



THE REFLECTIONS OF THE CEDAW CONVENTION ON THE LEGAL STATUS OF WOMEN IN ALGERIAN FAMILY CODE

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ABSTRACT

Even though the Convention on the Elimination of All Forms of Discrimination Against Women is the first international document that guarantees all rights for women in all areas of life and ensures all effective means to eliminate discrimination against them, the latter has come with a set of positive and negative effects on the Arab Islamic family and the Algerian family.

After Algeria ratified the CEDAW convention to eliminate all forms of discrimination against women and uphold the principle of equality between women and men, the family legislator found itself amending numerous legal provisions in line with the principles of the Committee on the Elimination of Discrimination against Women. This resulted in granting mature women the right to conclude their marriage contracts themselves, making their consent in the marriage contract equal to that of men. Additionally, it imposed restrictions on men's right to polygamy as a safeguard for women while also bolstering their position in terminating marital relationships by granting them the right to seek divorce through khula and granting them guardianship rights.

INTRODUCTION

Women's rights are considered a priority for the international community.

This concern has been manifested through convening conferences and seminars and establishing several international organizations to achieve a global system to protect these rights.

This has led to multiple conventions that obligate all United Nations member states to sign and implement their provisions without considering their suitability and compatibility with the principles and needs of countries. One of these conventions is the CEDAW convention.

The CEDAW convention has sparked an intense debate because it is the most daring convention to address the issue of women's rights and family rights, especially with unparalleled candor.

It aimed for equality in rights and duties as commonly practised in previous declarations, but it did not confine itself to a declarative nature; rather, it surpassed it to become mandatory. It stipulated the establishment of a United Nations committee known as the Committee on the Elimination of Discrimination against Women, tasked with monitoring women's issues, caring for their rights globally, and monitoring the extent to which countries comply with the convention's provisions.

Since women's rights are of interest to the Algerian state, as they are to other countries, it sought to join this convention to empower women and align with the international system. It also sought to adapt domestic legislation in accordance with the provisions of this convention. Among these adaptations was the amendment and supplementation of laws, including the Family Law, which is the most important law concerning women rights. The recent amendments included several articles that entrenched gender equality in marriage and divorce matters, influenced by international agreements. This was influenced by a report from the Committee on the Elimination of Discrimination against Women on January 27, 1999, which expressed deep concern that "the Family Law still contains many discriminatory provisions that deprive women of fundamental rights such as free consent to marriage"¹

Based on the preceding, while the CEDAW convention constitutes a positive step towards advancing women's rights worldwide, the question arises: What are its prominent impacts on family legislation in promoting women's rights when amending the Algerian Family Code? We address this issue by examining the reflections of the CEDAW convention on the legal status of women in marriage matters as a first point, followed by presenting its legal status in matters of marriage dissolution in compliance with the provisions of the CEDAW convention as a second point.

1. THE IMPACT OF THE CEDAW CONVENTION ON THE LEGAL STATUS OF WOMEN IN MARRIAGE CONTRACTS

The Convention on the Elimination of All Forms of Discrimination Against Women, issued in 1979 and ratified by Algeria in 1996 with certain reservations, is regarded as a significant achievement of the international community in protecting women's rights and ensuring their quality with men. Among the issues addressed by this convention concerning women's rights during the conclusion of marriage contracts and its codification in Algerian family law is the women's right to freely choose their spouse and enter into marriage contracts, as well as their right to impose conditions on the spouse in the marriage contract.

1.1. The right of women to enter into marriage contracts

The CEDAW convention advocates for women's freedom to choose their spouse and prohibits the conclusion of marriage contracts without their full and voluntary consent, as outlined in Article 16, the first paragraph. It urges member states to take appropriate measures to eradicate discrimination against women in all matters related to marriage and family relations, ensuring specifically the equal right of men and women to freely choose their spouse and enter into marriage contracts.²

1 The Algerian Family Code. (2005). Official Gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/>

2 Convention on the Elimination of All Forms of Discrimination against Women. (1979). <<https://www.ohchr.org/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

The Algerian legislator also stressed the woman's consent to marriage contracts and her right to choose her husband freely. This document is evident in the requirement of several single pillars of the combined knot,³ even in Islamic law, where it is considered one of its pillars.

Therefore, the Algerian legislator has granted women the right to choose a suitable spouse with whom they wish to build a private marital life, considering that the family is the fundamental nucleus in shaping society. However, the question remains: Has the legislator left this right unrestricted ?

1.1.1. Women's right to choose a spouse

Referring to the Algerian Family Law, we find that it acknowledges women's right to enter into marriage contracts with their consent, without coercion. Article 4 defines marriage as "a contract of consent between a man and a woman",⁴ while Article 10 states that consent is manifested by a positive expression from one party and acceptance by the other party in words implying the meaning of marriage according to Islamic law. Similarly, Article 9 asserts that consent is the sole pillar of the marriage contract, thereby equalizing the rights of men and women in this regard.⁵

The right to consent gives rise to another right, namely the woman's right to choose her spouse, as outlined in Article 16, paragraph 4 of the Convention on the Elimination of All Forms of Discrimination Against Women. The Convention advocates for equality between women and men in all matters concerning marriage, including selecting a spouse by the woman's full volition. This is known as the principle of "the sovereignty of will" in contracts, where contracts are established based on the will of both parties.

All international treaties have emphasized the right to choose a spouse, leaving it unrestricted, thus disregarding religious, racial, and even environmental beliefs of the women's surroundings. This may be attributed to the hardships women

have faced in some societies, such as being forced into marriage for the sake of financial gain obtained by the father or being inherited to another person after the death of their spouses.⁶

As for the Family Code, it recognizes the woman's right to choose their spouses when entering into marriage without imposing any conditions on this right. It uses the term "consent" without distinguishing between women and men. However, upon examining this law, we find that it includes several provisions that may restrict this choice, such as the requirement for the presence of the guardian on the day of concluding the marriage contract, the issue of a Muslim woman marrying a non-Muslim, and various impediments to marriage. All of these provisions are derived from Islamic law.

Additionally, in Article 222,⁷ the legislator states that the provisions of Islamic law shall apply without specific provisions in the Family Code. Furthermore, in Article 24 of the Family Code, the legislator mentions absolute impediments to marriage, including kinship, affinity, and breastfeeding, which restrict women's freedom to choose their spouses. This restriction is not uncommon in societies because kinship holds significance and cannot be disregarded by women.

When exercising their right to choose their spouses, women can select their partners based on the qualities they desire in a life partner. The character and uprightness in their religion and their chivalry are among the most important attributes that women value. For any virtue in a man holds no value if devoid of religion and good character.⁸

For women's freedom in choosing their life partner to be complete, their consent must be valid. It is considered in valid if the woman lacks the legal capacity or is incompetent. Hence, a relationship between consent in marriage contracts and the legal age for marriage begins.⁹

[sites/default/files/cedaw.pdf](https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15) (Last accessed: September 11, 2024).

3 The Algerian Family Code. (2005). Official Gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

4 Ibid.

5 Ibid.

6 Aissawi, A. N. (2015). Rights of Married Women under International Conventions and Algerian Family Law. PhD thesis in Private Law, University of Tlemcen, Algeria, p. 32.

7 The Algerian Family Code. (2005). Official gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

8 [8] Aissawi, A. N. (2015). The aforementioned reference, p. 32.

9 [9] Daoudi, A. K. (2012). Family Provisions between Islamic Jurisprudence and Family Code. Dar Al-Basa'ir, Algeria, p. 28.

Article 7 of the Family Code¹⁰ states that the legal capacity of both men and women is attained at 19. Therefore, the Algerian legislator has set the legal age for marriage at 19 for both spouses. However, there is an exception to this requirement, allowing minors who have not reached this age to marry with the judge's authorization, considering necessity and interest.

The Algerian legislator was criticised for not specifying the minimum age for marriage and leaving the matter unrestricted. However, it is commendable that the judge is required to ensure the ability of both parties to marry, whether it be financial, mental, or physiological, including considerations of physical maturity or puberty as dictated by Islamic law.

Dr Chawarjilali's opinion on this matter states: "The interests of the parties themselves and society dictate that minors should not be granted the right to marry until they reach a certain age at which their physical ability to bear the consequences of marriage is confirmed. They should also possess a sufficient level of discernment to understand the outcomes and consequences of what lies ahead. To achieve these objectives, the legislators should set the minimum age for girls at sixteen years and for boys at eighteen years. Marriages should be prohibited regardless of the interest or necessity if the age at the time of the contract is below that threshold."¹¹

Making marriage authorization the responsibility of the judge serves as legal protection for underage women to prevent them from being coerced into marriage without their consent. The judge ensures her full consent to the person she is about to marry, laying the foundation for the family, which is essential for societal formation.

After a woman freely chooses her spouse without any external pressure, she faces another issue related to concluding the marriage contract: does the woman have the right to initiate her marriage contract as one of the parties? To what extent has family law legislator enshrined this right for her?

1.1.2. The women's right to conclude a marriage contract

International conventions stipulate women's right to contract their marriage independently without requiring a guardian's approval for the marriage contract. Article 16 of the Universal Declaration of Human Rights asserts equality between men and women in the right to marry. This means that just as men have the right to enter into marriage contracts independently, without any restriction, women also have the same freedom and level of enjoyment of this right.

As affirmed by the Convention on the Elimination of All Forms of Discrimination Against Women, women are equal to men in matters concerning marriage. Since men can marry without needing another person, such as a guardian, women should also be able to marry without any requirement. However, the recent amendment to the family law has regressed on the issue of guardianship through Article 11,¹² which states: "An adult woman may marry in the presence of her guardian, who may be her father, a relative, or any person of her choice. Without prejudice to the provisions of Article 7 of this law, the guardianship of minors' marriages is undertaken by their guardians, who are the father, closest relatives, or a judge for those who have no guardian."

The text of the article indicates that the Algerian legislator distinguished between women who have reached the age of maturity and granted them the right to marry directly while preserving the role of the guardian in the marriage of minors. This attempts to embody the principle of equality between women and men as stipulated in the Convention on the Elimination of All Forms of Discrimination Against Women.

Indeed, the legislator in this article does not explicitly grant mature, rational women the right to enter into marriage contracts independently but instead uses implicit language by changing the wording of Article 11 of the Family Law from "the guardian undertakes marriage..." to "the mature woman contracts...". This leads to contradiction and ambiguity in Articles 9 and 3 of the Family Code, as the guardian's role becomes merely formal and secondary since he cannot force his ward to marry in all cases.

10 [10] The Algerian Family Code. (2005). Official Gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

11 [11] Chouar, D. (1999). Age of Marriage between Consent and Sanction in Algerian Family Law. Legal Journal of Legal, Economic, and Political Sciences, Faculty of Law and Administrative Sciences, Ben Aknoun, University of Algiers, No. 2, p. 79.

12 The Algerian Family Code. (2005). Official gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

The wording of Article 11 explicitly states “presence” rather than “approval”,¹³ meaning that the woman herself enters into the marriage contract, and the presence of the father suffices without requiring his consent. If he attends but does not consent, it does not affect the marriage contract. The right granted to mature women through this article is the choice of their guardian or someone else, leaving it open-ended. Here, we wonder if she can choose someone outside her family.

So, the family legislator entrenched the women’s right to personally conclude and initiate their marriage contract and be satisfied with the guardian’s presence at the contract. Thus, guardianship in the marriage contract has become a mere formality, devoid of substance, as it does not require them to bring a specific guardian to the contract, granting them the freedom to choose the guardian. As a result, the guardian now has the same role as a witness, as both must attend the contract session.¹⁴ Consequently, the mature woman bears alone the responsibility for initiating the marriage of her own full volition without facing any pressure from the guardian because his consent or lack thereof does not affect the marriage contract.¹⁵

From here, the legislator allowing the mature woman to initiate her marriage does not apply to the minor woman who has been granted judicial authorization to marry. Does the guardian have the right to force her to accept someone she does not agree with?

The family legislator has allowed the minor woman who has not reached the age of 19 to marry before that age for reasons dictated by the girl’s best interests, as outlined in Article 7 of the Family Law, which says: “The judge may authorize marriage before that age for the sake of necessity or urgency, provided that the parties are proven capable of marriage...”

Yet, the legislator in this case has made her marriage conditional firstly on judicial authorization, which is obtained by the guardian submitting a

request to the judge to obtain it. Secondly, it is stipulated that her guardian is the one who oversees her marriage, as stated in Article 11/2 of the Family Law: “Without prejudice to the provisions of Article 7 of this law, the guardians undertake the marriage of minors, who are their fathers, close relatives, or the judge for those who have no guardian”.

The Algerian legislator has maintained guardianship as a condition for concluding a marriage contract for minors, unlike for adult women. This is because minors do not possess full autonomy in deciding to marry,¹⁶ and the guardian is responsible for protecting them from being deceived or coerced by a man they intend to marry. However, the Algerian legislator did not give the guardian absolute authority to conclude a marriage contract for the minor, Article 13 of the Family Law states:¹⁷ “The guardian, whether a father or another, may not force the minor under his guardianship to marry, nor may he marry her without her consent.” Thus, Algerian law grants the guardian, in the case of minors, the right to choose, shifting from a position of coercion to one of consent. Therefore, the guardian cannot compel the minor under their guardianship to marry someone she does not wish to marry. This ensures that the minor is not forced or coerced into marriage by her guardian and that her marriage contract is based on her own will and desires.¹⁸

1.2. The women’s right to stipulate conditions in marriage contract

The issue of stipulation is one of the most important rights provided by the Algerian legislator for the benefit of the spouses, avoiding marital problems in the future and establishing understanding. In fact, no explicit provision in international agreements speaks directly to the right of spouses to set conditions when concluding a marriage contract.

13 Hamidou, Z. (2011). Some Newly Established Women’s Rights. *Journal of Legal Sciences, Faculty of Law and Political Science, University of Abu Bakr Belkaid Tlemcen, Algeria*, No. 12, p. 77.

14 Daoudi, A. K. The aforementioned reference, p. 112.

15 Ibn, R. (1995). *Bidayat Al-Mujtahidwa Nihayat Al-Muqtasid*. Al-Nadjah Book, Dar Al-Salam for Printing, Publishing, and Distribution, Cairo, No. 1, p. 6.

16 Abu Zahra, M. (2005). *Personal Status*. Dar Al-Fikr, Cairo, Egypt, p. 107.

17 The Algerian Family Code. (2005). *Official gazette, Issue 15*, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

18 Ben Oumr, M. S. (2016). *Gender Equality in Marriage Contract in Family Law and International Conventions*. Ph.D. thesis in Private Law, University of Tlemcen, Algeria, p. 165.

Referring to Article 19 regarding stipulation in the marriage contract, we find that the Algerian legislator has allowed for stipulation in the marriage contract or a subsequent official contract. Additionally, two fundamental conditions were specified, particularly the condition of monogamy and the condition of the woman not working.

If we compare this text with its predecessor in the law before the amendment, where the legislator did not specify the important conditions and left them general by stating that the spouses can stipulate in the marriage contract all conditions they see fit as long as they do not conflict with this law, it can be implicitly understood that the legislator mentioned the condition of women's employment influenced by Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women, which states: "States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment to ensure, based on equality between men and women, the same rights, in particular the right to work as an inalienable right of all human beings".

This amendment was made to promote family unity and harmony and to preserve society in line with all decisions, declarations, agreements, and recommendations issued by the United Nations and specialized agencies, particularly in compliance with the Convention on the Elimination of All Forms of Discrimination Against Women.¹⁹

2. THE IMPACT OF THE CEDAW CONVENTION ON THE EVOLUTION OF WOMEN'S STATUS IN MATTERS OF MARITAL DISSOLUTION

The family legislator has granted women the right to dissolve the marital bond through divorce and khula, influenced by the Convention on the Elimination of All Forms of Discrimination Against Women, which considers equality between women and men as the general principle governing all its provisions. Consequently, Algerian family law recog-

nizes a woman's right to divorce and khula on par with the man's right to dissolve the marital bond. Not stopping there, the legislator also added another right for women, which is the right to guardianship over her children who are under her custody.

2.1. Enshrinement of the principle of equality for women in the rights of divorce and khula

The Algerian legislator granted the spouse the right to request divorce at any time he wishes without restricting his request because marital authority is in his hands. Conversely, the woman was granted the right to dissolve the marital bond by filing for divorce and khula due to the harm inflicted upon her by her spouse, thus embodying the principle of gender equality. To what extent did the legislator equalize them in matters of marital dissolution ?

2.1.1. Divorce as a right for women in dissolving the marital bond

By "divorce" it is meant to terminate the marital relationship by a court ruling based on the wife's request for a matter stipulated by law and according to Article 53²⁰ of the old Algerian Family Code. The specified cases include the spouse's failure to provide for his wife, following a court order mandating it; defects that prevent the marriage's purpose from being fulfilled; the spouse's desertion of his wife in bed for a period of four months; a sentence of dishonorable punishment restricting the spouse's freedom for more than a year; absence for more than a year, in addition to committing an immoral act. Upon amending the Family Law by Order 05/02, the legislator added three other cases: continuous discord between the spouses, violation of agreed-upon conditions in the contract, and violation of the provisions of Article 08 related to polygamy.²¹

The legislator added these three reasons because they were influenced by the text of Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, which states

19 Ahmad Waseem, H. A. D. (2011). International Conventions on Special Human Rights, Children's Rights, Women's Rights, Refugee Rights, Workers' Rights, Rights of Persons with Disabilities, Prisoners' Rights. Halabi Human Rights Publications, Lebanon, p. 89.

20 The Algerian Family Code. (2005). Official gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

21 Ibid.

that women should have the same rights as men regarding the dissolution of marriage contracts. In line with this article and harmony with the Algerian Family Code, the Algerian legislator amended the provisions allowing women the right to dissolve the marital bond by expanding the grounds for divorce to enable women to alleviate harm inflicted upon them.²²

2.1.2. The woman's right to khula embodies the principle of gender equality

Article 54²³ of the Family Law states: "The wife may, without the spouse's consent, initiate judicial separation in exchange for financial compensation.

If the spouses do not agree on the financial compensation for khula, the judge shall rule based on not exceeding the value of customary dowry at the time of the ruling."

Thus, when amending this article, the legislator added the phrase "without the consent of her spouse," meaning that the wife has the right to initiate khula without her spouse's consent and has complete freedom to do so without any reason. Previously, obtaining the spouse's consent was necessary for a khula ruling,²⁴ which often allowed the spouse to pressure the wife to agree to a higher compensation for khula, especially with the decline in religious influence.

Therefore, the legislator may also have been influenced by the text of Article 16, paragraph 1, of the aforementioned Convention on the Elimination of All Forms of Discrimination against Women. This means that the right to divorce granted by the legislator to the spouse in Article 48 of this code directly corresponds to khula for the wife. On the one hand, khula, as provided for in Islamic law before international agreements, is permissible and legitimate because it helps alleviate harm and damage

to the woman and compensates the spouse for the consequences of separation.

2.2. The woman's right to guardianship over her nurtured child

The Convention on the Elimination of All Forms of Discrimination against Women equalizes parental rights between fathers and mothers in guardianship over their children and all matters related to them, as stated in Article 16, paragraph (d) of the Convention for the Elimination of All Forms of Discrimination against Women for the year 1979.

As for the Algerian legislator regarding guardianship, Article 87 of the Family Code²⁵ stipulates that guardianship over minors belongs to the father. In the event of his death, the mother assumes guardianship by law. If the father is absent or incapacitated, the mother takes over urgent matters concerning the children. In divorce cases, the judge grants guardianship to the parent awarded custody of the children.

Through this article, it becomes evident that the Algerian legislator has granted women guardianship rights over their minor children in the absence of the father or in cases of separation where custody is awarded to the mother. This embodies the principle of equality between men and women regarding rights and responsibilities towards their children. This change was influenced by the CEDAW convention on the one hand and, on the other hand, due to the neglect sometimes experienced by children from their fathers after separation, leading to administrative difficulties for the nurtured child with their mother.

CONCLUSION

Despite the Convention on the Elimination of All Forms of Discrimination Against Women being the first international document to ensure all rights for women in all areas of life and also guaranteeing all effective ways to eliminate discrimination

22 Ayssat, E. Y. (2003). Divorce by Request of the Wife in Algerian Family Law Supported by Judicial Ijtihad of the Supreme Court. Master's thesis in Law, Contracts and Liability Department, Faculty of Law, Algeria, p. 10 and following.

23 The Algerian Family Code. (2005). Official gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

24 Ben Sghi, M. (2014). Impact of Amending Family Law 05-02 on the Legal Status of Women. University of Khenchela, No. 1, p. 109.

25 The Algerian Family Code. (2005). Official gazette, Issue 15, 1 <<https://www.joradp.dz/FTP/JO-ARABE/2005/A2005015.pdf?znjo=15>> (Last accessed: August 12, 2024).

against them, it has brought about both positive and negative impacts on Arab-Islamic and Algerian families. The Convention aims to establish absolute equality between men and women in all areas. At the same time, Islamic law recognizes the natural differences between men and women, assigned by the Creator, and distinguishes the roles and responsibilities of each in life. These differences are not considered discrimination but complementary factors that help each fulfill their role comprehensively to complement the other.

The Algerian legislator attempted to reconcile Islamic and international references in the Family Code, oscillating between equality between men and women and protecting women, whether at the conclusion of marriage, during marriage, or in the dissolution of marital relationships.

Consequently, women were granted several rights, such as the right to choose a spouse, the right to conditions, and the right to dissolve the marital bond at her sole discretion. However, women have not achieved this advancement effectively, and there are still many loopholes that prevent the

realization of the desired goals of the Family Code.

Recommended proposals for developing and enhancing the status of women includes:

- Activating the judiciary's role in family matters by adding new legal provisions, whether in family law or civil and administrative procedures law, to provide greater protection for women before the judiciary;
- Returning the role of the guardian in marriage to its position before the amendment for adult women because their presence is a protection for women and not a diminishment of their will in marriage or an underestimation of their ability to determine their fate, as some may think;
- Abolishing Article 6 of the Family Code, which recognizes customary marriage, and Article 22 of the same code, which allows its registration, to protect women from the risks of customary marriage and its potential consequences.

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