



The right to visit a child in the Algerian-French agreement of 1988

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Abstract:

Conventional answers to some legal issues raised by the mixed marriage debate are thought to be among the most crucial issues that need to be addressed, especially those pertaining to the consequences of the divorce and the issue of exercising guardianship and visitation rights over children. The 1988 Algerian-French Agreement sought practical solutions to the problem of implementing the right of visitation for children living on the territory of one of the two countries; thus, this approach analyzes the Algerian-French practice of granting the right of visitation to mixed-married children after their marriage has ended.

Keywords: solutions - divorce - practice - protection- The right to visit.

الملخص:

تُعتبر الإجابات التقليدية على بعض القضايا القانونية التي تثيرها مناقشة الزواج المختلط من بين القضايا الأكثر أهمية التي تحتاج إلى معالجة، خاصة تلك المتعلقة بعواقب الطلاق وقضية ممارسة حق الحضانة وزيارة الأطفال. سعى الاتفاق الجزائري-الفرنسي لعام 1988 إلى إيجاد حلول عملية لمشكلة تنفيذ حق الزيارة للأطفال الذين يعيشون على أراضي أحد البلدين؛ وبالتالي، تحلل هذه المقاربة الممارسة الجزائرية-الفرنسية لمنح حق الزيارة للأطفال من الزواج المختلط بعد انتهاء عقد الزواج وانحلاله.

الكلمات المفتاحية: الحلول - الطلاق - الممارسة - الحماية - حق الزيارة

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Introduction

Because of the problems affecting the marital relationship, the dissolution of which has negative consequences, particularly for the interests of children, it is imperative that comparative legal systems pay particular attention to this issue in order to protect children from neglect. This is a subject that has been taken into consideration by the verses of the Koran and the Sunna of the chosen Prophet, where numerous legal provisions have been promulgated to guarantee children's rights and ensure their care from birth until the age of majority.

Most legislation, particularly in the Arab world, has adopted these principles as a basis for establishing legal texts that attest to the filiations of children, organize their breastfeeding, their custody, the expenses that concern them, and the management of their financial affairs until they reach the age of majority. The task becomes more complex when it comes to the consequences of separation in mixed marriages (marriages with foreigners), because of the serious repercussions on the interests of the children in particular and the family in general. Consequently, it is in the family's interest that the law governing its personal affairs be unified.

While unifying the family's place of residence can be easy, unifying their nationality can sometimes be difficult, particularly in the case of mixed marriages. Thus, most legislation, including Algerian legislation, have sought to find solutions to certain problems that could affect the protection of children from mixed marriages, particularly after separation¹, as it is the children who are the victims. Some nations have therefore sought to ensure better protection for children from mixed marriages after their parents have separated², by concluding bilateral agreements between countries to address these issues. Algeria has signed the "Agreement on mixed marriages between France and Algeria"³. However, there may be marriages between Algerians and foreigners for whom there is no treaty between their country and Algeria. In such cases, we refer to the general rules laid down by the legislator on conflict of laws in Algerian civil law.

Thus, this research will look at practical solutions for protecting children within the framework of the Franco-Algerian bilateral agreement concerning the protection of children of Franco-Algerian couples in the event of separation, as well as the various legal issues arising there from?

To answer the above question, we need to address the following points:

FIRST REQUIREMENT:the process of awarding custody of children after separation



SECOND REQUIREMENT : the efforts of the French and Algerian states to activate child visitation.

THIRD REQUIREMENT: procedures for maintaining the child's relationship with his or her parents.

FIRST REQUIREMENT: The process of awarding custody of children after separation

The most important legal consequences of the dissolution of a marriage contract or divorce concern the custody of the child, entrusted to the person best able to care for him or her and look after his or her affairs. Custody is a form of child protection designed to ensure that the child receives a sound and moral upbringing. Custody provisions thus represent one aspect of the concern of Islamic law and Algerian legislation for children.

1/ Definition of custody: Article 62 of the Algerian Family Law stipulates that custody consists firstly in taking care of the child, then in teaching him, educating him in his father's religion, watching over his protection, and preserving his health and behavior⁴. If any of these conditions is not met, custody is revoked. Thus, the definition of custody highlights the legislator's emphasis on its causes and objectives, thus defining the fundamental scope and functions of custody. Consequently, when the court pronounces the divorce and decides on custody, it must take into account all these aspects included in this definition.

2/ The conditions for exercising custody: when examining the provisions of Algerian family law, in particular articles 62 et seq., it is clear that the legislator has not explicitly listed the conditions for exercising custody by the single mother. This gives the judge discretionary power to assess the extent to which the conditions for exercising custody are met, with the aim of protecting the child in care⁵. Although the legislator has stressed the need for the guardian to be qualified for this responsibility⁶, this means that the person must be competent, possess full mental faculties, be capable to the extent that he or she is capable of exercising custody, and be honest in his or her morals⁷.

3/ The objectives of child custody: these can be deduced from an analysis of the provisions of article 62 of the Family Code, which can essentially be summarized as follows:



*** Education of the child:** this refers to formal education through enrolment with an official institution to follow studies, as long as education is compulsory and free of charge in accordance with the provisions of Article 65 of the Algerian constitutional reform of 2016 and that of 2020⁸. Every child has the right to receive an education in accordance with his or her intellectual abilities, mental aptitudes, innate and psychological preparation.

*** Bringing up the child in the religion of the father:** as far as Algerian Muslim society is concerned, which is based on principles and values derived from the Islamic Sharia, it is necessary to bring up the child in the values of the Islamic religion and its teachings. The child must be brought up according to the principles and values of the Islamic religion. As the marriage of a Muslim man to a non-Muslim woman is permitted, the judge grants custody rights to the non-Muslim mother and never denies them. She is treated as a Muslim, provided she complies with the provisions of Sharia law in the upbringing of the child.

*** Supervision of the protection of the child under guardianship:** the notion of guardianship thus legally defined appears to be a dismemberment of guardianship over the person of the child. The mother, as holder of the right of custody, would only be required to provide for the child's material needs, clean him, wash his clothes and prepare his meals⁹. In fact, she must confine herself to providing the care required by childhood, the other duties of protection and education being exercised by the father during his visitation rights¹⁰.

If child custody is a form of care and protection, it is essential that this protection encompasses its various manifestations¹¹. Thus, the child must not be exposed to physical aggression, such as beatings, or moral abuse. Protecting children morally means educating them to respect moral values, disciplining them and preparing them to become virtuous, well-balanced individuals. Similarly, protecting children's health requires that they receive comprehensive health care from their guardians, particularly in the first years of life. This includes regular vaccinations and visits to a doctor whenever necessary to maintain the child's health and physical condition.

It is up to the judge ruling on divorce and its consequences to assess the extent to which the conditions of custody have been fulfilled, and the extent to which the desired objectives have been achieved. This makes the decision subject to challenge to revoke custody when there is evidence that it is not fulfilling its objectives, as in the case where the mother, for example, does not respect the



father's religion by influencing the child's upbringing through the culture of the Western society in which she lives, or if there is evidence that she is a negligent mother.

SECOND REQUIREMENT : Efforts by the French and Algerian governments to facilitate the child's visit.

In view of the shared history uniting the two countries, and the large number of Algerians living in France who have established personal ties or mixed relationships with the French, it has been necessary to put in place a specific legal framework to deal with the negative effects arising from special international relations, particularly as regards the personal consequences of the dissolution of the matrimonial bond, and more specifically the protection of children when custody is exercised outside the territory of one of the spouses.

In view of the Franco-Algerian cooperation aimed at facilitating the process of child visitation, it was confirmed that the Algerian and French governments wished to collaborate on the judicial level. They expressed their concern to guarantee the best possible protection for children of Franco-Algerian couples after separation, as well as their freedom to move between the two countries. Both parties are convinced of the need to safeguard the best interests of the child, recognizing that the child should have the possibility of maintaining peaceful and regular relations with his or her parents, even in the event of separation, wherever their residences may be.

To give concrete expression to this commitment, the Algerian and French governments have agreed on a number of measures and procedures to protect children's interests. These are set out in the bilateral agreement signed in 1988¹².

1/ Creation of a central body responsible for cooperation in the field of child protection: The French and Algerian Ministries of Justice have undertaken to set up a central body in each country, responsible for promoting cooperation between the competent authorities in the field of child protection.

2/ Facilitation of child protection procedures: The central authority in one of the two countries must, at the request of the central authority in the other country, take all appropriate measures, in particular:

- Search for the whereabouts of the child concerned.



- Providing information on the child's social situation or on legal proceedings concerning him or her, in particular by sending a copy of any judgments rendered against him or her.

- Facilitation of any amicable solution ensuring the child's return or the exercise of visitation rights.

- Facilitation, organization and regulation of visitation rights or their effective exercise, in particular when it comes to guaranteeing the handover of the child to the applicant when he or she has the right to enforce the judgment.

- Notification to the central authority of the other state of the measures taken and the results achieved.

- Facilitation of effective visiting rights granted to a national of the other State on or from its territory.

- Authorization for spouses in conflict to obtain legal assistance in the territory of each of the two States, regardless of their financial resources.

3/ Judicial and administrative protection of the child: Administrative protection is the first level of protection, while judicial protection corresponds to situations in which parental consent is not possible, or situations of serious and/or immediate danger for minors¹³.

measures of judicial or administrative protection specific to the person of a minor child who is a national of one of the two countries are taken after consultation with the consulate of that country. The competent consulate also has regional jurisdiction for judicial or administrative protection procedures relating to a minor child born of the union of nationals of both countries, as soon as they are initiated.

Jurisdiction for actions concerning custody of the child, or its allocation as provided for in the agreement, lies with the court of the couple's habitual place of residence as the place where they live together as a family.

THIRD REQUIREMENT: Procedures for preserving the child's relationship with his or her parents

The provisions of the bilateral agreement have confirmed the commitment of the Algerian and French parties to guarantee the effective exercise of visitation rights for spouses in the event of separation, with the aim of preserving the child's relationship with his or her separated parents. This is achieved in particular by complying with several provisions of the agreement, summarized as follows:



1/ Recognition of judicial decisions concerning the award of custody: The interests of the child are a fundamental concept in family law since it is the determining criterion in any decision affecting him or her¹⁴.

Article 06/f2 of the agreement stipulates the obligation for both parties to respect judicial decisions handed down by the courts of each party concerning the award of custody to one of the parents. At the same time, the other parent must be granted visitation rights, including across state borders. In the event of exceptional circumstances endangering the physical or moral health of the child, the custody judge may adjust the manner in which visitation rights are exercised in the interests of the child.

2/ Legal value of judicial decisions relating to custody: Judicial decisions issued by the courts of both the Algerian and French states, which are enforceable or for which an enforcement order has been issued as the case may be, constitute an authorization to leave the national territory. Furthermore, a judicial decision recognizing access rights has immediate effect, even in the event of an appeal, thus confirming the preservation of access rights and of the child's relationship with his or her parents, as specified in article 10 of the agreement.

3/ Obligation to return the child after visitation: The agreement aims to effectively regulate visitation rights, enabling the child to maintain relations with both parents. Thus, both States ensure that the child effectively returns to the country he or she left at the end of the visit. In the event of the child's non-return, after the visitation period defined by the judicial decision confirmed by article 5 of the agreement, enforceable judicial measures relating to visitation rights between the two countries cannot be recognized or refused immediately, despite any decision or action regarding custody of the child. This also applies if the child visits outside the times set by the competent judicial authority.

4/ Liability procedures in the event of refusal to visit the child or failure to return the child to the custodian: When parents separate or divorce, they have to make a decision about child custody. This is a difficult decision to make, and can lead to a profound disagreement between the parents. This is when the family court judge steps in. There are several options open to him, but he must always endeavor to decide in the best interests of the children¹⁵.

A custodial parent who refuses to return the child is liable to criminal prosecution under the laws of both states. This occurs mainly when visitation rights are effectively denied either within the borders of one of the countries, or



between their borders, in violation of a court decision granting such rights to the other parent. In such cases, the competent public prosecutor, after receiving a complaint from the other parent, initiates criminal proceedings and prosecutions against the offender who refuses to return the child to its guardian.

In this respect, article 11 of the bilateral agreement confirms that the custodial parent shall raise the issue of the non-return of the child or the refusal of one of the parents to allow the visit with the central authority established by the provisions of the agreement, or with the public prosecutor who intervenes in the area of his or her competence in matters of custody, in order to speed up the implementation of the criminal proceedings provided for in the aforementioned article 08. The competent public prosecutor works to activate the use of the public enforcement force to effectively guarantee the return of the child to the territory he or she has left.

5/ Amicable settlement of disputes: To encourage the amicable settlement of disputes arising from custody and visiting rights, the two Algerian and French States are seeking to take the necessary measures to facilitate the amicable settlement of disputes, thereby avoiding legal proceedings. Responsibility for amicable settlement lies with a commission made up of equal members, formed for a non-renewable one-year term, with the aim of amicably resolving disputes after requesting the central authorities designated by Article 1 to conduct investigations in both States, carried out by the competent administrative and judicial authorities.

It should perhaps be recalled at the outset that many judges are called upon to rule on disputes concerning children: the family court judge deals with questions relating to the consequences for the child of the separation of his or her parents¹⁶. The Commission issues prior, reasoned opinions on custody and visiting rights, and on how they should be organized. On the basis of this opinion, the parent concerned may ask the judge who set and assessed custody and visiting rights to modify his or her decision in accordance with the provisions of this agreement.

In this respect, French judge Béatrice Biondi confirms that, as President of the International Bureau for Civil and Commercial Cooperation within the Family Affairs Department of the French Ministry of Justice, at the 2004 summit of the Hague Conference on Private International Law, which was devoted to the international protection of children, Béatrice Biondi underlined that France was facing numerous difficulties in implementing the provisions of the agreements relating to the right of return and contact with children. She noted that every



international case represents a human tragedy for separated parents. In response to this reality, France quickly drafted a specific law on parental authority to regulate children's rights more exhaustively. This issue is also frequently raised before the courts in Algeria.

Conclusion

The Algerian legislator has established child protection at national level with regard to the exercise of custody or visiting rights, in particular the penal protection set out in articles 328 et seq. of the Algerian Penal Code, as well as article 337 bis/F2 of the Code of Penal Procedure. International protection is guaranteed by the provisions of the bilateral Franco-Algerian convention on the protection of children of mixed Franco-Algerian couples in the event of separation, adopted in 1988.

This agreement is the inevitable result of the growing number of matrimonial relationships between Algerians and French nationals, as well as between Algerians living in France. The two central bodies set up in each country are responsible for implementing the provisions of the bilateral agreement.

* It should be noted that the provisions of the convention are succinct and lack explanation on many points, due to the sensitivity of the issue and its link with the domestic legal systems of both countries.

* In addition, the importance of favoring amicable settlement through a committee of equal members before resorting to criminal proceedings against one of the parents in breach of the court judgment on custody and visiting rights was emphasized, thus enshrining the historical aspect and advanced diplomatic relations between the two countries.

* Despite the bilateral regulation of the protection of children from mixed Franco-Algerian marriages thanks to this agreement, the growing number of cases brought before the courts in both countries is due to the failure of one of the parents to comply with the content of court rulings on custody and visiting rights.

¹ - We are currently witnessing an increase in the number of cases of children being taken abroad or detained. This trend constitutes a social scourge, due to the dramatic human repercussions of such acts". In: CHATIN Luis, les conflits relatifs à la garde des enfants et au droit de visite en



droit international privé, travaux du Comité français de droit international privé, 4eme année, 1981-1982. 1985. p 109.

² - Generally speaking, this agreement is reached following the divorce of a mixed couple whose parties (father and mother) are in two different countries. To decide on custody, each of the two countries was competent to do so, leading to contradictory decisions. The convention is therefore designed to facilitate the settlement of disputes and, more specifically, to promote the free movement of the child between the two parents and states.

³ - The Franco-Algerian convention in response to disputes concerning children from separated Franco-Algerian couples was ratified on June 21, 1988 in Algiers by the French and Algerian governments Official Journal of the Algerian Republic of July 28, 1988, p 828.

⁴ - Law no. 84-11 of June 09 1984 on the family code, amended and supplemented by order no. 05-02 of February 27 2005, Official Journal of the Algerian Republic n° 15/2005.

⁵ - Judges more often award custody of children to the mother, a trend that is all the more pronounced when the children are young. According to figures from the French Ministry of Justice, between 2003 and 2012, the children's place of residence was with the mother in 73% of cases. This percentage decreases as the children get older. In:

<https://droit-finances.commentcamarche.com/faq/512-droit-de-visite-et-d-hebergement>.

⁶ - See the second paragraph of article 62 of Ordinance 05/02, which incorporates the Family Code, mentioned above. The Algerian legislator has limited the conditions of guardianship to eligibility after defining it in article 62 of the Family Code in the second paragraph as follows: "The guardian must be qualified to exercise it", as it concerns the ability to bear and accomplish an arduous and risky task linked to the child's upbringing and preparation to be healthy and able to rely on himself in the future.

⁷ - Moral honesty is a condition that the guardian must meet in order to be able to exercise custody. Consequently, there is no custody for an unfaithful person. ... When it is proven in the present case that when the judges decided to award custody of the three children to the mother convicted of the crime of adultery, by ruling as they did, they violated the law, in particular article 62. Family Code. Supreme Court, Personal Status Chamber, file n° 564787, decision of 07/15/2010, Supreme Court Journal, number 02 of 2010, pp. 262-263.

⁸ - The right to education is guaranteed. Public education is free under the conditions laid down by law. Basic education is compulsory. The State organizes the national education system. The State ensures equal access to education and vocational training.

⁹ - Saad Abdelaziz, marriage and divorce in Algerian family law, Algiers, 1989 p 180.

¹⁰ - HANIFI Louisa, The civil liability of fathers and mothers due to their minor children (in the particular case of divorce), Algerian Review of Legal, Political and Economic Sciences, vol 32, n3, 1994.

¹¹ - Custody and supervision of children are two closely related concepts. They are both a right and a duty for parents. Their violation entails both criminal and civil liability. The Family Code obliges parents to contribute jointly to the protection of children and their healthy education, see: Article 36 of the aforementioned Family Code.



¹² - The Franco-Algerian convention in response to disputes relating to children born from separated Franco-Algerian couples cited above.

¹³ - Florence Rault, Protection administrative ou signalement judiciaire : une mise au point sur les devoirs et les responsabilités des professionnels, Dans *Enfances & Psy* 2013/3 (N° 60), p 66.

¹⁴ - Johanne Clouet, The influence of identity markers in decisions concerning child custody decisions, *RJTUM*, n°48, 2014, p 58.

¹⁵ - Patrick Lingibé, CUSTODY OF MINOR CHILDREN: WHAT HAPPENS IN THE EVENT OF DISAGREEMENT?, in : <https://www.village-justice.com/articles/garde-des-enfants-mineurs>.

¹⁶ - Laurent Gebler, The hearing of the child by the family court judge, Dans *Enfances & Psy* , n° 36, vol 3, 2007, p 50.

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