

Issues of Testamentary Bequests in Cases of Religious Differences
and Conflicts of Law
A Jurisprudential and Legal Study



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Abstract:

The will raises several jurisprudential issues when the testator and legatee have different religions. Generally, differing religions do not invalidate a will, but scholars debate if a Muslim can bequeath to a combatant or apostate. The Algerian legislator's stance is broad, allowing for varied interpretations. Wills with foreign elements face challenges in private international law, notably conflicts in characterizations and laws. Determining the appropriate connecting factor for disputes is complex. The Algerian legislator treats wills as personal status, applying the testator's nationality law at death for substantive conditions and the nationality law at the time of the bequest or the law where the will was made for formal conditions.

key words: will, difference in religion, characterization, conflict of laws, foreign element.

الملخص:

تثير الوصية حال اختلاف الدين بين الموصي والموصى له عدة إشكالات فقهية، فقد ذهب فقهاء المذاهب في مجمل أقوالهم على أن اختلاف الدين لا يؤثر على صحة الوصية، واختلفوا بشأن جواز وصية المسلم للحربي وكذا المرتد، بينما جاء رأي المشرع الجزائري مجملا دون تفصيل في المسألة مما فتح الباب لعدد التاويلات.

كما تثير الوصية التي تتضمن عنصرا أجنبيا العديد من التحديات في سياق العلاقات الدولية الخاصة، وأبرز هذه التحديات هو تنازع التكييفات، حيث تختلف التشريعات في تكييفها، بالإضافة إلى ذلك تنشأ مشكلة تنازع القوانين وصعوبة تحديد قاعدة الإسناد المناسبة لحل النزاع، فقد صنفها المشرع الجزائري ضمن الأحوال الشخصية وأخضعها للقانون الشخصي، كما أخضع المشرع الجزائري الشروط الموضوعية للوصية لقانون جنسية الموصي وقت وفاته، بينما تخضع الشروط الشكلية للوصية لقانون جنسية الموصي وقت الإيصاء أو قانون البلد الذي تمت فيه الوصية.

الكلمات المفتاحية: الوصية، اختلاف الدين، التكييف، تنازع القوانين، العنصر الأجنبي.

Introduction:

Islamic jurisprudence is a comprehensive and integrated system that guides individuals toward the optimal path for regulating their conduct, whether it pertains to personal matters, their relationship with God, or their interactions within society. Throughout history, Islamic jurisprudence has been a crucial source for shaping laws in Arab and Islamic countries, particularly as legal systems and regulations have evolved in contemporary societies over the past two centuries.

One of the most significant and complex issues within this framework is that of testamentary bequests, which are a key form of wealth transfer. Testamentary bequests generally pose no legal challenges.

Based on the above, the central research question of our study is as follows: What issues are raised by testamentary bequests in cases of religious differences and conflicts of law?

To address this question, we propose the following structure:

Chapter One: The Concept of Testamentary Bequests and the Impact of Religious Differences According to Islamic Jurists and Algerian Law

Chapter Two: Conflict of Laws in Wills.

Conclusion: Including results and recommendations.

This study involves analyzing legal texts and deriving rulings from them, as well as adopting a comparative approach by contrasting the rulings of Islamic jurisprudence with those of Algerian law. It also examines legislative and judicial positions in Algeria and compares them with those of other legal systems, leveraging these comparisons to address issues related to testamentary bequests in private international law.

THE FIRST TOPIC: The Concept of Testamentary Bequests and the Impact of Religious Differences According to Islamic Jurists and Algerian Law.

Islamic jurists from the four Sunni schools generally hold that religious differences do not invalidate a testamentary bequest. They permit a non-Muslim (dhimmi) to bequeath to a Muslim, and vice versa, provided the bequest involves matters permissible for both parties to own. Some jurists added another condition, which is that the non-Muslim beneficiary should be a relative of the Muslim testator. Their opinions varied regarding the permissibility of a Muslim making a will for a non-Muslim at war with Muslims, which will be detailed in this section.

First Requirement: The Concept of a Testamentary Bequest (Wasiyyah) in Islamic Jurisprudence

In this requirement, we address the concept of the testamentary bequest (wasiyyah) linguistically and legally, as well as the wisdom behind its legislation.

First Section: The Concept of a Testamentary Bequest

First: Testamentary Bequest in the Linguistic Sense

The plural of wasiyyah is wasāyā. Ibn al-Qaṣṣā¹ stated: It is said, “I entrusted him” (wassaytu ilayhi) as wasāyah or wasiyyah; I instructed him (wassaytuhu) or I advised him (awsaytuhu), and I entrusted something to someone (awsaytu ilayhi). The phrase “I joined one thing to another” (wasaytu al-shay a bil-shay wasyan) means that I connected it.¹

Second: The Legal Concept of a Testamentary Bequest

The concept of a testamentary bequest among Muslim jurists can be understood through three main perspectives. First, it may refer to a legal act in terms of its prescriptive ruling (Hukm taklīfī), that is, whether it is required to be carried out, abandoned, or merely permitted. Second, it may be understood as a legal act characterized by certain attributes based on its conformity with Islamic legal rulings, which is known as the descriptive ruling (Hukm waṣfī). Third, it may refer to the

¹ See: Al-Miṣbāḥ al-Munīr fī Gharīb al-Sharḥ al-Kabīr by al-Rāfiʿī, authored by Aḥmad ibn Muḥammad ibn al-Muqriʾ al-Fayyūmī, edited by ʿAbd al-ʿAzīm al-Shinnāwī, Dār al-Maʿārif, Egypt, Cairo, no edition stated, no date of publication, vol. 2, p. 662.

effect resulting from this act, such as the establishment of ownership or the absence thereof.²

The Mālikī jurists defined it as: “A contract that establishes a right in one-third of the property of the testator, which becomes binding upon his death, or that establishes a form of representation on his behalf after his death.”³

Ibn Qudāmah al-Hanbalī defined it in al-Mughnī as: “A testamentary bequest concerning wealth is a charitable donation that takes effect after death.”⁴

Second Section: The Wisdom Behind Its Legislation

Allah Almighty legislated the testamentary bequest to encourage people to perform righteous deeds and to reward those who do good, as well as to strengthen family ties and support needy relatives who are not heirs. The wisdom of the bequest reflects Allah’s mercy toward His servants, as a person may become distracted by prolonged hopes and love of worldly life and thus forget the Hereafter, only becoming alert at the approach of death. At that moment, one may feel regret over shortcomings and sorrow for what was not prepared for the life to come.

Second Requirement: the Effect of Religious Difference on Testamentary Bequests According to the Jurists of the Islamic Schools of Thought, with Analysis and Evaluation of Their Opinions .

In this section, we address the views of the four Islamic schools of jurisprudence – Hanafī, Maliki, Shafī'i, and Hanbali – regarding the impact of religious difference on testamentary bequests. We then analyze and evaluate these opinions to determine the most preferable view.

First section: The Impact of Religious Differences on Testamentary Bequests According to Islamic Jurisprudence.

1. Hanafī School:

The Hanafī jurists maintain that religious differences do not invalidate a testamentary bequest. They allow a Muslim to bequeath to a non-Muslim, whether they are a dhimmi (non-Muslim under Islamic protection) or a musta'min (a non-Muslim granted temporary protection). They base this ruling on the Quranic verse:

² Muḥammad ‘Abd al-Raḥīm al-Kashkī, *Inheritance in Islamic Law and Statutory Law*, 2nd ed., al-Azhar, 1963, p. 108 and the following pages.

³ Abd al-Raḥmān al-Jazīrī, *Islamic Jurisprudence According to the Four Schools of Thought*, Dār Ibn Ḥazm, Lebanon, 2001, vol. 1, p. 789.

⁴ Ilyās Nāṣif, *The Testament (The Testament for Muslims and in Private International Law)*, vol. 2, 2nd ed., Al-Ḥalabī Legal Publications, Beirut, Lebanon, 2007, pp. 11–12.

"Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes—from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly. Allah only forbids you from those who fight you because of religion and expel you from your homes and aid in your expulsion—forbidding you to make allies of them. And whoever makes allies of them, then it is those who are the wrongdoers." (Surah Al-Mumtahina,;8-9).

They also deem the bequest of a dhimmi or musta'min to a Muslim to be valid, as both are considered equal to Muslims in transactions under the contracts of dhimma and aman (protection).⁵

Regarding bequests involving a harbi (a non-Muslim from a territory at war with Muslims), the Hanafi jurists differentiate based on the circumstances. If a harbi enters Muslim lands under a protection agreement, his bequest to a Muslim is valid. However, the bequest of a Muslim to a harbi is considered invalid by Abu Hanifa and Abu Yusuf, as the harbi is likely to return to enemy territory, potentially strengthening the adversary against Muslims. However, Muhammad ibn al-Hasan disagrees, considering the bequest valid since the harbi entered Muslim lands under protection and should be treated like a dhimmi or musta'min.⁶

As for apostates (murtads), Hanafi jurists distinguish between male and female apostates. They consider the bequest of a male apostate invalid because he is not acknowledged in his state of apostasy and is regarded as someone whose life is forfeit. In contrast, the bequest of a female apostate is generally deemed valid, based on the view that she is imprisoned rather than executed. However, there is a contrary opinion that her bequest is invalid, as her belief in apostasy is not recognized.⁷

2. Maliki School:

Maliki jurists take the view that religious differences do influence the permissibility of a testamentary bequest, depending on the testator and the beneficiary. A non-Muslim's bequest to a Muslim is considered valid, as the non-Muslim meets the conditions for making a bequest—being free, sane, and the owner of the bequeathed property—with the exception of items that a Muslim is prohibited from owning, such as alcohol.

For a Muslim's bequest to a non-Muslim, the Malikis differentiate between a dhimmi and a harbi. A bequest from a Muslim to a harbi is invalid, as any portion of

⁵ See: *Al-Hidāyah Sharḥ Bidāyat al-Mubtadi'* by al-Marghīnānī, Al-Maktabah al-Tawfiqiyyah, Cairo, Egypt, vol. 4, p. 387.

⁶ *Al-Baḥr al-Rā'iq* by Ibn Najīm, Dār al-Ma'ārif, Beirut, Lebanon, vol. 8, p. 520.

⁷ Ibn Abidin *Ḥashiyat Ibn Abidin*, Dar Al-Fikr, Beirut, Lebanon, 1421 AH / 2000 CE: Vol. 6, p. 698.

the Muslim's estate bequeathed to a harbi reverts to the Muslim's heirs. However, there is variation among Maliki jurists regarding a Muslim's bequest to a dhimmi. Some hold that such a bequest is valid without conditions, while others stipulate that it should be out of familial or social connection, such as if the dhimmi is a relative, neighbor, or has shown kindness to the Muslim testator.⁸

The author of "Al-Bayan wa'l-Tahsil" offers detailed distinctions regarding a Muslim's bequest to dhimmi relatives versus non-relatives, presenting three main opinions:

First opinion: The bequest to dhimmi relatives is valid but discouraged (makruh) because it implies favoring non-Muslim relatives over distant Muslim relatives, though bequeathing to distant Muslims is considered more virtuous.

Second opinion: The bequest is valid without dislike, given the merit of maintaining family ties. This view is supported by the narration that Abdullah ibn Umar reported that Umar ibn al-Khattab provided clothing to his polytheist brother in Mecca.⁹

The third opinion within the Maliki school is that a bequest to non-Muslim relatives is not only permissible but commendable, as bequeathing to those with whom one has familial ties is considered more rewarding.¹⁰

3. Shafi'i School:

The Shafi'i scholars permit the bequest of a non-Muslim to a Muslim, provided that the bequest does not include items prohibited for a Muslim to own, such as alcohol. They also allow a Muslim to bequeath to a dhimmi, considering it an acceptable act within the framework of benevolence. However, regarding the bequest of a Muslim to a harbi, there are two opinions:

First opinion: The bequest is invalid because the purpose of a bequest is to benefit the beneficiary, and such benefit should not be extended to those who are at war with Muslims.

Second opinion: The predominant view within the Shafi'i school is that the bequest is valid, arguing that if gifting (hibah) to a harbi is permissible, then bequeathing to them should be permissible as well. The same debate exists regarding

⁸ Al-Sharh al-Ṣaghīr by al-Dardīr, Dār Ihyā' al-Turāth al-'Arabī, vol. 2, pp. 465–466.

⁹ Reported by Malik in Al-Muwatta, Dar Al-Hadith, Egypt, 3rd edition, 1418 AH / 1997 CE, Book of Clothing, Chapter: "On Wearing Clothes," Hadith no. 18: Vol. 2, p. 699.

¹⁰ Ibn Rushd Al-Jadd 'Al-Bayan wa Al-Tahseel, edited by Muhammad Haji and others, Dar Al-Gharb Al-Islami, Beirut, Lebanon, 2nd edition, 1408 AH / 1988 CE: Vol. 21, p. 477.

bequests by apostates, with some scholars prohibiting it, while others permit it. According to Imam al-Nawawi, the correct view is that it is permissible.¹¹

4. Hanbali School:

The Hanbali scholars hold that the bequest of a non-Muslim to a Muslim is valid, as well as a Muslim's bequest to a dhimmi, based on the Quranic verse:

"The Prophet is more protective of the believers than themselves, and his wives are [in the position of] their mothers. And blood relatives are more entitled [to inheritance] in the decree of Allah than other believers and the Emigrants, except that you may do to your close associates a kindness [through bequest]." (Surah Al-Ahzab :6).

They interpret the "kindness" mentioned in the verse as including the bequest to Jews and Christians.¹²

The Hanbalis are divided regarding a Muslim's bequest to a harbi. Some scholars argue that such a bequest is invalid, referencing the Quranic verse:

"Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes—from being righteous toward them and acting justly toward them. Indeed, Allah loves those who act justly. Allah only forbids you from those who fight you because of religion and expel you from your homes and aid in your expulsion—forbidding you to make allies of them. And whoever makes allies of them, then it is those who are the wrongdoers." (Surah Al-Mumtahina:8-9).

The verse suggests that it is not permissible to show kindness to those who fight Muslims. However¹³, other scholars permit such a bequest, citing a narration from Umar ibn al-Khattab "aforementioned", which serves as evidence for maintaining ties with those at war. They argue that since gifting to a harbi is valid, bequeathing to them should also be permissible. They interpret the Quranic verse as forbidding allegiance to those who fight Muslims, but not prohibiting acts of kindness or bequests. Furthermore, they differentiate between a harbi actively engaged in warfare against Muslims, to whom bequests are not allowed, and one who is not, to whom bequests are permissible.¹⁴

¹¹ Al-Nawawi 'Rawdat Al-Talibin, edited by Zuhair Al-Shaweesh, Islamic Office, Beirut, 3rd edition, 1991, Vol. 5, p. 49.

¹² Al-Qurtubī, Al-Jāmi' li-Aḥkām al-Qur'ān, edited by 'Abd Allāh al-Turkī, Al-Risālah Foundation, Beirut, 2006, vol. 21, p. 418.

¹³ Ibn Qudāmah, Al-Mughni, Dār 'Ālam al-Kutub, Riyadh, 2010, vol. 6, p. 104.

¹⁴ Al-Mardawi 'Al-Insaf, Dar Ihya' al-Turath al-Arabi, Beirut, Lebanon, 1419 AH: Vol. 7, p. 166; Kashshaf Al-Qina' by Al-Buhuti, Dar Al-Fikr, Beirut, Lebanon, 1402 AH: Vol. 4, p. 363.

second section: Discussing and favoring one of the four schools of thought.

From the preceding discussion, it is evident that most jurists agree that religious differences do not generally invalidate a testamentary bequest, subject to the specifics outlined. They permit bequests from a dhimmi to a Muslim and from a Muslim to a dhimmi, provided the items bequeathed are lawful for both parties to own. Some jurists also add the condition that the dhimmi receiving the bequest should be a relative of the Muslim testator. While the majority of jurists allow a harbi to bequeath to a Muslim, they are divided on the permissibility of a Muslim bequeathing to a harbi, as well as the validity of an apostate's bequest.

In light of the above, it appears, and Allah knows best, that allowing a bequest to a non-Muslim harbi could harm the Muslim community by directly or indirectly strengthening polytheists, which is impermissible. Additionally, Islamic law permits Muslims to appropriate the property of non-Muslims in specific contexts but does not reciprocate this for non-Muslims, thus reversing the permissible order, which is not allowed.

Regarding a musta'min (a non-Muslim under temporary protection), the view favoring the validity of bequests to them is stronger, given the evidence presented. The argument that a musta'min is akin to a harbi is weak, as even if this analogy holds, it does not necessarily invalidate the bequest, which is considered an act of kindness and connection. The musta'min is included in the generality of Allah's statement:

"Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes—from being righteous toward them and acting justly toward them." (Surah Al-Mumtahina,;8).

Thus, there is no basis for prohibiting bequests to them.

The comparison made by some scholars between inheritance and bequests is also flawed. Inheritance is based on guardianship (wilayah), which is nullified by religious differences, whereas bequests do not rely on guardianship, so religious differences do not affect their validity.

Third Requirement: The Algerian Legislator's Position on Religious Differences in Testamentary Bequests.

In this section, we examine how the Algerian legislator has addressed religious differences in testamentary bequests, and whether this aligns with Islamic legislation.

First section: The Will of a Non-Muslim in Algerian Law.

The Algerian legislator derives its legal framework from Islamic Sharia, as stated in Article 222 of the Algerian Family Code, which reads: "In all matters not specifically addressed by law, recourse shall be had to the provisions of Islamic Sharia."

The Algerian Family Code includes provisions related to both Muslims and non-Muslims. Article 200 of the Algerian Family Code affirms the validity of

testamentary bequests regardless of religious differences between the parties. The Supreme Court of Algeria has upheld this approach in its rulings, allowing bequests between individuals of different faiths.¹⁵

Moreover, Article 16, Paragraph 1 of the Algerian Civil Code stipulates: "The law of the nationality of the owner or testator or the person from whom the act originates at the time of their death shall govern inheritance, wills, and all acts that take effect after death."

It is noteworthy that Islamic Sharia considers apostasy to invalidate a testamentary bequest if the testator dies in a state of apostasy or is executed for joining enemy territory.¹⁶ The Algerian law's omission of the issue of apostasy likely reflects the rarity of such cases in recent history or the adoption of the Hanbali view, which permits the bequest of an apostate. However, given the current rise in atheism, it would be prudent for the legislator to address the issue of an apostate's bequest in specific legal provisions, adopting the majority view that prohibits an apostate from making a valid bequest.

The text touches on how different legal systems handle wills and inheritance, particularly in international private law, where conflicts may arise due to varying legal frameworks.

It highlights the principles of *lex personalis* (personal law) and *lex situs* (the law of the location of the property) in determining which law applies to inheritance cases involving foreign elements.

second section: Algerian Law on Inheritance and Wills.

The Algerian Family Code is the primary reference, specifically the provisions dealing with wills, including how they are affected by differences in religion.

The discussion emphasizes that, in Algeria, inheritance and wills are generally governed by the personal law of the deceased (i.e., their national law at the time of death).

The text also critiques the Algerian Family Code for not explicitly addressing issues related to apostasy and inheritance, recommending that these should be clarified in future legal reforms.

The need for more detailed legislative guidance on the issue of wills across religious lines, especially in the context of the rising trends of mixed marriages and apostasy.

A suggestion to harmonize the inheritance laws across Arab countries to ensure consistency and fairness, given the similar cultural and religious contexts.

¹⁵ Case file no. 0725847, ruling dated 9/5/2013, Family and Inheritance Matters Chamber.

¹⁶ Al-Arabi Belhaj, *Al-Wajiz fi Sharh Qānūn al-Urah al-Jazā'iri, Dīwān al-Maṭbū'āt al-Jāmi'iyyah*, Algiers, 2004, vol. 2, p. 317.

Religious Considerations in Wills: The document emphasizes the importance of considering religious contexts when discussing the validity of wills, particularly in Islamic law.

Legal Consistency: There's a strong advocacy for more detailed legislation and the harmonization of laws across jurisdictions to handle the complexities of modern inheritance issues.

Focus on Algerian Law: The discussion is centered on Algerian law, but it also draws comparisons with other legal systems, highlighting both strengths and areas for improvement.

The text offers a comprehensive analysis relevant for legal scholars, particularly those interested in Islamic jurisprudence, international private law, and comparative law.

THE SECOND TOPIC: Conflict of Laws in Wills.

The issue of wills in private international relations raises numerous complications. It has become a fertile ground for conflict between secular legal systems and those derived from Islamic Sharia. Since the rules governing conflicts of laws are national legal rules set by the domestic legislature of each country, this inevitably leads to differing views among legislators regarding the determination of the connecting factor that identifies the applicable law for a legal relationship involving a foreign element. This divergence is due to several factors, most notably religious differences. This issue raises significant legal challenges regarding the possibility of reconciling two or more legal systems, especially with the differences between countries in classifying personal statuses and actions within legal systems. Some jurisdictions categorize them under personal status, while others consider them under property law. This will be clarified in this section, along with the determination of the applicable law for wills.

First requirement: General Governing Rules of Wills and Their Legal Characterization.

In this section, we will address the concept of a will in Algerian law and its characterization in private international law. We will then outline the general governing rules of wills and the legal characterization of wills.

First:section: The Concept of Wills and Their Characterization.

First: Definition of a Will in Algerian Law: Article 184 of the Algerian Family Code states: "A will is the transfer of ownership that takes effect after death by way of donation."

Second: Definition of Characterization in Private International Law: It refers to the determination of the nature of the issue (the fact or legal situation) that is subject to conflicting laws by placing it within the category of legal systems designated by the legislator with a connecting rule, to assign its regulation to a specific law.¹⁷

The Algerian legislator addressed the issue of characterization in private international law in Article 9 of the Civil Code, which states: "Algerian law shall be the reference for characterizing the relationships whose nature is to be determined in case of a conflict of laws to ascertain the applicable law."

second section: General Governing Rules of Wills.

¹⁷ Amohamadi Bouzina Amina, Issues of Conflict of Laws in Personal Status Matters, New University House, Alexandria, 2019, p. 25.

The general rules governing wills in an international context align with inheritance as both serve as mechanisms for estate succession. However, inheritance succession is mandatory, while succession through a will is elective. Therefore, both inheritance and wills are linked to the estate.

A will shares with other voluntary dispositions the characteristic of being a disposition resulting from the unilateral will of the testator and requires the acceptance of the beneficiary. However, the distinction between a will and other voluntary dispositions (such as sale, lease, and mortgage) lies in the fact that a will takes effect after the testator's death, while other dispositions take effect during the lifetime of the disposer.

Accordingly, the legal system governing wills can be determined as follows:

- Some legislations subject wills and other posthumous dispositions to the general connecting rules governing legal acts, whether in terms of substance or form. This includes subjecting the will to the law of the testator's nationality.
- Some legislations distinguish between wills involving real property and personal property. If the will involves real property, it is subject to the law of the testator's nationality. If it involves personal property, it is subject to the law of the testator's domicile at the time of death. This approach is followed in French, English, Canadian, and Australian laws.
- Some legislations subject wills to the law of intention, treating the will as a voluntary disposition and therefore subjecting it to the law of intention rather than the law of nationality, location, or the testator. This is indicated in Article 90/2 of the Swiss Private International Law Act of 1987.

Despite the differences in legislative approaches, there are both substantive and formal rules governing wills. Additionally, certain personal property may require specific formalities for the acquisition of ownership and for the dispositions made concerning it.¹⁸

¹⁸ Jamal Mahmoud Kurdi, *Conflict of Laws*, Dar Al-Nahda Al-Arabiya, Cairo, 2006, p. 409.

Subsection Three: Characterization of the Will

First: Characterization of the Will as Personal Status.

The term "personal status" refers to the set of legal rules that regulate the legal standing of a natural person and their family relationships. These rules include matters such as inheritance and wills, which are considered part of personal status in most Arab legislations.¹⁹

Legal scholars in Arab countries have generally classified inheritance and wills as matters of personal status, as they are based on personal considerations focused on protecting family interests and regulating the transfer of wealth between generations. Inheritance and wills reflect these personal considerations, aiming to preserve family unity and facilitate the transfer of wealth within the family.

Based on this approach, it is preferable that inheritance and wills are governed by the law applicable to personal status, which is the personal law. However, there are differences between countries in defining what constitutes personal law. Some countries consider personal law to be the law of the testator's nationality, as is the case in many Arab countries, France, Belgium, Germany, and Spain. Others consider personal law to be the law of the country where the deceased had their last domicile.²⁰

The Algerian legislator supports this approach, considering the will to be part of personal status. This is affirmed in Article 775 of the Algerian Civil Code, which states that "the law of personal status and the relevant legal provisions shall apply to wills." Therefore, wills are subject to personal law, which is the law of the testator's nationality.

It is noteworthy that the Algerian legislator does not distinguish between immovable and movable property when it comes to estates, as it adopts the principle of the unity of the estate, subjecting the entire estate to a single law—the law of the deceased's nationality. This means that the nationality of the deceased at the time of death is the decisive factor, regardless of the nature of the inherited property.²¹

Second: Characterization of the Will as Real Status.

The term "real status" refers to the legal standing of property, which differs from "personal status," focusing on the legal standing of individuals and their family relationships.

¹⁹ Mohammed Saadi, *Private International Law and Its Applications in the Legal System*, 1st edition, Al-Masriah for Publishing and Distribution, Cairo, 2019, p. 117.

²⁰ Amer Mohammed Al-Kaswani, *Conflict of Laws*, 1st edition, Dar Al-Thaqafa for Publishing and Distribution, Jordan, 2010, p. 146.

²¹ Amohamadi Bouzina Amina, *Previous reference*, p. 506.

In some legal systems, such as the French, American, and English systems, the transfer of estates is considered a matter of real status. This is because a will is viewed as a means of transferring ownership, which depends on a material event (death) that transforms into a legal event due to the legal effect imposed on the property itself, according to the law of the location of the property.²²

Proponents of this view argue that inheritance and dispositions that take effect after death should be classified under real status because the transfer of property upon death is a regular method of transferring property. This transfer does not differ from other methods except in its cause, which is death. Therefore, estates should be subject to the legal system applicable to the property itself, i.e., the real law.

This approach distinguishes between immovable and movable property when determining the conflict-of-law rule. The inheritance of immovable property is subject to the law of the location of the property, while the inheritance of movable property is subject to the law of the deceased's domicile. The domicile of the deceased is often where most of their assets are located, as it is where they conducted their business activities. Subjecting the estate in immovable property to the law of its location is an application of the old rule that the law of the location of the property should apply. Similarly, subjecting the estate in movable property to the law of the deceased's domicile aligns with this approach, as the domicile of the deceased is where the assets related to the estate are usually located.²³

second requirement: Applicable Law to the Will.

Wills are subject to several substantive and formal conditions, which are not unified under a single law. According to Article 11 of the Algerian Civil Code and Article 11 of the Egyptian Civil Code, as well as the Tunisian legislator in Article 55, the applicable law may include an alternative option, which is the law of the place where the will was executed. In many Arab legislations, the conditions for the validity of the will are subject to the law of the testator's nationality at the time of death, aligning with what is prescribed by both Sharia and law that a will does not take effect until after the testator's death.²⁴

Based on this, Arab legislations have considered wills as part of personal status and have adopted a unified conflict-of-law rule, which is nationality. The Algerian legislator affirmed this in Article 115 of the Civil Code, which states that "the law of personal status and the relevant legal provisions shall apply to wills." Therefore, if

²² Mamdouh Abdul Karim, *Conflict of Laws (International Judicial Jurisdiction - Enforcement of Foreign Judgments)*, 1st edition, Dar Al-Thaqafa for Publishing and Distribution, Lebanon, 2005, p. 100.

²³ Nouria Shabourou, *Inheritance and Posthumous Dispositions within the Framework of Private International Law*, Master's Thesis, Faculty of Law and Political Sciences, Abu Bakr Belkaid University, Tlemcen, 2010-2011, p. 28.

²⁴ Jamal Saiss, *Algerian Jurisprudence in Personal Status*, Vol. 1, Click Publications, 1st edition, pp. 120-123.

the testator is Algerian at the time of death, Algerian law, specifically the Algerian Family Code (Articles 180 to 211), applies to the will.

First section: Law Applicable to the Substantive Conditions of the Will.

The substantive conditions of the will refer to those conditions that must be met for the will to be valid from a substantive perspective, such as the requirement of consent, cause, the testator's capacity, the portion that may be bequeathed, and the rule on revocation of the will, among others. This was confirmed by the Supreme Court in its ruling related to wills and the acquired rights of heirs, where it was stated that the rules of the Quran are considered mandatory rules. As a general principle, acquired rights under the law in force at the time of making the will cannot be infringed upon, and any ruling contrary to this would be considered a violation of this principle.

The principle of freedom to choose between Islamic law and French law can only be applied in multilateral contracts where the parties agree to follow Islamic law. A will, on the other hand, is considered a legal act executed by a unilateral will, intended to take effect in the future, and pertains to the rights of others—namely the heirs, who derive their rights from mandatory Quranic provisions. Therefore, the application of French law would unquestionably infringe upon these rights.

The issue here revolves around the general capacity of the testator at the time the will is made and the validity of the intention. Article 186 of the Algerian Family Code states that "the testator must be of sound mind and at least 19 years old," and the intention must be free of defects. Therefore, a will made by a minor, an insane person, or an idiot is considered void.²⁵

These matters are more closely associated with the will as a legal act than with the concept of general succession, which means that the law of the testator's nationality at the time of making the will should be considered. The importance of this issue arises when the testator changes nationality after making the will. Although a will is considered a legal act, it is a non-binding act that can be revoked as long as the testator is alive. Consequently, the substantive conditions of the will are not definitively determined until the testator's death. Therefore, the law of the testator's nationality at the time of death should also be considered when assessing the testator's capacity to make a will.²⁶

²⁵ Ruling issued on 11/12/1111, Judges' Bulletin, 1112, issue 2, p. 111, case M.M. vs. M.M.

²⁶ Mohammed Abu Zahra, *Explanation of the Law of Wills (A Comparative Study of Its Issues and an Explanation of Its Jurisprudential Sources)*, 2nd edition, Dar Al-Fikr Al-Arabi, Cairo, 2001, p. 54.

second section: Law Applicable to the Formal Conditions of the Will.

Considering a will as a disposition of the estate means it is a legal act, and thus it should be governed either by the law of the testator at the time of making the will or by the law of the country where the will was executed.²⁷

The Egyptian legislator, in Article 17/2 of the Civil Code, established the criteria for the form of a will, stating that "the form of the will shall be governed by the law of the testator at the time of making the will or by the law of the country where the will was made, as well as the form of all other dispositions made to take effect after death." This provision shows that the Egyptian legislator intended for the will and similar dispositions to be valid under Egyptian law if made according to the form prescribed by the law of the testator's nationality at the time of making the will or the law of the place of execution. Therefore, a foreigner residing in Egypt may execute a will according to the form prescribed by Egyptian law, which is affirmed by most Arab legislations.²⁸

The Algerian legislator followed the same approach, stipulating in Article 19 of the Civil Code that a will is subject to the law of the testator's nationality at the time of making the will or the law of the country where the will was made. The first rule (the law of the testator's nationality at the time of making the will) means that Algerians abroad may execute a will in the form prescribed by the law of their nationality at the time of making the will. The second rule (the law of the country) means that an Algerian abroad or a foreigner in Algeria may subject the form of the will to the local law—the foreign local law for the Algerian and the Algerian local law for the foreigner. Therefore, an Algerian residing abroad may choose to execute their will either in the local form or according to the provisions of Algerian law.

Since a will, like any voluntary act, is executed during the testator's lifetime, it must be subject to the general rules regarding the form of legal acts. For this reason, the Algerian legislator deleted the second paragraph of Article 16 of the Civil Code to avoid repetition.

Thus, for a will to be valid in terms of form, it must be executed in accordance with the law of the country where it was executed (applying the rule of "locus"), the common domicile of the parties, or the law governing the substantive conditions (i.e., the testator's nationality law as stated in Article 16 of the Algerian Civil Code), which is the approach adopted by France.²⁹

²⁷ Hisham Sadiq and others, *Private International Law (Conflict of Laws - International Judicial Jurisdiction)*, University Printing House, Alexandria, no date, p. 320.

²⁸ Ali Khalil Ismail Al-Hadithi, *Private International Law*, no edition, Dar Al-Nahda Al-Arabiya, Cairo, 2013, pp. 182-183.

²⁹ Amohamadi Bouzina Amina, *Previous reference*, p. 507.

Conclusion:

In conclusion, our research has led to several findings:

Divine Legislation of the Will: Allah, the Almighty, legislated wills to encourage people to engage in good deeds, strengthen family ties, and support non-inheriting relatives and those in need.

Scholarly Consensus on Wills: The jurists of the four Islamic schools of thought generally agree that a difference in religion does not invalidate a will. They permit a non-Muslim (dhimmi) to bequeath to a Muslim and vice versa, as long as the will pertains to matters that both parties are allowed to own. However, they differed regarding the permissibility of a Muslim's will to a combatant (harbi) or an apostate (murtadd).

Algerian Family Code on Wills: Article 200 of the Algerian Family Code affirms the validity of a will regardless of the difference in religion between the parties, a stance that the Supreme Court has upheld in its rulings, allowing wills between individuals of different religions.

Legal Classification in Algerian Law: The Algerian legislator addressed the issue of legal classification in Article 9 of the Civil Code, which states that Algerian law is the reference for classifying relationships that need to be defined when there is a conflict of laws to determine the applicable law.

Will as a Matter of Personal Status: Legal scholars in Arab countries, including Algeria, have tended to consider wills as matters of personal status, focusing on protecting family interests and regulating the transfer of wealth between generations.

Unified Conflict of Laws Rule: Some Arab legislations have considered the testamentary bequest as part of personal status and established a unified attribution rule based on nationality. The Algerian legislator affirmed this in Article 115 of the Civil Code.

Recommendations:

Clarification of Article 200: The phrasing of Article 200 of the Algerian Family Code, which validates wills regardless of religious differences, is broad and lacking in detail. It would be beneficial for the Algerian legislator to include additional provisions that clarify and elaborate on the term “difference in religion,” similar to the detailed jurisprudential interpretations.

Legislation on Wills of Apostates: The legislator should consider enacting a specific legal provision addressing the wills of apostates, adhering to the majority opinion that prohibits apostates from making wills, especially given the growing prevalence of atheism in our time and the increase in mixed marriages, which may lead to religious confusion.

Harmonization of Arab Legislation: It is notable that Arab legislations are very similar concerning wills in terms of conditions and classification. A unified Arab legislative framework could be established by consolidating these laws into a single legislation that safeguards the rights associated with wills.

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