



## The Algerian legislator was keen to prove marriage to protect the Algerian family

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### ABSTRACT:

To preserve rights from being lost, the Family Law stipulates the necessity of registering marriage contracts and registering them in the civil status records, as customary marriage is a social phenomenon that is increasing day by day. This prompted many legal and practical problems regarding the issue of proving it.

In order to confront these problems, the Supreme Court decided to establish customary marriage, and to consider it valid as soon as it fulfills its legal conditions. The Civil Status Law and the Civil and Administrative Procedures Law regulated the procedures for proving and registering customary marriage contracts.

From here, the importance of the subject appears, which necessitated a search for the legal mechanisms established by the Algerian legislator to prove marriage.

**Key words:** Marriage, proof, judiciary, procedures, family rights.

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### Introduction:

Referring to Algerian legislation, we find that the rules of evidence occupy an important place, as the legislator has devoted a large space to them within the legislative system, as evidenced by the vast number of texts governing the rules of evidence in civil matters in general and family matters in particular. This is because one of the most prominent and broadest issues addressed by the legislation is evidence in various disputes related to family affairs, whether in substantive or procedural rulings.

Given the importance of the marriage contract in Islamic law and its seriousness and status in Islamic society, witnessing the marriage contract was legislated for the purpose of authentication, announcement, and disclosure in order to preserve rights and ward off the harm that may result from a marriage that is not authenticated by witnessing and writing. Islamic law has indicated that debts should be written down and witnessed in all transactions, in order to protect people's rights and honor, so that the safety of the family and the stability of society can be assured. To achieve this, Islamic law and personal status laws in various Arab countries, including Algeria, call for the documentation of marriage contracts to protect rights from abuse and loss.

Writing is considered one of the most important means of expressing human will, as it documents information, facts, and rights that can be invoked when necessary. Written proof is evidence for judicial and legal proceedings.

Therefore, marriage contracts may be given a religious character and are concluded in the presence of a group of Muslims and relatives, accompanied by an imam to read the Fatiha, announce the dowry

publicly, and hear the expressions of consent and acceptance from both spouses, with witnesses attesting to the contract.

All of this is done when the marriage is announced and called a customary marriage (marriage by the opening chapter of the Quran). However, in order for it to be finalized and produce legal effects in a manner that protects the rights of both parties, it must be subject to administrative procedures, whereby the marriage is performed before a civil registrar or notary and then recorded in the civil registry, with this registration serving as proof of the marriage.

However, problems arise when a marriage is performed according to the Fatiha, which is known as a customary marriage, in accordance with customs and traditions, fulfilling all the conditions for its validity, but is not automatically registered in the civil registry. This situation will cause many problems for the spouses and even for the children born of this customary marriage. Therefore, in order to preserve rights, this contract must have legal legitimacy that guarantees both parties their rights, such as alimony, lineage, and inheritance. Hence, the importance and sensitivity of proving the marriage contract as the ideal means of embodying the marital relationship, which is the foundation of society, as it is the legal guarantee of the resulting rights and obligations. The number of cases brought before the courts regarding the validation of marriage contracts and the establishment of parentage is the best evidence of the sensitivity of the issue of validating marriage contracts, especially in their customary form. What methods has the Algerian legislature adopted to validate marriage contracts?

Marriage is concluded in accordance with Islamic law and is valid when it is based on mutual consent and fulfills the legal requirements of eligibility, dowry, guardian, witnesses, and the absence of legal impediments, without the need for specific formalities and procedures.

However, referring to the provisions of Algerian law, in particular the Algerian Family Law and the Civil Status Law, we find that the Algerian legislator considers the marriage contract to be a formal contract that is not recognized and does not arrange its provisions by mere mutual consent, but rather requires its registration with the civil status authority in order for it to have legal effect.

Article 18 of the Family Code stipulates that "the marriage contract shall be concluded before a notary or a legally qualified official, taking into account the provisions of Articles 09 and 09 bis of this Code." Article 22 of the Family Code also stipulates that "the marriage shall be proven by an extract from the civil status register, and in the event of non-registration, it shall be proven by a court ruling. The judgment confirming the marriage must be registered in the civil registry at the request of the public prosecutor."

By extrapolating the provisions of these two articles, we find that the Algerian legislator has distinguished between official marriage (first section) and customary marriage (second section) in the proof of marriage contracts.

lated in Articles 09 and 09 bis of the Q.A.J. are sufficient for the contract to be concluded. However, the preservation of the rights and duties resulting from it, on the one hand, and the difficulty and complexity of the verification process, on the other, necessitate a series of procedures for its registration (first) and invocation (second).

### **First: Procedures for formalizing a marriage contract**

Algerian lawmakers have stipulated that in order to conclude a marriage contract and arrange its legal effects, several procedures must be followed, the most important of which are as follows:

1. The formal marriage contract must be drawn up by a legally qualified official.

Based on Article 18 of the Civil Code, it is clear that Algerian lawmakers have assigned the task of concluding marriage contracts to legally qualified officials or notaries. Referring to Article 71 of Civil Status Law No. 70-20, we find that the officials qualified to draft marriage contracts are civil status officers or judges.

The civil registrar is the president of the municipal council or his deputies, and he may delegate a municipal official under his responsibility, provided that the latter is at least 21 years of age, in accordance with Articles 1 and 2 of the Civil Status Code.

The notary is a public official responsible for drawing up contracts that must be formally executed, as well as contracts that the parties wish to give formal status.

Article 71 of the Civil Status Law limits territorial jurisdiction to the registrar or civil status officer whose jurisdiction covers the place of residence of the parties to the marriage or one of them, or the place where one of them has been residing continuously for at least one month prior to the date of the marriage. Therefore, the jurisdiction specified in the text of this article is considered to be exclusive, and thus the marriage applicants may not move to any municipal headquarters or any notary office that is not legally competent. Nor shall the notary or civil registrar be entitled to document and register a marriage contract for a couple who do not have a domicile or place of residence within their jurisdiction, otherwise it shall be subject to annulment by any interested party. This applies to marriages contracted within the country. As for marriages contracted outside the country, the authority to draw up and register them has been delegated to the heads of diplomatic missions supervising consular departments or the heads of consular centers, pursuant to Articles 96 and 97 of the Civil Status Law, in their capacity as civil status officers, in accordance with the provisions of Article 1 of the Civil Status Law.

This multiplicity of persons qualified to draw up marriage contracts is criticized by Professor Ben Shuikh Al-Rashid on the grounds that it can sometimes cause many problems.

## 2- Provision of the necessary documents for registering the marriage contract

Article 21 of the QAH stipulates that the procedures for registering a marriage contract are subject to the provisions of the Civil Status Law, which specifies in Articles 74, 75, and 76 the documents that the marriage contract drafter must ensure are available before proceeding with the drafting of the marriage contract, which are as follows:

- Original birth certificates for both spouses, issued within the last three months.
- Residence certificate for the spouse who belongs to the local jurisdiction of the court or municipality.
- A license issued by a judge for those who do not meet the legal age requirement for marriage, in accordance with Article 75 of the Civil Code and Article 76 of the Family Code.
- Article 07 bis of the QAJ also stipulates that applicants for marriage must submit a medical certificate, dated within the last three months, proving that they are free of any disease that may constitute a danger that could interfere with the marriage. In implementation of this article, Executive Decree No. 06-154 was issued, specifying the conditions and procedures for applying the provisions of Article 07 bis of the Family Code and setting out the format of the medical certificate.
- Submission of a copy containing the conditions stipulated by both spouses, in accordance with the provisions of Article 19 of the Family Code.
- The death certificate of the former spouse or the final divorce decree for a wife who was married and whose marital relationship was dissolved due to divorce or death, in accordance with the provisions of Article 75 of the QAHM.
- In the case of a second marriage, a man who wishes to remarry must submit a second marriage license issued by the president of the court, in accordance with Article 08 of the Q.A.J.
- Submission of the marriage license required by law for certain categories of persons, such as national security personnel, members of the National People's Army, and members of the National Gendarmerie, as provided for by law, where applicable.

### **3- Registration of the official marriage contract**

The Family Law does not stipulate how the marriage contract should be registered, as it merely requires the person legally qualified to conclude the marriage contract to ensure that the conditions set forth in Articles 09 and 09 bis of the Family Law are met. Referring to the provisions of the Civil Status Law, we find that it distinguishes between two cases: in the case where the civil registrar is responsible for drawing up the marriage contract in accordance with the first paragraph of Article 72 of the Civil Status Law, he shall register it in the civil status records within five days of drawing up the contract and shall issue a family book to the spouses.

However, if the notary is responsible for drawing up the marriage contract, he shall register the contract in his records and provide the couple with a certificate confirming this. He shall then send a summary of the contract within three days to the civil registrar, who shall copy it into the civil registry within five days of its delivery, give the spouses a family record book, and record the marriage in the margin of their birth certificates in accordance with Article 72 of the Civil Code.

Whether the marriage contract is concluded before a notary or before a civil registrar, it must include the essential information specified in Article 73 of the Civil Status Code and Articles 15 and 19 of the Family Code.

#### **Second requirement: Methods of proving an official marriage contract**

The Algerian legislator has regulated how to prove an official marriage contract in Article 22 of the Family Code, from which we conclude that an official marriage contract is proven by an extract from the civil registry. However, our study of the drafting of marriage contracts has shown us that the Algerian legislator has delegated this authority to the registrar, the judge, and the notary. Therefore, is the certificate issued by the notary and the judge considered a document proving the marriage contract, just like the extract issued by the registrar?

#### **First: Proof of marriage contract with an extract from the civil registry**

According to Article 18 and the first paragraph of Article 22 of the Civil Code, it is clear that the marital relationship can only be proven by a marriage contract, which is a documentary evidence issued and registered by the civil registrar. If it is impossible to prove the marriage officially, it can be proven by other means.

The Algerian legislature has given priority to proving the marriage contract by having it notarized and registered with the civil registrar as a general rule. If registration is impossible, the marriage is proven by a court ruling and recorded in the civil registry.

The marriage certificate is the only legal means of proving the existence of a legal and valid marital relationship. Therefore, any person claiming to be married to another person under a marriage contract must have a copy of the marriage certificate issued by the civil registry in order to be entitled to claim the legal effects of that contract.

This has been confirmed by the Supreme Court in several of its decisions, including the decision issued on April 21, 1975, which states: "It is legally established that no person may claim to be married unless this is proven by a contract registered in the civil registry."

#### **Secondly, the extent to which a notarized contract is considered proof of a formal marriage contract**

According to Article 03 of Law No. 06-03 on the regulation of the legal profession, contracts drawn up by a notary are formal contracts. However, the Algerian legislature has excluded certain contracts drawn up by notaries, making their effect contingent upon the completion of subsequent legal procedures. Examples include contracts relating to real estate or real property rights, where the notarized contract only takes effect after it has been registered and published in the land registry.

The same applies to marriage contracts concluded before a notary, which the legislator has subjected to subsequent procedures after their drafting in order for them to be legally valid, in accordance with the provisions of Article 72 of the Civil Code.

If it is not registered within the legally specified period, it becomes a void contract, and the spouses must then resort to the court to obtain a ruling confirming the marriage contract and ordering its registration in the civil status records. In this case, the notarized contract can be used as a means of proving the marriage contract before the judge. The judge has full discretion in accepting this certificate as proof of the marriage contract.

This is unlike Islamic law, which has established three ways to prove marriage from a legal standpoint: acknowledgment, evidence, and refusal to take an oath.

## **Section II: Proving a customary marriage contract**

The issue of customary marriage is one of the most serious contemporary issues in the field of marriage, especially since such contracts have increased and spread in recent years, which necessitates research into how to prove them, particularly since most Arab legislation, including Algerian legislation, requires the registration of marriage contracts for practical purposes to preserve rights from being lost.

Algerian lawmakers have attempted to address the issue of customary marriage contracts by enacting a set of legal provisions that require citizens who are married under customary law to apply to the courts for an order or ruling to register their contracts in the civil registry, given the importance of registering marriage contracts and the consequences thereof.

The Civil Status Law stipulates that registration is based on a simple order, based on a petition submitted by the public prosecutor to the president of the court, while the Family Law stipulates that the marriage contract is proven by a ruling issued by a personal status judge after conducting an investigation to prove the marriage. This raises the question of when registration is based on an order and when it is based on a ruling.

The criterion for distinguishing between an order and a ruling lies in whether the customary marriage is disputed or undisputed, given that the dispute in a customary marriage may relate to its existence as a material fact or to its legal or religious validity, whether between the spouses or between one of them and the heirs of the other, or between their heirs after their simultaneous or separate deaths. This is evident in the procedures for registering a disputed marriage contract (first requirement) and the procedures for registering an undisputed marriage contract (second requirement).

### **First requirement: Proof of an undisputed customary marriage contract**

If the marriage is not disputed by either spouse or anyone with an interest in it, proof of marriage and its registration shall be established by following a series of procedures, beginning with the submission of an application containing proof of customary marriage and ending with the issuance of an order requiring confirmation with the order of registration before the competent judicial authority.

First: The competent judicial authority

Pursuant to the provisions of Article 39 of the QHMC, the judicial authority competent to consider applications for the confirmation of marriage contracts is determined by the court of the judicial district in which it can be registered, meaning the district of jurisdiction of the domicile of one or both spouses or their place of residence.

Second: Procedures

If the customary marriage was performed in accordance with the rules of Islamic law, the wife was taken in, and there is no dispute, the marriage shall be confirmed and registered as follows:

- A written request shall be submitted by the husband, the wife, or a person with an interest in the matter to the public prosecutor, containing the details of the marriage contract and the reasons for its registration, accompanied by the relevant documents and material evidence.
- The public prosecutor shall refer the request, accompanied by a petition, to the judge in charge of civil status, requesting an order to register the marriage in the civil status records with retroactive effect.
- The judge in charge of civil status shall investigate by hearing the spouses and verifying that the substantive and formal conditions for the marriage contract and its legality are met, and shall then issue an order to register the marriage contract in the civil status records.
- The original copy of the ruling shall be kept by the civil registry office, and a copy shall be sent to the civil registry officer of the municipality in whose territory the customary marriage contract was concluded, so that he may record the ruling in the marriage records for the current year, in accordance with the provisions of Article 40 of the Civil Code.
- In addition, a summary of the ruling shall be noted in the margin of the records under the date of the contract, as provided for in Article 42 of the Civil Code.

The order to register the marriage shall be considered a final decision that cannot be challenged by opposition or appeal, but it may be reviewed by the same judge if an error has been made.

#### **Second requirement: Proof of the disputed customary marriage**

If there is a dispute over the fact of marriage between the spouses or between those who have a legitimate or legal interest in it, and one of them claims that the marriage is lawful and legal, and the other denies it and challenges its existence or validity, the only way to prove the claimant's claim is to file a lawsuit to prove the marriage before the competent court. If the claimant is able to prove the marriage, the court will rule that the marriage has taken place, and when the ruling becomes final, the person concerned can obtain a copy of the civil status records.

Article 22 of the Family Code states that marriage is proven by an extract from the civil status register and, if it is not registered, by a court ruling. A lawsuit to prove a marriage contract is filed in the same way as any other civil lawsuit in terms of the procedures for filing the lawsuit and the eligibility and qualifications of the disputing parties.

Neither the Family Law nor the Civil Status Law specifies the procedures to be followed in filing a lawsuit, but with reference to the Civil and Administrative Procedures Law, the procedures to be taken are determined (second) before the competent judicial authority (first).

#### **First: Competent judicial authority**

Referring to the general rule, a case to prove a customary marriage shall be filed with the Family Affairs Section, as it is considered a personal status case in accordance with Article 32 of the QEM.

As for territorial jurisdiction, the competent court is determined by the court in whose jurisdiction the defendant's place of residence is located. If the defendant has no known place of residence, jurisdiction falls to the court in whose jurisdiction the defendant's place of residence is located, in accordance with Article 37 of the QMA.

#### **Second: Procedures**

The proceedings for bringing an action shall commence with the filing of a petition in accordance with Article 14 of the QEM, which shall be in writing, dated, and signed by the plaintiff or his lawyer, and filed with the clerk of the personal status section, and the judge may raise it on his own initiative in accordance with Article 13 of the QEM. The plaintiff must also have standing, interest, and capacity, as these are essential elements in any lawsuit, and the case will be dismissed if any of these elements are lacking.

As for the deadline for filing a lawsuit to prove a customary marriage, the legislator has not specified it, and therefore it may be filed at any time, considering that the marriage and its effects are not limited to the spouses only, but also extend to their heirs.

The judge in charge of family affairs receives the case file, studies it, and begins investigating the validity of the facts alleged by the plaintiffs, conducting a mandatory investigation into the disputed customary marriage case. This is done by hearing both the plaintiff and the defendant in minutes signed by both parties, the judge, and the court clerk. The judge then hears the witnesses presented by the plaintiff in a single set of minutes after confirming their identities and their relationship to the parties to the case in order to administer the legal oath. The judge then questions them about the marriage and the extent to which its elements and conditions of validity are met.

After completing the investigation, the judge shall issue a ruling rejecting the request if he finds no legal or religious justification for it, or issue a ruling accepting the request and ordering the marriage contract to be registered retroactively according to the date and place where it was concluded.

The public prosecutor then sends a copy of this ruling to the civil registrar of the municipality where the marriage contract was concluded and requests that the ruling be recorded and entered in the register designated for recording or registering marriage contracts for the year in which the contract was concluded.

The spouse concerned must take a copy of the judgment and send it to the president of the court through the public prosecutor, requesting an order to register the marriage contract in the civil status records.

## **Conclusion**

Given the serious consequences of customary marriage contracts, which threaten the rights of spouses and children, Algerian lawmakers must enact laws and legislation to limit them and emphasize the need to register them.

These laws must also be deterrent, including financial and moral penalties for violating marriage registration and certification procedures.

The importance of registering this type of contract is highlighted in preserving rights and eliminating many problems, the most important of which is ensuring the clarification of lineage and reducing its denial and manipulation, which leads to the corruption of society.

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