

PUBLIC ORDER EXCEPTION BASED ON RELIGIOUS DIFFERENCE IN MIXED MARRIAGE



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Abstract:

The application of the public order exception is a prevalent phenomenon in mixed marriages, largely due to the distinctive religious nature of these relationships. This makes it falls within the fundamental principles and foundations that may not be violated due to its connection to public order, which gives the judge the right to exclude the foreign law that contradicts the local provisions and replace it with the national law to protect the higher interests and basic principles. This research aims to present the concept of public order and the conditions for its application, and to highlight its role in excluding the application of foreign law to mixed marriages. It also seeks to clarify the judge's authority to restrict the will of the spouses when concluding a marriage contract or to rule it invalid once it has already been concluded.

Key words: Public Order Exception; Religion; Mixed Marriage; Conflict of Laws; Foreign law.

Introduction:

The idea of mixed marriage represents a fertile ground for conflict of laws, and this is due to the connection of the legal rules that regulate it to public order. This is, indeed due to the difference that exists between Arab countries and Western ones regarding the matters of marriage, divorce and the consequences arising from them, which are governed in Islamic countries by religious, cultural and social concepts. These are basic principles that are considered to be part of public order that should not be violated.

As a result, this international conflict of laws goes far beyond whether the marriage contract itself is valid. It deeply affects major issues that happen after marriage, such as complex disputes over dividing property, paying alimony, and child custody. Most importantly, it puts children at risk specifically regarding their paternal

descent (*nasab*) and inheritance rights, which may be recognized in one jurisdiction but entirely nullified in another. This conflict gives rise to the problematic phenomenon of 'limping relationships', unions and families that are legally valid in a Western state but viewed as legally non-existent under Arab public order, leaving spouses and children in a state of severe legal and financial insecurity.

In fact, the concept of public order was used to exclude the application of foreign law whenever the judge feels that it could conflict with one of the fundamental principles, due to the difference in legal systems in their view of the foundations upon which marriage is based. This pushes those laws that maintain the religious character derived from Islamic law to exclude foreign law that conflicts with public order, and the latter is used as a tool to protect the fundamental principles.

Accordingly, the judge uses public order as a protective mechanism to protect the country's identity and religious traditions. Here, the judge is not only supposed to read the law, but to protect society's moral values and ethics. This protection is vital when Western principles of absolute gender equality directly conflict with Sharia rules about who can marry whom. Furthermore, because public order is flexible, a lot depends on the local judge's own decision. The judge must constantly balance two opposite tasks: keeping the country's traditional values safe, while also dealing with international pressure to accept marriages from other countries.

In this context, since mixed marriages involve a foreign element in the marital relationship, who may belong to a different religion and be subject to a different legal system, this hinders the completion of such marriages due to its conflict with public order, which prohibits a Muslim woman from marrying a non-Muslim man, or a Muslim man from marrying a non-Muslim woman or a woman of the People of the Book. It is, therefore appropriate to raise the following question: To what extent does religious difference in mixed marriages constitute a legitimate ground for invoking public order, and how does such difference affect the validity of these marriages from the perspective of public order?

To answer the above question, the present study employs a descriptive-analytical approach to present the concept of public order and its conditions of application within both domestic legislation and international private law treaties. Alongside this, an analytical approach is dedicated to examining the effects of religious difference on the validity of the marriage contract, analyzing the extent to which it restricts the spouses' will in entering into the marriage, and identifying the legal consequences of invoking public order due to a religious difference between spouses. Furthermore, this descriptive-analytical investigation extends to evaluating how local courts navigate the clash between international human rights conventions and national

sovereignty. By doing so, the study aims to look beyond the immediate validity of the marriage contract itself to uncover the broader international effects.

In light of the above considerations, this paper tackles the public order exception under both local law and international treaties, with particular focus on its application to mixed marriages involving religious differences. The study is significant because it highlights the challenges of reconciling national legal values, Islamic Sharia and cross family relationships. The research, first discusses the concept and conditions of public order, then analyzes the legal consequences and, finally sheds light on its effects on mixed marriages before exposing a number of recommendations on mixed marriages in the context of Islamic Sharia and international legal law.

1.Section One: Public Order Exception

Public order is a fundamental concept in law, given its role in protecting social values and ensuring the stability of legal transactions, particularly those related to family matters. It can be invoked to challenge actions that violate public order, provided specific conditions are met. Furthermore, invoking public order has clear legal consequences affecting the validity of contracts and the actions of the parties involved. Therefore, this section will address two main points: defining public order and the conditions for its application, and the consequences of invoking public order, whether when establishing a new marriage in the judge's country or when applying it to the effects of a relationship established abroad.

Addressing the concept of public order requires understanding its fundamental features before examining the mechanisms for its implementation. Accordingly, this requirement has been divided into two parts; the first relates to defining public order, while the second is dedicated to explaining the conditions for its application.

1.1Definition of Public Order

Public order is a flexible legal concept that is difficult to define precisely, given its connection to the fundamental values upon which every society is based, and its evolution with time and place. Legislation, jurisprudence, and the judiciary have consistently applied this concept whenever it comes to protecting the public interest and preventing harm to the essential foundations of the legal system, particularly in matters of personal status and family law. Consequently, public order has emerged as a constraint on the freedom of individuals to enter into legal transactions, in order to protect the religious, social, and moral values of society.

Public order is defined as: “The sum of the fundamental principles and foundations upon which the system of society is based at a particular time in terms of politics, economics, society and religion. Therefore, public order is a flexible and relative idea that varies in time and place and is difficult to define precisely in advance.” (Zerouti, 2010)

It has also been defined jurisprudentially as: “A weapon for defense against any foreign law that can be applied as a necessary component in the original law if a conflict arises between its content and the concepts.” (Elheddaoui, 2011)

Although jurists were unable to agree on a specific definition of the concept of public order, they agreed on its strength and effectiveness in pushing for the exclusion of the relevant foreign law. It is an effective mechanism in protecting the essential foundations and principles upon which the judge's law is based in order to exclude the applicable foreign law. (Choubourou, 2018)

1.2 Conditions for Invoking the Public Order Exception

For the plea of public order to be admissible to exclude foreign law, several conditions must be met, including:

- The foreign law must have established legislative jurisdiction. The plea of public policy cannot be raised if the applicable law is the law of the judge.
- A requirement of public policy must exist. For the foreign law to be excluded, it must conflict with the fundamental principles and foundations governing the judge's country.
- The foreign law must be inconsistent with public policy. This is because the requirements of public policy change over time, and therefore, the prevailing opinion in jurisprudence and case law is to adopt the principle of the immediacy of public policy. (Chenouf, 2015)

2. Section two: The Legal Consequences of Invoking Public Order

When a national conflict-of-laws rule assigns jurisdiction to foreign law to govern a legal relationship before the courts, the national judge considers the extent to which the foreign law conforms to and shares fundamental legal principles with his national law. If the judge finds that the foreign law is incompatible with his national law, conflicts with one of its essential principles, or violates the moral, religious, and social values that govern his country's law, he is compelled to activate the public order exception mechanism, thereby excluding the foreign law and preventing the application of its conflicting rules. (Hamadi, 2017)

It is necessary to distinguish here between the effects resulting from the application of the public order exception mechanism in a new relationship that is to be established in the judge's country and which is incompatible with his legal system, and its application with regard to the effects resulting from a relationship arising abroad.

2.1The Consequences of the Public Order Exception on a Relationship intended to be established in the Judge's State

If it is a matter of establishing a right in the judge's country, then the latter examines the legitimacy of establishing this right according to his national law. If it conflicts with his national law, then public order intervenes and results in consequences that jurists have divided into a negative effect and a positive effect.

2.1.1Negative Consequences

It is the exclusion of foreign law if its application conflicts with the public order of the judge's state. This prevents the application of that law to the relationship tainted by a foreign element, as it contradicts the fundamental principles and foundations of the judge's law. This effect raises a question regarding the extent of this exclusion of foreign law: does it encompass the entirety of the foreign law, or does it only apply to the part that conflict with the public order of the judge's state?

Some French legal scholars argue that provisions of foreign law that violate public order in the judge's country must be completely and entirely excluded. This is because partially excluding such a law by rejecting the part that violates public order while applying the other parts distorts it and applies it in a manner contrary to the legislator's intent. Furthermore, partial exclusion violates the national conflict-of-laws rule, which aims for the full application of foreign law.(Arab,2002)

However, the prevailing view in legal scholarship holds that the negative effect of invoking public order does not entail the complete exclusion of the applicable foreign law under the national conflict-of-laws rule, but rather its effect is limited to excluding the part that violates the public policy of the judge's state without affecting the remaining parts, because the purpose of applying the public order mechanism is not to judge the foreign law itself, but rather to exclude the consequence that causes the foreign law not to be integrated with the national law. (Akli Swalhi, Ihdaden Chaib, 2021)

2.1.2Positive Consequences

The effect of the public order exception is not limited to excluding foreign law and suspending its provisions, but is followed by consideration of the alternative law to govern the conflict issue presented before the judiciary, in order to prevent the resulting legal vacuum. This is what is called the positive effect of the public order exception, as the judge excludes the foreign law that violates the public policy of his country in order to replace it and put national law in its place. (Hamadi,2017).

2.2 The Impact of the Public Order Exception in Foreign-Origin Relationships

This concern upholding the effects of a right acquired through a relationship that originated abroad. The judge examines the extent to which the acquired right can be invoked abroad and the degree to which it affects the public order of the country. To mitigate the absolute application of the public order exception, which is considered an aggravating factor, the principle of leniency and tolerance is activated in cases of upholding or establishing certain effects of a legal relationship that originated abroad. This is what is called the mitigating effect of public order. (Boukharouba, 2014).

The mitigating effect of public order limits the strictness of the public order exception and allows foreign law to extend to the judge's country, by acknowledging the acquired rights arising therein, taking into account the stability of legal positions and international transactions. However, public order may regain its role and strictness again in serious cases, and strictly address the acquired rights abroad, such as when a marriage contract is concluded between a Muslim woman and a Christian in a foreign country that does not recognize the religious impediment. In this case, it is not possible to take the mitigating effect of the public order of the Muslim woman's country, so it does not recognize the rights arising from this marriage and strictly addresses these acquired rights from this marriage, which it considers invalid.

The Algerian law has stipulated that rights and legal statuses acquired abroad are not recognized if they contravene Algerian public order. For example, on October 17, 1990, the Supreme Court overturned a decision by the Béjaïa Court of Appeal that had validated a will established under French law. Given that matters of personal status are governed by Islamic law, these laws cannot be contradicted or violated, and no rights can arise from them if they conflict with Islamic law. This principle has been adopted by legal systems that have adopted Islamic law as a source of legislation and have therefore not applied the principle of mitigating circumstances in these matters. (Boukharouba, 2014)

2.3 Religious Difference as an Impediment to Marriage

For a marriage to be valid in Islamic countries, it must be free from any impediments and must meet the conditions of validity stipulated by Islamic law for the conclusion of a marriage contract. Among these conditions is the unity of religion between the spouses. Therefore, a marriage between a Muslim woman and a non-Muslim man is not valid, nor is a marriage between a Muslim man and a non-Muslim woman who is not a People of the Book. If one spouse converts to Islam and their religions differ, the marriage is dissolved because Islamic law does not recognize the continuation of the marital relationship. This is considered an annulment, not a divorce. Ibn Qudamah (1969) stated: "If he is the Muslim, he is not permitted to

remain married to a non-Muslim woman, due to God's statement: 'And do not hold onto the bonds of marriage with disbelieving women.' And if she is the Muslim, it is not permissible for her to remain married to a non-Muslim man."

Marriage between a Muslim woman and a non-Muslim is forbidden in Islamic law, according to the consensus of scholars, based on the verse: "And do not marry polytheistic men until they believe" (Quran 2:221), and the verse: "If you know them to be believers, then do not return them to the disbelievers. They are not lawful [wives] for them, nor are they lawful [husbands] for them" (Quran 2:221). Therefore, marriage between a Muslim woman and a man of the People of the Book (Jew or Christian) is not permissible, just as marriage between a pagan or a Zoroastrian is not permissible. (Ibn Rushd, 1994).

Furthermore, it is unanimously agreed upon by the majority of scholars that a man is not permitted to marry a polytheistic woman, whether she is a Zoroastrian, a pagan, or an atheist or materialist, such as a communist, existentialist, or Baha'i, and so on. This is based on the verse: "And do not marry polytheistic women until they believe. A believing slave woman is better than a polytheistic woman, even though she might please you" (Quran 2:221). However, it is permissible for a man to marry a woman of the People of the Book, meaning one who believes in a revealed religion such as Judaism or Christianity. Scholars have unanimously agreed on the permissibility of marriage to women of the People of the Book. (Al-Zuhayli, 1985)

As a result, Islamic law is the source of personal status laws in Islamic countries, including Algerian law, the latter stipulates in Article 9 bis of the Family Code the absence of any legal impediments to marriage. This is further emphasized by the Algerian legislator in a separate chapter entitled "Impediments to Marriage," where Article 23 states that both spouses must be free from permanent and temporary legal impediments.

The impediment of religious difference between the spouses falls under the category of temporary impediments, which are legal impediments where the prohibition is temporary, not permanent. In other words, the reason for the prohibition is temporary; the prohibition remains in effect as long as the reason persists and ceases when the reason ceases to exist.

The Algerian legislator stipulated this in Article 30, as amended by Ordinance 05/02 dated February 27, 2005, in its final paragraph, stating: "The following is temporarily prohibited for women: the marriage of a Muslim woman to a non-Muslim man."

Furthermore, the Algerian Family Code prohibits a Muslim man from marrying polytheistic or atheistic women, according to Article 222, which refers all matters not

explicitly addressed in the text to the provisions of Islamic law, which, as we have seen, prohibits this matter.

It is well-established that Algerian domestic law does not recognize marriage contracts that violate its provisions and are concluded in foreign countries. This is stipulated in Article 24 (as amended) of the Algerian Civil Code. Any violation of the Algerian Family Code is considered a breach of public order.

3. Section Three: The Effects of the Public Order Exception Based on Religious Difference in Mixed Marriage

Since the marriage of a Muslim woman to a non-Muslim man, and the marriage of a Muslim man to a polytheist or an atheist woman, is among the impediments to marriage stipulated by the Algerian Family Law in application of the provisions of Islamic “Sharia”, such a marriage is not valid. Consequently, this issue is considered one of the objective conditions for the establishment of marriage, thus restricting the will of the two parties to conclude this contract, even if there is mutual consent between them, which is what the first element of this requirement addresses. Also, invalidity results in the event that this marriage is concluded, which is what is specifically discussed in the second element. Consequently, the judge has the right to exclude foreign law in this matter because it violates his public order, which is what this section addresses.

3.1 The Restriction of Marital Freedom due to Religious Differences

It is well-known in contract formation that when the wills of the contracting parties coincide, this agreement validates the transactions and establishes the contracts. However, when matters pertain to the highest issues of the state or to the fundamental principles and foundations governing society, public order intervenes to impose restrictions to prevent the violation of these principles and overarching norms. Individual will cannot contravene or transgress these restrictions; it must comply with them.

In this case, public order is not considered an infringement upon freedom or the sovereignty of the will. Rather, it serves to warn the will against exceeding the boundaries it has established for its operation. Public order prevents the misuse of the will and averts chaos and disorder. Therefore, public order is considered a restriction on the freedom of will that seeks to perform legal acts with consequences, provided that such acts are contrary to public order and the fundamental principles of society.

In the case of mixed marriages, the woman and the man have the right to enter into marriage when their wills are in agreement, provided that this will does not violate the principles of public order. If the spouses are of different religions—for

example, if the wife is Muslim and the husband is not, or if the husband is Muslim and the wife is polytheistic or atheist—they cannot enter into such a marriage according to public order, as this act violates the objective conditions stipulated by law. Consequently, the will of the spouses is restricted in this case, and their marriage is not valid. (Delal, 2014)

3.2 Invalidity of the Marriage Contract due To Religious Differences between the Spouses

This case concerns determining the legal status of a marriage contract concluded between spouses of different religions. Since this act contravenes public order, it is considered null and void. The court may declare this marriage null and void because it constitutes an infringement upon the higher interests of the state. Nullity applies to any legal act that violates public order. The nullity referred to here is absolute, not relative, voidable, or subject to ratification. Therefore, a marriage contract concluded between spouses of different religions is considered absolutely null and void because it violates public order. (Sabiq, 2004).

As for Islamic law, scholars agree that the marriage of a Muslim woman to a non-Muslim man, or the marriage of a Muslim man to a polytheist or apostate (atheist), is invalid. Such a marriage must be dissolved, and no legal consequences or rights arise from it. Therefore, legal systems derived from Islamic law have adopted the principle of invalidity for marriages between a Muslim woman and a non-Muslim man, or between a Muslim man and a polytheist, apostate, or atheist woman. This was the ruling of the Cairo Court of First Instance in its judgment of October 6, 1953, which declared the marriage of a Turkish Muslim woman to a British Christian man invalid because the marriage violated public order in Egypt. (Chebourou, 2018)

In this context, the Algerian legislator codified the provisions of Islamic Sharia, treating religious difference as a statutory impediment that invalidates legal capacity to contract marriage, and classifying it as a matter of **absolute nullity** rather than a mere relative or temporary invalidity. This is explicitly codified in **Article 31** of the Algerian Family Code, read in conjunction with **Article 32** of the same Code, which mandates the automatic dissolution of the marriage by operation of law if it contains any such legal impediment. The text of the article explicitly states: “A marriage is void if it contains an impediment or a condition that conflicts with the prerequisites of the contract.”

This principle has long been anchored in Algerian judicial precedent. Decades ago, the Supreme Court reaffirmed this established doctrine in its decision dated April 6, 1981 (File No. 23832), ruling as follows:

“Whereby, assuming this marriage took place, its contract, whether customary or official” is deemed void and invalid in accordance with established Sharia principles, which stipulate that for a marriage to be valid, the woman must not be permanently or temporarily forbidden to the man, including the marriage of a Muslim woman to a non-Muslim. Therefore, if this occurs, the judge is obligated to separate them.”

It is inferred from this analytical jurisprudence that the Supreme Court did not treat the matter as one subject to party autonomy. Instead, the Court viewed it as a grave violation of public policy and Islamic legal objectives, thereby requiring the judge to intervene (automatically) to halt any legal effects of this absolutely void contract

3.3 Exclusion of Foreign Law

One of the consequences of a mixed marriage between spouses of different religions is the application of the public order defense mechanism, considering that this action is contrary to the requirements of public order. Whenever a national judge is presented with a matter relating to the difference in religion between the spouses, the judge adheres to the invalidity as it is contrary to the public order in his country. He also excludes the application of the competent foreign law under the national conflict-of-laws rule if its provisions permit the marriage of a Muslim woman to a non-Muslim man and refers the decision in the case to the national law.

The statutory framework for the defensive invocation of public order finds its definitive mechanism in **Article 24 of the Algerian Civil Code (as amended by Law No. 05-10)**. A critical analysis of this provision reveals that it does not merely serve as a passive guideline; rather, it functions as a mandatory bilateral weapon in private international law, dictating both a negative effect and a positive effect.

First, the negative effect of Article 24 operates as an absolute barrier that strips a foreign law of its competence the moment it collides with Algerian public policy or Islamic morality. For instance, if a foreign secular law permits a Muslim woman to marry a non-Muslim man, Article 24 immediately evicts that foreign law from the Algerian legal sphere. Second, the article explicitly triggers its positive effect by mandating that “Algerian law shall apply in place of the foreign law.” This ensures there is no legal vacuum, instantly substituting the ousted foreign rules with the mandatory provisions of Articles 31 and 32 of the Family Code.

Furthermore, the legislature’s inclusion of the “**fraud against the law**” doctrine within Article 24 provides judges with an essential tool to counter international forum

shopping. This prevents individuals from artificially manufacturing connecting factors such as temporarily changing citizenship or entering into civil marriages abroad, solely to circumvent the absolute impediments of Algerian personal status laws. Therefore, Article 24 acts as the fundamental bridge linking the civil conflict-of-laws system to the religious sovereignty of the Family Code, establishing that international private autonomy must completely yield to national public policy.

The exclusion of foreign law applies only if the relationship originates in the judge's country. But what if the relationship originates in a foreign country? For example, if a Muslim Algerian woman agrees to marry a non-Muslim French man, and the marriage takes place in France, do the implications of public policy extend beyond national borders, preventing the formation of this contract or allowing its annulment if it has already been concluded? Or is the concept of public policy limited to national borders, being a purely national concept? Jurisprudential opinions on this matter have varied, with scholars dividing into two main groups:

A- The first group believes that public order is a national concept, and therefore it cannot extend beyond the borders of the state, nor can it be imposed. It is confined to the borders of the state in which it was established, without its effects extending abroad. In the example we presented of the marriage of a Muslim Algerian woman to a non-Muslim Frenchman, it is considered a valid marriage according to French law because religious difference is not considered an impediment to marriage.

B- The second group believes that if the public order in the country where the relationship took place is similar to the public order in the judge's country, then it is logical to work with the mechanism of the public order plea by what is called the reflexive effect of public order. However, if the public order differs in the two countries, then the idea of public order does not have a single effect, which leads to the non-recognition of this right in a third country. For example, if an Algerian woman marries a non-Muslim in France, this marriage cannot be invoked in Algeria because it is invalid due to the impediment of difference of religion. However, if it is wanted to be invoked in a third country, the matter differs depending on whether this country takes this impediment into account or considers it contrary to public order. If this marriage is invoked in Germany, then there is no doubt that it will be recognized. But in Syria or Morocco, it will not be recognized because these countries take this impediment into account. (Akli Soualhi,2014)

Since Islamic countries, including Algeria, do not recognize a marriage contract in which the spouses differ in religion because it includes an impediment to marriage, this marriage is considered invalid and no effects or rights result from it.

4. Conclusion

Since marriage in every country is linked to religious, social, and cultural considerations, its issues constitute a fertile ground for advocating public order. Foremost among these is the issue of religious difference between spouses, which is considered a fundamental matter governing marital relations in countries that adhere to Islamic law and adopt it as a source of legislation. Consequently, any relevant foreign law that conflicts with this matter, which is considered a matter of public order and cannot be violated, is excluded. On the whole, among the results obtained in this research:

- 1- The issue of religious difference between spouses is a fundamental aspect of marriage in countries governed by Islamic law, as it constitutes a temporary impediment to marriage.
- 2- A national judge can restrict the spouses' freedom of choice in entering into a marriage contract if the marriage is based on religious difference, thereby preventing its conclusion as it violates public order and the higher interests of society.
- 3- The Algerian legislator explicitly dictates the absolute invalidity of a marriage contract involving a prohibited religious difference, treating it as an absolute legal impediment that strips the parties of matrimonial capacity. Moving forward from a purely descriptive view, this invalidity is strictly governed by **Article 31**, read in conjunction with **Article 32** of the Family Code, which mandates the automatic judicial dissolution of any marriage containing an impediment that conflicts with the prerequisites of the contract.

Analytically, this statutory framework demonstrates that the Algerian legislature elevates religious compatibility to an element of public order. By enforcing automatic judicial dissolution under Article 32, the law strips the parties of any autonomy, ensuring that such contracts cannot be validated by time, consummation, or mutual consent, thereby completely neutralizing their cross-border legal effects.

- 4- To protect fundamental principles, higher values, and the interests of the community, the mechanism of invoking public policy allows for the exclusion of the application of relevant foreign law under the national conflict-of-laws rule if its provisions permit a Muslim woman to marry a non-Muslim man, thus referring the case to national law.

- 5- Legal scholars have differed on the issue of invoking public policy outside the borders of the state. Given that Islamic countries do not recognize marriage contracts between spouses of different religions, such marriages are considered invalid and do not entail any legal effects or rights. This is the position adopted by the Algerian legislator.

5. Recommendations

Based on the critical points raised regarding mixed marriage, Islamic Sharia, and international legal frameworks, the following key recommendations could ensure the protection of families and the preservation of public order:

1. **Protect Rights and Parentage:** Ensure the protection of marriage rights and effects when concluding contracts, especially for marriages between Muslims and non-Muslims outside their home countries to safeguard children's parentage, inheritance rights, and financial security.
2. **Raise Awareness of Sharia and Legal Culture:** Increase public awareness regarding Islamic Sharia provisions concerning religious differences between spouses, and promote legal literacy in contract conclusion to prevent violations of public order and its core principles.
3. **Establish International Agreements:** Create formal agreements between countries, particularly those hosting large Muslim communities to regulate and manage marriage matters, thereby protecting the resulting legal rights and consequences.

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