

Objective Intellectual Research Papers



Equitable Distribution of the Marital Property
Standard Descriptive Comparative Study

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First Edition
1444 AH – 2024 AD

Introduction

In the name of Allāh, the Most Gracious, the Most Merciful. All praise is due to Allāh, and peace and blessings be upon the Messenger of Allāh (peace be upon him). To proceed:

This is a research paper in which we discuss some of the issues facing Muslims residing in the West, foremost among them being family issues. These issues have, in turn, extended to Islamic countries, whether in terms of governing laws or in terms of Islamic and social discourse. Recently, calls have emerged in the Islamic East demanding a modification of the status of Muslim women in terms of their rights, especially in cases of divorce, on the grounds that existing rights are deemed unfair and do not consider the changing times and circumstances from the early era of Islam and thereafter. Nowadays, women have become more independent, actively participating in various fields, contributing to the financial support of their households, whether as wives, mothers, sisters, or daughters. In some cases, women have even become the breadwinners of their households.

Calls have emerged here and there urging the implementation of Western laws in matters of personal status, with a focus on the civil aspect more than others. We have seen demands for the legalization of the financial partnership in marital property and the right to equitable distribution of this property in cases of divorce.

Some have attempted to reconcile these calls with Islamic Sharia by finding an Islamic justification for them, utilizing the principles and branches of legal reasoning. On the principles level, they have employed analogical reasoning (qiyās) and consideration of public interests (maṣāliḥ mursalah). They have also discussed the broader objectives of Islamic Sharia, such as the pursuit of justice and the preservation of life. On the

branches level, they have resorted to interpreting certain texts from the Qur'ān and Sunnah to support these calls.

Due to the significance of this topic and its impact on many families, especially given the widespread occurrence of divorce, whether in the form of willing divorce or khul' (divorce initiated by the wife), I will present a series of discussions addressing the issue from various aspects:

Section One: Descriptive Aspect.

Section Two: The Relationship between the Right of Working and Striving and the Right of Equitable Distribution between Spouses.

Section Three: Islamic Rulings Aspect.

Section Four: Proposed Solutions Aspect.

Section One: Descriptive Aspect

Description of the Problem and the Civil Legal Background:

Before I delve into the existing Western laws concerning marital rights and communal property (marital assets) in the Western context, and the underlying reasons for raising this issue, I would like to share two stories, one of which I witnessed in one of the states, and the other we learned about recently through the media. Both stories encapsulate the essence of the issue and arising circumstances that are often similar in many cases.

The first story involves a businessman who had multiple outlets for trade, ranging from grocery stores to restaurants, and more. The man lived in the United States with his wife and children, working until he accumulated this wealth. However, fate intervened, and his wife passed away, leaving him with grown-up children who continued to reside with their father in his luxurious home, enjoying various aspects of life. After a period, the man decided to remarry. He returned to his native country and chose a woman from a relatively modest background. He brought her over, provided her with a comfortable residence, and bought her a new car, financed through installments (people engage in such arrangements for various reasons, including giving an opportunity to understand the other party well and handling tax-related matters, among others).

The lady gave birth to two children within a span of two years. She began to acquaint herself with some women in the community, and upon learning about her and her husband's identity, they started inciting her against her husband. They accused him of financial mistreatment to her, alleging that he has a palace where he lives with his children from his deceased wife. They claimed he has significant business ventures. They showed the lady all these assets, cars, and businesses and advised her to

demand that he allocate a portion of these assets to her young children. They also advised her to warn him if he didn't comply, she should take the matter to the court and demand half of what he owned. The lady listened to these provocations, confronted her husband, and demanded that they move with her children to the palace instead of the rented residence. She insisted that he allocate a share for her children and threatened him with legal action for equitable distribution in court.

The husband rejected these demands, citing their previous agreement and emphasizing that he had informed her he would not live with her where his children from the deceased wife live. He reminded her that he guarantees her a decent life for both her and her children. However, the lady refused to listen to his words and went to an attorney, filing for divorce. She sought equitable distribution and requested financial support for herself and her children, having been promised by the attorney that she would receive millions and a high monthly income.

The man temporarily stopped providing the lady with the rental payment and monthly expenses. The court proceedings began, and to everyone's surprise, it was revealed that the man's official income was very modest. All the claimed businesses were not under his name; it was confirmed that he was living close to the poverty line by local standards. The lady couldn't obtain anything from the legal proceedings. Instead, she ended up begging in front of a mosque. When some individuals intervened on behalf of her before the husband for supporting the young children, he gave her the choice of whether to continue the legal proceedings or to return with her children to their original country, and he will be covering all their expenses there.

The second story is about the famous football player, which has gained

prominence recently. It also became evident that his ex-wife would not receive any portion of his wealth. He is one of the highest-paid players in France, reportedly earning one million euros monthly, excluding other matters. This is because he transferred ownership of everything to his mother, and his salary goes directly to his mother's bank account.

So, what is the legal background of the marital property issue?

I will try to break down this background into elements as follows:

Firstly, the concept of marital property in Western customs:

This term is used in many Western societies and refers to the financial and material resources that are jointly owned by spouses or acquired during the period of marriage. This includes income, savings, investments, real estate, and other financial assets considered common or jointly owned under local law in the event of marriage. This also encompasses any outstanding and due debts.

Some of these societies allow the existence of separate financial properties exclusive to the husband or the wife in addition to marital property. This includes wealth acquired through inheritance or gifts, and some argue for mutual ownership for such properties.

If we consider the United States as the largest Western country in terms of size and population, with its adherence to secular laws, we find that it divides marital property into categories: Marital Assets, Non-Marital Assets, and Mixed Assets.

Marital Assets, or mutual property, is defined as assets (including debts) acquired during the marriage, either jointly or by either party, excluding inheritances or gifts received by one of the spouses.

Non-Marital Assets, or private property, includes assets and debts owned by each party before marriage and remain unchanged after marriage. It may

also include assets received by one of the spouses during the marriage, including gifts exchanged between spouses.

As for Mixed Assets, they are assets and debts that were initially non-marital but were replaced to acquire new assets, repaired, or enhanced during the marriage using marital property. In this same regard, non-marital debts may also be paid off using marital property. For example, cars may fall into this category sometimes due to financial support funded by marital assets, or if a car is purchased by installment and some or most of it is paid off during the marriage.

Secondly, the division of marital property in divorce:

Most secular Western laws and some other countries have come to agreement regarding the principle of dividing marital property between spouses in case of divorce. However, they differ in some details depending on the regulatory jurisdiction. Some jurisdictions follow common property laws, which generally involve an equitable distribution of assets acquired during marriage.

On the other hand, some jurisdictions use the principle of fair distribution, taking into consideration various factors such as the duration of the marriage, financial contributions, and the future capabilities of the spouses after divorce to determine a fair distribution of assets for each.

If we take the United States as a model again for the division method followed in case of divorce, we find the two previously mentioned approaches referred to as community property vs. equitable distribution.

For example, if you reside in states such as Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin, both spouses typically share equally all income, properties, and debts accumulated during the marriage in case of divorce.

If you live in any other state, the courts therein consider a set of factors to determine a reasonable distribution of all marital properties.

In all cases, these laws do not consider the differentiation of gender. A husband may share his wife's assets for which he made no effort to earn, and a wife may share her husband's assets even if she had not made any effort to earn them.

Root causes of the issue:

Several factors have recently contributed to raising this issue, including:

- The widespread phenomenon of divorce, whether through divorce (initiated by the husband) or khul' (divorce initiated by the wife), has led to a surge in legal cases in courts, often leaving the law struggling to find a solution to the civil and social rights resulting from divorce.

- The length of marriage and the financial overlap of spouses' properties complicate the assessment of their individual rights. For example, in Islamic minorities in the West, there is what is known as a "joint account," where spouses work and transfer their income to this joint account, then jointly consume from it.

- The system of legal sponsorship has become fragile due to changing lifestyle patterns. In the past, women were financially sponsored under the care of their male relatives, whether a father, husband, brother, or son. However, nowadays, we have seen women left in need despite the existence of male relatives.

- Drastic and rapid economic transformations in contemporary society. For instance, significant inflation rates render monthly financial support during the waiting period less valuable. Likewise, the drastic change in currency value to the extent that the dowry, for example, loses its real market value. What was once a significant amount, say twenty thousand

Syrian pounds as a dowry fifteen years ago, now may only be worth a few dollars. Similarly, a dowry of twenty thousand Egyptian pounds may not be equivalent to more than five hundred dollars now, insufficient for living expenses for more than two or three months.

- One of the root causes specific to Western countries is the significant excessive freedom against some Sharia restrictions/Islamic rulings. This pushes some women, or many of them, to choose the easy way out, which is to detach from the constraints of marriage while ensuring a fixed income from the husband's wealth. We can confidently describe this as an incentivizing factor, as many Western laws deeply rooted in liberalism are provocative against stable concepts such as the family. In the United States, for example - according to Forbes magazine - in a statistic published by journalist Christie Bieber on May 4, 2023, he mentioned that in 2021, the total number of divorces reached 689,308 in the 45 states that undergone these statistics. During the same year, there were 1,985,072 marriages, making the marriage rate in the United States 6 marriages per 1,000 people. More than a third of these marriages end in divorce, approximately, leaving a remaining rate of four marriages per each thousand people. This ratio reflects a significant indifference to the concept of family, partly due to the nature of provocative laws.

At the beginning of this section, I have presented the story of a woman who was enticed by her women company and the attorney.

Section Two: The Relationship between the Right of Working and Striving and the Right of Equitable Distribution between Spouses

In the previous section, we discussed the concept of equitable distribution as it developed in Western societies and mentioned some root cause for its widespread phenomenon, along with attempts to regulate it in the Islamic East.

In this section, we will address the issue of the right of working and striving and the extent of its compatibility as evidence for regulating the issue of equitable distribution from an Islamic perspective.

Firstly, the definition:

Linguistically, the term "al-Kadd" (to work) is derived from the verb "kadda" with its derivations (kadda, yakiddu, kaddan), meaning exerting effort and seeking sustenance¹.

So, "al-Kadd" is the exertion of effort in seeking sustenance and the means of life.

As for "as-Si'āyah," its stem is the verb "sa'ā" with its derivations (sa'ā, yas'ā, sa'yan)², meaning to strive. Allāh Almighty says: "And that each person will only have what they strive for, and that (the outcome of) their striving will be seen (in their record)."³

"As-Si'āyah" is a term that signifies work and seeking livelihood.

The intended meaning of both terms is what a person puts forth to acquire the means of life, either from scratch or through development.

¹ Lisān al-'Arab, V. 3, P. 377, kadda stem.

² Maqāyīs ul-Lughat, Ibn Fāris, V. 5, P. 126. Lisān al-'Arab, v. 14, p. 376.

³ An-Najm: 39-40.

When we say "from scratch," it refers to bringing into existence what was non-existent through one's efforts and endeavors.

When we say "through development," it refers to enhancing what already exists, whether for one's self or others, through one's efforts and endeavors.

The term (to work and strive), in its form and meaning, is largely applicable and jurisprudentially found in the Arab Maghreb. It is rarely found in the books of the scholars of the Arab Mashriq, even those who wrote about Maliki jurisprudence. Therefore, it may be expressed in various forms, including:

The right of "jirāyah," (to endeavor) "shaqā," (to exert effort) "kadd," (to work) or "si'āyyah" (to strive). Some even express it in the Amazigh language (Tamazight), a term derived from the verb "azal," meaning to strive and run¹.

Therefore, the right of striving is a personal right based on the acknowledgment of the due seekers to generate or develop the family's wealth as a customary practice. This right entitles seekers to a portion of the generated/developed income, each according to their contribution.

Secondly, the sources:

Most of the detailed writings about this right and its applications can be found in the contemporary issues (Fatwas) by the Arab Maghreb scholars, especially in the books of the Ghomara and Soussi scholars. These books recorded their great enthusiasm and significant interest in the issue of "as-Si'āyah," (striving for the livelihood) dedicating special chapters that cover

¹ Nizām al-Kadd wa as-Si'āyah (The Standard of Working and Striving), Al-Ḥusayn al-Mālikiy), P. 18.

a wide range of their works.

The author, Muḥammad al-'Uthmāniy, states: "The contemporary literature is rich in rulings related to "as-Si'āyah," such as the Nawāzil (contemporary issues) of Al-Burjiy on the section on partnerships, the responses of Abī al-Mahdiy 'Isā ibn 'Abd ur-Raḥmān as-Saktāniy on the chapter of inheritance issues and women's striving for livelihood. Additionally, the Jazuliy's Nawāzil by 'Abdullāh ibn 'Ibrāhīm Al-Jishtīmiy on the section of the issues of wives, whether they have earnings or wages under the responsibility of their husbands. There are also the responses of the scholar Muḥammad ibn Muḥammad ibn 'Abdullāh ibn Ya'qūb on the chapter of partnerships and similar matters. Fatwas of the rulers by Abī Al-Ḥasan 'Aliy ibn 'Aḥmad al-'Umariy at-Tiskdeltiy, responses of Shaykh 'Aḥmad ibn Muḥammad al-'Abbāsiy on the chapter of marriages and striving for the livelihood, and the annexes of Muḥammad ibn 'Abdullāh ibn 'Abd ar-Raḥmān al-Kaykiy on the chapter of sales and similar matters. Nawāzil by 'Ibrāhīm ibn 'Aliy al-Martīniy al-Waydāniy in (The Conclusion), responses of my master Muḥammad ibn Ya'qūb as-Samlāliy on the chapter of issues of striving for livelihood by wives and others, Abī Zayd 'Abd ar-Raḥmān ibn 'Abdullāh al-Jishtīmiy's poem on the chapter of dowry, financial support, and striving for livelihood, and Al-'Alamiy's Nawāzil (Part Two). Also, the (Supreme Grants) by Al-Mahdiy Al-Wazāniy (Part Two), and his book (The New Criterion) (Part Seven). Some authors have written specifically on this topic, such as 'Umar ibn 'Abd al-'Azīz al-Jarsīfiy, who wrote a (Treatise on the Issue of Striving for livelihood)."¹

The jurist Abū Mahdiy 'Isā as-Saktāniy (d. 1062 H) dedicated a section

¹ Al-Maḥajjah Magazine, number 253.

in his Nawazil book called (The Chapter of Inheritance and Striving for the Livelihood).

The jurist Abū al-'Abbās 'Aḥmād ibn Muḥammad al-'Abbāsiy (d. 1052 H) wrote a book titled (Issues of Marriages, Choice, Khul', Divorce, Loss, and Striving for the Livelihood).

The jurist Muḥammad ibn Muḥammad ibn 'Abdullāh ibn Ya'qūb as-Samlāliyy, a scholar of the Ya'qūbiyy family, wrote a book titled (Issues of Striving for the Livelihood by Wives and Others," in his responses.

The jurist 'Abdullāh ibn 'Ibrāhīm al-Jishtīmiyy at-Tamliyy (d. 1067 H) dedicated a section titled (Issues of Wives: Do They Have Earnings or Wages Under the Responsibility of Their Husbands?) in his book "Responses of the Latecomers."

Muḥammad al-Mahdiy al-Wazāniyy (d. 1342 H) tackled this issue in his comprehensive encyclopedia (The New Major Nawazi).

Thirdly, the application:

The woman (the worker) is entitled to a fair share of the earnings during the marriage as a result of her work and efforts in developing the family's finances. She can rightfully claim this share after the termination of the marital relationship, either through divorce or death, and even during duration of the marital life, especially when the woman knows that her husband is affluent and capable of providing for her and their children.

Judge of the Muslim community in Taroudant¹, 'Aliy ibn Sa'īd al-Hawzāliyy (d. 1001 H), comments on the matter, saying: "There is no doubt that the wife, who contributes in and strives for the livelihood, shares with her husband what they both gained financially in the manner indicated. This

¹ A Moroccan city in Taroudant territory in the Sous Valley.

is the custom in the Souss region, may Allāh, the Exalted, keep it safe. The rulings evolve with the evolution of customs..."¹

Fourthly, the foundations:

Jurists have differed in their approach to the concept of working and striving by women and we can summarize their perspectives as follows:

The first perspective: This perspective rejects this concept both in terms of foundation and application. Those who hold this view consider this right akin to a corrupt custom, lacking explicit or even plausible evidence. In addition, it falls under the prevailing necessity. They argue that women have been assisting their husbands in activities such as agriculture, trade, and industry since ancient times. For instance, 'Asmā' assisted az-Zubayr in farming, Qaylah al-'Anmāriyyah engaged in trade, and the blessed lady Ḥalimah as-Sa'diyyah nursed the Prophet Muḥammad (peace and blessings be upon him). 'Umm Kulthūm bint 'Aliy ibn 'Abī Ṭālib (may Allāh be pleased with them) worked in midwifery, and Ash-Shifā' bint 'Abdullāh Al-Qurashiyyah also worked in education. It is certain that they increased the family's income through their contributions. This happened during the time of the Tabi'īn (the generation that witnessed the Companions but did not see the Prophet) and beyond, yet jurists did not address this right of women's working and striving, neither in terms of foundations nor in terms of application.

Moreover, the right to women's striving contradicts the Islamic inheritance system and the right of financial support during the waiting period in divorce. This will render women entitled to multiple financial rights from a single source of wealth. They take their right of striving from

¹ Nawāzil Jurisprudence in Sous, P. 418.

the husband's wealth, then claim their share in inheritance from the remaining. Additionally, they receive their financial entitlement during the waiting period in case of divorce. This situation may cause financial hardship for men more than reasonable.

The second perspective: This perspective advocates for the implementation of this right. Its proponents rely on various textual evidence, including the verses: "And that each person will only have what they strive for,"¹ and "For men is a share of what they have earned, and for women is a share of what they have earned."²

They argue that since Allāh has established a right for women, the right to dowry, as an addition to the marriage contract or as an empowerment and protection against injustice, then how can we deny her the right of her work and striving? Allāh says: "But if you want to replace one wife with another and you have given one of them a great amount (in gifts), do not take (back) from it anything. Would you take it in injustice and manifest sin?"³

The proponents of this perspective also cite a story attributed to a judgement given by our master 'Umar ibn al-Khaṭṭāb. The story involves a woman named Ḥabībah bint Zurayq, the aunt of 'Abdullāh ibn al-'Arqam, who worked as a weaver, producing silk fabrics and embroidering clothes and turbans. Her husband, 'Aāmir ibn al-Ḥārith (or 'Umar ibn al-Ḥārith, according to some accounts), was a short-statured merchant. Both spouses worked until they acquired wealth from their respective trades. When her husband died without leaving any children, but he left uncultivated land

¹ An-Najm: 39.

² An-Nisā': 32.

³ An-Nisā': 20.

(land without buildings or trees), houses, wealth, and camels. His heirs, i.e., his brothers, took the keys to the treasuries and divided the inheritance. Ḥabībah pleaded against them, claiming her right of work and striving against her husband's family, who intended to possess the whole wealth, leaving her only her share in inheritance: one-fourth of her childless husband's wealth.

When she raised the case to Caliph 'Umar ibn al-Khaṭṭāb (may Allāh be pleased with him), he adjudicated in favor of joint ownership in the wealth. He awarded her half of the entire wealth for her striving and one-fourth as her inheritance share.

Similarly, some have attempted to justify this right based on contracts that involve the concept of partnership in acquired wealth, such as contracts of sharecropping, watering partnership, cultivation partnership, profit and loss sharing (limited partnership), and joint venture in modern business. In these contracts, the joint worker deserves a share in return for the work, or as per the agreement as seen in the joint venture contract.

Proponents of this perspective have differed in determining the specific amount allocated to the wife for her striving, and there are various opinions among them. Some of them argue:

1. The first opinion: The woman contributor, or others involved, is granted a share for her striving as a form of partnership. In this case, she becomes a partner in the wealth with a percentage reflecting the value of her work, as determined by subject matter experts.

For instance, the jurist At-Tummaliy allocated half of the husband's wealth, in case of divorce or death, to her in the absence of a prior agreement, stating, "The wife is a partner of the man in what they both financially gained during their union and cooperation period. The husband

cannot arrogate to himself the procurement that he owns officially. Instead, she is a partner with him by striving. If partnership is no restricted, it implies equality (in the wealth)."¹

Al-Wuthayliy Al-Ghamāriy allocated a quarter to the woman contributor and claimed that this was the opinion of the Ghamaras, stating, "The known practice in the country - meaning Ghamara - is that if a woman serves in her husband's house and the husband purchases assets through her efforts, she is entitled to a quarter of this procurement, as mentioned by Muḥammad al-Mahdiy Al-Wazzāniy in his commentary."²

2. The second opinion: The woman contributor or other contributors should receive a wage for striving, which she takes from the inheritance. This ensures her rights. The distinction here lies in the fact that the wage is given from the inheritance, not from farming, weaving, or trade in which the woman strived. The advantage of this approach is that if the produce is destroyed or damaged, the wage remains fixed.

The third perspective: This perspective details the matter, sometimes ruling in favor of the woman contributor, or others, with the concept of striving, sometimes ruling in favor of her receiving wages, and at times not ruling in favor of anything. However, the standard for this elaboration is not stable; some consider capital, others consider customary practices, and there are those who consider the thing in which the woman strived. Additionally, some consider the intention of the striving person. There is a distinction between the woman who strives voluntarily, for maintaining ties with the husband for example, the woman who strives as a partner, and the woman

¹ Fiqh an-Nawāzil in Sous (Jurisprudence of Contemporary Issues in Sous), P. 418.

² Fatwas Challenging Negligence, V. 1, P. 162.

who strive in exchange for a previous favor or a known precedent from the husband towards her family, among other considerations.

Hence, we find that Article 49 of the Family Code in Morocco states: "Each spouse shall have financial independence separate from the other, except that they may agree, within the framework of managing the funds acquired during the marriage, to invest and distribute them. This agreement shall be made in a separate document from the marriage contract. The authorities shall notify both parties of the aforementioned provisions upon their marriage. In the absence of an agreement, the general rules of evidence apply, taking into account the efforts and contributions made by each spouse to develop the family's funds."

The issue of the right of working and striving is a complex matter with multiple considerations, including:

- Proving it through textual evidence.
- Proving it through reliance on customary practices.
- The prevailing necessity due to the different nature and lifestyle patterns of most people.
- The prevalence of grievances and complaints among spouses, especially by women who work alongside men.

Firstly, proving it through textual evidence:

When we examine the evidence presented by those advocating for this right, we find that it relies on plausible evidence and potential indications, making it challenging to establish this right definitively. The verse "And that each person will only have what they strive for"¹ is concerned with the actions entitled to reward and punishment, as indicated by the verse "Then

¹ An-Najm: 39.

he will be recompensed for it with the fullest recompense."¹ Not every striving worker in worldly affairs receives the fullest recompense on the day of judgement.

Regarding the verse "For men is a share of what they have earned, and for women is a share of what they have earned,"² it establishes personal financial right but does not impose an additional right on anyone, as indicated by Allāh's statement in the same verse, "And do not wish for that by which Allah has made some of you exceed others." A poor man shall not claim any right in the wealth of his wealthy wife, and a poor woman is entitled only to the financial support recognized by the Islamic legislation from her husband's wealth.

As for the aforementioned story about the woman named Ḥabībah bint Zurayq, it is difficult to rely on it due to the lack of reliable biographical and jurisprudential sources mentioning it. The Moroccans seem to be the exclusive source of this story, and it is remarkable that there is no known companion by this name and occupation. The judgments of 'Umar ibn al-Khaṭṭāb are well-documented, and none of them resemble such a judgment.

The story appears in later Mālikiy books, and some claim that Ibn Abī Zamanayn (d. 324 H) mentioned it in his book (Muntakhab al-'Aḥkām), attributing it to Ibn Ḥabīb (d. 238 H) in (Al-Wāḍiḥah). However, upon reviewing Muntakhab Ibn Abī Zamanayn, there is no mention of the story. As for the book (Al-Wāḍiḥah) by Ibn Ḥabīb al-'Andalusi, the printed version contains only small sections related to prayer and pilgrimage.

One cannot confidently establish a financial right based on such a story.

¹ An-Najm: 41.

² An-Nisā': 32.

Additionally, while using various contract types as a basis for analogy might carry some weight in meaning, each of the contracts mentioned has its definitions, pillars, and conditions that may not align with the right of women's working and striving, even if there is a semblance of similarity.

Secondly, proving it through reliance on customary practices:

We will not delve into the details of using customs as evidence to establish legal rulings, as this is well-known and grounded in the books of the principles of jurisprudence. It has various applications in the branches of law and contemporary issues. However, it is essential to recognize that transitioning a ruling from a local custom tied to a specific environment to broader environments with differences involves a risk on the Islamic rulings.

For instance, what may be a custom among people engaged in a specific industry cannot be applied to others without additional evidence beyond being customary. If it was a custom for a specific group, it indicates its limitation to that group; otherwise, it would become a general ruling. An example is the daily wage for a hired worker, where the reference for the daily wage is based on the custom of the specific type of labor. It may differ from the agricultural industry to the trade and manufacturing industries, or to the clerical industry.

Looking at Moroccan jurists who uphold this right of striving, we find that most of them limit this right to people in rural areas, excluding urban areas due to the prevailing necessity there and the differences in lifestyle and types of required work. Generalizing this custom, which has departed from its original context, also involves a risk on Islamic rulings.

Thirdly, the prevailing necessity and the different lifestyle patterns of most people.:

Especially among Muslims, this element must be considered issuing judgements on new matters. It is undeniable that the emergence of women in the workforce, competing with men in various occupations, along with the mingling of financial liabilities, must have an impact on ownership of the wealth. Justice is a major objective of Islamic law, and it is not just for one party to incur losses while the other gains without justification. The legal maxim is gaining per loss.

Fourthly, the prevalence of grievances and complaints among spouses:

This calls for practicing personal reasoning in addressing and regulating this matter in a way that reflects the major objectives of Islamic law and its general principles. It considers the variations in time, place, and people's circumstances. Ignoring the issue while there is a call for regulating it to address grievances contradicts the legal maxim of there should be no harm nor reciprocating harm.

The focus should be on the fact that despite non-inclusion of this right in the legal texts, considerations of the major objectives of Islamic law, the variations in people's customs and habits, and the absence of the concept of social solidarity, both within families and in society as a whole, lead us to apply and regulate the right of working and striving. This should be done in a way that respects both public and private rights, expanding its scope to include unmarried sisters and unmarried daughters. However, this expansion should adhere to the following guidelines:

1. The allocated share should be proportionate to the level of work and striving, ensuring it is not an absolute share regardless of the degree of

striving.

2. It should be confined to the part actively strived for, without extending beyond what the husband individually earned.

3. It should not encroach upon pre-marital property or income obtained through means other than active work, such as inheritance and gifts.

4. It should consider the rights of all striving people, not just those of the wife, without affecting the established rights, such as inheritance.

Definitive evidence should be provided to substantiate this right.

Section Three: Distribution of the Marital Property from the Islamic Viewpoint

In the previous two sections, we discussed the issue of equitable distribution between spouses according to Western customs and laws. In the first section, we described the issue and its legal background, and in the second section, we discussed the concept of working and striving, its applications, evidence, and its relationship with the issue of equitable distribution between spouses.

In this section, we will discuss the issue in light of Islamic legislation.

Before stating the Islamic viewpoint on this matter, I would like to highlight several points:

1. Islam explicitly differentiates between the wealth of the husband and the wealth of the wife, assigning each of them a separate financial liability. Allāh says: "And do not wish for that by which Allāh has made some of you exceed others. For men is a share of what they have earned, and for women is a share of what they have earned."¹ Many narrations have accounted for the occasion of revelation of this verse, including a statement from 'Aḥmad and At-Tirmidhiy from Mujāhid from 'Umm Salamah who said: O Allāh's Messenger (peace be upon him), men participate in battles and women do not, and also women have half the inheritance [compared to the men]. Then, Allāh revealed "And do not wish for that by which Allāh has made some of you exceed others."²

Qatādah said: The people during the pre-Islamic times used to not give inheritance to women and children. When they have had a share in it, [under

¹ An-Nisā': 32.

² Reported by 'Aḥmad in his Musnad (26736) and At-Tirmidhiy in his Sunan (3022).

Islam,] and the male was given the share of two females, women wanted their shares to be equal to the men's¹.

The men said: Indeed, we hope to be favored over women with our good deeds in the Hereafter, just as we have been favored over them in inheritance. Then the verse was revealed, " And do not wish for that by which Allāh has made some of you exceed others."

The prohibited wish mentioned here is one that implies coveting what is in the possession of others, and feeling envy towards them for what Allāh has granted them in terms of wealth, status, or other matters that involve competition among people. This type of wish leads to discontentment within oneself, moral and religious corruption, and is akin to objecting to the wise distribution of affairs by the Creator, the Well-Knowing and the Well-Acquainted of His creation and the affairs of His servants².

The Quran has given special attention to women regarding the issue of financial liability and warned men against injustice towards them. Allāh says: "O you who have believed, it is not lawful for you to inherit women by compulsion. And do not make difficulties for them in order to take [back] part of what you gave them,"³ and "And if you have given one of them a great amount [in gifts], do not take [back] from it anything. Would you take it in injustice and manifest sin?"⁴

The majority of scholars from the Ḥanafiy, Shāfi'iy, and Ḥanbaliy schools assert the unrestricted control of women over their wealth. They can

¹ Reported by Aṭ-Ṭabariy in his commentary, V. 6, P. 430.

² At-Tafsīr al-Wasīṭ (The Medium Commentary) by Dr. Sayyid Ṭanṭāwiyy, V. 3, P. 131.

³ An-Nisā': 19.

⁴ An-Nisā': 20.

use it as they wish without requiring permission from men. Some textual shallow meanings that may suggest otherwise are considered weak or subject to interpretation by these scholars.

2. The marriage contract imposes financial and social responsibilities on both parties. The wife is entitled to full financial support as customary, according to the husband's capacity and in accordance with the valid customs, Islamically accepted social traditions, and Sharia. This financial support obligation is not lifted except in the case of disobedience (nushūz). In return, the wife has legal and social obligations, such as obedience, the husband's conjugal rights, and respecting known customs.

The explicit and implicit aspects of this contract form the governing document between the spouses. Allāh says: "O you who have believed, fulfill [all] contracts."¹ The legal maxim is to uphold the commitments made by the accountable individuals, who are bound by what they voluntarily commit to unless coerced.

3. It is permissible for a woman to work outside the home with the husband's permission and consent. The wife's employment does not exempt the husband from fulfilling her financial support which is made obligatory upon him based on legal guidelines, unless the conditions for disobedience (nushūz) are met.

A husband cannot force his wife to work or earn a living, either jointly or individually. It is his duty, and the voluntary participation of the wife in contributing to the family's expenses is recommended (mandūb) for the mutual cooperation, support, and harmony between the spouses.

Additionally, the spouses may mutually agree on the use of the wife's

¹ Al-Mā'idah: 1.

salary or earnings. The husband can also stipulate conditions when giving his wife permission to work.

4. The major maxim is that believers are bound by their conditions. Therefore, it is permissible for the wife to stipulate in the marriage contract that she will work outside the home or continue her education. If the husband agrees, he is obligated to fulfill this condition. Stipulation at the time of the contract should be explicitly mentioned, as narrated by Al-Bukhāriy and Muslim narrated that Allāh's Messenger (peace be upon him) said: "The most deserving conditions to be fulfilled are those with which you make sexual relations lawful."¹ Likewise, 'Umar said concerning this context: "The justification of rights is connected to stipulations."²

The husband may request the wife to quit her job after obtaining his permission, especially if her staying at home is in the best interest of the family and children.

It is also permissible to link the wife's permission to work outside the home to her contribution to the general household expenses. If such a condition is agreed upon, it must be fulfilled.

5. In financial transactions, the default principle is documentation and security. Allāh says: "O you who have believed, when you contract a debt for a specified term, write it down,"³ "And if you are on a journey and cannot find a scribe, then a security deposit [should be] taken,"⁴ and "And take witnesses when you conclude a contract."⁵ On such foundations,

¹ Reported by Al-Bukhāriy (2721) and Muslim (2/1035), shifting (63/1418).

² Al-Bukhāriy mentioned it as a hanging Ḥadīth before Ḥadīth no. (2721).

³ Al-Baqarah: 282.

⁴ Al-Baqarah: 283.

⁵ Al-Baqarah: 282.

voluntary financial contributions within marital life are regulated. If a husband is covering his wife's Ḥajj expenses, he is deemed doing something not in the scope of his responsibilities under the marriage contract. If a wife financially supported her husband or paid his debt, she is deemed doing something not in the scope of her responsibilities under the marriage contract. In such cases, documentation is highly recommended.

6. Islam has mandated financial rights for women due to marriage. Some are associated with marital life, including the dowry (mahr) and financial support (nafaqah). Others are established in case of divorce, such as the expenses during the waiting period ('iddah) and the provision (mut'ah), as well as the remaining portion of the specified dowry. Other financial rights for women are established in the event of the husband's death, where the wife is entitled to financial rights, including the remaining dowry and her share of inheritance, typically one-eighth or one-fourth. The financial rights in favor of the husband only have a counterpart in his inheritance rights, typically one-fourth or half.

Returning to the Islamic viewpoint on the issue of equitable distribution of marital property between spouses, we find that classical jurisprudential works did not address it in the first place. This is because it does not fall under the fundamental rights associated with marriage and divorce, both of which are detailed in the Quran and Sunnah. Given the prevailing necessity of this issue and the occurrence of marriage and divorce throughout history, it seems unlikely that jurists would overlook such a significant right, especially considering that they have discussed rights of lesser importance, such as breastfeeding compensation.

In contemporary scholarly efforts, no eligible jurist has asserted the concept of equitable distribution as a right resulting from divorce. The

ongoing legal claims in various places lack a proper basis in Islamic law, even though they may have some societal justifications resulting from the change in the concept of family and its sponsor.

I will provide my opinion in the following points:

1. The issue of equitable distribution between spouses in the Western sense lacks support from any explicit religious or rational evidence. In Islamic law, the rights and responsibilities of spouses are clearly outlined in the contexts of marriage and divorce, with no explicit or implicit mention to the issue of equitable distribution. For example, the woman's rights are established in the Quran as follows:

For the dowry (ṣadāq), Allāh says: "And give the women [upon marriage] their [bridal] gifts graciously."¹ For financial support (nafaqah), Allāh says: "Let a man of wealth spend from his wealth, and he whose provision is restricted – let him spend from what Allah has given him."² For suitable accommodation (sakan), Allāh says: "Lodge them [in a section] of where you dwell out of your means."³ For women's compensation for breastfeeding (riḍā'), Allāh says: "And if they breastfeed for you, then give them their payment."⁴ For women's rights of provision after divorce, Allāh says: "And for divorced women is a provision according to what is acceptable – a duty upon the righteous."⁵ For the expenses of child custody, Allāh says: "Upon the father is the mothers' provision and their clothing

¹ An-Nisā': 4.

² Aṭ-Ṭalāq: 7.

³ Aṭ-Ṭalāq: 6.

⁴ Aṭ-Ṭalāq: 6.

⁵ Al-Baqarah: 241.

according to what is acceptable."¹ For women's inheritance rights in case of the death of the husband, Allāh says: "And for the wives is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave."²

In the case of irrevocable divorce (bā'in), scholars have differed in some details regarding the rights that arise. None of them, however, have advocated for the right of equitable distribution of marital property. Ibn Qudāmah, in summarizing the opinions of scholars, states: "In short, in the case of a man divorcing his wife irrevocable divorce, it could be either a triple divorce, or through Khul' [divorce initiated by the wife], or annulment [to the marriage contract]. If the wife is pregnant, she is entitled to financial support and housing by the consensus of scholars. This is based on the verse: "Lodge them [in a section] of where you dwell out of your means and do not harm them in order to oppress them. And if they should be pregnant, then spend on them until they give birth."³ Some reports related to Fāṭimah bint Qays also indicate: "There is no financial support for you unless you are pregnant."⁴ Since the child in the womb is the husband's offspring, he is obliged to spend on it, and he can only fulfill this obligation by spending on the mother, similar to the obligation of breastfeeding compensation.

If she is not pregnant, then she is not entitled to financial support.

Regarding housing, there are two narrations: one that she is entitled to it, which is the opinion of 'Umar, his son, Ibn Mas'ūd, 'Aā'ishah, the seven

¹ Al-Baqarah: 233.

² An-Nisā': 12.

³ Aṭ-Ṭalāq: 6.

⁴ This statement is reported by Muslim in his Ṣaḥīḥ (2/1117), Ḥif'īng (41/1480); Abī Dāwūd (2/287), Ḥif'īng (2290); Imām 'Aḥmad in his Musnad (27337).

Madinan jurists, Mālik, and Ash-Shāfi'iy, referring to the verse.

The second narration denies her the right to housing and financial support, which is the apparent opinion of the school [i.e., the Ḥanbaliy school], 'Aliy, Ibn 'Abbās, Jābir, 'Aṭā', Ṭāwūs, Al-Ḥasan, 'Ikrimah, Maymūn ibn Muhrān, 'Ishāq, Abī Thawr, and Dawūd.

Most Iraḳi jurists hold the view that she is entitled to both housing and financial support, a position also supported by Ibn Shubrumah, Ibn Abī Layla, Ath-Thawriy, Al-Ḥasan ibn Ṣāliḥ, Abī Ḥanīfah and his companions, Al-Battiy, and Al-'Anbariy."¹

Therefore, none of the jurists from various regions have mentioned the concept of equitable distribution of the marital property in case of death or divorce.

From a rational perspective, the concept of equitable distribution discourages people from marriage, as no one likes to share his possessions with another unwillingly, especially after putting effort and investment into acquiring them. This impact is evident in Western societies, where men have shown aversion to traditional formal marriage. Instead, they have sought alternatives that do not involve such obligations, leading to societal corruption and a weakened concept of the family, accompanied by an increase in immoral behavior.

2. The issue of equitable distribution undermines the concept of financial liability and renders wealth a joint property, affecting religious obligations. Religious obligations include both physical acts such as prayer and fasting, and financial obligations like zakat. Some obligations are joint, such as Ḥajj, Jihād, and others. Each individual Muslim is addressed

¹ Al-Mughniy (The Sufficient) by Ibn Qudāmah al-Ḥanbaliy, V. 11, P. 402-403.

individually with these obligations. For instance, zakat, or Ḥajj, is not obligatory on a poor husband if his wife is wealthy. The fulfillment of these obligations requires a specific threshold (niṣāb), and if we consider marital wealth as shared by the spouses, Ḥajj may become obligatory on both spouses when the wealth is combined, even though it may not be obligatory for each based on their individual independent wealth. Similar considerations apply to the zakat funds which equal partnership funds. The majority of scholars, including Ḥanafīys, Mālīkiys, Ḥanbaliys, and Shāfi'ys in the early school, agreed that zakat is not obligatory on either partner until each one individually possesses the threshold amount¹.

Ibn Qudamah states: "When they [i.e., the partners] enter into partnership for other than freely grazing livestock, like gold, silver, trade commodities, crops, and fruits, their partnership has not effect on their individual wealth. There are still treated as individuals [not partners]. This is the opinion of the majority of scholars."² The same may apply to the gold of a woman. If she owns it individually, it may not be subject to zakat, with a disagreement between the majority of scholars and the Ḥanafīys. However, when it is treated as a shared property, zakat becomes obligatory because of the man's participation, as he is not allowed to use gold for adornment; therefore, he is saving it for trade which subjects him to zakat.

3. The concept of equitable distribution, as understood in the Western context, grants the man a right to his wife's wealth as well. The man is entitled to half of his wife's wealth merely for the existence of the marital relationship. This contradicts the Islamic principles of maintenance and

¹ See: The Kuwaiti Jurisprudential Encyclopedia, V. 26, P. 68.

² Al-Mughniy by Ibn Qudāmah, V. 4, P. 64.

financial support, where the husband is obligated to provide for the wife, even if she is wealthy. In fact, a majority of scholars, including Mālikiys, Shāfi'īys, and Ḥanbaliys, have stated that a woman has the right to terminate the marriage while retaining her rights if the husband is insolvent¹. They considered the concept of insolvency more legitimate for termination of the marriage contract than erectile dysfunction or impotence. Moreover, a majority of scholars among Mālikiys, Shāfi'īys, and Ḥanbaliys held the view that a woman's financial support becomes a debt on the husband if it is cancelled or delayed without a valid reason, because it is considered a form of compensation, turning it into a debt². Therefore, it seems contradictory for a man to take half of his wife's wealth in case of divorce. The only exception here is the case of Khul' or divorce for money, because this is implemented upon the wife's request.

4. The system of equitable distribution contradicts the concept of individual responsibility and its consequences, especially in the realm of duties. Equitable distribution, as it related to the acquired wealth during marriage, extends to acquired debts as well. These debts may result from imprudence of one party or a specific desire that is not considered necessary or needed, such as education loans, buying a car, or credit card debts that may have been used for both permissible and impermissible purposes. The legal maxim in all of this is: "Every soul, for what it has earned, will be retained,"³ "It will have [the consequence of] what [good] it has gained, and

¹ See: The Four-Schools-based Jurisprudence, V. 4, P. 148.

² See: Al-'Umm by Ash-Shāfi'īy (5/115), Badā'i' aṣ-Ṣanā'i' (4/38), and The Kuwaiti Jurisprudential Encyclopedia (34/46).

³ Al-Muddathir: 38.

it will bear [the consequence of] what [evil] it has earned,"¹ and that each individual is attached to their own debts, as stated in the Ḥadīth of Abī Hurayrah and others². Therefore, a person should not be obliged to pay for someone else's actions. Allāh says, "And no bearer of burdens will bear the burden of another."³ This principle extends to the heirs, who are not obliged to settle the deceased's debts from their inheritance shares or personal funds.

5. The Western legal system, relied upon by some to justify the right to equitable distribution, contradicts Islamic Sharia and customary practices regarding inheritances. In the case of one spouse's death, with the other surviving, all the wealth transfers entirely to the living party. Even if the deceased has elderly parents, they inherit nothing. Similarly, if the deceased has adult children by law, they inherit nothing. If there are minor children, they are entitled only to a specified share, remaining under the guardianship of the living party. In my view, this is a complete disregard for the regulated and organized system of inheritance outlined in the Quran as a complete "obligation [imposed] by Allāh."⁴ The system that claims to promote justice is, in reality, an unjust system that squanders the rights of the majority of deserving heirs. More troubling is its removal of the legal custody from the adult children and parents of the deceased and giving it to the deserving people according to its provisions.

However, we must acknowledge that in some cases of arbitrary divorce,

¹ Al-Baqarah: 286.

² Reported by At-Ṭirmidīy in *Ṣiḥḥ* (1078); Ibn Mājjīn in *Ṣiḥḥ* (2413); Ḥabīb Dawūd at-Ṭayālīsīy in his *Musnad* (2512).

³ Al-'An'ām: 164.

⁴ An-Nisā': 11.

severe harm may befall the woman, especially if she has no children, a brother, or father to support her, or if her life has been prolonged to an extent that makes her unable to work and earn a living for herself due to old age, especially if there is no sponsor for her.

Section Four: Proposed Solutions

In the three previous sections, we discussed the issue of equitable distribution between spouses in what is referred to as marital property. In the first section, we addressed the description and legal background, in the second, we discussed the right of working and striving, and in the third, we explored the right of equal distraction from the Islamic viewpoint.

In this section, I will present solutions for this issue based on my personal reasoning.

To begin with, ignoring the reality and the changes that have occurred in social lifestyle patterns and clinging to the regular traditions will not resolve the issue or eliminate the root of the conflict. Hence, we must acknowledge that there is a degree of injustice that befalls many women in cases of divorce, especially if it occurs after a substantial duration of marriage, during which social and economic circumstances for the wife undergo changes that make it difficult to return to her pre-marriage status.

As we previously indicated in another study, there has been a constant shift in the value of things, such as dowries, increased inflation, rising commodity prices, limited earning opportunities with advancing age, potential health issues, and other social, economic, and physical repercussions.

I have heard of stories where women in their sixties experience divorce without the right to housing, leaving them with no choice but to face homelessness and poverty after spending their lives in service to their husbands. Does this align with the objectives of Islamic Sharia and its spirit? Other husbands may divorce their wives due to illness affected them and banish them from the marital home without having any alternative place. Does this also align with the objectives of Islamic Sharia?

If there is no room for applying the system of equitable distribution in its Western concept, what is the more appropriate and righteous approach from a jurisprudential perspective?

I would say:

1. The truth, in my view, is expanding the rights of divorced women, not under the concept of equitable distribution, as we have proven its invalidity and corruption. However, it is more fitting to expand the concept of mut'ah (provision) for divorced women. Mut'ah is a right that Allāh has made obligatory upon the husband concerning his divorced wife. Allāh says: "And for divorced women is a provision according to what is acceptable,"¹ and "So, provide for them and release them in a kindly manner."²

Here, we need to address the issue of mut'ah (provision) for divorced women as follows:

Some verses were revealed to regulate the issue of mut'ah (provision) for divorced women after the death of the husband, such as the verse: "And those who are taken in death among you and leave wives behind – for their wives is a bequest: provision for one year without turning [them] out."³ Al-Qurtūbiy commented on this verse by saying: "A group of commentators who interpreted this verse hold that a widow was to stay in her deceased husband's house for one year and be provided for as long as she did not leave the house. If she left the house, the heirs shall have the right to cancel the provision. However, this was later abrogated by the four months and ten days and the financial provision was abrogated by the one-fourth and one-

¹ Al-Baqarah: 241.

² Al-'Aḥzāb: 49.

³ Al-Baqarah: 240.

eight [inheritance share], as mentioned in Surah An-Nisā. This was the opinion of Ibn 'Abbās, Qatadah, Aḍ-Ḍaḥḥāk, Ibn Zayd and Ar-Rabī'.¹ Thus, the woman status after the end of marriage was taken into account and justified in the early times, given the provider's death. However, the ruling was established to satisfy the woman's needs for care and prepare for the upcoming rulings. Then, it was abrogated by the subsequent verses of inheritance.

In the case of divorce, there are verses in the Quran that talk about mut'ah for divorced women, one type before consummation, as in the verse: "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 release them in a kindly manner."² However, this is beyond the scope of this study.

In other verses, Allāh says: "And for the divorced women is a provision according to what is acceptable, a duty upon the righteous,"³ "But give them [a gift of] compensation – the wealthy according to his capability and the poor according to his capability – a provision according to what is acceptable, a duty upon the doers of good,"⁴ and "Then come, I will provide for you and give you a gracious release."⁵

Al-Qurtubiy, in his interpretation of the second verse, said: "Allāh's statement: "And provide for them" means: give them something that serves as provision for them. Ibn 'Umar, 'Aliy ibn Abī Ṭālib, Al-Ḥasan ibn 'Aliy,

¹ Al-Qurtubiy's Commentary on the Quran (3/226).

² Al-'Aḥzāb: 49.

³ Al-Baqarah: 241.

⁴ Al-Baqarah: 236.

⁵ Al-'Aḥzā: 28.

Sa'īd ibn Jubayr, Abū Qilabah, Az-Zuhriy, Qatādah, Aḍ-Ḍaḥḥāk ibn Muzāḥim, all held that it is obligatory. On the other hand, other scholars held that it is recommended. The proponents of the first opinion base it on the apparent imperative implication in His saying: "And provide for them," while the proponents of the second opinion base it on His saying: " a duty upon the righteous," and "a duty upon the doers of good." The second proponents argued that if it were obligatory, Allāh would have expressed it in a way encompassing all people. However, the first opinion is more preferred, because the use of imperative general statements to provide, in His saying: "provide for them," and attributing the providing to the women using the possessive Lām letter, in His saying: "And for the divorced women," account for the obligation more than recommendation. In addition, His saying: "upon the righteous" confirms its obligation; because each person is obliged to be righteous before Allāh when it comes to associating partners with Him and committing sins. Allāh says in the Quran: "A guidance to the righteous."^{1,2}

He also stated: "There was a difference of opinion regarding the intended pronoun in His saying: "And provide for them": who are the women meant by it? Ibn 'Abbās, Ibn 'Umar, Jābir ibn Zayd, Al-Ḥasan, Ash-Shāfi'iy, 'Aḥmad, 'Aṭā', 'Ishāq, and the Ḥanafiyys stated: Divorce provision is obligatory for every divorced woman before consummation and stipulation, and recommended for the others. Mālīk and his companions said: Divorce provision is recommended for every divorced woman even if marriage was consummated, except in the case where the divorced woman was not

¹ Al-Baqarah: 2.

² Al-Qurtūbiy's Commentary on the Quran (3/200).

consummated and a dowry was stipulated for her. In this case, she is entitled only to what was stipulated, and no divorce provision is prescribed for her. Abū Thawr said: Divorce provision is obligatory for every divorced woman. The consensus among scholars is that if a dowry is not stipulated and marriage is not consummated, she is entitled only to divorce provision. Az-Zuhriy said: The judge shall decide it for her. The majority said: The judge will not decide it for her."¹

From the collective statements of the jurists, we find that their opinions on divorce provision (Mut'ah) can be categorized into three main views:

First View: Divorce provision is recommended without restrictions in any divorce except in cases where divorce provision is not permissible. The Mālikiy school holds the opinion that divorce provision is recommended for every divorce, and the woman shall not reimburse what she received of divorce provision, whether marriage was consummated or not.

They excluded the woman who seeks separation by li'ān (mutual cursing), as there is no divorce provision for her. Also, the woman who seeks separation by asking for it before or after consummation, she is not entitled to divorce provision because she is the one who chose to separate and should not be recompensed for the difficulties that she asked for².

Second View: This view is held by the Ḥanafiy school with further details. They hold the view that divorce provision is obligatory if a husband divorces his wife before consummation and proper seclusion with her, upon his determination, and he did not stipulate a sum of money for her during the marriage contract that could qualify as a dowry. This is based on the

¹ Al-Qurṭubiy's Commentary on the Quran, the same as last.

² Al-Muntaqā in Sharḥ al-Muwatta' by Abī al-Walīd al-Bājiy, V. 4, P. 88.

Quranic verse: "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 capability and the poor according to his capability—a provision according to what is acceptable, a duty upon the doers of good."¹ The verse denies any blame or sin upon the husband who divorces his wife before consummation, then established divorce provision upon him to alleviate his wife's losses and recompense her for the separation on which she had no control. This command is considered obligatory for such woman, excluding the other women who get divorced after consummation, with a sum of money stipulated for divorce or not, or those who get divorced before consummation, with a dowry being stipulated for divorce in the contract. For such women, the divorce provision is recommended. This is because divorce provision is obligatory in lieu of had of dowry in case of women divorced before stipulation or consummation.

As for the woman who, after consummation, deserves the specified amount or the normal dowry (mahr al-mithl), there is no divorce provision needed for her. Instead, it is recommended or permissible, as a form of releasing her.

In summary, according to the Ḥanafī school, divorce provision is recommended for every divorced woman. The only exception here is for the one who was married without a specified dowry, then divorced before consummation, if or dowry was improperly specified for her, where divorce provision becomes obligatory in such cases².

¹ Al-Baqarah: 236.

² See: Sharḥ Mukhtaṣar at-Ṭahāwīy by Abī Bakr al-Jaṣṣāṣ, V. 4, P. 406.

Third View: This view is held by the Zāhiriyy and Shāfi'iy schools, which is that divorce provision is obligatory upon every divorcing husband, regardless of the type of divorce—whether it is one, two, or three divorces. It does not matter whether consummation occurred or not; and whether a dowry was specified for divorce in the marriage contract, afterwards, or if there was no dowry stipulated at all. This is based on the Quranic verse: "And for the divorced women, [provide] maintenance according to what is acceptable."¹ Allāh has, therefore, made divorce provision obligatory for every divorced woman. Allāh also says: "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.'"² The obligation of divorce provision is the Shāfi'iy new school³, where the Shāfi'iy deemed divorce provision obligatory for a divorced woman after consummation, especially if the separation upon her request or failure. This is also the opinion of 'Aḥmad, which is preferred by Ibn Taymiyyah as well⁴. The absolute obligation of divorce provision is also the opinion of the Zāhiriyy school and one of Mālik's opinions⁵.

Therefore, we find that the Egyptian law, for example, outlined the provision of divorce in Article 18 (repeated) of Decree Law No. 25 of 1929, amended by Law No. 100 of 1985, which states: "A wife whose valid marriage is consummated, if divorced by her husband without her consent

¹ Al-Baqarah: 241.

² Al-'Aḥzāb: 28.

³ See: Al-'Umm by Ash-Shāfi'iy, V. 7, P. 270.

⁴ See: Chapter of Dowry in the book of Al-Fatāwā al-Kubrā (Major Fatwās) by Ibn Taymiyyah, V. 5, P. 468-477.

⁵ See: The Kuwaiti Jurisprudential Encyclopedia (36/95).

and not due to any fault on her part, is entitled to divorce provision in addition to the expenses of her waiting period. The divorce provision is estimated at a minimum of two years' worth of expenses, taking into consideration the financial condition of the divorcing husband, the circumstances of the divorce, and the duration of the marriage. It is even permissible to grant the divorced husband permission to pay this divorce provision in installments."

This law has been further detailed through amendments, stating that a wife whose valid marriage is consummated, if divorced by her husband without her consent and not due to any fault on her part, is entitled to divorce provision in addition to the expenses of her waiting period. The divorce provision is estimated at a minimum of two years' worth of expenses, with a minimum amount of 1500 Egyptian pounds.

In case of divorce after ten consecutive years of marriage, the divorce provision is estimated at five years' worth of expenses, with a minimum of no less than 2000 Egyptian pounds. If divorce occurs after 15 years or more of continuous marriage, the divorce provision is estimated at the expenses of seven years, with a minimum of no less than 2500 Egyptian pounds.

In Saudi Arabia, divorce provision, according to Saudi law, is the right of the divorced woman. If the husband refuses to pay it, the woman can resort to the court to enforce her rights. In case the legal proceedings are prolonged, the judge has the authority to establish a temporary maintenance for the divorced woman.

Upon the husband's refusal or delay in payment, after the issuance of the final judgment and specifying the maintenance, and the judge can sentence the husband to imprisonment accordingly, whether he refused payment, concealed his wealth, refused to disclose his financial status, engaged in

money laundering, or filed a lawsuit with the aim of obstructing the enforcement of the judgment for divorce provision.

As for the value of the divorce provision in Saudi law, there is no specific amount defined, and it primarily depends on the financial situation and status of the husband.

The duration of the marriage is also considered, and the divorce provision varies depending on whether the husband is financially well-off and considered wealthy or if the woman is wealthy. In such cases, the value of the divorce provision is determined as that of the wealthy. Conversely, if the husband has low financial capability and is considered poor, and the woman is also poor, the value of the divorce provision is determined as that of the poor. If the husband is financially well-off while the woman is poor or vice versa, then the value of the divorce provision is determined as that of the middle class.

In Morocco, divorce provision is considered part of the entitlements of the wife arising from divorce. In the event of divorce initiated by the husband, the divorce provision is determined based on the following factors:

- The social status of the husband: Consideration is given to the fact that the husband may be establishing a new family and has other obligations. Excessive amounts that could harm him should not be imposed.
- The husband's income and finances: The court appoints an expert to investigate the income available to the husband, including salary, profits, and assets that generate income, such as agricultural, commercial, or real estate properties.
- Living conditions: Living conditions vary from place to place, considering rural and urban distinctions.

In Moroccan law, divorce provision includes food, clothing, medical

treatment, and other necessities, as well as education for the children. The costs of the residence for the dependents are separate from the divorce provision, expenses for custody and others. The determination of all these factors takes into account moderation and the provider's income, the status of the competent, the cost of living, and prevailing customs and traditions in the environment where the maintenance is enforced.

The amount of maintenance can be adjusted, increased, or decreased, provided that one year has passed since the date of determining the maintenance.

Therefore, divorce provision is enacted in many Islamic countries. It serves as a broad avenue through which women can be compensated, especially in cases where there is no income or support for her. The determination of divorce provision is subject to the judge's discretion, without a specific limit, allowing the judge or their delegate to exercise personal reasoning. The judge may include provisions for housing or a portion of the husband's earnings to ensure a stable income for the divorced woman.

2. The second matter that expand is related to the conditions in the marriage contract. This is another aspect where the wife may stipulate conditions upon her husband that consider both cases of marriage and divorce. The evidence for this is the Quranic verse that we mentioned before: "O you who have believed, fulfill [all] contracts,"¹ the saying of the Prophet (peace be upon him): "The most deserving conditions to be fulfilled are those by which you make sexual relations lawful," and the statement of 'Umar ibn al-Khaṭṭāb (may Allāh be pleased with him): " The justification

¹ Al-Mā'idah: 1.

of rights is connected to stipulations."

Here, it is essential to mention that conditions in the marriage contract can be divided into three types:

1- Conditions that align with the general objectives of Sharia and the specific objectives of the marriage contract:

For example, the conditions of good treatment, financial support from lawful sources, fair treatment between her and others – such as co-wives, the mother or sister - and the legitimate right to having intercourse. These conditions are permissible by mutual agreement and obligatory to fulfill.

2- Conditions that contradict the general objectives of Sharia and the specific objectives of marriage:

For example, the condition of waiving of financial support, making obedience to the husband non-obligatory, allowing others to enter the house without the husband's consent, or not providing financial support to his dependents such as co-wives, parents or brothers and sisters. This also applied to the conditions set by the husband for not paying a dowry or not having intercourse with his wife. These conditions are considered invalid, and the contract remains valid according to the opinion of the Ḥanafiy scholars. Some argue that any contract shall be nullified if its conditions are invalid. However, the majority of scholars among the Shāfi'iys and Ḥanbaliys scholars provide further clarification that there are invalid conditions that render the contract invalid and others don't invalidate the contract.

3- Permissible conditions:

This category includes a wide range of conditions that a woman may secure for her marriage or post-divorce life. Examples include having property registered in her name, the husband covering her education costs,

not being moved from her place of origin, or allowing her to visit her family. As narrated by Al-'Athram on the authority of 'Umar, a man married a woman with the condition that her residence is her own house. When he later wanted to move her to another house, they contested the matter to 'Umar, who stated: "She shall have her condition applied."¹ Another example under this category is allowing her to receive part of his possessions if he divorces her. This could be a specified condition or a component of the deferred portion of the dowry.

3. Hastening to regulate the right of working and striving, as discussed in light of the aforementioned guidelines. I will reiterate them here:

1- The allocated share for the striving person (the wife here) should be linked to the degree of working and striving, not to be an absolute share regardless of the level of striving.

2- It should be confined to the part for which striving is sought, not extending to gains acquired solely by the husband.

3- It should not encroach upon pre-marital assets or those obtained without work, such as inheritance and gifts.

4- It should consider the rights of all striving people, not just the wife's right, and should not infringe upon established rights like inheritance.

5- There should be clear and conclusive evidence to support it, not merely the claimant's assertion.

In conclusion, I would like to remind, as a point of admonition, that although the marriage contract is a contract for exchanging benefits, it is based on forgiveness. The fundamental principle in case of separation is highlighted in the Quranic verse: "And do not forget graciousness between

¹ See: Muṣannaf ibn Abī Shaybah (16706) and Al-Mughniy by Ibn Qudāmah (9/485).

you."¹ The Prophet Muhammad (peace be upon him) also said: "May Allāh have mercy on a man who is flexible when he buys, when he sells, and when he demands his rights."² It is noteworthy that his saying: "May Allāh have mercy on a man," is a general address as a preferring term, including women, not an exclusive address to men.

¹ Al-Baqarah: 237.

² Reported by Al-Bukhāriy in his Ṣaḥīḥ (2076).

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Transliteration Guide

Arabic	English
ا	Ā
ب	B
ت	T
ث	Th
ج	J
ح	Ḥ
خ	Kh
د	D
ذ	Dh
ر	R
ز	Z
س	S
ش	Sh
ص	Ṣ
ض	Ḍ
ط	Ṭ
ظ	Ẓ
ع	‘
غ	Gh
ف	F
ق	Q
ك	K
ل	L
م	M
ن	N
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و	W – ū
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ي	Y – ī
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ِ	I
ُ	u

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