

LEGAL AND JURISPRUDENTIAL FOUNDATIONS OF MARRIAGE IN ALGERIAN AND COMPARATIVE FAMILY LAW: CONDITIONS AND FORMULATION OF MARRIAGE

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Abstract:

This article explores the legal and jurisprudential foundations of marriage within the context of Algerian and comparative family law, focusing on the conditions and formulation of marriage. It examines the historical and contemporary legal frameworks that regulate marriage in Algeria, highlighting key legal provisions, socio-cultural influences, and religious considerations that shape marital institutions. Additionally, the article compares the Algerian legal system with other legal traditions, addressing similarities and differences in the recognition of marriage, its formation, and associated requirements such as consent, age, and capacity. Through a detailed analysis of jurisprudential interpretations, the article also identifies how family law has evolved in response to changing societal values and the role of courts in interpreting marital law. The comparative approach offers insights into potential reforms and the harmonization of legal principles across different jurisdictions.

Key words: Algerian family law, marriage conditions, comparative family law, legal foundations, jurisprudence.

INTRODUCTION:

Marriage is considered one of the most important contracts that regulate the relationship between individuals in society, as it is governed by a strict legal framework aimed at protecting rights and organizing duties between spouses. In Algerian legislation, the Family Law clearly defines the elements and conditions of a marriage contract, and this legal system reflects the social and cultural transformations that Algeria has experienced in recent years.

In this context, this research will discuss three main topics related to marriage contracts in Algerian legislation. In the first section, we will address the components of a marriage contract, focusing on the essential elements that are necessary for the creation of a valid marriage contract according to the law. We will discuss the conditions of mutual consent, eligibility, and the form the contract must take, as well as the role of the notary or authorized officer in finalizing the contract.

In the second section, we will review the issue of polygamy in Algerian legislation and how it is regulated in a way that aligns with legal principles that protect the rights of both women and men, in light of the provisions of the Family Law, with a focus on the legal positions related to this topic.

In the third section, we will address the documents required to finalize a marriage contract before the notary or the legally authorized officer, focusing on special provisions related to employees in the National Security apparatus and their role in managing these documents and completing the marriage contract procedures in a legal and correct manner.

This research requires a discussion of the issues related to the practical application of these conditions and components, as well as the challenges that the concerned parties may face in terms of legal procedures and the correct application of the provisions. We must also raise key research questions, such as: Do the legal provisions in marriage ensure the protection of the rights of both spouses? Does polygamy in Algerian legislation align with women's rights and promote family stability? What are the procedures that should be followed to register a marriage contract legally in Algeria?



Through this research, we aim to provide a comprehensive analysis of these issues that concern Algerian society and find practical legal solutions that contribute to improving the application of marriage provisions in Algeria.

Chapter 1: Marriage Conditions

Marriage is a sacred relationship that represents a strong contract between a man and a woman in a legal manner with the aim of establishing a lawful family. Thus, marriage is a means that enables both spouses to preserve the lineage in a legitimate way. According to Article 04, marriage is defined as "a consensual contract between a man and a woman in accordance with legal provisions, aimed at forming a family based on affection, mercy, cooperation, and the preservation of lineage."

Before marriage, there comes the engagement phase, which reflects the intention of both parties to marry. The legislator has given special legislative attention to this phase, as obligations are created for both the fiancé and fiancée. This calls for studying these obligations and the role of the legislator in protecting the rights of the fiancés before they become husband and wife, or even in the event that this relationship ends at the stage of the intention to marry.

While the marriage contract is considered a civil contract that binds the husband and wife legally and leads to the legitimate affiliation of children to the husband, there is also an Islamic aspect that is separate from this legal framework. This aspect is the permission of the marital relationship between the spouses according to religious law, which is reflected in marriage through the recitation of the Fatihah.

From the above, it is clear that the legal marriage contract is a written civil contract, under which the rights of both parties are preserved, while the religious marriage is a customary marriage, one of the most dangerous consequences of which is the loss of lineage.

Section 1: Elements of the Marriage Contract

Article 09 bis of the Family Code, amended by Order 02/05, defines the elements of the marriage contract: eligibility (first), the guardian (second), the dowry (third), the absence of legal impediments to marriage (fourth), and the submission of a medical certificate as outlined in Article 07 bis.

First: Eligibility for Marriage

1- The lack of eligibility renders the marriage contract absolutely void. Article 07 of the Family Code states that eligibility for both men and women is completed at the age of 19, and the judge may grant permission to marry before this age if there is a necessity or interest, provided that the judge is satisfied with the ability of the parties to marry. A minor spouse can be eligible to litigate with regard to the rights and obligations arising from the marriage contract. The legislator has equated marriage eligibility with civil maturity, making the marriage age identical to the age of majority, in order to avoid cases of absolute nullity.

The amendment of Article 07 of the Family Law regarding the marriage age raises significant questions about its wisdom, especially considering that girls reach maturity earlier than boys. One of the concerns is the potential harm that could be caused by early marriage and the risk of undesirable consequences. The amendment seems to suggest that the judge holds the authority to permit marriages, turning the exception into the rule, which results in an increase in the number of requests for marriage permits, ultimately leading to an increase in refusals by judges due to their overwhelming numbers. This shift raises important concerns about the underlying reasons for such an approach, especially with the aim of reducing harm and ensuring that marriage is a decision made with full understanding and responsibility.

Second: Consent (Rida) in Marriage

Article 10 stipulates that consent is established through an offer made by one party and accepted by the other, provided that the meaning of marriage is expressed legally using any appropriate language. The offer and acceptance are considered valid even if made by someone incapable, as long as the meaning of marriage is conveyed in a clear manner, whether through speech, custom, writing, or even gestures.



Third: The Role of the Guardian (Wali)

According to Article 11 of the Algerian Family Law, a marriage contract for an adult woman requires the presence of her guardian, who could be her father, a relative, or anyone she chooses. Article 13 further asserts that the guardian, whether a father or any other person, cannot force a minor under his guardianship to marry, nor can he marry her off without her consent. This provision ensures that the guardian's role is protective, maintaining the rights and autonomy of the woman.

Fourth: The Dowry (Sadaq)

Article 14 defines the dowry (Sadaq) as anything of value presented to the wife, whether in the form of money or something permissible by Islamic law, and it is considered her exclusive property, which she is free to manage as she wishes.

Regarding the determination of the dowry, Article 15 specifies that it should be agreed upon in the marriage contract, whether it is to be paid immediately or deferred. If the amount is not specified, the wife is entitled to the dowry of the equivalent (Sadaq al-Mithl).

Article 16 states that the wife is entitled to the full dowry in the event of consummation or the husband's death, whereas she is entitled to half if divorce occurs before consummation.

The dowry, or "mahr," is a financial right that the husband must provide to the wife upon marrying or consummating the marriage, as a symbol of his desire for a lifelong and honorable union. The importance of the dowry is emphasized in Islamic texts, such as "And give the women their dowries as a free gift," and "So whatever you enjoy of them, give them their due compensation as an obligation."

Thus, the dowry is considered a legitimate right of the wife, and she has the freedom to use it as she wishes. The husband has no right to reclaim it or direct it toward a specific purpose, even if that purpose relates to the marital home. The dowry acts as a form of financial compensation that reflects the wisdom behind its establishment, which is to honor and empower the woman, aiding her in preparing for marital life. It serves as a gift that partially helps secure the necessities of marriage. Consequently, the dowry represents a token of empathy and goodwill, expressing the husband's genuine intention to establish a family and a reminder for both parties of the importance and responsibility of marriage.

However, it should be noted in this context that the dowry (Sadaq) in Islamic legislation is considered more sacred than being merely a price or compensation paid by the man for enjoying a woman under the guise of marriage, as some Orientalists and Western jurists have claimed. This negative perspective was perpetuated by colonial jurisprudence in Algeria, where the dowry was viewed as a price for the woman, violating Islamic principles.

This viewpoint may stem from the legal reasoning of the Maliki school, which likened the dowry to the price in a sales contract, considering that the sale contract is one of the most well-known and important contracts. Alternatively, it might be influenced by the Hanafi school, which viewed the woman as the subject of the marriage contract, which some in the West understood as the woman being a commodity that can be bought and enjoyed by whoever has the money.

However, these opinions lack a legitimate legal foundation, as marriage is, in essence, a sacred bond based on affection, mercy, and mutual rights. This is clearly emphasized by the Algerian legislator in Article 04 of the Family Law, which highlights the noble nature of this relationship.

Fourth: The Absence of Impediments to Marriage

Article 23 of the Family Law requires that both parties be free of legal impediments, whether they are permanent or temporary. Article 24 clarifies and defines the permanent impediments to marriage, while Article 30 addresses the temporary prohibitions on women.

Thus, marriage impediments are divided into two types: permanent impediments (a), which make marriage permanently forbidden, and temporary impediments (b), which prevent marriage for a certain period or due to specific circumstances that may eventually be removed.

A. Permanent Marriage Impediments

There are three main categories: consanguinity, suckling, and affinity (marriage relations).



1. **Prohibited by Consanguinity:** This includes women who are prohibited for marriage due to their direct or indirect blood relation. This is supported by the verse: *"Prohibited to you (for marriage) are your mothers, your daughters, your sisters, your paternal aunts, your maternal aunts, your nieces (daughters of your brothers or sisters)."*

According to Article 25 of the Algerian Family Law, the prohibited consanguineal relations include: mothers, daughters, sisters, paternal aunts, maternal aunts, and nieces (daughters of brothers or sisters).

From the Quranic verse and the article, it is clear that the following categories of women are prohibited for marriage:

- **Direct female ancestors:** such as mother, grandmother (from either father's or mother's side).
- **Direct female descendants:** such as daughter and granddaughter.
- **Sisters and nieces:** all daughters from the first generation of siblings, and nieces (whether from the father's or mother's side).
- **Aunts and maternal aunts:** regardless of whether the aunt is the father's or mother's sister.

However, **the second level of relations**, such as cousins (sons or daughters of aunts and uncles), are not prohibited for marriage.

The wisdom behind these prohibitions is to avoid family conflicts, breakups, and the prevention of moral corruption in society. This also aims to preserve family ties and prevent social decay and moral degradation. Additionally, prohibiting such marriages helps to prevent the temptation and ensures purity and integrity in family relationships.

Furthermore, marriage between close relatives, even those allowed by the law, such as cousins, could carry health risks. For example, there is a potential for birth defects or mental disabilities in offspring, which strengthens the importance of adhering to the legal and health standards prescribed by Islamic law to protect the welfare of individuals and society as a whole.

2. Prohibited by Affinity (Marriage Relations)

These are individuals prohibited from marriage due to their relation through marriage, as follows:

- **Wife of the man's ancestors, regardless of whether they are on the paternal or maternal side:** This includes the wife of the father or grandfather. However, while the father's wife is prohibited for the man, his father's wife's daughter (the stepdaughter) is not prohibited for him.
- **Ancestors of the wife, regardless of whether they are on the paternal or maternal side:** Once the marriage contract is concluded, even if the couple hasn't had marital relations yet, the marriage to the wife's daughters prohibits marriage to her mothers. Similarly, marriage to the mother prohibits marriage to her daughters.
- **Wife of the man's descendants, regardless of their level:** This includes the wife of the son, or the wife of the daughter's son. The marriage contract makes the man's wife prohibited for marriage to his son or grandson, even if he hasn't had relations with them, as stated in the verse: *"And the wives of your sons who are of your own loins"*. It is noteworthy that the verse specifies the children of one's loins, meaning that the prohibition doesn't extend to adopted children.
- **Descendants of the wife, if the husband has had relations with her:** This includes daughters from the wife's side, but only if the marriage was consummated. If not, no prohibition applies. This is supported by the verse: *"And your stepdaughters who are in your care, from the women whom you have entered into marriage with; but if you have not entered into them, there is no blame upon you."*
- **Widows or divorcees of the husband's ancestors, regardless of their level.**
- **Widows or divorcees of the husband's descendants, regardless of their level.**



The wisdom behind prohibiting marriage due to affinity is that the marriage bond establishes a connection with the extended family of the spouse, making the person part of that family. This prohibition reflects mutual respect between family members and reinforces family ties.

It also serves to reduce the potential for animosity and resentment between fathers and sons, as it fosters understanding and respect within the family, preventing conflicts that may arise from inappropriate or complicated relationships.

3. Prohibited by Suckling (Rada')

The prohibition of marriage due to suckling is established by both the Quran and the Sunnah. This is affirmed by the verse: *"And your mothers who suckled you, and your sisters by suckling"* and the Hadith of the Prophet (peace be upon him): *"What is prohibited by blood relation is also prohibited by suckling."*

This is mirrored in Article 27 of the Algerian Family Law, which states that the prohibition of suckling is equivalent to the prohibition of blood relations.

Furthermore, Article 28 explains that the suckled child, alone, becomes the child of the wet nurse and her husband, and thus a sibling to all her children. This prohibition also extends to the child's descendants.

It is worth noting that suckling is proven through the testimony of women who disclose this at the time of the marriage contract, as illustrated in a case where the Supreme Court relied on the testimony of a mother who confirmed that she had suckled both the plaintiff and defendant when they were infants.

The wisdom behind the prohibition of marriage due to suckling lies in the strong similarity between a wet nurse and a biological mother. Since both share in the nourishment of the same child, this establishes a bond similar to blood relations, which justifies the prohibition of marriage between individuals who are related by suckling, as it creates a kinship bond akin to that of biological relatives.

B. Temporary Prohibitions to Marriage

The temporary prohibitions to marriage can be summarized as follows:

1. **The Chaste Woman (Al-Muhsanat):** It is prohibited for a man to marry a woman who is already married, i.e., she is in the marital bond of another man, as the right of her first husband over her still exists. This is in accordance with the verse: *"And married women (are prohibited) except those whom your right hands possess."* Thus, a marriage with a woman who is already married is invalid and is subject to annulment, whether consummated or not. However, this does not negate the establishment of paternity if children are born from this union.

2. **The Woman Divorced Three Times (Al-Mubarra'ah):** If a man divorces his wife three times, she becomes permanently prohibited for him, and no subsequent contract or reconciliation can occur unless she marries another man, has marital relations with him, and then divorces or becomes widowed. This is in line with the verse: *"Divorce is twice; then either keep her in an acceptable manner or release her with kindness."* According to Article 30, paragraph three, of the Algerian Family Code: "A man cannot remarry the woman he has divorced three times unless she marries another man, and the marriage is consummated before being divorced or widowed." Therefore, if a man divorces his wife three consecutive times, she is permanently prohibited from him until she marries another man, but if he divorces her once and uses the phrase of three divorces, she is still permissible for him to remarry.

3. **The Woman in Waiting Period (Iddah):** A woman in the waiting period (iddah), whether it is due to divorce or the death of her husband, cannot remarry until the iddah period is over. This is supported by the verses: *"And you have no right over them (wives) in terms of remarriage during their waiting period."* and *"Do not contract marriage with them until the prescribed waiting period reaches its term."* It is important to note that the waiting period for a divorced woman is applicable only after marital relations have occurred. If a woman marries a second man during the waiting period without the finalization of the divorce proceedings from her first husband, this constitutes



adultery. Therefore, any marriage during the waiting period is invalid and must be annulled, even if consummated, though it does not affect the legitimacy of the children.

4. **Marriage to Two Sisters:** It is prohibited for a man to marry two sisters, whether by blood or by suckling, as evidenced by the verse: *"And you shall not combine two sisters (in marriage), except what has already occurred."* The Prophet (peace be upon him) also said: *"Do not marry a woman on top of her aunt, or her maternal aunt, or her niece, and if you do so, you will sever your family ties."* However, if the first wife dies, the prohibition is lifted, and the man can marry the sister of his deceased wife or other prohibited relatives.

These prohibitions are designed to protect the sanctity and structure of the family, prevent the mixing of lineages, and avoid harmful relationships that may result in societal or familial discord. They also contribute to preserving the health of relationships by ensuring that marriage is based on mutual respect and proper understanding of the roles and responsibilities within the family unit.

Marriage Regulations for Algerians and Foreigners: It should be noted that the marriage of Algerians with foreigners is subject to regulatory provisions. These provisions ensure that the marriage respects national laws and international agreements.

Rights and Duties of Spouses

According to Article 36 of the Algerian Family Code, both spouses are obligated to:

- Maintain the marital bond and fulfill the shared responsibilities of married life.
- Treat each other with kindness, respect, affection, and compassion.
- Consult each other on family matters, including spacing of children.
- Preserve family ties and treat their parents and close relatives with respect.
- Visit and host their parents and relatives in a courteous manner.
- Treat each other's parents and relatives with kindness, respect, and visit them regularly.

Financial Independence of Spouses

Under the Algerian Family Code, the theory of financial independence for each spouse is adopted, consistent with Islamic law. Article 37 stipulates that each spouse has a separate financial status. However, the spouses may agree in their marriage contract or in a subsequent agreement to determine common assets acquired during the marriage, as well as the proportion of each spouse's share in these assets.

Chapter Two: Polygamy in Algerian Legislation

Based on Islamic law, Algerian law allows polygamy as an exceptional case, permitting a man to marry more than one wife under certain conditions. This is allowed if there is a legitimate reason, the man is financially able to support his wives, and there is the intention of equality among them. This is in accordance with Article 08 of the Family Code, which states: *"It is permitted to marry more than one wife within the limits of Islamic law when a legitimate reason exists and the conditions and intention of justice are met."*

Criticisms of the Law on Polygamy:

The legislator has been criticized for not defining what constitutes a "legitimate reason" for polygamy, which could lead to ambiguity and confusion in legal practice. This lack of clarity often leads to legal disputes where judges are left to interpret what is considered a valid reason. Commonly, these reasons might include the infertility of the wife, serious illness, or permanent disability. These concerns have raised the need for further clarification by the Algerian legislator.

Conditions for Polygamy

The conditions under which polygamy is permitted in Algerian law include the following:

- The man must have the financial means to support multiple wives equally.
- The intention of fairness and equality among the wives must be clear.
- A legitimate reason for polygamy, as defined by the law, must exist.

Some scholars, such as Al-Faqih Belhaj Ali in his work *"Ahkām al-Zawaj wa Āthārha fī Qānūn al-Usrah al-Jazā'irī,"* have argued that personal dislike or desire for another woman could be valid



reasons for polygamy, but this interpretation is controversial. Many argue that this could undermine the dignity and status of the wife, and that divorce should be the alternative solution if a man is unhappy with his wife, rather than taking a second wife.

Guarantees for the First Wife and Penalties for Violations:

In the case of polygamy, there are guarantees for the first wife to ensure her rights are respected, including maintenance and justice in matters of housing, financial support, and emotional treatment. If the husband violates these principles, he could face legal consequences. The law ensures that women are not unfairly treated in a polygamous marriage and that the husband is held accountable for meeting his obligations.

In conclusion, while Algerian law allows polygamy in exceptional cases, the legal framework surrounding it remains subject to scrutiny. The conditions and justifications for polygamy must be clearly defined to avoid confusion and protect the rights of all parties involved, particularly the first wife.

Based on this, the conditions for polygamy will be defined as follows: (A) religious conditions and (B) legal conditions.

A. Religious Conditions: The religious conditions revolve around the number of wives, the ability to provide financial support, and the necessity of having the intention of justice.

1. **Number:** The number of wives must not exceed four.
2. **Ability to Provide Financial Support:** The legislator did not provide detailed provisions regarding this condition. However, reference should be made to Islamic law and the provisions of Article 222 of the Family Law.
3. **Intention of Justice:** In this regard, the legislator deviates from Islamic law, which stipulates the necessity of actual justice. The question arises: Did the legislator mean that the husband must have the intention of justice before concluding the contract, while justice afterward does not matter? The legislator should have used the term "justice" without requiring the intention, as the phrase creates unnecessary complications for judges, especially when it comes to proving the intention.

B. Legal Conditions :

1. **Existence of a Legal Justification:** Neither Islamic law nor Algerian legislation defines what constitutes a legal justification. However, a medical certificate in the case of infertility or a serious illness can be considered a legitimate justification.
2. **Informing the Previous and Subsequent Wives:** This allows the wives to request divorce if they wish. However, the law does not specify how to notify them or who is responsible for the notification—whether it is the husband or a judicial officer.

Guarantees for the Previous Wife in the Case of Polygamy and Penalties for Breach:

The most important guarantees provided by the law for the previous wife in the case of breach of the polygamy conditions are as follows:

1. **Refusal of Permission in Case of Failure to Inform or Absence of Legal Justification:** According to the third paragraph of Article 8 of the Family Law, the court president may refuse permission if the wife is not informed, there is no consent, or there is no legal justification.
2. **Right to File for Divorce:** The wife has the right to file a lawsuit against her husband requesting divorce in the case of deception.
3. **Cancellation of the New Marriage Before Consummation:** The new marriage can be annulled before the consummation if the husband has not obtained permission from the court as stipulated in Article 8 of the Family Law.

Section Two: Marriage of Minors

Marriage Eligibility in Algerian Legislation: Referring to the provisions of Law No. 63-224 dated June 29, 1963, the Algerian legislator set the marriage age for men at 18 years and for women at 16 years. However, in Family Law No. 84-11, the eligibility for marriage was inconsistent with the Civil Code and Family Law, where the legal majority was 19 years, while Family Law No. 84-11 set the marriage eligibility for men at 21 years and for women at 18 years. Consequently, a person may



reach the legal majority under the Civil Code but may not be eligible for marriage under Family Law, and a woman may be considered eligible under Family Law without reaching the legal majority according to the Civil Code. However, under the amendment of Family Law by Ordinance 05-02, the legislator set the eligibility for both men and women at 19 years, as stipulated in Article 7, which states: "The eligibility for marriage for both men and women is complete at 19 years."

It is evident here that the legislator has equated men and women in terms of legal majority and financial independence, as well as the material and moral responsibilities of marriage, which are significant and serious, along with biological and psychological factors. Marriage eligibility requires both mental maturity and physical adulthood, ensuring that the couple is capable of handling the financial and emotional burdens of marriage. The minimum marriage age is based on comparative law, which now agrees on preventing marriages for minors who are incapable of handling the material and emotional obligations of marriage. The eligibility is determined at the time of the marriage contract, not at the time of consummation, and is verified through the civil status register or the birth certificate obtained from the civil status records of both spouses.

However, in accordance with the provisions of Article 6, paragraph 2, of Presidential Decree No. 16-254, which ratifies the African Charter on Human and Peoples' Rights regarding the rights of women in Africa, it states: "The parties to the charter ensure equal rights for men and women and consider them as equal partners in marriage. In this regard, the parties adopt appropriate legislative measures to ensure that the minimum age for marriage for women is 18 years." From this, it is clear that the Algerian legislator has aligned with the international agreements, considering the eligibility for marriage for women as 18 years, as agreements ratified by the President of the Republic take precedence over national law according to Article 150 of the 1996 Constitution, as amended by Law 16-01, which states: "Treaties ratified by the President of the Republic, according to the conditions set out in the Constitution, prevail over national law."

The Eligibility for Marriage for a Girl

The eligibility for marriage for a girl is determined by reaching the age of 18 years, while for a boy, the eligibility for marriage is reached at 19 years, according to Article 07 of the Family Law. Since the agreement ratified by the President of the Republic takes precedence over domestic laws, and the Family Law is a regular law, the provisions of this agreement prevail over the provisions of Article 07 of Ordinance 05-02.

Given that the aforementioned agreement, ratified under Presidential Decree No. 16-254, states that both men and women enjoy equal rights and are considered equal partners in marriage, the principle of equality must be upheld. Therefore, the Algerian legislator should amend the provisions of Article 07 of the Family Law to make the marriage eligibility age for both men and women 18 years, as is the case in Moroccan legislation.

The Impact of Presidential Decree No. 16-254 on Minor Marriages

Here, we will address the issue of child marriage in Islamic jurisprudence in the first section and then discuss it in light of the provisions of Ordinance 05-02 and Presidential Decree No. 16-254 in the second section.

First Section: The Marriage of a Minor Girl in Islamic Jurisprudence: The majority of jurists agree that both parties involved in the marriage contract must be eligible to conclude it, meaning the person executing the contract must have the authority to do so. As Allah Almighty says: (And test the orphans until they reach marriageable age), which refers to the ability to consummate marriage. Allah has set the age of maturity as the time when human intellect is fully developed, and this is when legal obligations are imposed, as it is a clear and measurable sign, visible to the senses. Therefore, anyone who reaches maturity and shows no signs of mental impairment is considered legally accountable. The Prophet Muhammad (PBUH) said: "The pen is lifted from three: from the sleeper until they wake up, from the child until they reach puberty, and from the insane until they regain their sanity." If no signs of maturity are evident, a person is considered an adult once they reach the usual age of maturity. However, jurists differ on the age at which marriage can occur, ranging between 15 and 18 years.



The disagreement among jurists concerns the marriage of minors who have not reached puberty, regarding whether it is allowed, valid, and enforceable. The opinions can be summarized as follows:

- **First Opinion:** The majority of jurists (Hanafi, Maliki, Shafi'i, and Hanbali) agree that there is a legal guardian (wali) over the minor, and it is permissible for the guardian to marry off the minor. They support this with several arguments :

1. **From the Quran:** The verse that refers to the waiting period for women who are unable to menstruate (due to age), indicating that girls who have not reached puberty can still be married and their marriage is valid.

2. **From the Sunnah:** The Prophet Muhammad (PBUH) married Aisha (RA) at a young age, and there is no evidence to suggest that this was an exception for the Prophet alone. Many companions also married off minors, such as Ali (RA) who married his daughter Umm Kulthum to Umar ibn al-Khattab (RA).

3. **From Consensus:** The companions of the Prophet and Islamic jurisprudence agreed on the validity of a guardian marrying off a minor girl, even if she objects to the marriage. Ibn Qudama reported the consensus of scholars on this point.

4. **From Narrations:** There are reports from companions like Ibn Umar (RA) and Ali (RA) marrying off their minor daughters.

5. **From Reason:** Marriage is a beneficial institution for both genders, offering social, emotional, and physical advantages. The suitable match may be available during childhood and might be lost after puberty, so it is better to marry off minors to protect their interests.

- **Second Opinion:** Scholars like Ibn Shibrama, Uthman al-Batti, and Abu Bakr al-Asamm disagree with the marriage of minors and believe that no one has the right to marry off a minor before they reach adulthood and give their consent. They argue that:

1. **From the Quran:** They cite the verse (And test the orphans until they reach marriageable age), asserting that puberty is the sign of maturity. If marriage were permissible for minors, this verse would lose its meaning.

2. **From Reason:** They argue that marriage should be for companionship, shelter, and procreation, which minors are not capable of fully understanding or engaging in. Forcing a minor into marriage may cause harm and prevent them from finding harmony with their spouse, which goes against the wisdom behind marriage contracts.

Preference:

After presenting the differences among the scholars on the issue of marrying minors, it appears that the majority view is the one that permits the marriage of a minor by her guardian if there is a benefit, and in order to prevent the potential harms of remaining unmarried. The Hanbali scholars, in this regard, stipulate that it is permissible to consult the judge when marrying minors. If a minor girl marries without the permission of her guardian, the guardian has the right to annul the marriage, whether before or after consummation. In this context, Az-Zabidi Ibn Abdul-Salam states: "Whoever follows the goals of the Sharia in bringing about benefits and preventing harms, will come to realize that this benefit must not be neglected... and this harm must not be approached, even if there is no specific text, consensus, or analogy."

Section Two: Marrying a Minor Under the Provisions of Order 05-02 and Presidential Decree 16-254

The Algerian legislator has considered marriage as a consensual contract based on the free will of both parties, meaning it is one of the actions that requires full legal capacity due to the material obligations and social and familial responsibilities it entails. The will must come from a mind capable of distinguishing between what benefits and harms it, and the individual must have reached a level of maturity and natural readiness for marital relations. According to Article 04 of Order 05-02, "Marriage is a consensual contract between a man and a woman in accordance with the Sharia, with the goal of forming a family based on love, mercy, cooperation, and the preservation of lineage." The same order also stipulates the conditions for the validity of the



marriage contract through the provisions of Article 09, which includes the eligibility of both parties to marry. Article 07 of the same order states: "The eligibility of both the man and the woman to marry is completed at the age of 19, and the judge may grant permission for marriage before this age in cases of necessity or benefit, once the capacity of both parties to marry is confirmed."

The legislator, through the provisions of Order 05-02, has set the minimum age for marriage for both men and women at 19 years, aiming to establish a marriage institution on solid foundations. Regardless of sexual maturity, which has become insufficient in modern times to conclude a marriage contract, it is essential to regulate the age at which the objectives of marriage are achieved in order to ensure the safety of both the individual and society.

Although the general rule set by the Algerian legislator is that the man and woman should reach 19 years of age (the same age as legal adulthood), the legislator has provided an exception where the judge is granted the authority to permit the marriage of minors. Therefore, the judge may grant permission for marriage before the age of 19 for a legitimate interest or necessity, once the capacity of both parties to marry is confirmed. The judge is tasked with granting permission for the marriage of a minor by issuing a well-reasoned decision that explains the interest and justifying reasons for the decision.

Thus, the benefit or necessity must be clearly established and be the main reason for seeking the marriage permission. The judge must ensure this before granting permission. Since the legislator did not specify what constitutes such an interest, it should be inferred after hearing from the minor's parents, as the Supreme Court ruled in its decision dated 17/05/1998, stating: "It is legally established that the father is the guardian of his minor children, and upon his death, the mother automatically takes his place as the legal guardian." It could also include an opinion from a specialist doctor or a social investigation on the matter, or from an interview between the judge and the minor or minors wishing to marry. This interest could include situations like an uncontrolled sexual drive, a girl being pregnant due to suspicion or rape, leading to a request for marriage to the person responsible for the pregnancy or rape.

For minors, the consent of the guardian is mandatory according to the provisions of Article 11, Paragraph 2 of the Family Law, which states: "Without prejudice to the provisions of Article 07 of this law, the marriage of minors is undertaken by their guardians: the father, or one of the paternal relatives, or the judge as a guardian for those who have no guardian." If the guardian refuses consent, and the minor insists on marriage, and both parties remain firm in their positions, the matter returns to the judge, who decides whether to grant the marriage permission or not, in accordance with what he has confirmed through the provisions of Articles 11, Paragraph 2, and Article 90 of Family Law 39.

The judge must ensure the presence of necessity, a clear or established interest for both parties, and the ability to bear the financial and moral consequences of marriage, among other justifications that would lead the judge to waive the age requirement set by law in accordance with Article 07, Paragraph 1 of the Family Law.

As for the failure to meet the eligibility condition or the lack of marriage permission, the Algerian legislator did not explicitly or implicitly outline the consequences of violating the marriage eligibility age or contracting marriage before reaching the required age. This differs from Law No. 63-224, which set specific consequences for violating eligibility conditions or obtaining permission.

If the judge grants permission for the minor's marriage, the minor gains eligibility to litigate regarding any matters related to marriage and its consequences, including rights and obligations, as the legislator grants them eligibility in specific matters related to the effects of the marriage contract, such as rights, obligations, and family-related disputes, like alimony, children, and family matters.

Thus, a minor husband can claim his marital rights and act as the plaintiff, and likewise, a minor wife can seek divorce (khul'), in which case she must pay the compensation for divorce. This differs from civil contracts where reaching legal adulthood is the only requirement for financial transactions.



After the President's approval of Presidential Decree No. 16-254, which concerns the interpretative declarations of the African Protocol on Human Rights and People's Rights regarding women's rights in Africa, which set the marriage eligibility age for girls at 18, we find a contradiction with the amended Family Law.

Order 05-02, which set the marriage eligibility age at 19 years. This raises the question of whether the judge is obligated to grant marriage permission to a minor girl under the age of 19, or to a girl under the age of 18 based on Presidential Decree 16-254.

According to the provisions of the Presidential Decree, a girl who is 18 but not yet 19 does not require judicial permission to marry, as she is not considered a minor under the agreement ratified by the President of the Republic, which holds higher authority than ordinary law, according to Article 150 of the amended 1996 Constitution. However, if the girl is under 18 years old, she is considered a minor and requires judicial permission.

Regarding Article 06 of Presidential Decree 16-254, in its second paragraph, the girl who requires judicial permission is the one under 18 years of age. However, the Algerian legislator did not set a minimum age that the judge must not go below when granting marriage permission, leaving it to the judge's discretion. Therefore, the judge may grant permission provided the age does not fall below 18, with the possibility of setting narrow margins (one or two years) in exceptional cases.

As for the boy, the minimum age is not less than 19 years, except by one or two years. This is the same in Moroccan legislation, where the minimum age for both the girl and the boy is not specified. In such exceptions, the age should not fall below one or two years, with a three-year exception, as stated in a 2005 ruling by the Tangier Court of Appeal in Morocco, which stated: "Request for permission to marry a 14-year-old minor - approval from the guardian and a medical report - court discretion... Yes."

Marriage eligibility is considered complete when the male and female reach the age of 18. However, Article 20 of the Moroccan Family Code grants the family judge the authority to grant permission for marriage before the minor reaches 18 if it serves the minor's best interests and valid reasons for doing so are provided.

If the guardian's consent and the medical report confirming the minor's biological ability to marry are provided, the girl may still be at an early age of 14, and her best interests may require postponing her marriage until she matures. Rushing her marriage could lead to unforeseen consequences. The judgment rejecting the request was deemed correct and should be upheld.

Additionally, the Algerian legislator should have set a minimum age for both the boy and the girl in the case of granting marriage permission, as is the case in some Arab legislations, such as the Syrian legislation, which sets the minimum marriage age at 15 years for the boy and 13 years for the girl, according to Article 18 of the Syrian Personal Status Law, which states: "If a male adolescent claims to have reached puberty after completing 15 years or a female adolescent after completing 13 years and requests marriage, the judge may grant permission if he finds their claims truthful and their physical maturity likely..."

Section Three: Required Documents to be Submitted to the Notary or Authorized Legal Officer

According to the law, both parties to the marriage contract must submit a recent medical certificate dated within the last three months, proving they are free of any disease or factor that could pose a risk to the marriage. The notary or civil status officer must verify that both parties have undergone the necessary medical examinations before preparing the marriage contract. The parties must be aware of what these examinations may reveal, including any diseases or health factors that may negatively affect the continuation of the marriage or impact one party's health or the marriage in general. This should be noted in the marriage contract, which is a new procedure not established under Law No. 84-11 (Family Code).

The couple may also stipulate in the marriage contract or a subsequent official contract any conditions they deem necessary, such as the condition of not marrying more than one spouse or the woman working, provided these conditions do not contradict legal provisions.



1. **Special Provisions for National Security Employees:** The Algerian legislator has provided special provisions for certain categories, including national security employees, members of the national army, and members of the national gendarmerie, who must obtain written permission from their respective authority. To obtain the permission, a written request must be submitted to the administrative body responsible for their employment three months before the marriage. The request should be accompanied by a copy of the marriage certificate and nationality certificate. The absence of a special permit for national security employees does not affect the validity of the marriage contract.

Algerian law, under the repealed Article 20 of Order 05-02, allowed a marriage agent to conclude a marriage contract on behalf of the spouse, provided they had a special power of attorney drafted by the notary. However, due to the repeal of this article in the new law, it no longer has legal effect, and the general rules of civil law regarding agency provisions must apply. It is important to note that the marriage contract is considered a civil contract, as previously mentioned.

Required Documents:

The Civil Status Law, in Articles 74, 75, and 76, defines the documents that must be submitted to the civil status officer when completing the marriage contract.

2. **Civil Status When Registering the Marriage Contract:** The Algerian legislator does not detail the exact process for registering the marriage contract but emphasizes the importance of the authorized officer ensuring that the marriage contract meets the requirements and conditions set forth in Article 9 of the Family Code. However, referring to the Civil Status Law, Article 72 distinguishes between two cases:

- **Marriage Certificate Requirements :**

- A recent birth certificate for both spouses, not exceeding three months, or national identity cards or family record books.
- A certificate of residence for the husband.
- The judicial permit for anyone who does not meet the legal marriage age.
- A marriage license required by law for foreigners, national security employees, members of the national army, and national gendarmerie.
- A death certificate of the previous spouse or a final divorce ruling for a woman whose marriage was dissolved due to divorce or death.

3. **Marriage Registration and Data Included in the Marriage Contract:** The Algerian legislator did not detail the procedure for marriage registration in the Family Code but emphasized that the authorized officer must ensure that the marriage contract meets the necessary legal requirements according to the Family Code.

If the marriage contract is executed before a notary, the notary records the contract in their registers and provides the couple with a certificate to confirm this. The notary then sends a summary of the contract to the civil status officer within three days, who registers it in the civil status records within three days from receipt. The civil status officer then gives the couple a family book and records the marriage details in the margin of their birth certificates, in accordance with Article 72, Paragraph 02 of the Civil Status Law.

If the contract is executed before the civil status officer, the officer is required to register the marriage contract and provide the couple with a family book, as stipulated in Article 72, Paragraph 1 of the Civil Status Law.

As for the data that must be included in the marriage contract, Article 73 of the Civil Status Law specifies the following:

- Confirmation that the marriage was conducted in accordance with legal requirements.
- The titles, names, dates, and places of birth of both spouses.
- The titles, names, and occupations of the parents of both spouses.
- The titles, names, and occupations of the witnesses.
- The legal marriage permits for individuals who are required by law to obtain one.



- The exemption from the legal age granted by the judge for the spouse or spouses who have not reached the legal marriageable age.

CONCLUSION:

It is clear from the above that the Algerian legislator, in light of the recent amendments to the Family Code, sought to keep pace with the economic, social, and cultural transformations the country has undergone due to globalization. The legislator also tried to remove some restrictions that were a heavy burden on Algerian women, revisiting the nature of the contract that binds them to their social partner. The legislator considered the marriage contract to be a civil contract, with the husband and wife being its main parties. Thus, the legislator made consent the most important element of the contract, so that the absence of consent leads to the invalidity of the contract, while violation of other conditions results in annulment, as previously mentioned.

Additionally, the legislator restricted the execution of this contract for the benefit of both parties with conditions aimed at protecting them, the most important of which is the requirement of providing a medical certificate before executing the marriage contract, due to the potential negative effects it may have on the spouses and their future children. The Algerian legislator acted wisely in this case, as it is essential to ensure that both parties are free from any diseases that may negatively impact the health of the marriage and family life.

The Algerian legislator also acted wisely by granting women the freedom to choose who will handle their marriage matters. This was necessary due to the practical realities and legal disputes presented before the relevant authorities, where some guardians would abusively refuse to attend the marriage contract signing due to previous conflicts (such as divorce). This often compounded the woman's suffering in some cases and made the execution of the contract more difficult.

The precise application of all marriage conditions is of great importance, as it enhances the stability of marital life and helps protect the rights of all involved parties, especially the woman. Ensuring that health and legal conditions are met reflects the law's focus on establishing healthy families that enjoy legal well-being, which contributes to the creation of a stable and balanced society.²⁰¹⁴.

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