The role of testimony in proving customary marriage in Algerian legislation

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Abstract:

The present study addresses the issue of proving customary marriage by witness testimony within the context of Algerian legislation, a subject of particular pertinence within the fields of family law and civil status law. In Islamic jurisprudence, testimony plays a pivotal role in the establishment of marriage, particularly in instances of significant discord between spouses, which often results in the dissolution of the marital bond. In such cases, it is imperative for the parties concerned to adhere to specific procedures to prove the validity of the marriage in order to initiate divorce proceedings.

Keywords: Customary marriage, proof, registration, contracts, testimony, family.

Introduction:

The family unit is of paramount importance in Islamic society, and Islamic law is concerned with its formation and protection as the fundamental building block and cornerstone of society and the safety of the nation. It is for this reason that the present study has been devoted to the analysis of anonymous marriage contracts, given their significance and the wise Shari'a designation of the great pact. Anonymous marriage contracts are defined as agreements that were executed in the past, in accordance with the tenets of Islamic jurisprudence, yet not documented in civil status records. Within the Islamic legal system, these agreements are referred to as a marriage scroll or a nikah declaration[1]. The propagation of such contracts can be attributed to two predominant factors: firstly, the pervasive influence of Islamic law within Algerian society, and secondly, the widespread illiteracy and legal ignorance.[2]

The official marriage contract does not present any issues in terms of substantiation, as it can be substantiated by a document extracted from the marriage contract registered in the civil status records. Conversely, the customary marriage contract poses significant challenges in terms of substantiation, particularly in instances of escalating marital discord, which often

[1]The distinction between 'term declaration' and 'scroll' is determined by their usage in different circumstances. The term declaration is used when both spouses are alive, whereas the scroll is a customary paper used in the event of the death of both spouses.

[2] - For more details, see Abdelfattah Takia, Lectures on Personal Status Law, for students of the Professional Competence of Lawyers Department, Thala Publications, Algiers, 2000, p. 23.

results in the husband evading his marital obligations, including the rights of the wife and children. Additionally, in instances where the wife seeks to terminate the marriage, the substantiation of the customary marriage contract becomes particularly arduous.

In instances where recourse is to the judiciary, the Family Affairs Court refuses to accept such claims due to the absence of documentation substantiating the purported marital relationship. **This paper sets out to explore the concept of customary marriage in comparison to corrupt marriages, and the procedures for proving it.**

In order to study this topic, the first requirement deals with the concept of customary marriage, highlighting the role of testimony in proving it, and in the second requirement, we explain the procedures for registering customary marriages.

First part: The concept of customary marriage:

It is imperative to note that a considerable number of individuals within society erroneously equate a corrupt marriage with a legitimate customary marriage that has not been officially documented in civil status records. This requirement will therefore address the definition of anonymous marriage contracts, explain the difference between them and corrupt marriages, and then explain the role of testimony in proving such contracts

The initial section: The definition of customary marriage:

The term 'customary marriage' is understood to possess dual meanings: a linguistic interpretation and a jurisprudential interpretation.

The definition of custom in language.

It signifies that which is recognized and to which individuals are accustomed in their respective customs. The terms "custom" and "knowledge" are considered synonymous in the context of nikr, which represents all that the soul comprehends as being conducive to its well-being. The term "hadith" is employed to denote a collective designation for all that is recognized through obedience to God, proximity to Him, benevolence towards others, and all that is advocated and proscribed by the law, encompassing both that which is deemed favorable and that which is deemed unfavourable[3].

Secondly, the jurisprudential concept of custom: is consistent with the linguistic concept, which is defined as follows:

This nikah is defined as a contract between a man and a woman, in accordance with the principles of Islamic jurisprudence, in which the wife enters the marital home and is not registered in the civil status records within the legally prescribed period[4].

The Journal of Contemporary Jurisprudential Research offers a definition in the context of marriage, stating: 'It is a modern term for a marriage contract that is not documented by an official document, whether written or unwritten.' Dr Abdel Fattah Amr defines it as: 'It is a contract that fulfils its legal conditions but is not documented, i.e. without an official or customary document.'[5]

These definitions of customary marriage demonstrate that there is no distinction between it and legitimate marriage, which is required to fulfill all the pillars and conditions. However,

[3] Abbas Mahjoub's article, Secret Marriage, Not Customary Marriage is taken from the following website: http://meshkat.net/new/home.php

[4] See Badawi, Algerian Judicial Encyclopaedia, second issue, p. 27.

[5] See the following website: http://www.egypty.com/lelkebar/issue7/article1.htm

there is a distinction between it and official marriage, as for marriage to be official, it must be documented in the state's documentation department, while legitimate marriage does not require documentation because it is already documented[6]. The legal deadline for the registration of customary marriage contracts is estimated at three days from the day of the ceremony, according to the Civil Status Law, if the contract is concluded within the national territory. However, if the contract is concluded outside Algerian territory, the deadline is estimated at one year[7].

In the Algerian legal system, a customary marriage is defined as a legal contract that encompasses all the elements of a marriage contract, including a guardian, two witnesses and a dowry. These elements were stipulated as conditions under the recent amendment, Order 05-02, with the sole exception of registration in the civil status registry[8].

Section II: The distinction between a customary marriage contract and an invalid marriage contract:

It has become necessary to differentiate between customary marriages and other types of marriages that have come to compete with it in Arab societies, such as marriage of convenience, secret marriages and Musyar marriages

Firstly, Marriage of convenience:

This is defined as a marriage in which a man marries a woman for a specific period of time and specific financial compensation, after which the marriage is considered to be terminated without the requirement for a divorce. This type of marriage does not entail any obligation of alimony or housing. In the event of one spouse's death before the termination of the marriage, there is no entitlement to inheritance.

Secondly, the Secret Nikah: it involves the formalization of a marital agreement between a man and a woman, whereby a document is written and signed by both parties, acknowledging the establishment of marriage. This agreement is witnessed by two individuals and is recorded in two separate documents, one for the man and one for the woman. In exchange for this agreement, the man provides financial compensation to the woman. This practice is considered invalid due to its lack of a guardian and its foundation on secrecy and lack of publicity.

Thirdly, the Musyar marriage: is defined as follows:

This is characterized by the formalization of a marital union through a legal agreement that encompasses all the necessary components. However, it should be noted that the woman waives her right to housing and alimony[9].

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[6] See Osama bin Omar bin Sulaiman al-Ashqar, Customary Marriage, taken from the following website: http://www.almoslim.net/admin_prod/chapters_list_main.cfm?id=31

[7] Article, Badawi Ali, Algerian Judicial Encyclopaedia, second issue, p. 27.

[8] File no: 188707 Decision dated 17/03/1998. See Al-Aish Fadil, Family Law supported by the jurisprudence of the Supreme Court with the latest amendments, Office of University Publications, 2005, p. 27.

[9] See Sulaiman ben Saleh Al-Kharashi, The difference between Musayyar marriage, Mut'ah marriage and customary marriage. http://saaid.net/Warathah/Alkharashy/m/index.htm

This form of marriage is not a recent innovation, as Dr Yusuf Al-Qaradawi observes: "It is a practice that has been recognized since ancient times, where the man goes to the woman's house and she does not move to his[10].

Second part: Witnessing Customary Marriage:

The Islamic Shari'ah has been very keen on establishing a healthy family structure since its inception, and it has been regulating the provisions of the marriage contract in a way that preserves its structure and achieves the interest of society.

The customary marriage contract is substantiated by evidence, confession and oath. The focal point of this research is the evidence, that is, the testimony of witnesses to a specific incident, and the testimony is a transitive argument. This signifies that the evidence substantiated by such testimony is admissible not only for the plaintiff but for all concerned. The quorum required for the substantiation of customary marriage is the testimony of two men. Consequently, the testimony of two women or one man and two women is not admissible. This principle has been upheld by the Supreme Council in a definitive decision: "It is a Sharia-established rule that if one person claims marriage and the other denies it, it must be proven by conclusive evidence, such as witnessing the contract or hearing it, and the testimony considered in marriage is the testimony of two male justices, so any judgment that violates this principle is contrary to the provisions of Islamic law."[11]

It is not permissible for a witness to testify to something that they have not seen, and as an exception, jurists allowed testimony by hearsay in the case of marriage in order to avoid embarrassment and disruption of judgments[12]. This position was formally endorsed by the Supreme Council in a decision promulgated on 27/03/1989, which stated: 'It is legally established that marriage can only be proven by eyewitness testimony, whose owners testify that they attended the wedding of the two parties, or by hearsay testimony, whose owners testify that they heard from witnesses and others that the two parties were married. Hence, the appeal against the contested decision for lack of legal grounds and violation of procedural rules is misplaced and must be rejected[13].' It is therefore vital that the hearing is conducted by individuals who are impartial and cannot be expected to collude in order to provide false testimony.[14]

A challenging scenario that the Algerian judge encounters in practice pertains to the death of one or both spouses prior to the formalization of the marriage contract. This state of affairs leaves the surviving spouse with the onus of substantiating their marriage through full evidence under oath, as established by the Supreme Court in a definitive ruling: The court's ruling stated that "The marriage contract after the death of one of the spouses shall be confirmed by the testimony of witnesses and an oath, in accordance with Khalil's statement in the chapter on testimony - no marriage after death - and therefore, the trial judges, by ruling

[10] See Abbas Mahjoub, op cit, http://www.meshkat.net/new/list.php?catid=6&authid=2

[11] See, File No. 43889, decision dated 15/12/1986, Judicial Review, No. 02, 1993, p. 37.

[12] See, Adel Mohamed Salim, Customary Marriage, Technical Office for Legal Publications, 2002, p. 55.

[13] See File No. 53272, Decision dated 27/03/1989, Judicial Review, No. 03, 1990, p. 82.

[14] See Adel Mohamed Salim, op. cit. p. 55.

that the respondent must take an oath about her customary remarriage to the deceased in addition to hearing the testimony of witnesses, correctly applied the law."[15]

Section I: Registration of Customary Marriages:

All laws and decrees issued from before independence to the present day, as Algeria was part of the Ottoman Empire before gaining independence and lacked a civil status system, are based on customary contracts according to Islamic Sharia jurisprudence.

However, following the occupation, the French government initiated the issuance of certain laws on an intermittent basis. These laws were designed to address the absence of formal documentation and registration of anonymous marriage contracts, as well as birth and death certificates.

Firstly: Texts that dealt with the marriage contract before independence

1- The law of 23 March 1882 containing the declaration of marriage, which established a criminal penalty in case of failure to declare it.

2- Law No. 777-57 of 11 July 1957 pertains to the substantiation of marriage contracts that were concluded prior to a specified date, and it stipulates the mandatory registration of such contracts within the civil status records.

3- The law of 4 February 1954, which was brought into force by the decree of 17 September 1959, regulates marriage contracts that are not registered in the civil status register, and which can be proven (place and date) by documents or witness testimony.

Secondly: texts dealing with the marriage contract in the aftermath of independence:

1- Decree No. 126-62 of 31 December 1962, which deals with certain marriages and deaths that occurred between 1954 and 1962 for a period of one year, effective from the day of publication of this decree in the Official Gazette.

2- Law No. 224-63 of 29 June 1963 on the age of marriage and its registration, Article 5 of which prohibits litigation before the courts without the presentation of a civil status extract.

3- Order No. 72-69 dated 16 September 1969, which deals with the status of marriage contracts concluded in accordance with Islamic law prior to this date, is to be registered by order of the president of the court.

4- Ordinance No. 70-20 of 19 February 1970 on the current Civil Status Code, which came into force on 1 July 1972, pertains to customary marriage contracts[16], thereby conferring full jurisdiction on the court to adjudicate and register such instruments. In the event that the contract is executed within the national territory, jurisdiction is vested in the court of the place of conclusion of the marriage contract, or alternatively, the court in which either spouse resides, in accordance with the provisions set out in articles 39 and 8 of the Consumer Protection Code and the Civil Procedure Code.[17]

[15] File No. 204254, decision dated 22/09/1998. Judicial Review, No. 02, 2000, p. 173. See another decision, File No. 37501, decision dated 23/09/1985, Judicial Review, No. 1, 1989, p. 95.

[16] Badawi Ali, op. cit. pp. 34-35.

[17] Abdelaziz Saad, Marriage and Divorce in Algerian Family Law, third edition, Dar Homa for Printing, Publishing and Distribution, Algeria, 1996. P.166, Belhadj Larbi, Al-Wajeez in the Explanation of Family Law (Marriage and Divorce), : Part I, 4th edition, Office of University Publications, Algeria, 2005. Page 144.

5- In the event that a marriage is contracted extraterritorially, the court with the requisite jurisdiction to register such a union is the Algiers court, in accordance with the provisions enshrined in Article 99 of the Consumer Protection Law and Article 8 of the Code of Civil Procedure.

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The second section: **the procedures for registering customary marriages**:

In accordance with the stipulations of Islamic law, the terms and conditions of marriage contracts can be formally documented and registered within civil or consular records. This process can be achieved through two distinct methods, as outlined in Articles 39 of the Consumer Protection Law and 22 of the Code of Civil Procedure[18].

Secondly, according to the Civil Status Law, these contracts are registered by issuing a simple order on a petition submitted by the public prosecutor, accompanied by the documents of the nikah contract[19]. However, in practice, this procedure is not applicable, if not legally possible, although it has been discussed in many books on Algerian law.

In contrast, the Family Code expressly stipulates the registration of such contracts through a judicial ruling issued by the Family Court, subsequent to an exhaustive and meticulous investigation into the evidence of the legal marriage.

In order to study this topic, it is necessary to distinguish between two types of marriages: the method of registering customary marriages that are undisputed and the method of registering marriages that are disputed.

Firstly the method of registering undisputed customary marriages:

In addressing this issue, it is imperative to distinguish between two cases: the first case concerns marriages concluded within the national territory, while the second case pertains to marriages that took place outside the national territory[20].

1- **The case of undisputed marriages concluded within the Algerian territory:**

The procedures for registering customary marriages, concluded in accordance with the provisions of Islamic jurisprudence, in which the wife is admitted, before being registered in the civil status records, are as follows:

A- The husband and wife, or whoever has an interest in the matter, must submit a written request to the competent public prosecutor in the court of the district where the marriage was concluded.

B. It is incumbent upon both the husband and wife to present their respective birth certificates.

c) In addition, a written certificate from the bailiff attesting to the presence of two witnesses to the contract and wedding ceremony must be provided.

Upon submission of these documents, the Public Prosecutor must prepare a petition and submit it to the President of the Family Court, requesting him to issue an order to register the omitted marriage in the civil status records[21], with retroactive effect. Subsequent to the

[18]See Badawi Ali, op. cit. pp. 34-35.

[19] See Abdelaziz Saad, op. cit., p. 166; Belhadj Elaraby, op. cit., p. 144.

[20] See Badawi Ali, op. cit. pp. 34-35.

[21] See Badawi Ali, op. cit. pp. 34-35.

validation of the marriage, the presiding judge will adjudicate on the petition, thereby issuing an order to the civil status officer to register the customary marriage and enter it into his records. The original copy of the order is retained by the registry office, which dispatches a second copy to the civil status officer in the relevant municipality so that the contract can be registered on the date it was performed.

It is important to note that the order issued to register the marriage is typically a mandatory order that is not subject to the normal methods of appeal, such as opposition and appeal. However, it is subject to review by the same judge, in the event of an error being made, in order to correct it[22].

2- **The case of an uncontested marriage that took place outside the national territory**:

The procedures for registering a marriage between two Algerians or an Algerian and a foreigner, who reside together in another country, and whose marriage was not contracted at the Algerian consulate, nor registered in the municipality of that country, shall be registered according to the following procedures[23]:

A- The spouses, or any interested party, are obliged to submit an application to the public prosecutor of the Court of Algiers.

B- The husband and wife must present their birth certificates.

The petition is to be accompanied by the official testimony of two adult witnesses who attended the contract and wedding ceremony.

The public prosecutor of the Court of Algiers is tasked with the preparation of a petition, which is then submitted to the president of the court for the issuance of an order to register the customary marriage contract between an Algerian and a foreigner.

The Algerian legislator has assigned this jurisdiction to the Court of Algiers only, through the text of Articles 100 and 101 of the Consumer Protection Law, because the rectification of the status of Algerians residing abroad is at the level of the Civil Status Office of the Ministry of Foreign Affairs[24].

Secondly, the method of registering a marriage that is in dispute:

This pertains to the registration of a marriage whose existence or validity is contested between the spouses, with one claiming the marriage and the other denying its existence, whether during their lifetime, or after their death between their heirs, or between one of the spouses and the heirs of the other spouse.

In order to substantiate this matrimony, one of the spouses against the other spouse or vice versa, or the heirs of one spouse against the other spouse, or the public prosecutor representing the public right, in accordance with the provisions of Article 03 bis of the new Family Code, which has become an original party in personal status cases. The Family Court is now composed of a new composition, headed by the trial judge in addition to the public prosecutor and the presence of the registrar, in a manner similar to that of criminal courts[25].

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[22] See Abdel Fattah Taqiyeh, op. cit., pp. 169-170

[23] See Badawi Ali, op. cit. pp. 34-35.

[24] See Badawi Ali, ibid, pp. 34-35.

[25] Ben Daoud Abdelkader, Al-Wajeez in explaining the new family law, Encyclopedia of Legal Thought, Dar Al-Hilal for Media Services, Oran, 2005, pp. 60-61.

In both cases, a judicial judgment is issued, either rejecting the marriage or validating it. These rulings are typically of a preliminary nature[26], and if they are elevated to a final adjudication, subsequent to the exhaustive exploration of all ordinary and extraordinary appellate mechanisms, procedural measures are initiated. In this process, the judicial bailiff endeavors to effectuate the ruling by transmitting a copy thereof to the civil status officer through the intermediary of the public prosecutor, thereby facilitating its registration[27].

It is important to note that no court has the right to order the registration of a customary marriage contract that is flawed and does not fulfill the elements and conditions of the marriage contract in accordance with the provisions of Article 09 of The Consumer Protection Law.

Conclusion :

At the conclusion of this research, entitled Evidence by Witnesses in Matters of Marriage and Divorce in Islamic Jurisprudence and Algerian Family Law, it is hoped that the topic has been given its due in terms of study. Should there be shortcomings, these are due to the many issues raised by the topic, which require more in-depth, specialized and comprehensive studies in order to remove the confusion and ambiguity related to it. It is acknowledged that any work is subject to its own limitations.

The objective of this study was twofold: firstly, to demonstrate and emphasize the extent to which the testimony of witnesses in personal status articles in the Algerian Family Law is implemented; and secondly, to ascertain the extent to which the Algerian judge and Algerian law are in accordance with Islamic jurisprudence on these matters.

The study revealed that the Algerian legislature has made commendable efforts in delineating the procedures for witness hearings in the Code of Civil and Administrative Procedure, entrusting the judge with the discretionary authority to evaluate witnesses' statements and determine their admissibility.

This finding indicates that the testimony of witnesses is considered highly authoritative and has a high status in evidence, despite the advancements in various scientific fields that have led to the development of modern scientific techniques, such as blood analysis and genetic fingerprinting. However, it is observed that testimony is considered superior to written evidence and other aforementioned means, particularly in cases pertaining to customary marriage and its consequences.

It is concluded that the role of witnesses in proving the marriage contract is an urgent necessity, as the family judge cannot confirm any customary marriage without the testimony of witnesses. Although witnesses are not a pillar of marriage in Algerian family law, with the exception of some narrow areas in which writing takes precedence over testimony, such as proving official marriage and divorce, which is usually through a court judgement, some disputes concerning household goods where the plaintiff has the purchase receipt, in addition to proving parentage by modern scientific methods.

The following observations are hereby submitted for consideration by the Algerian legislator:

[26] It is subject to opposition if the judgement is issued in absentia, and subject to appeal if it is an in-person judgement.

[27] Badawi Ali, ibid, pp. 34-35.

- The inclusion of new, unified legal texts regulating the conditions of the witness within the Family Code and the Civil Status Code is hereby requested, with a view to eliminating the existing contradictions between the articles and judicial judgments.

- The provisions of testimony in all Algerian laws should be reorganized to keep pace with scientific developments, such as psychology to clarify mental illnesses, sociology and other modern sciences.

The Family Code should include a provision that establishes the judge's absolute discretion to take or not take witness statements, including the principle of the judge's personal conviction in family law, as is the case for the criminal judge.

The organization of training courses for judges, with a particular emphasis on family law judges, is recommended. These courses should be overseen by psychologists specialized in the principles of witness testimony criticism, with the objective of enabling judges to examine witness testimony using scientific and rigorous methods.

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