

**Article**

Jurisprudential Issues Regarding the Marriage of Algerians to Foreigners

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Abstract: The subject of this research paper revolves around judicial jurisprudence in matters related to mixed marriages between Algerians of nationality and foreigners, the two parties legal rulings may differ based on varying beliefs, in accordance with the exception in Article 13 of the Civil Code, national law exclusively governs these situations, This is the In cases where either spouse holds Algerian nationality at the time of the marriage contract's conclusion and it does not matter if it is changed later, except for eligibility, as it is subject to the nationality law.

Keywords: Mixed Marriages Judicial Jurisprudence Algerian Nationality Conflict of Laws Article 13 of the Algerian Civil Code.

INTRODUCTION

The Algerian legislator regulated everything related to marriage and its provisions through the Family Code, which based most of its texts on the provisions of Islamic Sharia. It is known that the facts and developments are infinite and the texts are finite, so they do not accommodate all disputes and disputes if they are presented to the judiciary, which leaves the judge before There is only one option in the absence of texts or the generality of their meanings, which is judicial jurisprudence, and one of the issues that the judicial mind has worked on and issued rulings on is the marriage of Algerians to foreigners, and the reason for this is that it falls within the realm of conflict of laws. So what is the truth about the marriage of Algerians to foreigners and the law that supports it? To him, and how did judicial

jurisprudence treat it, and what role does judicial jurisprudence play in order to achieve How did the legislator address established legal principles when amending family law in accordance with Islamic Sharia?

The answer to this problem will be by following the analytical approach, according to the following plan:

- The first axis: The truth about Algerians marrying foreigners and the legal framework for it.

The second axis: judicial jurisprudence in matters of marriage between Algerians and foreigners.

THE FIRST AXIS: THE TRUTH ABOUT ALGERIANS MARRYING FOREIGNERS AND THE LEGAL

FRAMEWORK FOR IT.

1- The truth about Algerians marrying foreigners.
Procedural definition: Mixed marriage is a contract and covenant of mutual consent between a man and a woman based on legal foundations. The parties differ in religion, affiliation, irrespective of nationality, for the purpose of creating a stable family (Mamdouh Abdel Karim, 2005, p 188).

The essential nature of mixed marriage resides in the distinction between the contracting parties, a difference of religion, belief, or nationality. This type of marriage has brought together Algerians with parties who differ from them in religion, even if both spouses are of Algerian nationality. But one of them follows a religion other than Islam, and they may differ in nationality, such that one party is Algerian - man or woman - and the other party is foreign or Arab, and the difference in religion and nationality may combine on the other party.

Mixed Algerian-foreign marriage is a marriage in which an Algerian man or an Algerian woman is paired with a foreigner, such that this pairing is controlled by "various variables such as culture, customs, ways of thinking, the language of communication, the path of dialogue, and differences in religion and values." (Ammar Aoun, 2013/2014, p. 48).

Some of them defined it by saying: "It is every marriage concluded in Algeria or abroad between two persons who hold Algerian nationality and another person who holds the nationality of a foreign country." (Al-Arabi Belhaj, 2010, p 284).

This definition is based on the following:

-First, the expression using the word "two people" instead of "a man and a woman" is somewhat confusing, especially in this era in which same-sex marriage is permitted in foreign countries, and the definition stated that marriage may be concluded abroad, so the expression must be precise, even if the definition does not mean this.

Secondly, the element of the difference of religion between the two parties was not considered. If it is said that not including The differing religious definitions arise because Algerian law prohibits marriage between an Algerian woman and a non-Muslim man, and what is forbidden by law is like a senseless one, and mentioning it is a form of redundancy that is useless.

We respond and say that the marriage of an Algerian woman to a non-Muslim, even if it is forbidden by Sharia and law, still exists in reality, just as the marriage of an Algerian to a woman of the book does not violate Sharia and the law. As for his marriage to

a non-Muslim woman, which is prohibited by law and law, it also exists in reality, and this type of marriage is common. Marriages, especially among the Algerian community abroad, including expatriates who return to the homeland, face the problem of proving their marriage contracts in violation of Sharia and Algerian law before the national judiciary.

Thus, the restriction of differences in religion and belief is important in the definition. Because the effects that result from it, whether by ruling the marriage invalid, invalid, or valid, are distinct from the consequences of a marriage between co-religionists.

The definition focused solely on nationality, disregarding religious differences in marriages between Algerians and foreigners, and there is a difference between the form of agreement on religion or its difference in the legal and legal controls or procedures and proof of the marriage contract.

Procedural definition: A contract and pact of mutual consent between a man and a woman based on legal foundations, involving an Algerian national, irrespective of whether the spouses share the same religion, aiming to establish a stable family.

A- I did not mention the legal foundations so that the definition includes images that violate the provisions of Sharia, such as the marriage of an Algerian Muslim woman to a Christian, Jew, or polytheist, and the marriage of an Algerian Muslim woman to a non-Kiblah woman.

B - Violating the legal provisions does not require a legal violation because the marriage may be concluded abroad in accordance with foreign law or the law of an Arab country, whose law does not prevent the conclusion of a marriage whose parties, differ in belief, if the legal conditions are met.

C- Stable families are intended to exclude temporary unions.

D- The contract involves an Algerian citizen. It is a restriction that produces a picture of the marriage of foreigners of nationality in Algeria. This restriction encompasses situations where both parties involved in the contract are Algerian, but one of them changed his nationality before concluding the marriage contract. This is also considered a type of marriage of Algerians to foreigners.

2- Applicable Law for marriages involving Algerians and foreigners:

The marriage contract is considered a material and legal fact linking a man and a woman. In order for it

to be valid, it must include objective conditions that govern it, and this is what the majority of countries in the world have done. There are those who consider its objective conditions to be formal conditions, and these differences become more severe when the parties to the marriage contract are... People of different nationalities (mixed marriage), which leads to legal disputes that may lead to the exclusion of relevant foreign law in the name of the public order prevailing in each country (Bushra Zalasi, 2011, p 174).

A - Objective conditions: To conclude a marriage contract between Algerians and foreigners, they mean the conditions on which the marriage depends, and they also do not exist in the event of their absence, as they are the fundamental foundations on which it is based (Amina Rahaoui, 2010/2011, p 11). The Algerian legislator specified the conflict of laws in mixed marriage (Al-Tayeb Zarouti, 2016, p 361) with regard to the objective conditions of Articles 11 and 13 of the Civil Code, and what is meant by the conflict of laws is: "a conflict of two or more laws regarding the ruling of a legal relationship that includes a foreign element." (Fatiha Bashour, 2016/2017, p 3).

Text of Article 11: "The objective conditions for the validity of marriage shall be governed by the national law of each spouse." (Algerian Civil Code, 2007, p3) The Algerian legislator assigned the objective conditions for The marriage contract is governed by national law, which also determines the applicable law, two trends emerged in legal jurisprudence, one trend calling for the comprehensive application of the spouses' nationality law, and the other trend calling for its distributed application. As for the comprehensive application, it has been criticized for its difficulty in applying it in practice. Because it makes the legal relationship impossible to conclude once one of the conditions stipulated in both laws is not met, and according to the distributed application, each spouse fulfills the objective conditions stipulated in his national law only, (Amina Rahaoui, 2016, pp 110-111) and according to the meaning of Article 11 Civil, the Algerian legislator is influenced by the theory of distributed application, but if it is related With the impediments, the comprehensive application is always applied to them (Amin Darba, 2007-2008, p14).

This is as a general rule to Article 13 states the exception: Algerian law applies (per Articles 11 & 12) if a spouse was Algerian at marriage, except for marriage eligibility.

Here are several ways to rephrase the given text, aiming for clarity, conciseness, and flow:

Article 13 mandates the application of Algerian law if

a spouse was Algerian at marriage, except for marriage eligibility, which is governed by nationality law (Article 10 Civil Code).

When it is decided that Algerian law is the one to be applied according to Article 13's exception, the Algerian Family Law is the one that determines the objective conditions, as stipulated in Articles 9, 9 bis, 25, 26, 27, and it is concluded from these articles The marriage contract includes consent, a guardian, witnesses, dowry, and the spouses are free from permanent and temporary legal impediments (Amina Rahaoui, 2016, p 113).

B - Formal conditions: In order for the legal effects of the marriage contract to take place, the formal conditions stipulated by the law must be met, which are everything related to the procedures and issues of jurisdiction, Formal marriage requirements include proxy marriages, announcements, contract creation, and proof, These formalities publicly demonstrate the marriage (Hassan Al-Hadawi, 1997, p 109).

The Civil Code was devoid of a specific attribution rule regarding the formal conditions for the validity of marriage. Therefore, in its absence, we return to the general rules regarding the form of legal transactions in general, considering marriage as one of them, and we find that they are subject to the rule of the place of conclusion (Yamna Hawassi, 2016, p 400).

Article 31 of the Family Code stipulates that: "The marriage of Algerian men and women to foreigners of both sexes is subject to regulatory provisions," and what is meant here is an administrative license issued by the regionally competent governor of the state, which must be presented to the civil status officer based on his instructions. Ministry of Interior No. 02 issued on 11/20/1980, stipulating that the governor cannot grant a license except after investigation and approval by the responsible security services regarding the behavior of the foreigner (Aissa Maaiza, 2019, p 365).

C- According to Article 12 of the Civil Code, the husband's national law at the time of marriage governs the personal and financial aspects of the marriage. His national law at the time of the lawsuit governs dissolution and separation.

This text is specific to the personal and financial effects of marriage (the first paragraph) and its dissolution (the second paragraph), noting that according to the 2005 amendment, physical separation was also included. As I mentioned previously, the text of Article 13 is civil and was included as an exception to Articles 11 and 12, so

Algerian law is more appropriate to apply. Whenever one of the spouses was Algerian when the marriage was concluded, even if the Algerian party later changed his nationality, and therefore the matter is the validity, effects, and dissolution of the marriage according to what Algerian law alone requires, except with regard to the eligibility of marriage, whose law the foreign party remains subject to, and its importance lies in (the law National) in determining the validity of the marriage and explaining its effects and methods of dissolving it if the foreign law stipulates other than what is stipulated in Algerian law, then what matters is what is stipulated in the national law, and Algerian law does not specify custody with a special rule of attribution, and therefore the appropriate rule of attribution is the law Applied to the dissolution of marriage as one of its effects (Al-Tayeb Zarouti, 2006, p 366).

D- Article 16 of the Civil Code stipulates that the law of the deceased's nationality at the time of death governs inheritance, encompassing wills and all other financial transactions taking effect after death.

Algerian law subjects inheritance to the deceased's national law at the time of death. This law governs all aspects of inheritance, including its nature, content, related rights, heirs, grounds for inheritance, obstacles, shares, withholding rules, and special cases (Fatihah Bashour, 2016/2017, p 41).

THE SECOND AXIS: JURISPRUDENCE IN MATTERS OF MARRIAGE BETWEEN ALGERIANS AND FOREIGNERS:

1- Questions and cases of Algerians marrying foreigners were addressed by Algerian jurisprudence:

A - Most of the cases presented before the Family Affairs Departments are related to registering and proving mixed customary marriage between Algerians and foreigners due to the Algerian legislator subjecting this marriage to special regulatory conditions, and given the lengthy procedures for obtaining an administrative license, and the possibility of the application being rejected by the competent administrative authorities, resorting to Marriage applicants go to the embassies and consulates to which the foreign party is affiliated in order to conclude marriage contracts before them, which are considered foreign contracts according to the law, They then submit applications before the competent Algerian courts in order to legalize these contracts ,the executive formula must be obtained before execution can proceed under Articles 606 and 607., they resort to the civil status services in order to register their marriage in the civil status records. However, the Algerian courts have begun to treat claims for granting these contracts with the executive

formula as lawsuits proving common-law marriage (Al-Sabti Bourkab, 2021, p 5).

The Supreme Court based its decision on the basis that the Council considered the prior authorization issued to a foreigner for the purpose of marriage to be required of him upon registering the contract and not upon its conclusion. This is an interpretation that the Supreme Court considers wrong and contrary to the principle mentioned in Article 31 of the QA, which subjects the marriage of Algerians to both sexes. With foreigners according to the regulatory provisions, he must decide to confirm common-law marriage and registering it without a license from those concerned is a violation of the law, noting that the courts of first instance and judicial councils have confirmed marriage to a foreigner on the basis that entry makes The marriage is valid as all necessary elements and conditions are present, and the absence of only the prior license, which is not considered a pillar or condition for proving the marriage, the absence of which has no legal effect (Aissa Muayza, 2019, p 368). The Supreme Court's decision was based on security reasons to preserve the public interest and public order. The administrative license is not granted to the foreign party except after verifying his criminal record through the security services, and there is no difference between registering or confirming the contract, especially since it includes contracts concluded in a foreign country for the purpose of Circumventing the law and then seeking to legalize the contract and confirm it in Algeria.

B- Among the issues that raised legal problems in the marriage of Algerians to foreigners is custody and what is attached to the person entitled to it from the parents if he is a non-Muslim or resides abroad, The evolution of the Supreme Court's position on this matter is demonstrated below through an analysis of select rulings: In a decision issued by On January 2, 1989, the Supreme Council approved the contested decision that refused to give an executive formula to a foreign ruling that granted custody to the mother residing abroad, recalling a principle upon which its jurisprudence is based, in the case of one of the parents being in a foreign, non-Muslim country, and they disputed over the matter. Children in Algeria, whoever is there has more right to them, even if the mother is not Muslim, considering that the presence of the child in custody abroad changes his belief and deprives the father of the right to visit and monitor his son. However, in a recent decision, despite the fact that the custodian acquired a foreign nationality and resides in a foreign, non-Muslim country, the Supreme Court agreed with the ruling on the subject, which assigned custody to her as long as she was a Muslim, as if the religious characteristic was a substitute for the father's right. This is a striking development for the Algerian judiciary in This matter

(Al-Tayeb Zarouti, 2006, p 367).

2- The influence of judicial interpretation on Algerian family law regarding marriages between Algerians and foreign nationals:

Judicial jurisprudence is the effort of a judge or judicial body to exert all its efforts to obtain a legal ruling that is final in the dispute under consideration, and jurisdiction is binding on the parties to the dispute.

Judicial jurisprudence as a source of law is the sum of legal principles that are extracted from the rulings issued by the courts in the issues they adjudicate, and the legal principles that are considered a legal source are the principles that decide on issues that are not governed by a clear legal text and the judiciary decides to follow them, and then it was Today, the Supreme Court interpretation of legal texts constitutes binding jurisprudence (Mahfouzben Seghir, 2008/2009, p 232).

In Algeria, jurisprudence is a key interpretive source of law, It is not obligatory except in cases in which a judicial ruling is issued, to establish the principle of separation of powers, the judicial authority, paradoxically described as an executive authority, implements laws enacted by the legislative authority. Building it with materials characterized by abstraction, generality, and binding. This does not mean that judicial jurisprudence is less important than legislative jurisprudence, as it is the subordinating aspect of abstract texts on reality that is presented to the judiciary in the form of disputes for decision, application consistent with the spirit of the law represents an investment in its intended purpose, taking into account both public order and the principles of Islamic Sharia.

Judicial diligence is required whether a relevant legal text exists or not. When a legal text exists, the judge's diligence manifests in two primary ways: First, in the careful interpretation of the text itself, especially when the text suffers from defects such as material error, ambiguity, deficiency, or internal contradiction. This interpretive process requires meticulous attention to detail and a thorough understanding of the legal context. Second, judicial diligence is crucial the application of interpreted legal text to the specific facts of a case necessitates careful consideration of the case's nuances and a reasoned explanation of how the interpreted text supports the judge's decision, even in the absence of directly applicable legal provisions, judicial diligence remains essential. In such instances, the judge must engage in legal reasoning, drawing upon broader legal principles, analogous legal provisions, established legal doctrines, and considerations of justice and

equity to reach a just and reasoned decision. This may involve developing new legal interpretations or adapting existing ones to address the novel circumstances of the case (Ratiba Ayash, 2020/2021, p 6).

From here, the real role played by judicial jurisprudence in the Algerian legal system becomes clear in establishing the rules of law. Although it is not considered an official source of law, it creates the law. However, these legal rules that the judiciary devises remain based in their binding force on their application. Indeed, by the courts themselves, without it rising to the level of legislative obligation. If the courts are expelled in accordance with the principles of jurisprudence, it can be said that they are stable in practice and not in law. This jurisprudential role is entrusted to the Supreme Court, which is not considered a third level of litigation, and its jurisdiction The scope of appellate review is confined to assessing the conformity of the appealed ruling with the applicable law, excluding any re-examination of factual findings, which are the province of the trial court and, where applicable, the Supreme Court, upon which its judiciary rests, is an expression of the judiciary's approach and an explanation of the approach it follows while adjudicating the disputes presented to it, and it is called The rulings that the Supreme Courts decide to adhere to judicial principles, and their importance lies in the fact that some of the laws' articles may be afflicted with either ambiguity and ambiguity or be deficient in some cases, so that there becomes a legal vacuum, and in this case the judge and lawyer take comfort in referring to the principles. Previous judicial rulings for similar cases and judicial principles arise due to the presence of ambiguous materials or cases that were not addressed when the law or system was enacted (Mahfouz ben Seghir, 2008/2009, p 240).

What evidence demonstrates the importance of established judicial principles and jurisprudence in the realm of family law generally, and specifically in cases of marriage between Algerians and foreign nationals?, is the absence of sufficient legal texts, in addition to the ambiguity of what was found of them, even though they are few. The text that refers to the marriage of Algerians and Algerian women and foreigners of both sexes are subject to regulatory provisions. It has been interpreted and the meaning of the regulatory provisions has been clarified based on an instruction that is in fact directed to administrative authorities (the regionally competent state and others) that clarifies the method and procedures for obtaining an administrative license to conclude a marriage contract, and is not legal legislation directed to the judiciary.

Therefore, the door to judicial jurisprudence is necessarily opened, and Article 222 of the Family Law stipulates that: "Everything not stipulated in this law shall be referred to the provisions of Islamic Sharia.", This is an explicit text of the law directed to judges to take into account the provisions of Islamic Sharia in their ijtihad in the absence of a text, and it is more appropriate to interpret ambiguous or incomplete texts, and it is impossible for the texts to cover developments, and the judiciary is presented with calamities and facts that require ijtihad, so the judicial work directs the legislator to reconsider his texts and Modify it or add and supplement its deficiency.

Custody is one of the issues that raises a problem due to the absence of a text, and saying that the appropriate basis of reference for it is the law applied to the dissolution of marriage is a rule for which there is no evidence. Because custody is related to the upbringing and care of children, it is assigned to one of the parents. There may be a difference in belief and religion between them. If it is said that the lesson is in the dissolution of marriage according to As Algerian law is the sole governing law, and custody is a consequence of divorce, Algerian law applies, and the Algerian family law is derived from the provisions of Islamic Sharia. It is answered that Algerian law does not stipulate the issue of the difference in religion between the spouses. If the mother is of Algerian nationality, non-Muslim, or of the Book, married to a foreign Muslim, how does he give her priority in custody?

With regard to legal references for inheritance, the Algerian legislator, as per Article 16 of the Civil Code, has established that it is subject to the law of the deceased's nationality at the time of their death, and it is known in the provisions of inheritance in Islamic law that difference of religion is one of the impediments to inheritance, so a Muslim does not inherit a non-Muslim, nor does a non-Muslim inherit a Muslim. This attribution is in fact wrong and contradicts the finality of inheritance rulings, in which the scope of legal ijtihad is narrow, not to mention legal ijtihad and the adoption of foreign law. The text of Article 222 Algerian family law contains the phrase "Islamic Sharia provisions," which are general and do not make judicial jurisprudence linked to one jurisprudential school of thought rather than another, and this is very problematic because it will lead to jurisprudence in concocting between schools of thought, and limiting it to the Maliki school of thought, which is the official school of thought in Algeria in various ways. Its official and educational institutions make judicial jurisprudence more stable, and this does not mean fanaticism for the doctrine and not adopting at all from other doctrines.

A fundamental tenet of the Maliki school of jurisprudence is the principle of according due consideration to dissenting opinions and their supporting evidence, provided such evidence is interpreted and applied within established controls and conditions, and in issues that are well-known. In the case of disagreement between schools of thought, it is necessary to adopt the most correct opinion, and if it differs from the Maliki school of thought, it is something that no one of the scholars denies. As the scholars have said, whoever does not know the disagreement does not smell the scent of jurisprudence, and the Maliki school of thought is one of the most interest-sensitive schools of jurisprudence.

Therefore, the weak statement may be taken to achieve it, and the judicial ruling revolves around where the interest is present or non-existent, according to methods that inform the judge on how to achieve a fair resolution, and the most important of these methods is "what was done in action," which is: "adopting a weak or abnormal opinion in The doctrine is opposed to the more correct or well-known opinion for the sake of an interest, necessity, or something else, or it is for the judges to rule in a calamity, imitating a weak opinion and contradicting the well-known and more correct opinion of a matter that necessitated it while the ruling on it was established, and the judges worked according to it (Mohand Ou Idir Mechnan, 2019, p 317).

The role of judicial jurisprudence in realizing the objectives of Islamic law, and the marriage of Algerians to foreigners are among the fertile areas of judicial jurisprudence until it puts its hand on the areas of legal vacuum or contradiction that resulted in different rulings in similar cases across the country's courts.

What is based on judicial work, which was based on the provisions of Islamic Sharia according to the Maliki doctrine, taking into account the objectives of Sharia in a mixed marriage between an Algerian man or woman and the other is a foreigner, is raw material for legislation that must be amended periodically to accommodate changes and developments, and in this way it is The texts of the law are flexible and far from rigid, which ensures family stability and the preservation of public order.

CONCLUSION:

The results of this research paper are summarized in the following points:

- The marriage of Algerians to foreigners is a type of mixed marriage, and it is one of the marriages that is The intersection or conflict of international laws is often occasioned by the presence of a foreign national as a party to the legal relationship.-The legal texts to

which issues of marriage between Algerians and foreigners are based do not include the details and elements of this legal relationship, and their meanings are characterized by ambiguity and generality.

- The decisions of the Supreme Court were aimed at preserving public order and the public interest, so they often excluded foreign law and what was decided by national law alone was considered.
- Judicial treatment of disputes brought before the courts - specializing in personal status cases - does not only represent a decision by a binding judicial ruling on the parties to the dispute, but rather, in their entirety, they constitute legal principles in a cumulative manner, leading to a legislative review of the Family Code.

Recommendations:

The issue of Algerian marriage to foreigners is one of the issues that requires further research and diligence by specialists, including jurists, judges, and scholars of Islamic law, as a matter of consultation and participation, to reach accurate results.

- Referring to the provisions of Islamic law in ijtihad should be in accordance with the Maliki school of thought, taking into account disagreement and avoiding fabrication between schools of thought.

Decision makers pay attention to forming a consultative cell that brings together specialists in a body of an official nature, in order to create a climate of collective diligence, and for the legislative authority to take into account the research results and legal principles in diligent matters to review family law in accordance with the provisions of Islamic Sharia and its objectives.

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