for every divorced woman, whereas compensation is awarded only to those divorced arbitrarily. Thus, *mut’ah* is broader and more comprehensive in scope than compensation (Lati, 2016, pp. 259–260).

Accordingly, the conceptual divergence between compensation and *mut’ah*, and their differing rationales, precludes the characterization of compensation as *mut’ah* for the divorced woman. Hence, the notion of compensation cannot be founded upon the concept of *mut’ah* as recognized in Islamic jurisprudence.

Regarding the position of judicial precedent on *mut’ah* maintenance, we find it inconsistent: at times it equates *mut’ah* with compensation, while at other times it distinguishes between the two. The Supreme Court issued a ruling stating: “Since the provisions of Islamic law grant the wife divorced by her husband a consolatory grant (*mut’ah*) to alleviate the pain of separation, this in itself constitutes compensation.” Thus, the Court held that *mut’ah* maintenance is equivalent to compensation (Supreme Court, Personal Status Chamber, Case No. 359112, Judicial Decisions, 1989, No. 1, p. 89).

In another ruling, however, the Supreme Court reversed its position, stating: “*According to the provisions of Islamic law, a wife divorced arbitrarily is entitled to neglect maintenance, mut‘ah maintenance, as well as compensation that may be awarded to her as a result of arbitrary divorce...*” (Supreme Court, Personal Status Chamber, Case No. 41650, Judicial Decisions, 1989, No. 2, p. 69).

From our perspective, *mut‘ah* and compensation cannot be considered one and the same. *Mut‘ah* is due to every divorced woman, even in the absence of arbitrariness, whereas compensation is awarded only when the husband’s arbitrariness in pronouncing divorce has been established.

b. Characterizing Compensation for Arbitrary Divorce as Civil Liability

Civil liability is divided into two types: contractual liability, which arises from the breach of a contractual obligation (for example, when a building contractor fails to deliver the house on the agreed date, forcing the owner to rent alternative accommodation, the contractor is liable to compensate the owner for the rental costs as a result of his contractual fault), and tort liability, which arises from the breach of a legal duty requiring a person not to cause harm to others (for instance, when someone accidentally breaks the glass façade of a shop while playing with a ball, he is legally obliged to compensate the shop owner for the repair costs as a result of the damage caused to another’s property). In both cases, the injured party is entitled to compensation whenever the elements of civil liability are present, namely fault, harm, and a causal link between them.

If we attempt to classify compensation for arbitrary divorce under contractual liability, we cannot, since divorce is a unilateral right of the husband and not a contractual obligation. Its exercise by the husband’s unilateral will does not constitute a breach of the terms of the contract, except in cases where the wife has stipulated compensation in the event of divorce. In such circumstances, the divorced woman may claim compensation on the basis of contractual liability even if the husband was not arbitrary in pronouncing divorce (Lati, 2016, p. 264).

This is permitted under Algerian law through Articles 19, 53, and 53 bis of the Family Law, which allow spouses to stipulate in the marriage contract or in a subsequent agreement any conditions they deem necessary, provided they do not conflict with the law or with the provisions of Islamic law. If either spouse violates the agreed conditions, he or she is obliged to pay compensation to the other party.

As for classifying compensation for arbitrary divorce under tort liability, this cannot be established unless the divorced woman suffers harm due to the husband’s lack of prudence in pronouncing divorce (Lati, 2016, p. 265). The husband is not considered at fault merely by exercising his right to divorce; however, tort liability may serve as a basis for compensation if the law imposes a specific obligation in matters of divorce or restricts it with certain conditions, and the husband violates such provisions. In that case, his breach entails liability for compensation on the basis of tort (Latif & al-Zibari, p. 49).

c. Characterizing Compensation for Arbitrary Divorce as Abuse of Rights

As noted earlier, arbitrariness, according to contemporary scholars, is defined as “contradicting the intent of the Lawgiver in an act that is, in principle, permitted by law” (Al-Durini, 1988, p. 87). Arbitrary divorce thus contradicts the objectives of the Lawgiver in dissolving the marital bond. Accordingly, the

foundation of compensation for arbitrary divorce lies in the contradiction of the Lawgiver's intent regarding the right to dissolve marriage.

On this basis, a husband is deemed arbitrary in divorce whenever he pronounces it contrary to its legitimate purpose and rationale; for example, divorcing his wife while in a death-illness with the intent of depriving her of inheritance (Lati, 2016, p. 262).

Compensation in cases of arbitrary divorce is rooted in the theory of abuse of rights, based on the notion of arbitrariness in exercising the right of divorce. The criterion of arbitrariness is derived from Article 124 bis of the Civil Law. In its modern interpretation, the theory has been incorporated under the concept of fault, considering arbitrariness as a fault that entails compensation in accordance with Article 124 of the Civil Law. This point will be addressed in detail later.

1.2 SECOND REQUIREMENT: Conditions for Entitlement to Compensation for Arbitrary Divorce

For the husband to be obliged to pay compensation for divorcing his wife arbitrarily under Algerian family law, specific conditions must be met, as follows:

1. The existence of a valid marital relationship between the spouses

Discussion of compensation for arbitrary divorce is only possible if the marital bond actually exists between the spouses, arising from a valid contract that fulfills its pillars and conditions. (Issaoui, 2011, p. 212).

Thus, compensation for arbitrary divorce is only awarded upon consummation. Any compensation awarded for divorce prior to consummation is merely for moral harm and does not constitute compensation for arbitrary divorce in its proper sense.

This was confirmed by the Supreme Court in a ruling which stated: *"It is legally established that the assessment of harm is a substantive matter within the jurisdiction and discretion of the trial judges. When, in the present case, the reasons relied upon by the appellant in seeking divorce prior to consummation were found to be unfounded, and the failure to consummate the marriage caused moral harm to the respondent, the judges of the council, by pronouncing divorce before consummation and awarding compensation, applied the law correctly."* (Supreme Court, Personal Status Chamber, Case No. 245159, Judicial Decisions, 2001, Special Issue, p. 259).

In our view, this judicial approach is fair, as it transcends the narrow perspective that confines the rights of a woman divorced before consummation to "half the dowry" alone, and instead recognizes that terminating marriage through unilateral and arbitrary will constitutes an abuse of right that warrants compensation.

2. Divorce Must Be Pronounced by the Husband's Unilateral Will

Islamic law entrusts the right of divorce to the husband, based on practical and social considerations, among them his greater responsibility for the financial burdens associated with marriage and its continuation, as well as the additional obligations that may arise upon entering a new marriage. The marital bond is legally

vested in the husband, who alone may pronounce divorce, as indicated by the Prophet's saying: "*Divorce belongs to the one who holds the leg.*" (Abdelaziz, 2014, p. 118).

Accordingly, if the wife initiates proceedings to dissolve the marital bond without proving harm, she is not entitled to compensation. This was affirmed by the Supreme Court in its ruling of 27 March 1989, which stated: "*Any wife who initiates a lawsuit seeking divorce from her husband and is granted it cannot lawfully be awarded compensation; thus, any judicial ruling to the contrary constitutes a misinterpretation of the law.*" (Supreme Court, Personal Status Chamber, 27 March 1989, Case No. 53117, Judicial Decisions, 1991, No. 1, p. 56).

Our analysis of this Supreme Court decision reveals that it enshrines the principle that if the wife initiates divorce proceedings without proving fault on the husband's part, the basis for compensation is absent.

3. The Husband's Arbitrariness in Pronouncing Divorce

This condition is among the most essential prerequisites for the divorced woman's entitlement to compensation for arbitrary divorce. The recognition of the concept of abuse of rights is reflected in numerous general principles and legal maxims, such as "*No harm and no reciprocating harm,*" "*Harm must be removed,*" and "*Preventing harm takes precedence over bringing benefits.*" On this basis, jurists have sought to prohibit all forms of aggression, including abuse in the exercise of rights, even when such rights are legitimate in principle (Al-Daws, 2010, pp. 34-35).

The Algerian legislator addressed arbitrariness in Article 52 of the Family Law, yet the provision shows clear shortcomings in defining the basis of compensation, the criteria for its assessment, and the mechanisms for proving arbitrariness. In light of this legislative gap, recourse must be made to the general principles established in the Civil Law, which confines abuse of rights to three forms under Article 124 bis:

- When exercised with the intent of harming another.
- When aimed at obtaining a trivial benefit compared to the harm caused to another.
- When pursued to obtain an unlawful benefit.

Applied to divorce, the first form; intent to harm, is the most relevant and illustrative of arbitrary divorce. Whenever the husband fails to provide a legitimate or reasonable justification for dissolving the marital bond, the judge may infer an intent to harm the wife. Nevertheless, the characterization of the justification and the assessment of its seriousness remain discretionary matters within the competence of trial judges, who exercise their authority in evaluating the facts (Issaoui, 2011, p. 213).

Although the Family Law does not require specific grounds for a husband to request divorce, the judiciary exercises its authority to question the husband in order to verify the seriousness of his reasons. If the judge determines that the divorce is "arbitrary" and lacks a legitimate or acceptable factual basis, he awards the divorced woman compensation for material and moral damages pursuant to Article 52. (Saad, 2018, p. 135).

Thus, the husband may bear responsibility for divorce without disclosing to the judge the reasons that prompted him to do so, either to avoid embarrassment or to bypass evidentiary rules. Pronouncing divorce unilaterally without justification is considered a correct application of the law, as affirmed in a Supreme Court

ruling (Supreme Court, Personal Status Chamber, Case No. 22 30 19, Judicial Decisions, 1999, Special Issue, p. 104).

4. The Occurrence of Harm to the Wife as a Result of Arbitrariness

Proof of harm warranting compensation is subject to a flexible personal standard that goes beyond the narrow concept of harm as a ground for divorce, encompassing moral and psychological dimensions resulting from separation. The judge must take into account variations in the degree of harm based on the duration of marriage, social and cultural level, and societal standing of each wife individually. What constitutes serious harm for one woman may not be the same for another, thereby granting trial judges broad discretion in assessing the facts (Hamli, 2013, p. 67).

2. SECOND SECTION: The Judge's Authority in Assessing Harm and Awarding Compensation in Arbitrary Divorce

The Algerian legislator subjected divorce to judicial oversight, granting judges discretion to determine whether the husband abused his right to unilateral divorce. This authority relies on material and moral criteria, including the absence of legitimate justification. The judge's role is to assess the dispute, protect the weaker party, and ensure fair compensation by considering the divorced woman's social and personal circumstances.

In this section, we shall examine the concept of judicial discretion and its limits (First Requirement), followed by the criteria upon which the judge relies to assess harm and compensation, and the manner in which these criteria are applied (Second Requirement).

2.1 FIRST REQUIREMENT: The Concept of Judicial Discretion and Its Limits

1. The Concept of Judicial Discretion

Judicial discretion is defined as: “*An intellectual activity aimed at uncovering the extent to which the premises inherent in the elements of the dispute correspond to the model premises set forth in the law. Once this correspondence is established, the legal effect or legal consequence flows from the legal rule to govern the disputed status.*” (Al-Chawarbi, 2001, p. 81).

Through Article 52 of the Family Law, the Algerian legislator granted judges discretion to award compensation when divorce is deemed arbitrary, namely when the husband fails to justify his decision or divorces with intent to harm his wife materially or morally. In such cases, the husband must pay compensation, the amount determined by the Supreme Court in a 2006 ruling which stated: “*The determination of compensation for arbitrary divorce is a discretionary matter within the exclusive competence of trial judges.*” (Supreme Court, Personal Status Chamber, Case No. 368660, Judicial Decisions, 2006, No. 1, p. 483).

2. The Limits of Judicial Discretion

Although the judge has broad discretionary authority in family disputes, this power is limited by the law. He may exercise discretion only within the boundaries set by legislation and cannot depart from its

purpose. In adjudicating cases, he must apply legal rules, yet his will remains essential, for without it judicial discretion would cease to exist.

The judge, when examining the dispute before him, may base his ruling on his personal knowledge. Yet applying the law in light of such knowledge does not amount to adjudicating by personal knowledge, since he is tasked with applying the law to the facts (Omar, 2004, p. 43).

It is well known that when faced with complex disputes, the judge may seek the assistance of experts, so as not to rule in ignorance, which could lead to the violation of individuals' rights.

Accordingly, any intellectual activity undertaken by the judge must be objective, guided by the public interest of society as a whole, and free from personal considerations (Jerada, 2021, pp. 346-347). The judge is also obliged to provide reasons for his judgment by setting out the legal grounds that led him to the operative conclusion. This reasoning reveals the legal arguments upon which the judgment is based, since unlike the jurist, the judge must not remain in the realm of possibilities but must reach certainty in the decisions he makes and disclose the reasoning behind them (Al-Chawarbi, 2001, p. 102). This is achieved only after examining the facts of the dispute, studying the case file, and conducting the necessary investigation.

Among the constraints that delineate the limits of judicial discretion is the prohibition against adjudicating by personal knowledge; for example, relying on facts outside the case file that were not subject to adversarial debate. Should the judge do so, his ruling would be invalid, as he would be acting simultaneously as witness and judge. Violating this prohibition undermines judicial impartiality and results in nullity of the judgment (Jerada, 2021, p. 350). This ensures that the judge has no personal interest in the dispute and remains unbiased toward either party, thereby enabling him to rule objectively.

The question that arises, however, is: does the discretionary authority of the family judge in assessing compensation for harm fall under the review by the Supreme Court?

The trial court enjoys absolute discretionary authority in assessing the amount of compensation and examining the facts, without review by the Supreme Court, provided that the elements of harm and its legal conditions are clearly established. The Supreme Court's oversight is limited to the *legal characterization* of harm, by reviewing whether the facts are sufficient to constitute harm, the nature of the harm, whether actual and realized or future, whether material or moral and the adequacy of the reasons and means relied upon in proving it (such as witness testimony), in order to ensure the correct application of the law. Once the legal elements of compensation are complete and the assessment is based on sound factual grounds, the matter cannot be contested before the court of cassation (Afif, 2010-2011, p. 235).

This principle was affirmed in a Supreme Court ruling which stated: "*It is legally established that the assessment of facts falls exclusively within the discretion of trial judges, and the Supreme Council has no oversight over them in this regard.*" Another ruling similarly held: "*It is legally established that the assessment of harm is a substantive matter within the jurisdiction and discretion of trial judges.*" (Supreme Court, Personal Status Chamber, Case No. 245159, Judicial Decisions, 2001, Special Issue, p. 259).

In a ruling issued by the Supreme Court, Case No. 56490, dated 27 November 1989, it was held: "*It is legally and religiously established that when pronouncing divorce, the judge must specify the type of harm suffered by the wife and indicate the means of proving such harm. If harm is proven by witness testimony, the*

witnesses must be identified in the manner required by law. Failure to do so necessitates annulment of the ruling, which relied solely on Article 53, and for its failure to observe the religious rules governing divorce.”

Similarly, in a ruling issued by the Supreme Court, Case No. 39689, dated 24 February 1986, it was held: “The assessment of compensation due to redress actual harm is within the authority of the trial court, which bases its decision on the evidence presented to it demonstrating the reality of the material and moral damages suffered by the injured party. This assessment is made in light of the circumstances of the case, and its validity cannot be contested so long as the legal elements for awarding compensation are complete and the award redresses all material and moral harm.”

2.2 SECOND REQUIREMENT: The Criteria Judges Rely Upon in Assessing Compensation and Their Application

1. The Criteria Applied by Judges in Assessing Compensation

Judicial discretion in assessing compensation is characterized by a balance between legal standards and factual considerations aimed at achieving justice. This assessment varies according to the nature of the harm and the circumstances of the case.

a. The Objective Criterion

Objective assessment rests on a normative standard reflecting prevailing conduct, adopted by the legislator in shaping legal rules. The judge applies this model to safeguard the public interest, even when individual considerations are set aside. Judicial discretion extends beyond resolving the substance of the dispute to examining jurisdiction and procedural admissibility. This is exercised according to an abstract objective standard grounded in intellectual analysis, free from personal considerations. The aim of this approach is to realize the public interest and the justice sought by the law (Jerada, 2021, p. 338).

b. The Subjective Criterion

Subjective assessment relies on an individual standard, where the judge considers the personal circumstances of the party concerned. It focuses exclusively on the litigant’s specific factors without regard to external conditions, and these may directly influence the outcome of the dispute. It finds particular application in family disputes, where the human dimension predominates, with the aim of protecting the weaker party in the litigation. It differs from objective assessment, which is applied when imposing legal obligations upon individuals. (Afif, 2011, p. 112). Accordingly, the judge does not award a uniform amount; rather, he increases it where the woman is elderly, ill, or without shelter, in consideration of her vulnerable circumstances, while he reduces it in the case of a young, employed, and financially secure woman.

Subjective and objective criteria complement each other in ensuring justice. The subjective accounts for personal circumstances of the litigants, while the objective remains predominant, grounded in abstract reasoning aimed at protecting the public interest and securing legal stability free from bias.

2. How Judges Assess Compensation

The issue of compensation assessment by the judge hearing the dispute does not raise any difficulty when the harm suffered by the wife is material. In such cases, the judge relies on numerous objective elements in the assessment process, such as bodily injury sustained, medical expertise, treatment expenses, and so forth.

However, when the harm is moral, as expressly recognized by the Algerian legislator in Article 182 bis, the matter becomes more complex. Moral harm is relative in nature and subject to judicial discretion, while remaining bound by the requirements of Article 131 of the Civil Law, which obliges consideration of the “surrounding circumstances” of the divorced woman, such as her age, health condition, and social status. Compensation in this context covers both actual harm and losses such as missed opportunities or lost prospects of remarriage. Importantly, compensation is assessed as of the date of judgment, not the date of the harm (Amiri, 2024, p. 398 ff.).

The claimant seeking compensation for arbitrary divorce must establish proof of arbitrariness in the divorce by any means of evidence; writing, testimony, witness statements, or admission. This requirement applies particularly to divorces pronounced outside the court. By contrast, when divorce is pronounced before the court, the divorced wife is not required to provide proof, since the judge infers arbitrariness from the case file or during the conciliation session (Ben Chouikh, 2022, p. 51).

Conclusion:

This study has been confined to the principal findings and recommendations derived from the research, which simultaneously provide a substantive response to the problem formulated in the introduction and pursued throughout its various sections.

Findings

- Compensation for arbitrary divorce under the Algerian Family Law is a mechanism of liability for abuse of the right to divorce. It seeks justice and redress for divorced women, yet its application reveals a gap between legislative intent and judicial practice.
- Judges are granted wide discretion to determine arbitrariness, assess material and moral harm, and set compensation based on criteria such as gravity of harm, the wife’s situation, the husband’s means, and surrounding circumstances, subject to Supreme Court review.
- Judicial practice faces obstacles, notably the burden on women to prove arbitrariness and establish causation between the husband’s conduct and the harm suffered.
- Interpretations of arbitrariness, harm, and compensation often diverge, leading to restrictive readings, especially in cases of moral harm that resist material quantification.
- Alimony for “mut‘a” is a recommended gesture to ease separation, while compensation is a legal sanction imposed when arbitrariness and abuse of divorce rights are established.

- Compensation awards are frequently disproportionate to the actual harm, due to the absence of clear standards, social and economic pressures forcing women into inadequate settlements, and the limited means of husbands that hinder enforcement of judgments.

Recommendations

- Bridge the gap between legal texts and judicial practice by unifying interpretation through clear standards for Article 52 of the Algerian Family Law, especially in defining arbitrariness, harm, and fair compensation.
- The legislator should establish precise foundations for compensation assessment, similar to the Civil Law, and introduce a minimum threshold in arbitrary divorce cases to safeguard women's rights.
- Judges are encouraged to raise the amounts so that the awards deter trivializing marriage or manipulating family stability.
- A separate provision should distinguish "mut'a" (consolatory alimony) from compensation to eliminate conceptual confusion and clarify the difference between moral consolation and legal redress.
- Family law should be reinforced by appointing highly experienced judges, particularly in primary courts, given the sensitivity of family relations.

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