



CHALLENGES IN APPLYING NATIONALITY LAW IN CASES OF CONFLICTING LAWS IN DIVORCE AND PHYSICAL SEPARATION (The Algerian legislator as an example)

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ABSTRACT

The issue of conflict of laws in personal status matters cannot be studied without starting from the established principle for determining the applicable law. The Algerian legislator has relied on the principle of nationality to determine the law applicable to personal status matters. Based on this, the Algerian legislator considered it the best law or rather the principle of assignment that provides the greatest protection for the Algerian individual and for the Algerian public system according to the different requirements of the state. However, the problem is that the application of nationality law in conflict of laws has resulted in several shortcomings that have undermined the rights of the parties at the individual level, particularly the violation of the principle of gender equality, sometimes compromising the interests of the wife, the difficulty in preserving acquired rights, the problem of recognizing physical separation, and other issues that we will try to highlight in the national symposium.

INTRODUCTION

The Algerian legislator has relied on the principle of nationality to determine the law applicable to personal status matters. Based on this, the Algerian legislator believed that it was the best law or, more accurately, the most appropriate principle to provide greater protection for Algerian individuals and the Algerian public order according to the various requirements of the state.

However, the problem arises when applying nationality law in conflicts of laws, which has resulted in several shortcomings that have affected the rights of individuals, especially in terms of gender equality, sometimes compromising the interests of the wife, the difficulty in preserving acquired rights, and the issue of recognizing physical separation.

The Algerian legislator addressed the issue of marital dissolution and physical separation in family relationships involving a foreign element in two paragraphs: in paragraph 2 of Article 12, amended from the Algerian Civil Code, which states: *“The national law to which the husband belongs at the time of filing the lawsuit shall govern the dissolution of marriage and physical separation”*.

Article 13 of the same law stipulates: *“Algerian law alone applies to the situations mentioned in Articles 11 and 12 if one of the spouses is Algerian at the time of the marriage, except with regard to the eligibility for marriage”*.

It is noted that the legislator introduced physical separation, which represents a legal category unknown in Algerian law and society.¹

The legislator used the term “dissolution of marriage” to encompass all forms of divorce, including divorce by the unilateral will of the husband, as well as divorce initiated by the wife’s request or through death. This is evident from Article 47 of the Algerian Family Law, which states: *“The marital bond is dissolved by divorce or death”*.

1 Aliouche Kurbou, “The Applicable Law for the Dissolution of Marriage and Physical Separation in Algerian Private International Law”, Academic Research Journal for Legal Research, Faculty of Law and Political Science, Abdelrahman Mira University, Bejaia, Special Issue 2015, for the National Conference held at Bejaia University on “Conflicts of Laws in Personal Status Matters”, held on April 23 and 24, 2014, and for the International Conference held at the same university on “The Shift in the Concept of Public Order: From Public Order to General Systems”, on May 7 and 8, 2014, p. 157.

As a result, the legislator subjected all forms of divorce to the same law, while some Arab legislations have distinguished between divorce and “talaq”, where divorce is subject to the husband’s law upon pronouncement, and “talaq” is subject to the husband’s law upon filing the lawsuit.²

Upon examining Article 12, paragraph 2, and Article 13 of the Algerian Civil Code, it is stated that the national law to which the spouses belong at the time of filing the lawsuit applies when both spouses are foreigners. However, Algerian law alone applies if one of the spouses is Algerian at the time of marriage.

Nevertheless, these two articles raise several issues, especially regarding their application. Therefore, in this discussion, we will address the problems raised by paragraph 2 of Article 12 of the Civil Code (First Section) and the exceptions outlined in Article 13 of the same law concerning the dissolution of marriage and physical separation (Second Section).

1. ISSUES RAISED REGARDING PARAGRAPH 2 OF ARTICLE 12 OF THE CIVIL CODE

It is mentioned that the Algerian legislator stipulated in paragraph 2 of Article 12 of the Civil Code

2 In Egypt, for example, there is a distinction between divorce by the unilateral will of the husband, which is subject to the husband’s nationality law at the time of divorce, and other methods of ending the marital bond, which are subject to the husband’s nationality law at the time of filing the lawsuit. See, for instance, the research conducted by Draba Ameen in “Rules of Conflict related to Marriage and its Dissolution: A Comparative Study”, submitted for a Master’s degree in Private International Law, Faculty of Law and Political Science, University of Abi Bakr Belkaid, Tlemcen, 2008, p. 52. Also, refer to Mourad Sufian’s article “The Problem of Attribution in Personal Status and the Possibility of Reconciliation”, published in the Academic Research Journal of Legal Research, Faculty of Law and Political Science, University of Abderrahmane Mira, Bejaia, Special Issue 2015, for the National Symposium held at the University of Bejaia on “Conflict of Laws in Personal Status Matters”, on April 23 and 24, 2014, and for the International Symposium held at the same university on “The Shift in the Concept of the General System: From the General System to General Systems”, on May 7 and 8, 2014, p. 27. Additionally, this ruling is established in Syria, Iraq, Libya, Jordan, Sudan, and the United Arab Emirates; see Aliouche Kurbou, “Marginalization No. 06”, p. 157.

that: “The dissolution of marriage and physical separation shall be governed by the national law to which the spouse belongs at the time of filing the lawsuit”. However, the criterion set by the legislator, which is the nationality of the spouse at the time of filing the lawsuit, raises several legal issues that negatively affect familial relationships involving a foreign element.

These issues can be summarized as follows: the problem of infringing upon the principle of equality between spouses (firstly), the issue of changes in the spouse’s law between the time of marriage and the time of filing the lawsuit (secondly), and the possibility of fraudulent behavior regarding the law (thirdly).

1.1. The Problem of Infringing upon the Principle of Equality between Spouses

The establishment of applying the spouse’s law at the time of filing the lawsuit to disputes regarding the dissolution of marriage and physical separation has led to extensive debate about this solution.³

The Algerian legislator’s choice of this criterion is considered arbitrary as long as the national law to which the spouse belongs is not neutral, thus undermining the principle of equality between men and women, a principle recognized in the Algerian Constitution. Article 32 of the Constitution of the People’s Democratic Republic of Algeria states: “All citizens are equal before the law. No discrimination shall be made based on birth, race, gender, opinion, or any other personal or social condition or circumstance”.

This is stipulated in the Constitution of the People’s Democratic Republic of Algeria, issued by Presidential Decree No. 96-438, dated December 7, 1996, amended, and supplemented. The Official Gazette in its issue No. 76, and Law No. 02-03 dated April 10, 2002, published in Official Gazette No. 25 dated April 14, 2002, Law No. 08-19 dated November 15, 2008, published in Official Gazette No. 63 dated November 16, 2008, and Law No. 16-01 dated March 6, 2016, published in Official Gazette No. 14

dated March 7, 2016. Giving preference to the nationality of the husband over the nationality of the wife is therefore problematic.⁴

Furthermore, the Algerian legislator’s choice of this criterion may be considered arbitrary since the national law to which the spouse belongs is not necessarily neutral, thus infringing upon the principle of equality between men and women, as enshrined in Article 32 of the Algerian Constitution. The Constitution stipulates that “*all citizens are equal before the law*”, without discrimination based on factors such as gender. Therefore, giving precedence to the husband’s nationality over the wife’s nationality is problematic.

Additionally, applying the criterion of the spouse’s nationality at the time of filing the lawsuit raises the issue of potential changes in the husband’s law between the time of marriage and the time of filing the lawsuit. Consequently, subjecting the dissolution of marriage and physical separation to the law of the husband’s nationality at the time of filing the lawsuit may dissolve the marital bond according to a law that the wife is not subject to, which could be detrimental to her interests.⁵

Therefore, it would be preferable for the legislator to at least consider the nationality of the husband at the time of marriage as the applicable law for both parties or to adopt a similar approach to that taken by the Tunisian legislator in Article 49 of the Tunisian Private International Law Code (Law No. 97 dated November 27, 1998), which states that divorce and physical separation are governed by the common personal law when the lawsuit is filed. In cases of different nationalities, the law of another common domicile of the spouses is applied if available; otherwise, the court applies its own law.

It is noteworthy that the Tunisian legislator prioritized the common personal law between spouses when filing for divorce and physical separation. In cases of different nationalities, the law of another common domicile is applied if available, thus providing an equal solution for both spouses without favoring one law over the other.

3 Mouri Sufian, the aforementioned reference; p. 27; Aliouche Kourbou, p. 160.

4 Ayat Mansour Kamal, “The Problem of the Law to be Applied to Physical Separation and Adoption”, Academic Journal of Legal Research, Faculty of Law and Political Science, Abderrahmane Mira University, Bejaia, 2010, Issue 02, p. 148; Mourad Sufian, p. 27.

5 Aliouche Kourbou, p. 160; Mourad Sufian, p. 27.

Referring to paragraph 2 of Article 12 of the Algerian Civil Code, it also leads to the potential for fraudulent behavior towards the law, which will be further elucidated in the next point.

1.2. The Possibility of Fraudulent Behavior towards the Law

Preferring the time criterion represented by “the time of filing the lawsuit” has the potential to create a phenomenon of fraudulent behavior towards the law, exacerbating the prevalence of this phenomenon.⁶

The phenomenon of fraudulent behavior towards the law (*fraus legis*) generally refers to the deliberate alteration by the parties of one of the criteria used by the law to determine the applicable legal framework, with the intention of evading the provisions of the law that would originally apply to the relationship.⁷

“In cases where a spouse resorts to changing their nationality to alter the law applicable to the dissolution of marriage or physical separation, especially if the new law provides guarantees not established by the law of their nationality at the time of marriage, it may be difficult to prove the existence of fraudulent behavior towards the law. Therefore, the law of the spouse’s nationality at the time of filing the lawsuit is the law applicable to the dissolution of marriage or physical separation. This could harm the interests of the wife and compromise her legal status”.⁸

This is largely what can be said about the challenges raised regarding paragraph 2 of Article 12 of the Algerian Civil Code. Now, let us inquire about the challenges surrounding the exception found in Article 13 concerning the dissolution of marriage

and physical separation, which will be addressed in the next section.

2. CHALLENGES OF THE EXCEPTION IN ARTICLE 13 OF THE CIVIL CODE REGARDING MARRIAGE DISSOLUTION AND PHYSICAL SEPARATION

One of the most important articles concerning conflict of laws in personal status matters is Article 13 of the Algerian Civil Code, which states: “Algerian law alone applies in the matters specified in Articles 11 and 12 if one of the spouses is Algerian at the time of marriage, except with regard to the eligibility for marriage”.

Article 13 of the Civil Code is an exception to the rules established in Articles 11 and 12 of the same legislation. This article is among the most controversial and debated in jurisprudence, given the solution it adopts by granting exclusive jurisdiction to Algerian law to decide every dispute covered by the provisions of Articles 11 and 12, where one of the parties is Algerian at the time of marriage.⁹

Therefore, this article raises several issues, including the impossibility for judges to apply Algerian law in the matter of physical separation (firstly), and the impossibility of applying the issue of physical separation from its origin due to the existence of Article 09 of the Civil Code, which subjects adaptation to the law of the judge who does not recognize this legal category (Article 9 of the Algerian Civil Code states: “Algerian law shall be the reference in adapting the relationships whose type needs to be determined in case of conflict of laws to know the law to be applied”).

6 Touati Nesira, “Challenges of Subjecting Physical Separation to the Nationality Criterion”, *Academic Journal of Legal Research*, Faculty of Law and Political Science, Abderrahmane Mira University, Bejaia, Special Issue for the National Symposium held at the University of Bejaia on “Conflict of Laws in Personal Status Matters”, on April 23 and 24, 2014, and for the International Symposium held at the same university on “The Shift in the Concept of the General System: From the General System to General Systems”, on May 7 and 8, 2014, p. 179.

7 Araab Belqasem, *Algerian Private International Law, Conflict of Laws*, Vol. 1, Dar Houma, Algeria, 2003, p. 187.

8 Touati Nesira, p. 179.

9 Bilal Othmani, “A Study of Article 13 of the Civil Code”, *Academic Journal of Legal Research*, Faculty of Law and Political Science, Abderrahmane Mira University, Bejaia, Special Issue for the National Symposium held at the University of Bejaia on “Conflict of Laws in Personal Status Matters”, on April 23 and 24, 2014, and for the International Symposium held at the same university on “The Shift in the Concept of the General System: From the General System to General Systems”, on May 7 and 8, 2014, p. 183.

2.1. Impossibility for Judges to Apply Algerian Law in the Matter of Physical Separation

The method of physical separation, or as some call it, bodily separation (*Séparation de Corps*), is a system not recognized by the legal systems in most Arab countries.

In an effort by the Algerian legislator to ensure and protect private interests with an international dimension, new provisions were introduced into the rules of attribution by amending the Civil Code for the year 2005, including those relating to physical separation under Article 12/2 of the Civil Code. (Where paragraph 2 of Article 12 of the Civil Code used to read as follows before its amendment: “The national law to which the spouse belongs at the time of filing the lawsuit shall apply to the dissolution of marriage”).

We find that the legislator has subjected physical separation to the national law to which the spouse belongs at the time of filing the lawsuit.

Physical separation is considered an unfamiliar system in Algerian family law, although it is a system practiced in Western countries like France¹⁰, where Article 296 of the French Civil Code states: “La Séparation de Corps peut être prononcée à la demande de L’un des époux dans Les mêmes cas et aux mêmes conditions que le divorce”.

Physical separation refers to the physical separation of the parties to the marital relationship, leading to the cessation of cohabitation between them for certain reasons that may be obvious and may be left to the discretion of the judge who is presented with the dispute.¹¹

Physical separation is also defined as: “the cessation of cohabitation between spouses and the suspension of mutual obligations while the marital bond remains intact”.¹²

It is also defined as: “a system that entails the cessation of cohabitation between spouses without the immediate dissolution of the marriage contract, but it may be a reason for divorce if it lasts for a certain period that varies from one law

to another”.¹³

Some may initially think that both physical separation and divorce convey the same meaning or entail the same connotations and result in the same consequences, but upon analyzing these terms and concepts, differences and distinctions are found among them.¹⁴

Where divorce by the unilateral will of the spouse, repudiation, and *khul’* at the request of the wife are considered two methods or paths that inevitably lead to the dissolution of the marital bond, while physical separation does not always lead to the dissolution of the marital bond. The spouses may return to their previous status after the end of the period of physical separation, or they may not return to it when physical separation turns into the dissolution of marriage definitively by judicial decision.¹⁵

Referring to the text of Article 13 of the Civil Code under study, the law applicable to physical separation is Algerian law if one of the spouses is Algerian at the time of marriage. However, the issue raised here is: Can the issue of physical separation be raised between spouses where one of them is Algerian? There are two assumptions: – The first assumption: If we assume that an Algerian married a foreign Christian French woman, here this wife cannot claim physical separation before the Algerian judge because the latter will not rule in her favor, as he is unaware of such a legal institution. The Algerian law does not recognize this system as it contradicts the provisions of Algerian family law, which did not regulate physical separation in the first place.¹⁶

10 Osmani Bilal, cited above, p. 186.

11 Belaïour Abdelkrim, Lectures on Private International Law in Light of the Amendments Brought by Law No. 05-10 of 2005, Faculty of Law, Ben Aknoun, Algiers, 2010-2011, p. 93; Touati Nassira, p. 175.

12 Ait Mansour Kamal, p. 144; Osmani Bilal, p. 186.

13 Al-Zarouti Al-Tayyib, Algerian Private International Law Compared to Arab Laws, Vol. 1, Conflict of Laws, Al-Kahina Press, Algiers, 2000, p. 178; Azzouz Abdullah, Private International Law, Conflict of Laws, Vol. 2, 9th ed., General Egyptian Book Organization, Egypt, 1986, p. 308.

14 Touati Nassira, p. 175.

15 Touati Nassira, p. 175.

16 See, Ait Mansour Kamal, The Situation of Personal Status in Algerian Attribution Rules, Academic Research Journal for Legal Research, Faculty of Law and Political Science, Abderrahmane Mira University, Bejaia, Special Issue 2015, for the National Symposium held at the University of Bejaia on: “Conflict of Laws in the Field of Personal Status”, held on April 23 and 24, 2014, and for the International Symposium held at the same university on: “The Transition in the Concept of the General System: From the General System to the General Sys-

The second assumption: If an Algerian woman married a French Muslim man, here the French husband cannot claim physical separation before the Algerian judge because the latter will not rule in his favor, considering that Algerian family law did not regulate this issue in the first place.¹⁷

“Therefore, referral to Article 12 paragraph 02, which includes physical separation, is an unsuccessful referral, because there is an impossibility for there to be physical separation between spouses, one of whom is Algerian, and the application of Algerian law”.

Among the issues raised by Article 13 of the Civil Code is also the lack of objectivity of the attribution criterion represented by the nationality of one of the spouses being Algerian at the time of marriage, which will be addressed in the next point.

2.2. Lack of Objectivity of the Attribution Criterion Used in Article 13 of the Civil Code

The attribution criterion in the text of Article 13 of the Civil Code for determining the law applicable to the dispute is a non-objective criterion, as it exclusively considers the nationality of one of the spouses being Algerian at the time of marriage, regardless of the nationality of the other party, and without giving any consideration to whether Algerian law is the most appropriate for ruling on the dispute before the judiciary.¹⁸

Another issue is the lack of suitability of the temporal scope of this criterion, as Article 13 of the Civil Code specified the application of Algerian law within a specific timeframe, which is when the person is Algerian at the time of marriage.

Marriage often leads to situations where Algerian law may not be suitable for adjudicating the case before an Algerian judge. For example, if we consider a scenario where an Algerian marries a French woman and the Algerian acquires French nationality while renouncing Algerian nationality, and later the couple decides to dissolve the mar-

tems”, on May 7 and 8, 2014, p. 15; Aliouche Karbou, p. 162.), as Algerian law does not institutionalize this system. Touati Nassira, p. 180; Aliouche Karbou, p. 162; Osmani Bilal, p. 189.

17 Aliouche Karbou, p. 162.

18 Osmani Bilal, p. 190.

riage, and the dispute is presented to an Algerian judge.

Referring to Article 13 of the Civil Code, the applicable law should be Algerian law, since the husband was Algerian at the time of marriage. However, if the husband renounced his Algerian citizenship and acquired the nationality of another country, especially if the couple settled in a country other than Algeria, then how can Algerian law be applied to non-Algerian spouses when the dispute is brought before the Algerian judge? There is no connection between this husband and the Algerian state.¹⁹

Therefore, it is advisable for the Algerian legislator to reconsider the time frame mentioned in Article 13 of the Civil Code.

Moreover, we question why the legislator does not allow parties the freedom to determine the applicable law for the dissolution of marriage and physical separation. This will be explained in the following points.

Thirdly: The failure of the legislator to allow parties the freedom to determine the applicable law for the dissolution of marriage and physical separation has become apparent. In recent times, private international law tends to leave more room for parties to determine the applicable law²⁰ Unless the law chosen by the parties violates public policy and public morals.

This is because personal status is a personal matter. Therefore, if the parties agree on the applicable law for the dispute presented before the Algerian judge, there is no objection to applying the law chosen by the parties, provided it does not contradict public policy and public morals.²¹

19 Hussein Nowara, Legal Issues Facing the Application of Nationality, Academic Research Journal of Legal Research, Faculty of Law and Political Science, Abdelrahman Mira University, Bejaia, Special Issue 2015, for the National Conference held at the University of Bejaia on “Conflict of Laws in Personal Status” held on April 23 and 24, 2014, and for the International Conference held at the same university on: “Transition in the Concept of Public Order: From Public Order to Public Systems”, held on May 7 and 8, 2014, p. 58-59; Alyush Qarbu, p. 168; Tawati Nasira, p. 180.

20 CARLIER Jean-Yves, “Autonomy of Will and Personal Status”, Maghreb Rights Journal, Vol. 1, 1995, p. 5, 17.

21 Osmani Bilal, p. 189.

CONCLUSION

The rules regarding personal status, particularly in cases of marriage dissolution and physical separation, in relationships involving a foreign element, raise numerous issues. These include the problem of infringing on the principle of equality between spouses by restricting it only to the application of the national law to which the husband belonged at the time of filing the claim, without taking into account the law most appropriate for the wife according to Article 12, paragraph two, of the Civil Code. Additionally, there is the problem of the husband's law changing between the time of marriage and the time of filing the claim and the possibility of fraud regarding the law.

Moreover, the exception in Article 13 of the Civil Code raises many issues, including the impossibility of judges applying Algerian law in cases of physical separation, and even the impossibility of applying this. The latter is essentially due to the presence of Article 09 of the same law, which subjects the adaptation to the law of the judge who is unfamiliar with this foreign legal category. Additionally, the legislator's failure to allow parties the freedom to determine the applicable law for marriage dissolution and physical separation has further complicated matters.

Algerian private international law rules regarding personal status have been based on social considerations, with the Algerian legislator envisioning that nationality criteria provide the greatest protection for the Algerian public order. However, this has led to encroachments on individuals' rights, especially the disregard for acquired rights.

It is more fitting for the Algerian legislator to consider the highly important issue of religious affiliation and its change among individuals when establishing the assignment rules specific to the objective conditions for marriage formation, whether both parties are foreign (Article 11 C.C.) or one of the parties is Algerian (Article 13 C.C.).

Marriage in Islamic law is considered a solemn covenant and is highly sensitive. Therefore, it was necessary for the assignment rules to be clearly formulated in a manner that assists in providing the most accurate solution to all types of disputes arising in personal status matters in general, particularly in marriages with a foreign element.

While the criteria of nationality and its application remain valid to this day, theoretically speaking, it is essential to explore appropriate solutions and strike a balance between various interests, as is the case in comparative laws.

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