

Proposal to Amend Article 07 bis of the New Family Law

إقتراح إعادة النظر في المادة 07 مكرر من قانون الأسرة الجديد

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Abstract:

The new family law does not include a specific provision regarding the health status of spouses, nor is it considered a condition for marriage under Article 09 bis of the same law. However, with the introduction of Article 07 bis through Order 05/02 and Executive Decree No. 06/154 dated 05/11/2006, a requirement was established for individuals wishing to marry to submit a medical certificate. This measure was implemented as a preventive step to avoid both material and moral damages that may result from separation after marriage. While the Algerian legislator's inclusion of this provision was a positive development, our analysis of this article reveals certain legal issues that need attention. Specifically, there is a need to establish legal harmony and consistency between the provisions of Article 07 bis and those outlined in Articles 6/2, 18, and 22 of the same law.

Key words: Algerian Legislator, Algerian Law, Family Law.

Introduction:

The issuance of Order 05-02 on February 27, 2005, which amends and supplements Family Law No. 84-11 of July 9, 1984, came in response to the significant advancements in human rights, particularly women's rights, both domestically and internationally. This amendment followed calls from women's rights organizations for legislative action to safeguard their rights. It garnered widespread attention from legal professionals, particularly researchers, and sparked interest across various segments of society with differing cultural backgrounds. This is due to the law's impact on the family, which is the fundamental unit of any society, with its core values and ideologies shaping society's structure over time.

Whenever the family is built on strong religious values, good morals, fear of God, and chastity—both in private and public life—it becomes a symbol of stability, security, and peace. Such a foundation avoids collapse and dissolution, ensuring the fulfillment of the positive

outcomes of marriage, such as the growth of healthy offspring and the preservation of the human species from lineage mixing and the birth of disturbed or complex descendants.¹ As such, the family must be protected by constitutional authority, as stated in Article 58 of the 1996 Constitution, and is granted protection by both the state and society. Furthermore, Article Two of the Family Law recognizes the family as the basic unit of society, formed by individuals bound by marriage and kinship.

Marriage is one of the most significant and consequential contracts a person can enter into, as it entails both rights and obligations that have far-reaching, long-term effects. It is essential for the legislator to establish a specialized legal framework that encompasses all aspects of marriage. Marriage is only valid with the consent of both spouses, which is considered a fundamental requirement according to Article 9 of the Algerian Family Code, as amended and supplemented by Order 05-02. Furthermore, Article 9 bis of the same law outlines the conditions for the validity

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of the marriage contract, including the capacity to marry (Article 7 of the same law), the dowry, the guardian, two witnesses, and the absence of any legal impediments to the union.

The new family law does not explicitly address the health status of the spouses, nor is it considered a condition for the validity of marriage according to the provisions of Article 9 bis. However, Article 7 bis mandates that anyone proposing to marry must undergo a medical examination and submit a medical certificate when formalizing the marriage contract. This requirement has attracted significant attention from researchers in both legal and Islamic jurisprudence, as it involves expertise from specialists in legal, medical, and ethical fields.

The rapid advancements in medicine, genetics, and genetic engineering have made it possible to detect various diseases early and identify individuals carrying genetic traits that may lead to hereditary conditions. This scientific progress offers an opportunity to protect offspring from birth defects and physical or mental disabilities. In response to these advancements, Algeria, like many other countries, has implemented legislation requiring individuals about to marry to undergo a medical examination. This measure aims to prevent the transmission of genetic and sexually transmitted diseases, ensuring family stability and the protection of future generations.

Based on the information provided, the question that arises is: What legal and practical challenges does this issue present, and to what extent has the Algerian legislator succeeded in addressing its legal and regulatory aspects? To answer this question, we will first explore the nature of the premarital medical examination, and then examine how it is regulated in Algerian law.

1-Premarital Medical Examination

1.1- Technical Definition

A premarital medical examination refers to the laboratory or clinical tests that individuals about to marry must undergo before the marriage contract is finalized. These tests are conducted in specific centers designed for this purpose, aiming to detect potential genetic or infectious diseases that could threaten marital stability. The goal is to provide appropriate medical advice based on the findings.² In medical terms, the premarital medical examination involves providing couples with mandatory or optional medical consultations and issuing a medical certificate based on the laboratory or clinical tests conducted before the marriage contract is concluded.

1.2- The Role of Medical Advancements:

Advancements in medical science have significantly contributed to the identification of various diseases that can impact marital relationships. The need to preserve both individuals' health and the well-being of their offspring—protecting them from genetic, chronic, or infectious diseases—has made premarital medical examinations essential. These examinations play a crucial role in identifying diseases that could be transmitted between spouses, which could negatively affect marital life.³

- **Genetic Diseases:**

Genetic diseases are caused by defects in the genetic material within the cells. Each cell's nucleus contains this genetic material, which determines individual traits, unique to each person. Genetic disorders can be divided into four categories:⁴

1. Chromosomal disorders
2. Diseases caused by defects in individual genes
3. Diseases resulting from defects in multiple genes or conditions with various causes
4. Disorders transmitted from mother to children, such as thalassemia.

- **Sexually Transmitted Diseases (STDs):**

STDs are a growing concern due to their rapid spread. These diseases are often seen as a consequence of moral and religious decline, particularly linked to certain aspects of Western culture. In the 28th World Health Organization (WHO) meeting in May 1975, it was emphasized that STDs pose a significant threat to global public health, and many

countries have not yet fully recognized the gravity of the issue. Some of the most common STDs include herpes, gonorrhea, syphilis, trichomoniasis, and the deadly disease AIDS.⁵

2-Effects of Premarital Medical Examination

A thorough examination of the premarital medical examination, considering both its benefits and potential drawbacks, has led many countries to implement it either as a mandatory requirement or an optional measure. In Algeria, the legislator has chosen to make it a requirement, obligating individuals about to marry to undergo the examination and submit a medical certificate in accordance with Article 7 bis of the Family Law. The positive aspects of this measure include:

A. **Preventive Measure Against Diseases:** The premarital medical examination serves as an effective preventive tool against hereditary, infectious, and dangerous diseases that could hinder the purpose of marriage and affect marital stability. These include conditions such as cancer, diabetes, and high blood pressure, which could disrupt the well-being of both spouses and society at large. By detecting these diseases early, the examination helps in reducing their spread and impact.⁶

B. **Protecting Offspring:** The examination plays a vital role in safeguarding the health of the fetus, preventing congenital and mental deformities that could arise from genetic diseases carried by the parents. It also helps identify infectious diseases, such as hepatitis and syphilis, which may be transmitted to the offspring.

The Algerian legislator has specifically mandated that women undergo tests for rubella, which can affect pregnancy, as well as a blood type test (per the form in Executive Decree 06-154 dated 05/11/2006). Additionally, both the man and woman must undergo clinical examinations, including lung examinations, when necessary, as per Article 3 of the Decree. Article 4 of the same Decree also emphasizes informing the individuals concerned about the risks of transmitting infections to the spouse or offspring.⁷

C. **Reducing Financial Burdens:** The premarital medical examination can help alleviate the financial burdens associated with treating genetic or infectious diseases. The high costs of treating such conditions can be a significant strain on the couple and the healthcare system, placing additional pressure on hospital budgets and health centers. Early detection can lead to preventive measures that reduce long-term healthcare costs.⁸

However, there are certain shortcomings and challenges related to the implementation of the premarital medical examination:

- ❖ **Misconceptions About the Examination:** One of the negative aspects is that people may be led to believe that undergoing the test will guarantee protection from all genetic diseases. In reality, the tests typically focus on just one or a few known diseases prevalent in the region where the examination is conducted. This limitation can be addressed through proper health education and public awareness efforts.
- ❖ **Timing of the Examination:** Another challenge is the timing of the medical examination. In some cases, marriage proceeds despite the discovery of potential health risks during the examination, as the results may come too late in the process—after many steps of the marriage preparations have been completed. This can create an embarrassing and difficult situation for the couple and their families, making it harder for them to back out of the marriage. To mitigate this issue, the examination should be conducted earlier, ideally during the engagement period, allowing for a smoother decision-making process if any risks are detected.
- ❖ **Lack of Legal Penalties for Non-Compliance:** A significant issue with the premarital medical examination is the absence of a deterrent legal penalty for individuals who fail to comply with the examination requirements. This lack of enforcement has contributed to a lack of seriousness in the implementation of the examination. In some cases, the examination becomes a mere formality, with individuals presenting certificates without actually undergoing

the required tests. This could be due to favoritism, bribery, or the use of connections. Furthermore, the results of the medical examination may be disclosed inappropriately, leading to potential harm, embarrassment, and even the exploitation of individuals for financial or moral gain.⁹

- ❖ **Confidentiality Concerns:** The confidentiality of medical examination results is a critical issue. The disclosure of sensitive information about genetic diseases can cause personal and social harm, especially when it affects the reputation or marriage prospects of individuals within a family. The misuse of such information could lead to material and moral damage, and the possibility of the results being used for coercion or defamation further underscores the need for strict controls over the confidentiality of medical examination results.

3- The Nature and Legal Consequences of Premarital Medical Examination

The obligation to undergo a medical examination before marriage is a procedural requirement for concluding the marriage contract. This obligation does not render the contract invalid if not complied with. The relevant authority in the state does not have the power to prevent individuals from marrying or to annul a marriage based solely on non-compliance with the examination. It is simply a procedural step that the spouses and the notary are responsible for, with the notary bearing the responsibility if they fail to include the medical certificate proving that the spouses are free from hereditary or infectious diseases in the documentation.¹⁰

The legal classification of the medical examination is that it serves as a condition for providing evidence during the documentation of the contract, but not as a fundamental requirement that affects the validity of the marriage. Non-compliance with the examination or its results may lead to certain legal consequences, but these depend on the legislative provisions specific to each country. For instance, if a disease is detected after the marriage contract is completed, the spouse may lose the right to request separation. Additionally, there may be consequences related to forgery of the medical certificate or any deception in this regard. If one spouse transmits an infectious disease, legal responsibility may arise as well.

3. Premarital Medical Examination in Algerian Family Law

Given the rapid spread of serious genetic or infectious diseases and the progress in medical science, the premarital medical examination is a vital measure to prevent the transmission of diseases, protect marital life, and ensure the well-being of offspring. According to Article 7 bis of the Algerian Family Code, introduced by Order 05-02 on February 27, 2005, individuals intending to marry must submit a medical certificate issued no more than three months prior to marriage. This certificate must confirm that they are free from diseases or factors that could pose a risk to the marriage.¹¹

The Algerian legislator has stipulated that the marriage contract cannot be concluded without this medical certificate, in order to ensure that the spouses are not carrying hereditary, infectious, or sexual diseases that might undermine the intended purpose of the marriage. However, the new Family Law does not include a specific provision regarding the health of the spouses as a condition for the marriage to be valid. Articles 4, 9, and 18 of the Family Law do not consider the health condition of the spouses as an impediment to the validity of the marriage contract. Even if one of the spouses is terminally ill, the marriage contract is still legally valid, though it may not involve inheritance rights (Articles 131 and 222 of the Family Law). Thus, Article 7 bis serves as a preventive measure before the marriage, based on Sharia policy, without affecting the contract's validity, provided all other requirements are met (Article 7/2 of Decree 06/154 dated 05/11/2006).¹²

Health conditions, such as the physical or sexual health of one of the spouses, are not considered essential for the validity of the contract unless they directly affect the consent of the other party. For instance, in cases of sterility or sexual impotence, the Supreme Court has clarified that the wife must prove her claim of the husband's sexual impotence. If proven through medical

expertise, the husband is given one full year to seek treatment (Supreme Court Decision 02/23/1993, File No. 88856).¹³

The Algerian legislator has taken the right approach by mandating the premarital medical examination through the amendments made in 2005 (Article 7 bis of the Family Code and Executive Decree 06/154). This provision serves as a preventive measure to avoid material and moral harm that may result from separation after marriage. Islamic law does not view this as harmful, as the intention is to inform the spouses about potential hereditary, infectious, or serious diseases (Articles 4 and 3 of Executive Decree 06/154). This allows either party to choose to withdraw from the marriage or proceed despite the risk of serious health conditions (Article 4/2 and Article 7 of Executive Decree 06/154). This approach is considered preferable to annulling the marriage contract or proceeding with a divorce after the marriage due to the discovery of infectious or hereditary diseases or mental disabilities. However, defects like blindness, lameness, or non-infectious diseases in either spouse do not justify the annulment or separation of the marriage.¹⁴

In accordance with Article 7 bis/2 of the Family Law, the notary or civil status officer is prohibited from drawing up the marriage contract unless both parties provide the medical certificate required by law (Article 6 of the aforementioned executive decree), confirming that they have undergone the necessary medical examinations. The notary must also ensure that both parties are fully informed about the results of their medical exams, including any diseases or factors that could pose a risk to the marriage. This must be done by consulting both parties together to confirm their understanding of the findings. The notary is not permitted to refuse to conclude the marriage contract for medical reasons if both parties are willing to proceed with the marriage.¹⁵

Regarding the role of the doctor, the law outlines specific responsibilities. The doctor may not issue the required medical certificate unless they have reviewed the results of the relevant tests, including a comprehensive clinical examination and blood type analysis. Additionally, the doctor may advise the individuals to undergo further tests to detect hereditary, familial, or infectious diseases that could be transmitted to the spouse or offspring. Women of childbearing age should also be tested for rubella and have their blood type assessed as part of these medical examinations.

Conclusion:

The provisions of Algerian law regulating premarital medical examinations clearly position them as a preventive measure designed to avoid hereditary or infectious diseases that could impede the purpose of marriage. Although these examinations are mandated (Article 7 bis of the Family Code and Article 2 of Executive Decree 06/154), they are not a requirement for the validity of the marriage contract (Article 9 of the Family Code).

A marriage concluded without the medical certificate confirming that the couple has undergone the prescribed medical examinations remains valid. However, in such cases, the injured party may request a divorce on the grounds of defects or illnesses (Article 48 of the Family Code) if the illness was concealed by the spouse, or seek divorce due to defects or illnesses (Article 53/2 of the Family Code). Additionally, the marriage may be annulled on the grounds of a mistake concerning an essential characteristic of the person (Articles 9 and 33 of the Family Code and Article 82 of the same law), particularly regarding the ability to engage in sexual relations, which is considered a fundamental aspect of marriage.

Upon reviewing these provisions (Article 7 bis of the Family Law and Executive Decree 06/154), it becomes apparent that the infectious or serious diseases that the doctor is required to detect, as specified in Article 4/2 of the Executive Decree and Article 7 bis/2, are presented in a general and broad manner. The primary aim of the medical certificate is to ensure that those intending to marry are free from diseases that could prevent the marriage from achieving its purpose, such as contagious venereal diseases and serious conditions like AIDS, cancer, or tuberculosis.

Executive Decree 06/154 outlines the conditions and procedures for implementing Article 7 bis of the Family Code, particularly regarding the doctor's responsibilities in informing the individual about the results of their medical examination and recommending any additional tests deemed necessary. However, the decree does not designate a specific private doctor for this task, meaning any licensed physician can perform the examination. This creates flexibility for the individual to choose one or more doctors to conduct the tests, but it also undermines the legal credibility of this obligation.

Moreover, the legislator did not explicitly address the confidentiality of the medical examination results in Article 5 of the Executive Decree. While the doctor is legally bound to maintain confidentiality according to Article 36 of Executive Decree No. 92/276, which contains the Code of Medical Ethics, the decree does not specify that the results of the marriage-related medical examination must be kept confidential. Furthermore, there is no penal provision within the law to address violations of this confidentiality.

The doctor is required to fulfill his obligations, but if a doctor neglects to perform the necessary clinical examination and blood type analysis, as outlined in Articles 3, 4, and 5 of the executive decree, and fails to inform the patient of the severity of any discovered disease, the doctor may be held liable for professional malpractice. This includes any harm caused to the individual, their spouse, or offspring, as seen in the case of rubella, for which clinical examination is now mandatory.

In the event of a violation of the provisions of Article 7 bis of the Family Code, the notary or civil status officer shall be subject to prosecution by the Public Prosecution in accordance with the provisions of Article 3 bis of the Family Code and Article 77 of the Penal Code. The penalty may include a maximum of two months' imprisonment along with a fine, in addition to the provisions outlined in Article 26 of Order 70/20 dated 02/19/1970, which contains the Civil Status Code.

It is important to note that, under Article 6/2 of the Family Law, the combination of the Fatiha with the engagement, provided that the elements of consent and the conditions of marriage outlined in Article 9 bis of the same law are met, is considered a legally valid contract, even if it is not officially enforced (in the absence of the formal procedures stipulated by law in Articles 18 of the Family Law and 39 of Order 70/20, which includes the Civil Status Law). This allows for the possibility of informal marriage taking place without the presentation of a medical certificate, which contradicts the requirements of Article 7 bis of the Family Law.

Based on the various legal and practical aspects of premarital medical examination in Algerian family law, we propose the following recommendations:

First: The medical examination is a necessity driven by the need for progress and organization to serve the public interest. Therefore, we believe that the legislator should intervene to revise and strengthen its legal requirements. This should include involving specialists in genetic and infectious disease medicine, as well as experts in legal, social, and Sharia sciences, to ensure a comprehensive approach.

Second: The content of the executive decree that defines the conditions and procedures for implementing the medical examination should be reviewed, particularly the form of the medical certificate. This review should ensure the data is accurate and aligned with the legal requirements of the medical examination. Additionally, a legal framework specific to the doctor performing the examination should be established, defining their specialty and ensuring the credibility of their role, potentially by having them work within public hospital institutions.

Third: More attention should be given to the results of the medical examination, particularly regarding the possibility of preventing marriage or at least postponing it until the issue is addressed. Specialists in medicine, Sharia, and law should be involved in these decisions. Furthermore, penalties for tampering with or ignoring the results of the examination should be increased to reflect the material and moral damage caused by such actions.

Fourth: There should be greater focus on educating society about the importance of premarital medical examinations, considering their legal, religious, and health implications. This can be achieved through the development of awareness programs that utilize all available material, human, and legal resources.

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- ¹⁰ Article 18 of the Algerian Family Law states the following: "The marriage contract shall be concluded before a notary public or any legally qualified employee, taking into account the provisions of Articles 9 and 9 bis of this law."
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- ¹⁴ Article 7/2 of Executive Decree 06/154 dated May 11, 2006, Official Gazette, May 14, 2006, Issue 41.
- ¹⁵ Article 4 of the same Executive Decree No. 06/154 .