



The Problem of Engagement under the Conflict of Laws Rules in Algerian Law

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Abstract:

The issue of legal engagement in conflict of laws is highly relevant within the framework of Algerian private international law. This is due to the intersection of several complex factors, chief among them being the ambiguity of key legislative texts—namely, the Family Code and the Civil Code—and the dual legal nature of engagement. Engagement is caught between being a moral promise to marry and a potential tortious act when the right to withdraw is misused. It also reflects the broader tension between differing legal and social values across legal systems. The core problem lies in how to reconcile the general conflict of laws rule, which is based on the nationality of the parties, with the need to ensure practical justice for those harmed by the breakup of an engagement. At the same time, the necessity of Algerian public policy intervention must be acknowledged to protect fundamental legal principles.

Keywords: Engagement, Mixed Marriage, Conflict of Laws, Engagement Conditions, Abuse of Right, Non-Contractual Obligations.

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INTRODUCTION

Mixed marriage represents a space where civilizations both interact and clash. It is a fertile ground for conflict of laws, particularly in the context of the free movement of persons and capital in today's global society. Engagement, as a preliminary stage to marriage, takes on special legal significance. It is not a binding contract, but rather a promise to marry. According to Article 5 of the Algerian Family Code, either party may withdraw from it freely. However, such withdrawal can still create burdens and lead to liability.

When a foreign element exists in the engagement—such as differences in nationality or residence—a situation of international legal conflict arises. The main question becomes: which law applies? While Algerian law considers engagement to be a non-binding promise, it does not set out any specific conflict of laws rule for it. This raises significant challenges in identifying the applicable connecting factors. Even judicially, there is a notable lack of explicit rulings dealing with conflicts of law in engagement cases.

Thus, the key question is: What legal rules govern this type of relationship? Should we apply the rules related to contractual obligations—as if engagement were equivalent to a marriage contract? Or should we refer instead to the rules on non-contractual liability and compensation for harm?

Answering these questions requires a deeper examination of the legal nature of engagement and its classification. It also involves exploring the appropriate conflict of laws rules in cases involving foreign elements, especially when one party withdraws from the engagement in a way that causes harm and could warrant compensation.

Accordingly, this study addresses the following:

First: The Meaning and Legal Nature of Engagement

Second: The Law Applicable to the Substantive and Formal Conditions of Engagement

Third: The Law Applicable to the Effects of Engagement and the Consequences of Withdrawal

Conclusion

First: The Meaning and Legal Nature of Engagement

1. The Meaning of Engagement

Engagement (al-khitbah, with a kasrah under the letter kha) refers to a man's request to marry a specific woman. This request may be made directly to her or through her guardian. It is defined as a marriage proposal addressed to a woman who is legally eligible for marriage and free from any religious impediments. The proposal may be presented in person, through her family, or by third parties sent to negotiate or clarify the terms of the potential marriage and the suitor's expectations. If the proposal is accepted, the engagement is considered to have been concluded¹

2. The Legal Nature of Engagement

Article 5 of Algerian Family Law No. 05-02 states:² Engagement is a promise to marry. Either party may withdraw from the engagement

Article 6 of the same law provides: Reciting Al-Fatiha during the engagement does not constitute a marriage. However, if Al-Fatiha is recited during the session of the contract and the element of consent is present, along with the conditions of marriage as set out in Article 9 bis of this law, it is considered a valid marriage³

It is clear from the text that engagement is merely a promise to marry. It is neither a contract nor a marriage. Each party has the right to withdraw from it. It does not create any obligation to proceed with the marriage contract. Algerian courts also consider engagement only a promise that does not produce the legal effects of marriage. If either party refuses to proceed with the marriage, no legal consequences arise—unless the withdrawal is accompanied by actions that cause harm to the other party.

Some scholars also view engagement, in terms of its nature and consequences, as a 'preliminary agreement' that prepares the ground for the marriage contract, but is not itself a marriage.

The importance of engagement lies in its function as a means of mutual acquaintance. It allows both parties to inquire and observe one another to avoid surprises that may arise later in the relationship. Through this process, each party comes to know the other's character, behavior, and appearance⁴ There are also other factors that may lead each party to wish to be joined with the other. However, engagement may take place between two individuals belonging to different legal systems. This introduces the relationship into the domain of private international law. If a dispute arises, the issue becomes one of conflict of laws. In such cases, the question of which law governs the engagement is raised.

Second: The Applicable Law Governing the Substantive and Formal Conditions of Engagement

The Algerian legislator did not specify the law applicable to engagement. However, it is certain that engagement falls within the scope of personal status. The prevailing view is that the rules governing

¹ Belhadj Al-Arabi, *Al-Wajeez fi Sharh Qanun Al-Usra Al-Jaza'iri: Muqaddimat Al-Khitba, Al-Zawaj, Al-Talaq, Al-Mirath, Al-Wasiyya*, D.M.J.J., Ben Aknoun, Algeria, 2022, Vol. 1, p. 44.

² Law No. 84-11, amended and supplemented by Ordinance No. 05-02 dated 27 February 2005, concerning the Algerian Family Code.

³ Article 9 bis of the Family Code (Law No. 05-02) provides: "The marriage contract must meet the following conditions: marriage capacity, dowry, guardian, two witnesses, and the absence of legal impediments."

⁴ See: Bakhiti Al-Arabi, *Ahkam Al-Usra fi Al-Fiqh Al-Islami wa Qanun Al-Usra Al-Jaza'iri*, 1st ed., D.M.J.J., 2016, pp. 13–17.

engagement should be aligned with those applicable to marriage. This is because engagement is, in the end, a step toward concluding the marriage contract.

In the context of private international law, determining the legal nature of engagement is subject to the rule that classification is governed by the law of the forum¹ According to Article 9 of the Algerian Civil Code².

Engagement involves both substantive and formal conditions, and it produces legal effects. The applicable law to these conditions is determined by the conflict-of-law rules that govern the marriage contract. Classifying whether a given condition is formal or substantive is a matter of legal characterization, which is subject to the law of the forum. In what follows, we examine the applicable law governing the various aspects of engagement.³

1. The Applicable Law to the Substantive Conditions of Engagement:

The substantive conditions related to engagement—such as the prohibition of engagement due to kinship through marriage or breastfeeding, the inadmissibility of proposing to someone already engaged or in a waiting period (*'idda*), and issues related to delays in engagement—are governed by the national laws of both parties (the fiancé and the fiancée). This follows the same principle applied to the substantive conditions of marriage. In this context, the application of national law is divided between the two parties⁴ Except for the impediments to marriage, the national law is applied jointly⁵.

2. The Applicable Law to the Formal Conditions of Engagement:

The formal conditions of engagement refer to its procedures and forms. These are subject to the law that governs the form of legal acts in general, pursuant to Article 19 of the Algerian Civil Code (Law No. 05-10 dated June 20, 2005), which states: “Legal acts are subject in their formal aspects to the law of the place where they were performed. They may also be subject to the law of the common domicile of the contracting parties, their shared nationality, or the law governing their substantive provisions.”

Accordingly, an engagement is formally valid if it complies with the prescribed form in the country where it took place or in accordance with the law of the fiancé’s and fiancée’s nationality. It may also be valid if it follows their common nationality law or the law of their mutual domicile. The issue of proving the engagement is governed by the law applicable to the form of engagement, as set forth in Article 19 of the Algerian Civil Code.

3. The Applicable Law to the Effects of Engagement and the Consequences of Its Dissolution:

¹ Kamal Soumia, “The Relationship between Conflict of Law Rules and Public Policy in Matters of Marriage,” *Al-Sada Journal for Legal and Political Studies*, Issue 7, June 2021, p. 123.

² Article 9 of the Algerian Civil Code: “Algerian law shall be the reference for the legal characterization of the relationships for which the applicable law is to be determined in case of a conflict of laws.” See: Ordinance No. 75-58 of 20 Ramadan 1395 (corresponding to 26 September 1975), concerning the amended and supplemented Civil Code.

³ Kamal Soumia, previously cited, p. 123..

⁴ **Split Application:** This is the view held by the majority of jurists. It states that for a marriage to be valid, each party must meet only the substantive conditions required by their own national law, without regard to those required by the other party's law. This view has been adopted by several legal systems. However, an exception is made in the case of **marriage impediments**, which must be subject to joint application due to their serious nature. These impediments serve to protect social interests and reflect shared moral and ethical standards. See: Zerrouki Tayeb, *Private International Law in Comparison with Arab Legislation*, previously cited, p. 151.

⁵ **Comprehensive Application:** This refers to the requirement that both spouses must satisfy all conditions imposed by both their own nationality’s law and that of their partner’s nationality. See: Es’ād Mouhand, *Private International Law, Part I: Conflict of Laws*, D.M.J.J., 1989, p. 295; also, ‘Ezzedine ‘Abdullah, *Conflict of Laws and International Jurisdiction*, Dar Al-Nahda Al-‘Arabiyya, Egypt 1974, vol. 2, p. 68.

1. The law governing the effects of engagement:

The effects of engagement include the extent of the obligation to complete the marriage, the fiancé's right to visitation, the relationship between the parties, and similar matters. These issues are governed by the law of the fiancé's nationality at the time of engagement, by analogy to how the effects of marriage are governed by the law of the husband's nationality at the time of marriage, as provided in Article 12 of the Algerian Civil Code¹ The Algerian legislator has established unity regarding the scope of this law by subjecting both financial and personal effects to a single governing law. This law is that of the country where the husband resides at the time the marriage is contracted. The rationale behind this choice includes:

- Taking the husband's nationality at the time of marriage aims to avoid the problem of changing conflicts of law, as the husband may change his nationality after marriage.
- Ensuring the stability of the effects of marriage, since the rights and duties of the parties are determined at the time of marriage, and the wife consents to be subject to this legal framework. It would be unfair for these rights and duties to change as a result of the husband's unilateral voluntary action.
- Applying two different laws to the effects of marriage often makes it difficult to implement either one when they conflict. To prevent this issue, the effects of marriage are governed by a single law. This reasoning also explains why French courts choose a specific law to govern marital effects when spouses have different nationalities—namely, the law of their common residence.

In contrast, Islamic countries generally apply the law of the husband's nationality at the time of marriage to govern the effects of marriage, excluding the wife's law. This is due to the position of the man within the family in Islamic law²

However, it is important to note the exception established by the Algerian legislator in Article 13 of the Algerian Civil Code: "Algerian law alone shall apply in the cases provided for in Articles 11 and 12, if one of the spouses is Algerian at the time of marriage, except regarding marriage capacity." Accordingly, this exception applies Algerian law if one party is Algerian at the time of marriage. The purpose of this exception is to protect the Algerian wife, since the Algerian husband's law generally governs the marriage at its inception. Notably, this exception remains valid even if the husband's nationality changes afterward.

2. The applicable law concerning the effects arising from withdrawal from engagement:

The Algerian legislator addressed withdrawal from engagement in Article 5 of the Algerian Family Law, stating: "Both parties may withdraw from the engagement. If withdrawal causes material or moral harm to one of the parties, compensation may be awarded."

It should be noted that withdrawal from engagement is a right for either party and does not ordinarily require compensation to the other. This is the general rule. However, abusive withdrawal obligates the withdrawing party to compensate the other if the withdrawal causes loss. This includes cases accompanied by bad faith or severe material or moral harm to the other party. Such cases may lead to tort liability for the party who withdrew.

Accordingly, if the withdrawal aims to avoid coercion into marriage, no liability arises for the withdrawing party. However, if withdrawal results in material or moral harm to either party—such as when the fiancé demands she abandon her studies, fail to complete her work, prepare a dowry, misses marriage opportunities, or when the fiancé demands costly home preparation, or one party defames or harms the reputation of the other after withdrawal—these circumstances justify awarding compensation³

¹ **Article 12 of the Algerian Civil Code (Law No. 05-10):** "The law of the country to which the husband belongs at the time of marriage governs the personal and financial effects arising from the marriage contract."

² See: A'rāb Belkacem, *Algerian Private International Law: Conflict of Laws*, Dar Houma, Algiers, 2001, pp. 248–249; and Jamāl Mahmoud Al-Kurdi, *Conflict of Laws*, New Alexandria University Press, Egypt, 2005, p. 289..

³ See: Belhadj Al-Arabi, *Al-Wajeez fi Sharh Qanun Al-Usra Al-Jaza'iri*, cited above, p. 55..

While withdrawal from an engagement is a right, it must not be exercised abusively. When such withdrawal is accompanied by actions that cause material or moral harm to the other party, compensation may be awarded. The damage must be actual and proven, not speculative or possible, meaning the claimant must have truly suffered a loss. If the party who withdrew from the engagement did not contribute to the resulting harm, they are not liable for compensation, as they did not cause the damage.

The Algerian legislator stipulated in Article 5, paragraph 2, of Order No. 05-02, amending the Family Code, that “if withdrawal from the engagement causes material or moral damage to either party, compensation may be awarded.” The compensation referred to in this article is not for the mere act of withdrawing from the engagement, but rather for the harm caused by such withdrawal. This is based on tort liability rather than contractual liability, given that engagement is not considered a contract¹

The Algerian legislator has settled the issue of compensation for moral damages when convincing justifications are presented to the judge. This is in accordance with Article 5, paragraph 3, of the Family Code and Article 182 bis of Law No. 05-10, which amends the Civil Code.

The assessment of damage is a substantive matter that remains within the discretion of the trial judge. The judge must ensure that the compensation awarded corresponds proportionally to the harm suffered by the injured party.

Generally, compensation in cases of withdrawal from engagement is based on the harmful act rather than the contract itself. Therefore, it can be proven by all means, as it constitutes a legal fact. However, the damage claimed must be linked to the fault committed by the party who withdrew from the engagement.

In such cases, liability for compensation falls upon the party who committed the wrongful act, which corresponds to what is known as tortious liability².

Accordingly, in cases where the engagement is terminated and the withdrawal by one party is abusive, the rule of tort liability applies. This liability is governed by the local law in accordance with Article 20, paragraph 2, of the Algerian Civil Code³

Thus, the conflict-of-law rule applicable to non-contractual obligations is applied. ⁴ Article 20 of the Algerian Civil Code stipulates the application of the law of the country where the harmful act (the wrongful act) occurred:

“The law of the country where the material act giving rise to the obligation took place governs non-contractual obligations. However, with regard to obligations arising from a harmful act, the provisions of

¹ “Definition of Engagement, Its Conditions, and Consequences of Withdrawal,” published 14/12/2023; accessed 13/07/2025 at 11:53, Elmizaine.com.
https://www.elmizaine.com/2023/12/blog-post_14.html

² See: Jamal Mahmoud Al-Kurdi, Previously Cited Reference, p. 272.

Amara ‘Amara, Lectures on the Conflict of Laws in Family Matters, Faculty of Law and Political Science, Department of Law, Mohamed Boudiaf University, M’sila, Academic Year 2020–2021, p. 39.

See also: Abdelaziz Saad, The Basis of Compensation for Damages Resulting from the Withdrawal of Engagement, in Algerian Family Law in Its New Form: Provisions of Marriage and Divorce after the Amendment, 1st ed., Dar Houma, Algiers, 2011, p. 21.

³ Kamal Soumia, Previously Cited Reference, p. 124..

⁴ Non-contractual obligations,” understood as legal facts falling under Article 20 of the Civil Code—these include obligations arising from harmful acts (tort liability), beneficial acts such as unjust enrichment, undue payment, and quasi-contracts. See: Nasreen Cheriki & Sa’id Bouali, Algerian Private International Law, 1st ed., Dar Belqais, Casablanca–Algiers, 2013, p. 88..

the preceding paragraph do not apply to acts committed abroad that are lawful in Algeria, even if they are unlawful in the country where they occurred."

Another issue arises regarding the determination of the "place of the harmful act" in cases where the engagement is terminated through telephone, written communication, or across borders.

As for the proof of damage and causation, these matters fall under the procedural law, i.e., Algerian law for Algerian courts, which follows procedural formalities. However, the elements of damage and causal link may be subject to a different substantive law based on conflict-of-law rules.

Regarding the issue of deferred mahr and gifts given by one party to the other, questions arise about the applicable law governing the obligation of either party to return these gifts if the engagement is broken. Specifically, the law applicable to the mahr advanced by the fiancé or gifts given according to custom and tradition becomes relevant.

Jurisprudence differs on determining the governing law in this matter. The absence of explicit conflict-of-law rules here creates a significant challenge. Some argue for applying the law of the donor's nationality, reasoning that gifts are essentially donations, and donation contracts are subject to the law of the donor's nationality at the time of making the gift¹.

Some scholars have argued that the matter of returning gifts should be governed by the national law of the parties, as it relates to the formation of the engagement. Another opinion holds that the return of gifts should be subject to the law of the place where the enrichment occurred, on the basis that the obligation to return gifts is an application of the principle of unjust enrichment. A different view suggests applying the law of the place where the gifts were delivered, or the law of the common residence of the parties. In practice, legal interpretation tends to favor the application of the law of the place of delivery, or the law chosen by the parties.

If Algerian law is applied, Article 5 (paragraphs 4 and 5) of the Algerian Family Code states: "The fiancé may not recover any of the gifts given to the fiancée if the withdrawal is from his side. He must return to her any gifts she gave him that are still in existence or their value if consumed. If the withdrawal is from the fiancée, she must return the gifts to the fiancé if they are still in existence or pay their value if they have been consumed."

As for the **mahr** (bridal gift), it is considered an essential condition for the validity of the marriage contract, as explicitly provided in Articles 9 bis, 14, and those that follow in the Algerian Family Code. Islamic jurisprudence has settled on the principle that the fiancée must return all that she has received as **mahr**, regardless of whether the withdrawal was initiated by her or the fiancé. This is because she is not entitled to any part of the **mahr** unless a valid marriage contract is concluded. If what she received still exists in kind, it must be returned as is. If it has been consumed or lost, she must return its equivalent if it is a fungible item, or its value if it is not.

However, the Algerian legislator remains silent on the specific situation where the **mahr** is offered by the fiancé during the engagement period. Article 5 of the Family Code only addresses the issue of gifts and the consequences of withdrawal from engagement. This silence appears to be based on the view that engagement is merely a promise to marry and does not give rise to financial obligations such as the **mahr**. Engagement is seen only as a preparatory phase for mutual acquaintance between the two parties, and legally, payment of the **mahr** during this stage is not recognized.²

It is important to note that the law applicable to engagement may be excluded if it contradicts public policy in Algeria. For example, if that law imposes compensation for mere withdrawal, includes a penalty clause for it, or obliges the parties to proceed with the marriage, it must be set aside as contrary to public policy.³ Engagement is merely a promise to marry. Each party has the right to withdraw from it, and neither is

¹ Article 16(2) of the Algerian Civil Code.

² "Definition of Engagement, Its Conditions, and Consequences of Withdrawal," cited earlier..

³ Jamāl Mahmoud Al-Kurdi, *Conflict of Laws*, cited above, p. 272..

legally bound by it.

CONCLUSION

The absence of a unified legislative or judicial approach regarding the applicable law governing engagement—particularly in relation to the consequences of its dissolution—has led to a state of inconsistency and legal uncertainty.

From the analysis presented, several findings have emerged:

- In Algerian law, engagement is classified as a **non-binding promise**, not a contract.
- The **legal nature of engagement** is determined based on the **law of the forum**, in accordance with Article 9 of the Algerian Civil Code.
- The Algerian legislator **has not established specific conflict-of-law rules** for engagement.
- The **substantive conditions of engagement** are subject to the **national law of each party**, by analogy with the rules governing the substantive conditions of marriage, as per Article 11 of the Algerian Civil Code.
- The **formal conditions of engagement** follow the law governing **the form of legal acts** in general, in application of Article 19 of the Civil Code.
- The **legal effects of engagement** are governed by the **national law of the fiancé** at the time of engagement, by analogy with the rules governing the effects of marriage, which are determined by the husband's nationality at the time the marriage is concluded, pursuant to Article 12 of the Civil Code.
- If one of the parties is Algerian at the time of the transaction, **Article 13** of the Algerian Civil Code applies, designating Algerian law as the reference law for matters of personal status, including engagement.
- As a general rule, **either party may withdraw from the engagement** without liability for compensation.
- However, **arbitrary withdrawal** from engagement may give rise to liability if it causes harm to the other party. This applies when withdrawal is accompanied by bad faith or results in significant material or moral damage. In such cases, tort liability may arise. If withdrawal is made solely to avoid coercion into marriage, **no liability arises**.
- The harm must be **actual and proven**, not hypothetical or presumed. If the withdrawing party did not directly cause the damage, **no compensation is owed**.
- If engagement is broken and the withdrawal is found to be abusive, the rules on **non-contractual obligations** apply. The relevant law is that of the country where the **harmful act occurred**, as per Article 20(2) of the Algerian Civil Code.

To address these issues, the following recommendations are proposed:

- It is necessary to **establish specific conflict-of-law rules** for engagement in the Algerian Civil Code when a foreign element is involved, to avoid reliance on divergent scholarly opinions and the resulting judicial inconsistency.
- Courts should be encouraged to adopt a **clear and consistent position** regarding the legal nature of engagement—whether it is a moral obligation or a potential source of legal liability—and to clarify the applicable law in cases of international disputes.

In engagements involving a foreign element, parties should be encouraged to **formalize their agreement**, especially regarding **gifts and preliminary financial obligations**, and to select the applicable law for these matters, provided such choice does not violate public policy.

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