

Legal separation in Algerian law - legal and practical dilemmas**الانفصال الجسماني في التشريع الجزائري-اشكاليات قانونية وعملية**DEBBA Nacer Doctor ⁽¹⁾

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Abstract:

The legislator introduced the concept of legal separation into the Algerian law terminology through the amendment of the Civil Code by Law 05/10, specifically in Article 12, Paragraph 2. Under the provisions of this article, legal separation became subject to the same conflict of laws rules that govern the dissolution of marriage. However, the legal analysis of this legislative amendment revealed its inconsistency with other provisions within the same law, which has generated multiple problems at the legal, judicial, and jurisprudential levels. Addressing these contradictions requires legislative intervention to review and reorganize this amendment. Therefore, through this research, we seek to provide an in-depth analysis of the issue at hand, while highlighting the legal challenges and their practical implications.

Keywords : Legal separation, private international law, civil code, public order.

الملخص:

أضاف المشرع مفهوم الانفصال الجسماني في مصطلحات القانون الجزائري بعد تعديل القانون المدني بموجب القانون 10/05، من خلال المادة 12 الفقرة 2، و قد خضع الانفصال الجسماني، بموجب أحكام هذه المادة، لقواعد تنازع القوانين ذاتها المطبقة على حل الرابطة الزوجية. غير أن التحليل القانوني لهذا التعديل التشريعي كشف عن تعارضه مع أحكام أخرى في ذات القانون، مما أفرز إشكالات متعددة على المستويات القانونية والقضائية والاجتهادية. إن معالجة هذه التناقضات تستدعي تدخلاً تشريعياً لمراجعة هذا التعديل وإعادة تنظيمه. ولهذا نسعى من خلال هذا البحث إلى تقديم تحليل معمق للإشكالية المطروحة، مع تسليط الضوء على التحديات القانونية وأثارها العملية.

الكلمات المفتاحية: الانفصال الجسماني، القانون الدولي الخاص، القانون المدني، النظام العام.

Introduction:

The disparity in religious and moral values between Muslim and Western societies, particularly concerning personal status, poses a significant barrier to the development of legal relations between states. Public order is frequently cited as a key reason for rejecting foreign laws or refusing to enforce foreign judgments that are deemed incompatible with the social, moral, and cultural foundations of these nations. In this context, it is essential to examine the stance of the Algerian legislator during the 2005 revision of the Civil Code, especially with regard to the modification of Article 12/2, which introduced an important provision by placing legal separation under the same conflict of laws rules that apply to the dissolution of marriage⁽¹⁾.

This amendment empowers judges to determine jurisdiction based on the nationality of the spouses when proceedings are initiated. This legal concept, embraced by many Western countries, has sparked ongoing debate among Algerian jurists and magistrates due to its apparent incompatibility with the Algerian Family⁽²⁾ Code and the fundamental principles of Muslim law. In fact, the notion of legal separation has no precedent or mention in Algerian law.

The new law raises critical questions about the alignment of Algerian law with international legal norms while highlighting potential conflicts between legal modernization and the preservation of traditional values. It prompts a thorough reflection on how to adapt national law to foreign legal influences while safeguarding the integrity of the legal⁽³⁾ system and Algerian social values.

From this context arises the question: How does the amendment of Article 12-2 of the Algerian Civil Code address the challenges of private international law while respecting national legal particularities?

This subject will be examined through the following outline.

1- The conceptual framework of legal separation

1.1- The concept of legal separation

2.2- The effects of legal separation

2- The place of legal separation in Algerian law

2.1- Analysis of the amendment of the Algerian Civil Code

2.2- Legal separation in relation to public order

Conclusion.

1- The conceptual framework of legal separation

Legal separation exists within a complex framework that balances the preservation of the marital bond with the mitigation of its legal effects. This institution has been part of the legal traditions of many Western systems since ancient times, providing a mediation solution for troubled spouses⁽⁴⁾. It embodies a unique legal model characterized by an inherent duality: on one hand, it maintains the official status of marriage, while on the other hand, it suspends certain essential obligations. This allows spouses to distance themselves without fully

¹ Civil Code, dar pitra Algeria, 24^{em} éd, 2009, p 4.

² Art 47 Family Code « dissolution of marriage by divorce or death of one of the spouses »

³ Art222 Family Code « in the absence of a provision in this law, reference is made to the provisions of the Sharia »

⁴ Bénédicte Decourt Hollender, the concept of injurious facts in divorce and legal separation in the 19th century. HAL Id:hal-04492569 <https://hal.science/hal-04492569>, seen on 6/03/2024, at 15h30.

severing their relationship. It is important to note that this option is not recognized in Muslim law or in most legal systems of Muslim countries.

Legal separation must be distinguished from other legal concepts related to marriage, such as widowhood, neglect, abandonment of the marital home, and legal retirement. While some jurisprudential trends may attempt to assimilate these concepts due to their shared characteristic of temporary separation, they are fundamentally different.

In the specific context of Algerian law, which is central to our analysis, it is crucial to emphasize the absence of legal separation as a formally recognized institution in Algeria.

1.1- The Concept of legal separation

Legal separation, with roots in earlier legal frameworks, is a *sui generis* legal institution situated between the maintenance of marriage and its dissolution. It serves as an alternative to divorce, allowing spouses to live apart without formally ending their marriage⁽¹⁾. French law recognizes this concept, referred to as "divorce for Catholics," which stands as an exception to the principle of the indissolubility of marriage. This procedure enables spouses to terminate their obligation of cohabitation while preserving the marital relationship, thus offering a legal solution to marital crises.⁽²⁾

Its emergence in the modern era is closely tied to the notion of fault, allowing a spouse to address significant grievances while still maintaining the marital bond. A key function of legal separation has been to protect women, enabling them to exit unhappy unions without forfeiting their rights. However, it should be noted that a husband can only seek separation if his wife has committed adultery.⁽³⁾

Legal separation was recognized during the Ancien Régime as a means to reconcile the continuity of marriage with the cessation of cohabitation. The French Revolution, driven by the principle of individual autonomy, marked a significant departure from this tradition. This radical shift was epitomized by the decree of September 20, 1792, which abolished legal separation and reaffirmed the principle of divorce,⁽⁴⁾ replacing the idea of marital indissolubility with the freedom to divorce.⁽⁵⁾

In the post-revolutionary context, the Civil Code of 1804 introduced a more nuanced approach. It retained the institution of separation while allowing divorce as a means of dissolving marriage. This duality in the legal system reflects the complex debates of the time regarding the nature of marriage and reveals a certain ambivalence in the legislative approach to family matters at the dawn of the 19th century

1.1.1- The definition of legal separation

Legal separation is a judicial process defined by law, specifically designed for marital unions, in which a court determines the termination of the obligation for spouses to cohabit, without dissolving the marital bond. This separation marks the end of shared life while preserving the rights and duties associated with marriage, such as fidelity and the obligation

¹ See articles, 6, 228 of the Civil Code, art, 23. Art 261 to 261-2 of the Civil Code.

² BENABENT Alain, Civil and family law, Montchrestien Editions, France, 2010, p. 176.

³ RENAUT Marie-Hélène, Histoire du droit de la famille, 2eme éd, Ellipses, Paris, 2012. P89.

⁴ Law of 20 September 1792, Section I, article 7 « The spouses may be disunited only by divorce » https://www.ined.fr/fichier/s_rubrique/18939/pop_et_soc_francais_240.fr.pdf, seen on 05/08/2024 at 23h20.

⁵ The law authorising divorce in France was passed on 20 September 1792 by the National Assembly and amended by decrees in 1793 and 1794.

of support. In essence, legal separation does not end the marriage but signifies a significant rupture in the marital relationship.

The grounds for divorce due to a definitive alteration of the marital bond were notably modified by the legislative reform of 2004, with the law of May 26, 2004, aimed at modernizing the divorce process. This reform reduced the required duration of separation from six years to two years. More recently, the law of March 23, 2019, which took effect on January 1, 2021, further shortened this period for divorce resulting from a definitive alteration of the marital bond following the cessation of cohabitation. It now allows for separation after two years if the proceedings commenced before January 1, 2021, and after one year from that date onward. The objective of this ongoing legal evolution is to expedite the dissolution of marriage when spouses clearly express their desire to part ways.

The procedures for legal separation are identical to those for divorce (Code of Civil Procedure, Articles 1129 and 1148-3). However, it is essential to highlight specific characteristics related to the nature of legal separation, whose legal consequences are less extensive than those of divorce. Legal separation can be pronounced under the same circumstances and conditions as divorce, as stipulated by Article 296 of the Civil Code, which establishes a procedural parallelism between these two legal institutions.

1.1.2- The nature of legal separation

Legal separation is a distinct legal institution situated between a fully realized marriage and its dissolution through divorce. Its hybrid character is evident in the combination of elements of continuity and rupture within the couple. Legally, it preserves the marriage while establishing a legal distance between spouses. The complex nature of legal separation arises from this intrinsic duality, reflecting the tension between the preservation of the marital institution and the recognition of marital issues. It is viewed by some legal scholars as an alternative to divorce, highlighting its specific role in family law.

The analysis of doctrinal debates surrounding this institution since the late 19th century is particularly illuminating. In 1887, prominent jurists, such as M. Demangeat, questioned the essence of legal separation. Some viewed it as a "disguised or hidden divorce," asserting that it had effects similar to divorce, except for the notable dissolution of the marriage. Others described it as a "roundabout way to declare the end of a marriage without imposing an absolute separation, allowing spouses the right to remarry." The divergence in legal thought at that time underscores the inherent complexity of legal separation, which continues to exist today.

This historical debate highlights the longstanding inquiries regarding the nature and role of legal separation within the legal system. Since the 19th century, it also reflects the evolution of social and legal perceptions of marriage and its dissolution. Today, from a sociological perspective, legal separation can be seen as a means of adapting to contemporary changes in family structures, providing an alternative for couples in crisis who, for personal, religious, or cultural reasons, prefer not to divorce.

Thus, legal separation transcends its simple procedural definition, aligning with a broader movement of transformation in the social and legal norms that govern marital relationships. By examining these historical debates and analyzing its current role, we can better understand the complexity and evolution of this institution, while also highlighting its enduring relevance as a subject of legal and social reflection for over a century.

1.2- The effects of legal separation

Legal separation has significant consequences for the lives of spouses. While it does not dissolve the marriage, it leads to substantial changes in the rights and obligations within the couple. By creating a distinct legal framework, legal separation influences various aspects of the spouses' lives. This section will explore these effects in detail, focusing on two main areas: matrimonial effects and property effects. Together, these elements illustrate how legal separation redefines the relationship between spouses, both in their status as married partners and in the management of their assets and finances.

1.2.1- Matrimonial effects

Legal separation, while preserving the marital bond, introduces important changes to the relationship between spouses from a matrimonial perspective. This legal process establishes a new equilibrium within the couple, redefining certain fundamental aspects of marriage while maintaining others. We will examine three primary effects of legal separation on the matrimonial front: the cessation of cohabitation, the maintenance of the marital bond, and the persistence of certain marital duties. These factors highlight the complexities of legal separation, which suspends certain obligations of marriage while retaining its legal character.

1.2.1.1- Cessation of cohabitation

One of the most concrete effects of legal separation is the termination of the obligation to cohabit, freeing spouses from the legal requirement to live together. This provision is outlined in Article 299 of the French Civil Code . Importantly, this end to shared living does not necessarily signify a total rupture in relations between the spouses. They can maintain amicable or familial ties, even when living separately. Legal separation thus allows spouses to redefine their lifestyle while preserving certain channels of communication.

1.2.1.2- Maintenance of the marital bond

A defining feature of legal separation is the preservation of the marital bond, distinguishing it clearly from divorce. According to Article 303 of the French Civil Code, "Legal separation preserves the duty of support; the judgment that pronounces it or a subsequent judgment establishes the alimony owed to the spouse in need." This provision highlights the continuity of certain marital responsibilities. Additionally, Article 301 states that "In the event of the death of one of the spouses who are legally separated, the other spouse retains the inheritance rights granted by law to the surviving spouse," confirming their status as mutual heirs. These legal parameters have tangible implications, as separated spouses are prohibited from remarrying due to the bigamy prohibition outlined in Article 147 of the Civil Code . Under certain conditions, legal separation may allow spouses to retain specific tax benefits, such as the family quotient for income tax. Thus, this intermediate status provides considerable flexibility for couples who, for personal, religious, or practical reasons, wish to maintain a legal bond while reorganizing their married life.

1.2.1.3- Maintenance of certain duties (Fidelity, Assistance, Support)

While legal separation relaxes certain marital obligations, it preserves several essential duties between spouses. The French Civil Code, in Article 299, implicitly affirms that legal separation maintains the duty of fidelity. This provision upholds the monogamous essence of marriage, even in the absence of cohabitation. Moreover, Article 212 reminds us that "spouses owe each other respect, fidelity, support, and assistance." The duty of assistance, in particular, remains fully in effect, as confirmed by Article 303, which mandates alimony for the spouse

in need. Jurisprudence reinforces the continuation of these marital duties, as illustrated by the ruling of the Court of Cassation on April 29, 1994 (n° 92-16.843), which upheld a request for alimony following legal separation. Therefore, even if spouses are physically separated, they remain bound by significant mutual obligations, reflecting the unique nature of this legal status, which occupies an intermediate position between full marriage and divorce.

1.2.2- Patrimonial effects

Beyond its implications for the marital relationship, legal separation has significant repercussions for property matters. This legal process fundamentally alters the management and distribution of assets between separated spouses. In this section, we will analyze the property consequences of legal separation, which influence various aspects of the couple's financial life. We will specifically examine how this measure impacts the property system, the management of joint and individual assets, and the mutual financial obligations of the spouses. While these changes are less definitive than those resulting from divorce, they necessitate a substantial reorganization of the couple's property relationships. By exploring these effects, we can understand how legal separation balances the preservation of certain economic ties with increased financial autonomy for the separated spouses.

1.2.2.1 - Liquidation of the marital regime

According to Article 302 of the French Civil Code, "legal separation always entails separation of property," meaning that legal separation leads to the liquidation of the marital regime, although this process is less systematic than in a divorce. This signifies the termination of the previous marital regime, whether it was a legal community or a contractual arrangement. As a result, spouses must liquidate and divide their joint or undivided assets. However, jurisprudence (Cass. 1st civ. Jan. 11, 2005, No. 02-19.016) allows spouses the option to postpone this dissolution. Furthermore, unlike divorce, legal separation does not revoke matrimonial benefits, which are only terminated upon the dissolution of the marital regime or the death of one spouse (Article 265 C.C.)⁽¹⁾. This nuance may influence the property strategy of spouses during the legal separation process.

1.2.2.2 - Adoption of the separation of property regime

As previously noted, legal separation automatically results in the application of the separation of property regime, occurring by operation of law without the need for any specific formalities from the spouses. The purpose of this shift to a property division is to safeguard each spouse's financial interests by clarifying asset ownership. Each spouse retains the administration, enjoyment, and free disposition of their personal property, both in terms of capital and income (Article 1536 of the Civil Code)⁽²⁾. However, the Court of Cassation has ruled that this change in regime has no retroactive effect (Cass. 1st civ., October 28, 2015, No. 14-23.207), meaning that actions taken under the former regime remain valid. It is important to note that if the spouses later reconcile, they will need to choose a new

¹ Article 265 provides that « matrimonial benefits which take effect only on dissolution of the matrimonial regime or on the death of a spouse are revoked ipso jure on divorce, unless the person who granted them wishes otherwise ».

² Article 1536 of the Civil Code states that « Voluntary resumption of cohabitation puts an end to legal separation. In order to be enforceable against third parties, it must either be recorded in a notarial deed or be the subject of a declaration to the civil registrar. A note to this effect is made in the margin of the marriage certificate. »

matrimonial regime through a notarized deed to terminate the division of property (Article 305 of the Civil Code).⁽¹⁾

1.2.2.3 - Potential alimony

Article 303 of the French Civil Code stipulates that legal separation may lead to alimony. This financial support aims to address disparities in living conditions between the spouses following their separation. The amount of alimony is determined by the family court judge, who considers the needs of the requesting spouse and the resources of the paying spouse. The criteria for granting alimony are similar to those for compensatory payments in divorce cases, according to jurisprudence (Cass. 1st civ, November 6, 2013, No. 12-23.766).

However, unlike compensatory payments, alimony in the context of legal separation is typically paid as a pension and can be adjusted if either party's circumstances change. It is important to note that this alimony obligation ceases, as per Article 304 of the Civil Code, upon the remarriage of the recipient spouse or in cases of cohabitation. If the spouses reconcile, alimony payments are automatically suspended unless otherwise agreed upon in a valid agreement approved by the judge.

During the legal separation proceedings, children are subject to provisional measures established by the family court judge. The judge determines the arrangements for parental authority, including the children's residence, visitation rights, and participation in their care and upbringing.⁽²⁾ These provisional measures remain in effect until a final decision on the separation is made, at which point they can be validated or modified based on the best interests of the children and the parents' circumstances.

2. The role of legal separation in Algerian law

This discussion unfolds within a legal-religious framework that Algerian law does not formally recognize. Islamic law is particularly attentive to the legal ramifications of separation and its impact on the marital relationship, especially regarding divorce. The absence of legal separation provisions in the Algerian Family Code suggests that the legislator prioritized two key concepts: marriage and divorce, rather than the principle of moderation. This perspective highlights a fundamental legislative distinction between Algerian law and other legal systems.

It is noteworthy that the Algerian judicial system outright rejects legal separation judgments, viewing them as fundamentally opposed to public order. Nonetheless, certain circumstances related to separation, such as abandonment and desertion of the marital home, are acknowledged as legal grounds for divorce rather than as pathways to separation itself. For instance, Article 53, paragraph 3, of the Family Code permits a wife to seek divorce if her husband abandons her for over four months. Similarly, Article 55 allows either spouse to request divorce if the other abandons the marital home. These provisions underscore the divergence between Algerian legislation and Western countries that recognize legal separation.

¹ Article 305 of the Civil Code states that « The voluntary resumption of life together shall put an end to the separation from the body. To be opposable to third parties, it must either be registered by notarial deed or be declared to the civil registrar. Mention of the marriage is made in the margin of the marriage certificate. »

² <https://www.village-justice.com/articles/separation-corps,46920.html>, updated on 04/08/2023, seen on 12/08/2023 at 16h46.

2.1- Amendments to the Algerian Civil

The Algerian Civil Code has undergone significant revisions through Law No. 05/10, enacted on June 20. Three primary areas have been amended: private international law, the general theory of obligations, and the overarching theory of law. Our analysis will concentrate on the changes to private international law, particularly regarding conflict of laws.

Prior to this reform, divorce was solely recognized as a means of dissolving marriage under Algerian law. However, the reform introduced a previously unrecognized legal framework: legal separation, as articulated in Article 12, paragraph 2 of the new law.

As this new provision on legal separation enters Algerian law, it is crucial to recognize that legislative updates and French case law indicate an evolution in this area, particularly concerning procedural, formal, and temporal dimensions. Such developments suggest a potential for the eventual repeal of this institution in French law, which may compel the Algerian legislator to reconsider Article 12 of the Civil Code.

This raises important questions about the relevance and utility of this modification introduced by the Algerian legislator. The incorporation of a legal institution that may be at risk of being undermined in its country of origin prompts a critical examination of legislative strategy and Algeria's adaptation to international family law trends.

Consequently, this reform necessitates a thorough reflection on the motivations behind the Algerian legislator's decisions, the current legal framework, the long-term implications of these changes, and the capacity of the Algerian legal system to respond to shifts in private international law concerning marriage dissolution.

2.1.1- The governing law on legal separation

According to paragraph 2 of Article 12 of the Algerian Civil Code, "the dissolution of marriage and legal separation are governed by the national law of the husband at the time of filing the petition." A close examination of this article reveals a subtle but significant legislative innovation. The legislator has created a tacit equivalence between divorce and legal separation as public law mechanisms in Algeria, with legal separation seen as contradictory to the core tenets of Algerian law.

Additionally, considering the husband's nationality as a connecting factor raises concerns about its alignment with the constitutional principle of equality. This approach could be interpreted as introducing legal inequality between spouses, potentially contravening Algeria's international commitments to gender equality. The desire to conform to Article 13 of the Civil Code—which states that Algerian law applies only when one spouse is of Algerian nationality at marriage—further complicates the system's internal consistency. Furthermore, the possibility for a wife to acquire Algerian nationality later adds another layer of complexity to the application of these provisions.

In navigating these legal challenges, a judge might invoke the exception of international public policy as a possible solution. However, while pragmatic, this approach does not resolve the systemic inconsistencies inherent in the legislation surrounding marriage dissolution. The implicit equivalence results in the application of identical connecting rules to these two distinct legal institutions.

A careful reading of this text reveals the adoption of a specific connecting criterion: the national law of the husband at the time of the petition's filing. This method raises significant

questions regarding its relevance and practical application within the Algerian legal framework.

The inquiry centers on two main aspects:

1. Legal separation is not recognized in the Algerian legislative framework.
2. The potential consequences for the constitutional principle of equality before the law.

These factors give rise to a significant doctrinal controversy that questions the coherence and effectiveness of this legislative provision. By applying this legal norm, the judge finds themselves in a paradoxical situation. Let's consider a scenario where a husband of Algerian nationality initiates legal separation proceedings. The conflict rule points to the applicable Algerian legislation. However, since the institution of legal separation lacks a basis in family law, the judge faces a legal impasse: apply a law that does not recognize the institution in question, decline jurisdiction at the risk of violating conflict rules, or refer the case to a foreign court, potentially compromising a citizen's rights.

In another scenario, if both spouses were French, the Algerian judge would encounter an equally complex dilemma: implementing Algerian law would lead to a deadlock, as legal separation is not recognized in Algerian law. Furthermore, applying French law would also be problematic.

2.1.2- Implications of the amendment

The modification of Article 12, paragraph 2, of the Algerian Civil Code has sparked significant doctrinal debate regarding its purpose and legal consequences. This controversy revolves around two primary interpretive lines, each presenting a distinct perspective on the legislator's intentions and the potential implications of this change.

According to the first viewpoint, this legal amendment could herald the future introduction of a legal separation regime in the Family Code.⁽¹⁾ This assumption is based on a teleological analysis of the reform, suggesting a gradual evolution of the Algerian public order toward an implicit recognition of this legal institution. Advocates of this interpretation argue that the pragmatic nature of the modification itself indicates the legislator's tacit acknowledgment of the principle of legal separation.

Conversely, an opposing doctrinal trend advocates for a more restrictive interpretation, focusing on the implications for private international law. The uniqueness of this approach lies in the placement of the concept of legal separation within the chapter on conflict rules, rather than in the provisions concerning personal status, despite simultaneous reforms in both codes. The absence of this concept from the Family Code—a normative text that details the procedures for dissolving marital ties—suggests that the legislator intended to confine this notion to the realm of private international law.

This latter perspective is notably supported by Mr. Ben Melha's research, which he presented at a national conference at the University of Laghouat⁽²⁾, offering a nuanced analysis of the reform's implications. According to his thesis, Article 12 of the Civil Code should not be interpreted as a relaxation of the case law regarding the enforcement of foreign

¹ Legal forum, 'Feasibility of amending article 12 of the Algerian Civil Code', professional dialogue, house of lawyers, Batna, Algeria, 2006.

² The similar national one which took place at the University of Laghouat on April 29, 2006, under the title « the conflict of laws in matters of personal status, through the Civil Code. »

judgments related to legal separation. Rather, he argues that such decisions will continue to face challenges, barring public order exceptions, thereby affirming their alignment with the fundamental principles of Algerian family law. The Family Code has not been amended from 2005 to the present to recognize legal separation as a valid means of marriage dissolution. This lack of modification reinforces the position of those advocating for the more restrictive interpretation. The legislator has not deemed it necessary to include this provision among the legal options for marriage dissolution, which seems to strengthen the arguments of this viewpoint.

Despite these differing interpretations, the complexity of the issues surrounding this reform is highlighted, balancing between a potential transformation of substantive law and a mere clarification of private international law rules. This situation emphasizes the necessity for a comprehensive examination of the interactions among various branches of Algerian law—particularly civil law, family law, and private international law—to fully grasp the implications of this legislative change.

2.2- Legal separation in relation to public order

When personal status is grounded in the principles of Islamic law, any relationship that resembles legal separation is prohibited. This viewpoint arises from the core tenet of marriage in Islamic law, which seeks to ensure the permanence of marital life in its most stringent sense. Consequently, any disruption of this continuity, outside the legal framework of divorce, is deemed a breach of both legal and religious principles.

From this perspective, the essence of marriage is defined by the cohabitation of spouses under the same roof. Therefore, spouses cannot simultaneously assume two distinct legal statuses (marriage and separation). This raises critical questions regarding the compatibility of the legal mechanism of legal separation with established legal and social norms. Thus, we must analyze this issue from two key angles: first, the potential conflict of legal separation with public order, and second, the exceptions to public order.

2.2.1- The contradiction of legal separation with public order

Legal separation, a legal mechanism absent from Algerian law, originates from Catholic tradition and has been adopted by various Western legal systems, including French law⁽¹⁾. This system, founded on a moderate principle, necessitates the physical separation of spouses while maintaining the essential legal effects of marriage⁽²⁾. Presenting itself as an alternative to divorce rather than a means of dissolving marriage, it raises significant concerns regarding its alignment with Islamic law and, consequently, with Algerian public order.

It is clear that legal separation is inconsistent with the principles of Islamic law. By preserving the marital bond despite the physical separation of spouses, this institution contradicts the Islamic perspective on marriage and its dissolution. Thus, legal separation appears incompatible with Algerian public order, particularly since national jurisprudence has yet to reach a definitive conclusion on this matter. From a judicial perspective, the contradiction between legal separation and public order is evident in the stance of Algerian

¹ See articles 296-297 of the French Civil Code.

² Art 238 of the Civil Code states that « the definitive alteration of the marital bond results from the cessation of the community of life between the spouses, when they have been living apart for two years at the time of the writ of divorce ».

courts, which firmly reject such judgments, indicating their unenforceability within the Algerian legal system.

A parallel can be drawn with the French legal order, where jurisprudence has determined that repudiation—an institution of unilateral marriage dissolution originating from Islamic law—is contrary to public order. Judgments of repudiation rendered in this manner have been consistently dismissed in light of this position. Notably, the French legislator, in alignment with this jurisprudential stance, has neither adopted repudiation as a cause for marriage dissolution in its positive law nor included it in the conflict of laws rules governing marital dissolution. This approach underscores a strong commitment to upholding the fundamental principles of French law regarding divorce, such as equality between spouses and judicial oversight of the divorce process.

Given that legal separation is established as contrary to public order in Algeria, a pressing question arises: what motivated the Algerian legislator to contemplate incorporating legal separation into its legal framework? This inquiry prompts essential discussions about the evolution of connecting rules in Algerian law, its interaction with foreign legal traditions, and its ability to reconcile modernization with the fundamental principles of the national legal order.

2.2.2- The exception of public order

The public order exception serves a critical function as a legal mechanism, aimed at safeguarding essential national values. A state's legal system may refuse to apply a foreign norm if its effects contradict the fundamental principles of the forum. Entrusted to the discretion of the national judge, this exception acts as a guardian of the integrity of the domestic legal order, highlighting its inherently national character. However, contemporary changes in private international law—particularly influenced by the increasing emphasis on fundamental rights—challenge the purely national nature of international public order. This dynamic raises questions about the sustainability of this purely national character, suggesting a potential evolution toward a more global or harmonized understanding of public order⁽¹⁾.

In private international law, legal qualification is central to the judicial reasoning process. The national judge is responsible for determining the legal nature of issues raised by disputes involving foreign elements. This process aims to categorize the dispute's elements within a legal framework recognized by the forum's law, facilitating the identification and application of the appropriate conflict rule. According to the general principles of private international law, when faced with questions concerning legal separation, the Algerian judge must perform a legal qualification. Article 09 of the Algerian Civil Code stipulates that Algerian law serves as the normative reference for determining the legal nature of the disputed issue.

The lack of recognition for the institution of legal separation in the Algerian legal system, particularly within the Family Code, creates a significant legal impasse. The magistrate encounters a substantial challenge due to this normative gap during the qualification process. The judge is unable to conduct the necessary qualification because no corresponding legal category exists within the national legal framework. This paradox highlights the limitations of

¹ LUYE Tony, la dénationalisation de l'ordre public international en droit de la famille – Étude de droit international privé à la lumière des droits fondamentaux, revue des droits et libertés fondamentaux, RDLF 2021 chron. n°39. <https://revuedlf.com/droit-international/> seen on 25/08/2024 at 23h30.

the current legal structure and raises questions about the alignment of the Algerian legal system with certain contemporary social realities.

Furthermore, as previously mentioned, legal separation—an institution of Catholic canonical origin—creates a hybrid marital status, where spouses are neither fully married nor divorced. This notion contradicts the fundamental principles of Islamic law and, by extension, the national legal order in Algeria. The question of Algerian international public order, as articulated in Article 24 of the Civil Code, concerns the application of foreign laws that conflict with public order and good morals in Algeria, resulting in a judicial dilemma for judges faced with a legal contradiction. On one hand, it is imperative to adhere to Article 12, paragraph 2 of the Civil Code, which mandates legal qualification; on the other hand, the absence of an appropriate legal category in Algerian law makes this qualification impossible. This situation underscores the extent of the repercussions resulting from the legislator's modifications to the conflict rule pertaining to Article 12 of the Civil Code. It highlights the necessity for comprehensive reflection on this conflict rule and the development of a revised version that aligns with the values and principles of Algerian society.

Conclusion

A comprehensive examination of the amendment to Article 12 of the Algerian Civil Code reveals the multiple repercussions of a legislative reform that appears to be inadequately developed. The consideration of the spouse's nationality as a connecting factor when initiating proceedings has resulted in a range of legal and practical challenges. This modification has created a significant jurisdictional dilemma, exacerbated by the lack of unified case law, which has led to divergent judicial interpretations. Additionally, it has established a clear conflict between Algerian civil law and the principles of Sharia, which are essential to Algerian family law. This reform affects conflict of laws rules, particularly in disputes involving binational couples or Algerians living abroad.

The amendment also raises fundamental questions about how Algerian courts handle transnational family matters. The major challenges regarding the international recognition of foreign judgments, especially concerning separation, are linked to the internal coherence of the Algerian legal system and its practical application. It is essential to consider harmonizing Algerian private international law with the constitutional principles and international commitments of the country in response to these issues. Implementing this approach is vital to resolving existing contradictions and ensuring a fair and consistent application of the law.

In this context, it seems necessary to amend paragraph 2 of Article 12 of the Civil Code. This revision should aim to protect the rights of the parties while ensuring alignment with the values and fundamental principles of Algerian society. A holistic approach is required, considering the legal, social, and cultural implications, to establish a robust legal framework that is suited to the current realities of Algeria.

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