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A COMPARATIVE ASSESSMENT OF SPOUSES RIGHTS IN MARRIAGE

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Abstract:

Family law is of particular importance in different legal systems in the world because the prosperity and achievements accomplished in families can directly or implicitly influence a country's welfare, security, civilization, and other structures. For instance, if the family laws are inefficient in a country, divorce rates increase, and cohabitation and evasion of responsibilities result in cultural and economic disorders. When the position of the family is designated, the spouses' rights and obligations become apparent as the foundation of the marriage contract because they decide to get married after considering the profits and losses. This comparative study investigated the rights and obligations of spouses in Imamah jurisprudence, and the laws of Iran, the Netherlands, Canada, the United States, and Morocco. In a comparative study, the strengths and weaknesses are revealed and the issues can be resolved. This research adopted a fundamental-descriptive method. The findings include knowledge of how different countries adopt various measures with regard to family issues, the current judicial procedure, the advantages and disadvantages of domestic law, and introduction and identification of the two current systems in the interpretation and legislation of family law.

Introduction:

Spouses' rights in traditional and moral schools are divided based on gender. On the contrary, communities that advocate individual rights enact equal rights for men and women, assuming equality of persons. In all legal systems, when a marriage contract is concluded accurately, its consequences, which include rights and duties for each couple, are resulting from. Some countries make most marital rights subject to mutual consent; some other countries, relying on the directory aspect of the contract, consider the couple's rights as an imperative rule. The common law and Roman-German legal systems generally oblige the two parties to cooperate with one another. Tradition-based systems consider some duties to only for men or women, and both in other cases. Family law in Iran is derived from Imamiah jurisprudence, so it refers to jurisprudence in elucidating and explaining the rights of the parties. However, in such cases as the standards of marriage or good conduct, etc., the role of the conventions and psychological or medical authorities are examined sources of law. In comparison, Morocco follows the system of spouses' equal rights based on common jurisprudence, but acts differently in the legislative process. The spouses' duties are divided into financial and non-financial. Financial rights in the pre-marital and post-marital stages are legal institutions such as alimony, marriage portion, reasonable wage, arbitrary donation, monthly allowance for financial independence, or individual/joint financial provision. Non-financial marital rights mainly include emotional support, sociability, wife's right to refrain from submission, and divorce, which are generally interpreted and legislated differently.

How are the spouses' rights and the guarantee of their implementation reflected in the laws and judicial procedure?

Do the spouses' equal rights cause fewer differences and dissatisfaction than the system of similarity of rights?

Does the system of similarity of rights apply to ordinary people in practice or is it gradually interdicted?

Does ethics or law better govern marital rights?

Is family law in Iran type of Al-Ahkam al-Ta'sisiyya (foundational rulings) or custom-based law and revocable?

1. The nature and origin of permanent marriage:

1.1. In Islamic jurisprudence and domestic law:

In Islamic jurisprudence, according to a hadith attributed to the Prophet Muhammad (PBUH) (Whoever marries has achieved one half of one's religion)¹, marriage is sometimes a strong *mustahabb* (recommended) and at some other sometimes strong *wajib* (compulsory). This exegesis guides the carnal desires and the instinct in line with harmonizing human relations. However, the nature of any contract is the validity and effect it establishes in the world of law, and other gaps in the contract are interpreted accordingly. For instance, the main effect of a contract of sale is that the buyer is the owner of merchandise and object of sale and the seller is the owner of the capital. In a consensual marriage contract, as the marriage contract is concluded, the marital relationship is established and the financial, emotional, and partnership obligations are incumbent upon the couple. Some believe that alimony is the financial obligation of the husband, which is cast upon him in return for wifely submission, and it is like a duty that is cast

¹ A group of scholars, *Hokam al-Nabi al-Azam*, Dar al-Hadith Scientific and Cultural Institute, Vol. 6, p. 511.

to the other party in an exchange.² Indeed, not only exchange but marriage contract is a useful moral institution that allows marriage and family formation, thus financial rights have a secondary status. In any case, the laws related to the family are basically imperative and directory and are mainly considered as foundational rulings. As a result, the couple's rights are first identified in the order mentioned in the law, marriage certificate, jurisprudence, and the conventions.

1.2. In Canadian Law:

In its general sense, marriage is often concluded in three types of legal establishment as civil marriage, religious ceremonial marriage, and partnership. Given that under Canadian law same-sex marriage is recognized but it is contrary to human nature and ethics, it is sufficient to mention it as a title.

1. Civil marriage: By going to the municipalities, the husband and wife register their marriage contract with their consent. This agreement is primarily subject to agreement and, depending on the couple's residence, to common law or Canadian positive laws.³

2. Religious ceremonial marriage: According to the conventions, all religions can register the marriages of their followers, and the marital relationship is basically subject to the law of the same particular religion.

3. Partnership or establishment of a partnership: A man and a woman who live and are married to each other for a period of at least three years, or for a period of at least one year and they are together the parents of a child, have a majority of the rights assumed for a civil couple.⁴ This is similar to temporary marriage, but it differs in conclusion and effects. First of all, in temporary marriage, the written consent, the marriage portion, and duration shall be specified, but in establishing the partnership, the legal relationship is established conditionally and without the written consent or express offer and demand of the parties thereto. Second, in a temporary marriage, the wife is entitled to the marriage portion and financial rights conditional on the marriage contract. In some cases, the marriage shall be officially registered and the wife shall observe the *iddah* (period of waiting); as a result, it is more lawful.⁵ However, in marital life, if the couple's marriage length reaches the said limit, almost all legal rights and obligations, including the right to financial support, apply.⁶ As a result, the marital life is different from *mariage blanc*. One of the tasks of the legislator is to control social phenomena by legislating them. Human beings are not equal in terms of claiming and controlling desires. Therefore, by the emergence of similar institutions, in order to restrict and guarantee the rights of women in the temporary marriage, legal measures such as stipulating alimony or granting Irrevocable mandate about waiving the duration and the like, have a more moral aspect.

² Zayn al-Din ibn Ali ibn Ahmad al-Ameli al-Shami, compiled by Ali Reza Amini-Seyyed Mohammad Reza Ayati, *Tahrir al-Rawdha fi Sharh al-Lama'a*, the Organization for Researching and Composing University textbooks in the Humanities (SAMT), Vol. 2, p. 348

³ Dr. Shiraz, Mehdi, Universite de Montreal

⁴ The Family Maintenance Act, Manitoba, Article 1, Definitions

⁵ Article 21 of the Family Protection Act adopted in 2013

⁶ The Family Maintenance Act, Manitoba, Part one spouses and common law partner, Article 4

1.2.1. The nature of civil marriage:

In the preamble to the Canadian Civil Marriage Act, marriage is a foundational institution, and Parliament is obliged to support it because it strengthens commitment in relationships and reflects the foundation of family life for many Canadians.⁷

In fact, based on this preamble, the importance of marriage contract is determined and its acceptance is not limited to domestic law, rather it is rooted in human nature and common sense (everything that is judged by reason is judged by Islam and everything that is judged by Islam is judged by reason). In Canadian law, partnership and same-sex marriage are permitted, but the legislature, relying on ethics and that a commitment has a great influence on human perfection, seeks the support of Parliament and encourages citizens to recognize the marriage contract. In the preamble to the Canadian Civil Marriage Act, contractual freedom governs the relations between the parties unless the agreement is detrimental to the public interest or public order.⁸ For instance, if two Iranians in Alberta get married under the rule of Iranian law and divest the Canadian law, Islamic law governs the marriage, but the husband cannot enter into a temporary marriage under his respecting country because polygamy is a criminal offense under Article 290⁹ of the Criminal Code of Canada, and committing an offense is against the public interest under the Act of Public Interest Disclosures, Alberta.¹⁰

Based on Canadian positive laws, marriage is a legal union that distinguishes and excludes¹¹ two people from others and requires their clear and free will.¹² The mentioned provision implies that marriage is a union and that the spouses are mutually obligated to assist reasonably in supporting and protecting one another.¹³ Common law requires each spouse to provide moral and financial support to the other. The couple's financial rights in the establishment stage supervise their equality, but in the enactment stage, it is enforced in favor of the weaker party. In domestic law, the legal presumption is different and consequently, the rights of the parties change. Consequently, in its special sense, marriage in the Canadian legal system is a legal union and partnership in life and soul, which is formally concluded and is basically subject to the rule of will.

2. A comparative study of spouses' non-financial rights:

1.2. The right to sexual intercourse:

Some recent authors have pointed out the negative educational or psychological effects of quitting sexual intercourse on women and, following some jurists, have considered sexual intercourse as a type of alimony and by discussing this subject, they raise the legal gap that why the guarantee of criminal and civil execution is not provided for a man who refuses to establish a sexual intercourse duty to his wife.¹⁴ The valid jurisprudential fatwas indicate that quitting

⁷ Statutes of Canada, Act of Marriage, 2005, preamble

⁸ Statutes of Canada, Chapter 33, Act of Marriage, 2005, preamble

⁹ Criminal code of Canada, 1985, Article 290

¹⁰ Act of Public Interest Disclosures, Alberta, Part 1 wrongdoing

¹¹ Statutes of Canada, Chapter 33, Civil Marriage Act, Article 2

¹² Ibid

¹³ The Family Maintenance Act of Manitoba, Part one spouses and common law partner,4(1)

¹⁴ Sharbafchyzadeh, Marzieh; Sadeghi Fasaei, Soheila; Azari, Hajar; Mirkhani, Ezat Sadat; Explaining the Sexual Rights of Couples in the Context of Jurisprudential and Legal Texts, The Women and Families Cultural-Educational Journal, Vol. 14, Issue 50 Spring 99, pp. 68-69

marriage intercourse for more than four months is not permissible.¹⁵ The prevailing evidence is disputed, yet expresses the impermissibility of quitting marriage intercourse for more than four months. Consequently, in neglecting sexual rights, it is better to use customary criteria as the basis for the ruling, depending on age, personal status, and other circumstances. The guarantee for the implementation of abstinence from sexual intercourse in jurisprudence is that at the request of the wife, the legislator obliges the husband to obey. Although the law is silent on this point, the judge's authority to place it is an example of the wife's indignation and embarrassment. It is said that if the husband causes the woman to be exposed to a forbidden act by not divorcing her, it is better and perhaps necessary to free her from that bound in order to prevent the commission of sin.¹⁶

1.1.2. Ethical standard of establishing the right:

In domestic Iranian law, when the husband has a sexually transmitted disease, the wife is entitled to refuse sexual intercourse and is not considered as a wife who refuses to fulfill her marital duties.¹⁷ If the opposite of this article is considered and if the wife has a sexually transmitted disease, based on the principle of harm, the husband is entitled to abstain from sexual intercourse, and the wife cannot object to it as the husband's violation of the conjugal bond and file a divorce lawsuit. The legislator is silent on the rights of spouses in sexual intercourse. As a result, according to Article 167 of the Constitution, this gap is bridged based on valid jurisprudential fatwas and legal principles. In addition, the conventions play an important role in completing and modifying the standard of establishing rights.

Since the judicial process is one of the sources of jurisprudence, an example in this regard is worthwhile. In a lawsuit, the husband had filed a petition for restitution of conjugal rights. The wife's lawyer, in defense, had argued that the husband had gone beyond sexual ethical limits and that his client would be in physical and mental danger if she returned home and therefore, had asked for a legal medical opinion. After the investigation, the forensic medicine announced its opinion: "The pressure on the internal anal sphincter is less than normal, which can interfere with the control of intestinal gas. The complication may be caused by anal intercourse."¹⁸ Then, Branch 11 of Shiraz Family Court, in case No. 9709970703800970, according to the opinion of forensic medicine and that the presence of the wife in the husband's residence causes fear of physical harm, issued a judgment to invalidate the husband's petition for restitution of conjugal right.¹⁹ In the mentioned case, according to popular opinion, intercourse with the wife and any woman with whom vaginal intercourse is permissible, the anal intercourse is also permissible, yet it is extremely unpleasant, particularly if the wife is not content²⁰; some even consider it haram.²¹

One way to standardize a phenomenon is to detect its misconduct. Hence, according to a study by the University of Kentucky in the United States, some examples of some dissatisfaction were reported: spouses cannot explicitly talk about sexual subjects such as the frequency of

¹⁵ Imam Khomeini, *Tahrir al-Wasilah*, 1992, Dar Al-Alam Publishing Institute, Vol. 4, p. 15

¹⁶ Seyyed Mohammad Kazem Tabatabai, *Appendices of Al-'Urwa al-Wuthqā*, Vol. 2, p. 76

¹⁷ Article 1127 of the Civil Code

¹⁸ Forensic Medicine of Fars Province, letter No. 1396/S/3306

¹⁹ Lawsuit No. 9709970703800970 issued by Branch 11 of Shiraz Family Court

²⁰ Najafi Javaheri, Mohammad Hassan, *Jawahir al-Kalam*, Vol. 29, p. 103

²¹ Imam Khomeini, *Islamic Laws*, Vol. 1, p. 260

intercourse. The parties' interests and resentments are not expressed in this regard. Physical harm during intercourse, coercion, and violation of privacy have caused dissatisfaction. Watching pornography at the request of the husband was reported as one of the issues.²² However, in order to guarantee this type of rights, it is necessary to observe two points.

First point: Shari'a's solution is that spouses should be of equal family or social status.²³ According to the previous cases, if the spouses are equal in goals, beliefs, and lifestyle, fewer problems are experienced.

Second point: fiancés are reluctant to talk about such subjects, even before or after marriage. Hence, just as the judiciary refers the couple to the counseling centers before filing a divorce petition in order to open a gate to return to their marital life, before concluding a marriage contract, spouses are advised to refer to counseling centers to find out about their rights so that the relevant authorities can inform them about issues they have not experienced.

In the interpretation, the standard of spouses' sexual rights should consider the difference between violence and consent. Therefore, any action that is without the explicit consent of the other party or beyond the ethics is considered violence and it is recognized according to the conventions and wisdom.

The husband's violation of the wife's sexual rights entitles her to leave the joint residence and receive alimony. However, if she is in trouble, she can file a divorce petition at the court.²⁴ Yet, if the violation is committed by the wife and it is not possible to correct her, the husband is free to divorce her.

2.2. The right to partnership:

2.2.1. Joint residence:

The main effect of the marriage contract is for the couple to form a family.²⁵ Without a joint residence, this goal is negated through the denial of the subject. The most important effect of partnership is for the couple to share morally and legally in strengthening the foundations of the family. This obligation is related to emotions and is essentially moral, but the guarantee of its fulfillment is legal. According to Iranian domestic law, if the wife leaves the joint residence and her obligation is not possible, the husband can file a petition to the court for permission to remarry.²⁶ In contrast, if the husband leaves the partnership due to his negligence and lack of attention to family matters, the wife can file a petition for divorce. In a marriage contract, one of the terms that entitles the wife to file for divorce is in an instance where the husband leaves the partnership without a valid excuse or is absent for six consecutive months without a valid excuse from the court's opinion. However, the husband's non-adhere to partnership in any way, including not working and partnership can be considered as examples of indigestion and embarrassment.

²² Srimati Baus, Professor of Gender and Women's Studies and Anthropology, University of Kentucky, *Marriage, Sexuality and The Law*, 28 April 2015

²³ Muhammad Hassan Baqir Najafi, *Jawāhir al-Kalām fi Sharḥ Sharā'i' al-Islām*, Dar Al-Ahya Al-Tarath Al-Arabi, Vol. 30, p. 122

²⁴ Article 1130 of the Civil Code

²⁵ Katouzian, Nasser, *Family Law*, Enteshar Co., 2006, Vol. 1, p. 214

²⁶ Article 15 of the Family Protection Act adopted in 1974

Abandoning partnership is not overlooked by the foreign legislator. For instance, if the couple lives apart for at least a year, it is considered a case of failure of partnership and each of them can file for divorce.²⁷ However, sometimes partnership is envisaged as a legal establishment (bed and board divorce). In common law, divorce is a legal and voluntary institution of quasi-divorce²⁸ in which most of the rights and obligations of the marriage are suspended without the effects of divorce, such as division of property, payment of joint debts, and remarriage. The couple may then decide to divorce or return to their partnership. This legal institution was created due to the prohibition of divorce in Christianity, but it still exists in some US states, including New Jersey and New York²⁹, and countries following the Common Law. The purpose of this institution may be to gain the financial independence of each couple, or in cases of boredom, due to the prohibition of seizing joint property and meeting each other, they may decide to continue their partnership again. In addition, spouses who cannot file for divorce due to the prohibition of divorce in religion use this institution.

2.2.2. Qasm:

One out of the four nights is the wife's right³⁰ and the man shall go to bed with her. The purpose of this right is not sexual intercourse, rather it is to make the couple more intimate. As a result, old age and other sexual excuses do not deprive the wife of this right. Except for justified excuses such as the contagious diseases of each couple that endangers the health of the other. It seems that if something more important prevents the establishment of this right, it should rule it. The husband may be forced to work in a remote area to provide for the family. As long as his motivation is to do his duty and provide for his living expenses, he is exempt from this duty.

2.3. Sociability

2.3.1. Sociability in jurisprudence and domestic law:

Sociability is based on verse 19 of Surah An-Nisa, "Consort with them in an honorable manner". Apparently, this is addressed to men, which is based on their power

because the husband may not respect the wife appropriately due to his physical superiority. Therefore, in verse 34 of Surah Fussilat, God says, "Good and evil [conduct] are not equal. Repel [evil] with what is best. [If you do so,] he between whom and you was enmity, will then be as though he were a sympathetic friend." Spouses are obliged to treat one another well,³¹ so the term sociability should be included in all the rights of the couple and interpreted according to conventions. Some writers have used this article to correctly explain sociability and have used customary and sharia tools to interpret sociability.³² Due to the fact that sociability varies in different cultures and according to age, personality, and gender of each person, the best way to

²⁷ Divorce Act of Canada, 1985-Last amended on June 21 2019, Article 9

²⁸ R. J. Peaslee, Separation Agreements under the English Law, Harvard Law Review, Apr., 1902, Vol. 15, No. 8 (Apr., 1902), pp. 638-656

²⁹ New York Domestic Relations Law, Article 10, Action for Separation, Section 200

³⁰ Zayn al-Din ibn Ali ibn Ahmad al-Ameli al-Shami, compiled by Ali Reza Amini- Seyyed Mohammad Reza Ayati, Tahrir al-Rawdha fi Sharh al-Lama'a, the Organization for Researching and Composing University textbooks in the Humanities (SAMT), Vol. 2, p. 344

³¹ Article 1103 of the Civil Code

³² Nobahar, Rahim; Hosseini, Seyedeh Umm Al-Banin, The Necessity of Sociability in Husband and Wife's Relationships, The Journal of Family Research, Spring 2015, Vol. 11, Issue 41, p. 55

identify and interpret it is common sense and based on conventions, law, and human dignity. For instance, in one part of Iran, the husband may return home late due to the hectic and busy urban life, yet this may not be an example of non-socializing, but in another region, it may be inexcusable. It seems that sociability rules all the rights of the couple's duties such as getting together, sexual relations, family management, etc. and its examples are not limited.

2.3.2. Comparative study of sociability:

In the comparative study, as mentioned, in Common Law spouses have a mutual duty to support one another, which of course has a financial and non-financial aspect. For instance, in Divorce Act of Canada, if one spouse commits adultery or treats the other party in a way that causes him/her physical or mental suffering and makes partnership unbearable, the other is entitled to file for divorce.³³

New York Domestic Relations Law considers instances of abuse more seriously. For example, any inhumane or oppressive conduct that endangers the physical or mental health of the spouse in a way that makes the partnership inappropriate or dangerous entitles the other party to divorce,³⁴ or one spouse can file for separation when the other party was legally required to support his/her spouse financially and refused to do so.³⁵ In domestic law, we believe more in the moral aspect and the religious preference of marriage, and we do our best to reconcile the two parties. Have the people in our society adapted to the current laws and made efforts to develop the family? Or is the society moving towards a subject-specific community that supports personal motives? In the comparative study, it gradually gets clear that the foreign legislator is more in favor of individual rights. As a result, this type of law relies on the protection of individual rights.

According to Article 51 of the Moroccan Family Code,³⁶ spouses are obliged to express mutual respect and affection, to protect the interests of the family, and to establish good relations with one another's parents and close relatives, according to acceptable standards.⁴²³⁷ When either spouse fails to fulfill his/her obligations, the obligation is made through the court. If the dispute is not resolved after the arbitration process and the court finds conciliation impossible, the spouses are entitled to the right to divorce.³⁸ Other instances of husband's abuse that entitle the wife the right to file for divorce are: 1. Causing physical harm to the wife in cases where it is proven at the court; 2. Refusal to pay the specified alimony; 3. The husband's over one-year absence.³⁹ The difference between Moroccan law and domestic law is that it enumerates instances of good conjugal relations and enacts strong enforcement for violating them. Violation of such instances has naturally been a serious and important issue for the Moroccan legislator. However, the domestic law is stricter for divorce and shows more willingness to reconcile the spouses.

³³ Divorce Act of Canada, 1985-Last amended on June 21 2019, Article 9

³⁴ New York Domestic Relations Law, Article 10, Action for Divorce, Section170

³⁵ New York domestic Relations Law, Article 10, Action for Separation, Section200

³⁶ Morocco Family Code, Moudawana of February 5, 2004

³⁷ Morocco Family Code, (Moudawana) of February 5, 2004, Article 51, (2) and (4)

³⁸ Ibid, Articles 94-97

³⁹ Ibid, Articles 98-106

4.2. The right to paterfamilias:

2.4.1. In domestic law:

In domestic law, the head of the household is one of the characteristics of the husband.⁴⁰ At the same time, the wife's obedience to her husband's compassionate decisions is the result of applying the same rule. The late Dr. Nasser Katouzian acknowledges the need for the husband's role as the head of the household in the conflict of individual freedoms that require equality of rights and the establishment of order that requires one to be the head.⁴¹

The husband's role as the head of the household depends on the ability to manage his own affairs. Therefore, maturity, intellect, and growth are necessary for the head, and the minor, lunatic, and insane who are not able to manage themselves, cannot draw the right path for the family. Indeed, in cases where the guardian selects a wife for the ward, according to the rule of guardianship and knowledge of the wife, the household head should be granted to the guardian.

There is a dispute regarding the husband's role as the head of the household. Some consider this role to be in charge of all wife's affairs and some for family relations.⁴² It seems that in family relations and interests, the priority is given to the husband's role as the head of the household, except for exceptions. Some authors consider the husband to be the final decision maker in the family in any type of dispute.⁴³ As a result, the husband's leadership over the family is about the management and protection of the family. Exceptions include:

1. When a right is granted to the wife by law or the husband's decision is against the law and sharia. For instance, the wife has the right to seize any of her property,⁴⁴ and the husband cannot force her to help with finances.
2. If the husband decides to dispossess the wife of her liberty,⁴⁵ for example, he cannot prevent her from seeing and visiting her relatives or confine her at home, nor can he decide to abort or divorce her with a child from her previous marriage.
3. In instances where the marriage contract proviso grants the wife a right. For instance, well-known jurists believe that if the right to determine housing is stipulated in the marriage contract in favor of the wife, the husband shall obey her, while the minority of jurists believe in the husband's role as a head and reject this condition.⁴⁶ Indeed, the popular opinion is confirmed in law.

⁴⁰ Article 1105 of the Civil Code

⁴¹ Katouzian, Nasser, Family Law, Enteshar Co., 2006, Vol. 1, p. 223

⁴² Parvin, Farhad; Hosseini, Vahideh. Conditions, Scope, and Jurisprudential and Legal Effects of the Husband's Guardianship over the Wife, Journal of Private Law Research, Vol. 2, Issue 3, spring and summer, pp. 72-74

⁴³ Mohaghegh Damad, Seyyed Mostafa, Jurisprudential Study of Family Law, Humanities Publishing Center, 2006, p. 288

⁴⁴ Article 1118 of the Civil Code

⁴⁵ Article 1118 of the Civil Code

⁴⁶ Zayn al-Din ibn Ali ibn Ahmad al-Ameli al-Shami, compiled by Ali Reza Amini- Seyyed Mohammad Reza Ayati, Tahrir al-Rawdha fi Sharh al-Lama'a, the Organization for Researching and Composing University textbooks in the Humanities (SAMT), Vol. 2, pp. 340-341

4. In instances where certain conventions and ethics grant the wife a right. In a lawsuit, the wife files a petition against the husband to provide an independent residence due to her dissatisfaction with living with her mother-in-law. Although the right to determine residence is for the husband, and he has the right to be the head, it is necessary to determine the residence according to the economic and cultural conditions. Branch 10 of the Shiraz Family Court⁴⁷ argues that "... the wife's alimony, including the provision of housing is one of the duties of the husband..." and therefore, issues a ruling obliging the husband to provide an independent residence. According to conventions, it is essential to grant privacy and freedom to the wife in partnership. In order to resolve this issue and avoid further disputes, it is best for the parties to stipulate their potential rights in the marriage contract.

2.4.2. Comparative study:

Article 88 of the Dutch Family Code makes certain legal possessions of one spouse subject to the written and official consent of the other, including: 1. Sale and any transaction that binds the joint residence and its related objects, 2. Gifts received during partnership other than ordinary gifts and things necessary for personal use, 3. Some types of contracts, including collateral for an obligation of a third party, 4. Concluding a hire-purchase contract except for contracts for the purchase of property that is only or often a person's business need.⁴⁸ The subsequent article stipulates the conditions where a spouse does not need consent. In Dutch law, the term "final decision-maker" is not used for either spouse. Even individual freedoms are limited by the priority given to the couple's participation.

In Morocco, one of the effects of the validity of a marriage contract is that all the rights and obligations of Islamic law regarding the relationship between spouses apply according to law.⁴⁹ Elsewhere in the law, polygamy is permitted in cases where the husband is not suspected to be unjust, or it is not prohibited based on marriage contract proviso.⁵⁰ However, for the husband's role as the head of the household, general jurisprudence is not followed and the wife and her husband are responsible for managing the family in protecting the education of the children and family affairs. Consultation in the two mentioned cases and family plans is the right of both husband and wife.⁵¹

3. Examining the spouses' financial rights:

3.1. Spouses' financial rights in domestic law:

3.1.2 Marriage portion:

Marriage portion is a financial asset that the husband appropriates to the wife in marriage contract. If the marriage portion is not stipulated, the parties can later agree on its amount, otherwise, the marriage portion is awarded marriage portion ordinary paid.⁵² It is said that determining the marriage portion more than traditional marriage portion is reprehensible (500

⁴⁷ Branch 10 of Shiraz Family Court, lawsuit No. 980998070700813, lawsuit No. 9809970703700953

⁴⁸ Sumner Ian and Warendarf Hans, Family Law Legislation of the Netherlands, Intersentia publishers, 2003, p. 5

⁴⁹ Morocco Family Code, (Moudawana) of February 5, 2004, Article 50

⁵⁰ Ibid, Article 40

⁵¹ Morocco Family Code, (Moudawana) of February 5, 2004, Article 51 (3) and (4)

⁵² Article 1088 of the Civil Code

dirhams) (about 1,250 grams of silver).⁵³ There is a difference in the nature and philosophy of the marriage portion, whether it is in exchange for marriage and sexual intercourse? Is the compensation paid to the wife due to being away from her family? Is it a secondary financial contract? Is it a tool for making a living?⁵⁴ What is certain is that the marriage portion is a financial right that is acquired within the limits of the consent of the parties and the rule of law.

3.1.3. Maintenance:

Maintenance is the consideration of the wife's obligatory sexual resignation to her husband and includes the normal expenses of life such as clothing, furniture, food,⁵⁵ medical services, and other needs of the wife, considering her peers in the same social class. In determining the amount of alimony, judicial conventions tend to take into account the husband's financial situation in terms of his solvency or hardship.

3.1.4. Reasonable compensation and arbitrary donation:

Reasonable compensation is defined in the Appended Note to Article 336 of the Civil Code, "If the wife has done the duties that are not legally her responsibility and is conventionally rewarded for them, by the order of the husband and without the intention of donation, and this is also proven to the court, the reasonable compensation is calculated by the court and shall be paid to her."

Question: What are the wife's duties based on Islamic law? In response, Imam Khomeini states, "Unjustifiable disobedience of wife to husband, which means her refusing from obedience to her husband in matters that are obligatory on her, does not imply abandoning things that are not obligatory on her. Thus, if the wife refuses to do household chores and fulfill the needs of the husband that are not related to sexual intercourse, such as sweeping or sewing

or cooking or the like, even watering the flowers and making the bed, it is not an instance of the unjustifiable disobedience of wife to husband.⁵⁶ As a result, the wife has no obligation other than sexual obedience and its preconditions and breastfeeding the children. Apparently, the wife's services at home are free in order to strengthen the foundations of the family, and conventionally the husband does not ask her to cook food or the like. However, the court procedure tends to determine the reasonable compensation according to the expert opinion. As a result, the woman has no obligation to work in a joint residence and does not violate the man's rights by abandoning this duty.

According to Clause B of Note 6 of the Law on Amending the Rules of Divorce, which has not been abrogated, the arbitrary donation is described as follows: "Based on the years of partnership and the type of works that the wife has done in the husband's house and the financial capability of the husband, the court determines an amount as the arbitrary donation for the wife." The conditions for the arbitrary donation are as follows: Divorce is not at the request of the wife and

⁵³ Abu Abdullah Mohammad Maki Ameli, compiled by Ali Reza Amini-Seyyed Mohammad Reza Ayati, *Tahrir al-Rawdha fi Sharh al-Lama'a*, the Organization for Researching and Composing University textbooks in the Humanities (SAMT), Vol. 2, p. 344

⁵⁴ Mohammadi Ramghani, Hassan; Roshan, Mohammad, A Study of the Legal Nature of Arbitrary Donation, *Journal of Legal Studies*, Vol. 3, Issue 1, Spring and Summer 2011, pp. 108-109

⁵⁵ Article 1107 of the Civil Code

⁵⁶ Imam Khomeini, *Tahrir al-Wasilah*, 1992, Dar Al-Alam Publishing Institute, Vol. 4, p. 57

during the partnership, it is not possible to claim for the arbitrary donation before the divorce is filed by the husband.

Question: Since the arbitrary donation and fair equivalent remuneration are about the same subject, can a ruling be issued on both in a dispute? Some authors have accepted the aggregate of both due to the difference between the arbitrary donation and fair equivalent remuneration.⁵⁷ However, justice requires that multiple debts not be imposed on the husband from one place, particularly in the case where the total financial rights of the wife cover her livelihood after divorce. In order to confirm the said opinion, the argument of Branch 8 of the Supreme Court can solve the issue. "... The wife's main objection is about the ignorance of the fair equivalent remuneration during the marriage. According to the aforementioned statements based on the minutes of the hearing on 30/07/2011, the court decided that her fair equivalent remuneration cannot be aggregated by the arbitrary donation. This objection is not significant and acceptable..."⁵⁸ As a result, the arbitrary donation is a legal factor and cannot be combined with fair equivalent remuneration.

2.3 A comparative study of spouses' financial rights:

In the Netherlands, common household expenses, such as raising a child, can be collected from each spouse's income. If the income of the one who earns less is received proportionally, and if it is still not sufficient, it will be collected in proportion from their main capital. Each spouse is responsible for contributing to the payment of house and child expenses based on their income unless otherwise stipulated. In the event of a dispute, the court shall determine the responsibility of each, taking into account the circumstances.⁵⁹ Even with or after a divorce decree, the court may consider a maintenance as a pension for any spouse who does not have sufficient income.⁶⁰

In the United States, the spouses' financial rights are determined by the type of marriage and are mainly divided into three types: traditional-religious, civil, and common law. Regarding religious marriage and common law, it was earlier explained that the former is based on the customs of the same religion and the latter is based on common law rights. In civil marriage, the spouses' financial rights and the prevailing legal regime depend on the will of the parties. There are generally three legal regimes governing the administration of spouses' property. 1. Each person's separation of the property before and after marriage belongs to him/her and has no cost or responsibility for the other party. 2. The partial community of property is the pre-marital property owned by the same person, but the property acquired after the marriage is considered joint property, except in the case of legal exceptions. Each spouse is responsible for the costs and income of the property, and after the divorce, the property is divided fairly. 3. The full community of property, in this case, is the property of the spouse either before or after the

⁵⁷ Mohammadi Ramghani, Hassan; Roshan, Mohammad, A Study of the Legal Nature of Arbitrary Donation, *Journal of Legal Studies*, Vol. 3, Issue 1, Spring and Summer 2011, pp. 117

⁵⁸ Branch 8 of the Supreme Court, Judgment No. 9109970906801009 issued on 03/10/2012

⁵⁹ Sumner Ian and Warendarf Hans, *Family Law Legislation Of the Netherlands*, Intersentia publishers, 2003, p. 57

⁶⁰ Sumner Ian and Warendarf Hans, *Family Law Legislation Of the Netherlands*, Intersentia publishers, 2003, p. 77

partnership, except in the case of legal exceptions. In this case, the property is divided equally after separation or divorce.⁶¹

4. Conclusion:

Countries follow two systems in legislating and interpreting the rights of spouses: 1. The system of similarity of rights; 2. The system of equality of rights. The proponents of the similarity of rights consider marital duties based on the difference in creation between men and women, resolve family problems as much as possible through arbitration, and tend to give preference to ethics over the law because of their emphasis on ethics and the preservation of traditions. For example, Iranian and Moroccan legislators oblige men to provide for their wives and families and give women more financial privileges. Instead, the man is considered responsible for the well-being of the family. Such communities may have to deal with a few problems due to time constraints. In today's society, women compete with men in science and employment and seek to eliminate gender discrimination, making it difficult to implement the system of similarity of rights. Some clerics have even considered the marriage portion as one of the previous laws of Islam⁶² so that the legislator has a chance to reconsider the law. In contrast, countries that apply the system of equality of spouses' rights, are willing to fully protect individual rights, even by enforcing the law in the details of marital life.

Another output of the rule of law on the behavior of the spouses is that it grants freedom to spouses in stipulating the marriage contract proviso and the nature of the marriage of is explained. However, it is possible to resolve the conflict between the domestic law of the family and the custom prevailing in some parts of the society by the marriage contract proviso. The presumed conditions for guaranteeing the wife's rights include restricting her husband's decisions, such as permission to study or work, the right to divorce in the event of physical harm, or such problems as not being employed for over a year, refusing to host close relatives, etc. In contrast, the husband's rights should be equally preserved. In a society where government officials, MPs, and government institutions' presidents are elected from among women, the donation is required and the consent against it is invalid. An unemployed man may even have to pay alimony to his working wife at the same time. Indeed, in all contracts, the right of one person may be violated, and the judge plays an important role in interpreting the texts of the law in favor of the weak party.

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⁶¹ MODULE 2: Marriage, Family and Property Rights, The United Nations Development Program and The Office of the United Nations High Commissioner for Human Rights, 2018, p. 10-11

⁶² Hujjat al-Islam Modaber Javad, a researcher at the Exegesis Center of the Seminary

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