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The Law Applicable to the Determination of Conditions for Mixed Marriage

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Abstract

Mixed marriages raise multiple issues, including conflicts of laws arising from the overlap of two or more legal systems when regulating this matter. To address this problem, legislation has adopted a technical mechanism for determining the applicable law in the event of a dispute. This mechanism is the conflict-of-laws rule, which is used to identify whether the applicable law is domestic (national) or foreign. When enacting these rules, the legislator undoubtedly took into account the interests of the state and the parties to the legal relationship, relying on a connecting factor intended to achieve this balance.

As the validity of marriage depends on the fulfilment of both substantive and formal requirements, it is necessary to examine the conflict-of-laws rules that govern these requirements in order to determine the connecting factor adopted by legislation in this field.

Keywords: substantive requirements; formal requirements; conflict-of-laws rule; domicile connecting factor; nationality connecting factor; place of contracting connecting factor; national law.

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Introduction

The development of communication and transport technologies has removed geographical boundaries, enabling individuals to move from one state to another. Consequently, people have formed multiple civil, commercial and personal relationships by integrating with nationals of host states through marriage. The appearance of the Internet has undoubtedly allowed this type of marriage to spread more and more by transforming the world into a small "global village" and removing borders, shortening distances, and changing long-held notions. It has created virtual time and space, enabling individuals to form relationships without physically moving, as virtual movement replaces the former.

Accordingly, marriage is no longer limited to people who hold the same nationality; rather, it now includes marriages where one or both partners are foreign nationals. This type of marriage is known as a 'mixed marriage' or 'marriage involving a foreign element'. Thus, a mixed marriage is one concluded between two people of different nationalities[1].

This form of marriage raises many legal issues. To address these issues, reference must be made to the rules of private international law, which is the body of law governing international relationships — that is, relationships involving a foreign element. One of the most prominent issues in private international

[1]- Nouria Chabrou, 'Mixed Marriage and Its Impact on the Status of the Spouses: A Comparative Study', PhD thesis in Private Law, Faculty of Law and Political Science, Abu Bakr Belkaid University, Tlemcen, Academic Year 2016–17, p. 4.

law, particularly in the context of mixed marriages, is the problem of legislative jurisdiction, which aims to determine the applicable law.

Furthermore, since marriage validity requires specific conditions to be met and the relationship includes a foreign element, the laws of two or more states inevitably compete to govern the formation of this legal relationship. To resolve this problem, legal systems have adopted a technical mechanism intended to identify the applicable law, known as conflict-of-laws rules or rules of private international law regarding conflict (choice of applicable law)[2].

Therefore, what is the legislative position regarding the applicable law for the conditions of mixed marriages?

Adopting multiple methodologies is the answer to this problem. Accordingly, the descriptive, analytical and comparative approaches were all used. The descriptive and analytical approaches were integrated by examining the information and facts presented on this topic, analysing its various components and drawing on doctrinal opinions and legal texts. Additionally, the comparative approach was employed by consulting legal texts in this field, both at the international and domestic levels. All of this was done with the aim of enhancing the qualitative and quantitative scientific accumulation.

To achieve the objective of this research, a two-part plan was followed, dividing the study into two sections:

Section One addresses the law applicable to the substantive conditions of mixed marriage.

Section Two discusses the law applicable to the formal conditions of mixed marriage.

Section One: The Law Applicable to the Substantive Conditions of Mixed Marriage

The substantive conditions of marriage form the essential basis of the marital bond. The validity of a marriage depends on whether these conditions are met[3]. Therefore, if any of these conditions are not met, the marriage will be void[4].

The substantive conditions of marriage are those upon which the existence of the marriage depends; if they are absent, the marriage does not exist. These conditions differ from one state to another. Indeed, some legal systems consider marriage to be a religious bond and require the presence of a religious official for it to be validly concluded. By contrast, other legal systems consider marriage to be a civil bond and do not require the presence of a religious official for it to be valid, in which case the religious official, if present, constitutes only a formal requirement[5].

Therefore, determining what falls within the category of substantive conditions of marriage is a matter of qualification (classification). In general, this is governed by the law of the forum (the lex fori), or the law of the judge[6]. This is also what the Algerian legislator established in Article 9 of the Algerian Civil Code[7], in

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[2]- Arab Belkacem, Private International Law, Vol. 1, 1st ed., Dar Homa Printing, Publishing and Distribution, Algeria, 2008, p. 67.
[3]- Mamdouh Abd al-Karim Hafiz Armoush, Jordanian and Comparative Private International Law, Vol. 1, Dar al-Thaqafa for Publishing and Distribution, 1998, p. 89.
[4]- Ghalib Ali al-Daoudi, Private International Law, 4th edition, Dar Wa'el Publishing and Distribution, 2005, p. 164.
[5]- Salah al-Din Jamal al-Din, Problems of Contracting Marriage in Private International Law, Dar al-Fikr al-Jami'i, Alexandria, 2010, pp. 98–99.
[6]- Alioushqrbo' Kamel, Algerian Private International Law: Conflict of Laws, Vol. 1, 1st ed., Dar Homa Printing, Publishing and Distribution, Algeria, 2006, p. 93.
[7]- Article 9 of Order No. 75-58 dated 20 Ramadan 1395 (corresponding to 26 September 1975), containing the Civil Code, as amended and supplemented, Official Gazette (J.O.R.A.), No. 78, issued on 30 September 1975: 'Algerian law shall be the reference for qualifying the relationships the nature of which is required to be determined in the event of a conflict of laws, in order to ascertain the law to be applied.'

line with other legal systems[8]. Under Algerian law, the substantive conditions of marriage include the consent and capacity[9] of the spouses, the dower (mahr), the wali (marriage guardian), two witnesses, and the absence of religious impediments (marriage prohibitions)[10].

It should also be noted that determining the applicable law to the substantive conditions of a mixed marriage requires addressing both the general rule in this area (Paragraph/Requirement One) and the exception to it (Paragraph/Requirement Two).

Section One: The general rule for determining the applicable law for the substantive conditions of a mixed marriage.

Legislation differs in its attribution of the substantive conditions for the validity of mixed marriages under conflict of laws. Comparative law reveals three primary trends.

The first trend advocates applying the substantive conditions of mixed marriage to the law of the spouses' domicile. This approach is adopted by English law and some Scandinavian laws[11].

The second trend supports applying the law of the place where the marriage is concluded, without distinguishing between substantive and formal conditions. This approach is adopted by American law and some Latin American states[12].

The third trend assigns the substantive conditions of marriage to the law of the spouses' nationality. This approach has been adopted by certain international conventions, including the Hague Convention on Conflict of Laws in the Area of Marriage, concluded on 12 July 1902, in its Article 1. It is also adopted by German and Polish law, and has been followed by many Arab laws[13], including those in Algeria[14].

French law does not contain an explicit conflict-of-laws rule in this regard. This has led legal scholars to advocate the application of Article 3(3) of the French Civil Code, which states that:

'Personal laws governing a person's status and capacity follow French law, even if they reside abroad.[15]'

Based on the foregoing, it is clear that the Algerian legislator has adopted the third trend. This is expressed in Article 11(1) of the Algerian Civil Code, which states:

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[8]- Article 10 of the Egyptian Civil Code; Article 10 of the Libyan Civil Code; Article 11 of the Syrian Civil Code; Article 11 of the Jordanian Civil Code.

[9]- Article 9 of the Family Code (Law No. 84-11), dated 9 Ramadan 1404 (corresponding to 9 June 1984) as amended and supplemented (J.O.R.A., No. 24, issued 12 June 1984): "Marriage is concluded by the mutual exchange of consent between the spouses".

[10]- Article 9 bis of the Algerian Family Code:
'The marriage contract must contain the following conditions:
- capacity to marry;
- mahr (dower);
- the guardian (wali);
- two witnesses;
- absence of lawful impediments to marriage.'

[11]- Al-Tayyib Zarouti, Algerian Private International Law, Vol. 1, Conflict of Laws (in light of Law No. 05-10 dated 20 June 2005), a comparative study with Arab and French laws, 2nd ed., Matba'at al-Faylsa, al-Duwayra, 2008, p. 161.

[12]- Nouria Chabrou, op. cit., p. 25.

[13]- 'This has been adopted by all Arab states: Article 12 of the Egyptian Civil Code, Article 13 of the Syrian Civil Code, Article 19 of the Libyan Civil Code, and Article 36 of Kuwaiti Private International Law.'
Taken from Ahmed Abd al-Karim Salama, Private International Law, 1st ed., Dar al-Nahda al-'Arabiyya, Cairo, 2008, p. 846.

[14]- Al-Tayeb Zarouti, op. cit., p. 160.

[15]- Article 3(3) of the French Civil Code, created by Law of 3 May 1803 and promulgated on 15 March 1803, provides that: 'Laws concerning the status and capacity of persons govern French nationals even if they are residing in a foreign country.'

'The law applicable to the substantive conditions relating to the validity of marriage is the national law of each spouse.'

According to Article 11 of the Algerian Civil Code, the conflict-of-laws rule requires that there be no contrary rule determining the applicable law regarding the substantive conditions of marriage through a special provision or a valid international treaty in Algeria. This is provided for by Article 21 of the Algerian Civil Code[16].

It should be noted that applying the above rule requires distinguishing between two situations:

1) where the spouses share the same nationality; and

2) where the spouses have different nationalities.

In the first situation, the issue does not arise since the substantive conditions for the validity of marriage are determined according to the common national law of the prospective spouses[17].

However, in the second situation, the problem arises of how the law of each spouse's nationality should be applied. Should they be applied cumulatively (as one combined standard) or distributed (each to the aspect relating to its respective spouse)?

In this regard, two scholarly (doctrinal) trends have emerged: the first advocates the cumulative application of the spouses' national laws, and the second calls for distributed (separable) application.

1) The doctrinal trend advocating cumulative application

Supporters of cumulative application require that the substantive conditions for marriage be subject to the national law of both spouses together. This means that, in the prospective husband, the substantive conditions required by the law of his nationality must be satisfied, as well as those required by his spouse's (the wife's) nationality law. Similarly, the substantive conditions required by the wife's nationality law must be satisfied alongside those required by the husband's nationality law[18].

They justify this position on the grounds that the national law of each spouse is intended to protect the marital relationship itself, rather than the individual spouse. Accordingly, they argue that no advantage should be granted to one national law over the other[19].

2) Criticism of the cumulative approach and the emergence of the distributed approach

This view has been criticised, primarily because it is difficult to apply in practice and tends to limit the circumstances in which a mixed marriage can be validly formed. Indeed, under this approach, it would be impossible to establish a marital relationship as soon as any one of the conditions provided for by either of the two national laws is not met. This contradicts the objective claimed by supporters of the cumulative approach: respect for the law of both spouses[20].

3) The second doctrinal trend: distributed application

In light of these criticisms, a second trend has emerged which advocates the distributed application of the two laws. "Application distributive".

16- Article 21 of Order No. 75-58, dated 20 Ramadan 1395 (26 September 1975) and containing the Civil Code, as amended and supplemented, provides that:
'The provisions of the preceding articles shall apply only where there is no provision to the contrary in a special law or in an international treaty in force in Algeria.'

17- Mohamed Akacha, Private International Law in the United Arab Emirates, Vol. 1, Conflict of Laws, Matba'at al-Najah, Dubai, 1997, p. 455.

18- Mounhd Issaad, Private International Law, Vol. 1, Rules of Renvoi/Displacement (qawa'id al-tanazzul), Diwan al-Matbu'at al-Jami'iyya, Algeria, 1989, p. 295; Alioush Kamel, op. cit., p. 216.

19- Aarab Belcacem, op. cit., p. 213.

20- Moucharaq al-Fatima, 'The Role of Nationality in Resolving Conflict-of-Laws Problems', Master's Thesis in Private International Law, Faculty of Law, Abu Bakr Belkaid University, Tlemcen, Academic Year 2011–12, p. 47.

Under this approach, the husband must satisfy only the substantive conditions required by the law applicable to his nationality, while the wife must satisfy the substantive conditions required by the law applicable to her nationality, regardless of the conditions that the other spouse's nationality law would require[21].

Supporters of this approach argue that each state's law is intended to protect its own nationals and therefore it is not appropriate to apply it beyond its own sphere to other nationals.

Adopting this approach, a marriage between a French and a Tunisian national is valid if the Tunisian spouse meets the conditions set out in their national law and the French spouse meets the conditions set out in their national law.

For reference, this view has been adopted by French jurisprudence and legislators in some countries[22]. However, legal scholarship, while excluding impediments to marriage, supports a different position regarding[23] the application of these impediments on a distributive basis so that they remain subject to the general application rule. This is due to the serious nature of such impediments, particularly since they aim to protect the marital bond itself rather than the individuals involved.

Furthermore, scholarship has distinguished between two types of impediment to marriage: (1) territorial and (2) racial. These do not extend beyond the territory of the state concerned, for example the impediment to a white person marrying a Black person. Such an impediment is excluded because it conflicts with public policy. (2) Other impediments constitute responses to ethical and religious principles, such as the impediment to the marriage of a Muslim to a non-Muslim. These should be subject to the general application rule[24].

Once the general rule regarding the applicable law to the objective conditions of marriage has been established, the exceptions to that rule must be identified.

Second requirement: The exception relating to determining the law applicable to the objective conditions of a mixed marriage.

Some legislation provides an exception[25] to the general rule for determining the applicable law for the objective conditions of a mixed marriage. The essence of this exception is that the national law of one of the spouses is applied. The Algerian legislator adopted this exception in Article 13 of the Civil Code, which states:

'Algerian law alone applies in the situations provided for in Articles 11 and 12 if one of the spouses is an Algerian national at the time the marriage is concluded, except with regard to marriage capacity.'

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[21]- Al-Tayeb Zarouti, op. cit., p. 161.
- Pierre Mayer, Droit international privé, 5th edition, Montchrestien, Paris, 1994, p. 360.
[22]- Cf. Jean-Marc Bischoff, Mariage, Répertoire de droit international, Dalloz, Vol. 2, Paris, 1999, p. 26.
[23]- 'Among other things, Article 3(1) of the German law dated 25 July 1986 containing the reform of private international law; Article 116 of the Italian civil code; Article 7 of the Swiss law dated 25 June 1891; Article 13 of the Greek civil code; Article 49 of the Portuguese civil code', taken from Al-Tayyib Zarouti, op. cit., footnote, p. 161.
As for Article 45 of the Tunisian Code No. 97 of 27 November 1998 relating to the issuance of the Tunisian Journal of Private International Law (Revue de droit international privé), it provides:
"The original conditions for marriage are governed by the personal law of each of the spouses separately."
[24]- Al-Tayeb Zarouti, op. cit., p. 162.
[25]- Article 14 of the Egyptian, Libyan and Syrian Civil Codes; Article 19 of the Iraqi Civil Code.

Accordingly, the objective conditions of marriage fall under Algerian law whenever one of the spouses is Algerian. However, marriage capacity is exempt and remains subject to the nationality law of the relevant spouse, in accordance with Article 10(1) of the Algerian Civil Code[26].

This solution is clearly intended to address cases where a marriage is valid under Algerian law but void under foreign law. One example is the marriage of an Algerian Muslim to a Christian (i.e. a woman of the 'People of the Book'), when the latter's law prohibits marriage with someone who does not belong to their religious community. This also applies to cases where the marriage is void under Algerian law but valid under foreign law, such as the marriage of an Algerian Muslim woman to a non-Muslim, which is void under Algerian law but valid under the laws of other states, including French law[27].

Based on the above, if a Tunisian man and an Algerian woman marry in Algeria, their marriage is subject to Algerian law alone. For the marriage to be valid, the consent required by the Algerian legislator under Article 9 of the Family Code must be present, as well as all the other conditions set out in Article 9 bis of the Algerian family law provisions. However, the spouses' capacity to marry remains subject to their respective national laws. Consequently, the wife's capacity to marry is determined under Algerian law, while the husband's is determined under Tunisian law.

It should also be noted that this exception only applies if at least one of the spouses is an Algerian national when the marriage is concluded. Therefore, if both spouses were foreign nationals when they married and subsequently one or both acquired Algerian nationality, this would not affect the applicable law for the objective conditions of the marriage. Since the marital bond had already been formed, acquiring Algerian nationality after the marriage does not alter its objective conditions.

Having determined the law applicable to the objective conditions of a mixed marriage, the next step is to address the law applicable to the marriage's formal conditions.

Chapter Two: The Law Applicable to the Formal Conditions of a Mixed Marriage

Determining the applicable law for the formal conditions of a mixed marriage requires clarifying, first, what is meant by the formal conditions of a mixed marriage, and second, examining the conflict-of-laws connecting factors that govern the formal conditions of the mixed marriage.(Second requirement)

First requirement: The meaning of the formal conditions

The formal conditions refer to the 'form' or 'shell' in which the element of consent is set out in a contract, or the framework within which will is expressed and made visible to the outside world. Accordingly, the formal conditions for entering into a marriage are, in principle, linked to the external form of the marriage—so that they represent the union of a man and a woman as defined by law[28].

Therefore, it is clear that the formal conditions are the methods required to manifest and disclose marriage to the outside world[29].

However, it is not easy to distinguish between formal and objective (substantive) conditions. This is because each legal system has its own understanding of marriage. For instance, in many Christian countries, the presence of a religious official is considered a formal requirement, whereas in certain countries, such as Spain, Greece and Bulgaria, it is viewed as an objective requirement. Resolving this

[26]- Article 10(1) of Order No. 75-58, dated 20 Ramadan 1395 (26 September 1975) and containing the Civil Code, as amended and supplemented. 'The personal status of persons and their capacity are governed by the law of the state to which they belong by virtue of their nationality.'
[27]- Al-Tayeb Zarouti, op. cit., p. 163.
[28]- Nouria Chabrou, op. cit., p. 55.
[29]- Hasan al-Hadawi, Private International Law: Conflict of Laws, General Principles and Substantive Solutions in Jordanian Law, comparative study, Maktabat Dar al-Thaqafa for Publishing and Distribution, Amman, 1997, p. 109.

problem therefore depends on the qualification process, which, as stated above, is governed by the judge's law[30].

Accordingly, the substance of a given condition varies according to its qualification. Thus, a marriage between Greek nationals in France in a civil form is valid under local law (i.e. French law as the law of the place of conclusion), but void under national law (i.e. Greek law as the law of the spouses' nationality). Whether it is valid or void in another state depends on whether that state's law aligns with the state in which the marriage was concluded — meaning whether it accepts the local form or considers it incompatible.

For example, if one were to rely on that marriage in Bulgaria, it would be invalid, since the religious form is treated as a formal requirement there, as in Greece. Conversely, if one were to rely on it in Algeria, it would be considered valid because the concept of form in Algerian law is consistent with that in French law[31].

Thus, it becomes clear that, in Islamic law, marriage is a civil system, even if its substantive rules are derived from Islamic law[32]. A marriage "by al-Fātiḥah" is not a religious form because it does not dispense with the required civil form. Based on this, the requirement for religious ceremonies in Algeria is considered to be a formal condition[33].

Accordingly, under Algerian law, all formal procedures relate to registering the marriage, the authorities competent to perform the marriage ceremony, informing third parties, and providing proof of the marriage. This includes officers who are legally empowered to receive marriage contracts, as well as documents submitted by the spouses to prove that the legal requirements are met, such as birth certificates and medical examination certificates[34].

The formal conditions also include procedures for documenting and drawing up the marriage contract in an official instrument, the required signatures, and marriage by proxy and proof of marriage. Furthermore, local law determines how to replace lost or destroyed marriage documents.

Having defined the meaning of formal conditions, it is necessary to address the connecting factors (conflict-of-laws rules) that govern the formal conditions of a mixed marriage.

Second requirement: Connecting Factors Governing the Formal Conditions of a Mixed Marriage

Determining the connecting factors that govern the formal conditions of a mixed marriage requires addressing the position adopted by legislation with respect to these factors when the marriage is concluded outside the remit of diplomatic and consular authorities (First Branch). This is followed by an examination of legislation's position regarding the connecting factors that govern the competence of the diplomatic and consular corps in concluding a mixed marriage (Second Branch).

First Branch: The position of legislation on the connecting factors governing the formal conditions of a mixed marriage concluded outside diplomatic and consular authorities.

Legislations have diverged significantly regarding the connecting rule governing the form of marriage. Indeed, some legislations establish an independent connecting factor for the form of marriage, distinct from the connecting rule governing form generally. For instance, Tunisian law subjects the formal conditions of marriage to the law common to the spouses or to the law of the place where the marriage is concluded[35]. Kuwaiti law takes a similar approach, providing additional detail by subjecting aspects of

30- Alioush Kamel, op. cit., p. 95.
31- Al-Tayeb Zarouti, op. cit., p. 168.
32- Nouria Chabrou, op. cit., p. 58.
33- Al-Tayeb Zarouti, op. cit., p. 164.
34- Al-Tayeb Zarouti, op. cit., p. 168.
35- Article 46 of the Tunisian Journal of Private International Law provides that:
'The formal conditions for marriage are governed by the common personal law or by the law of the place where the marriage was concluded.'

marriage, such as documentation and religious ceremonies, to the law of the state in which the marriage was concluded or the nationality law of each spouse[36].

Legislation also requires compliance with the provisions of each spouse's nationality law concerning the announcement or publication of the marriage. However, they do not render the marriage invalid in cases where such announcements and publications are not carried out, except in the state whose law was infringed.

For reference, Qatar's Civil Code provides an explicit connecting rule for the formal conditions of marriage. According to Article 14, formal matters of marriage, such as documentation and religious ceremonies, are subject to the law of the state in which the marriage was concluded, the nationality law of each spouse or their common domicile[37].

Based on this, it can be concluded that the Qatari legislator adopted the connecting factors of the place of conclusion, common nationality, and common domicile.

This approach has also been adopted by Jordanian[38], Iraqi[39] and United Arab Emirates legislation[40], where the formal conditions of marriage are connected to the law of the place of conclusion or the law of each spouse.

While some legislation has provided an independent connecting rule for the formal conditions of marriage, others have not. Such is the case with Egyptian and Algerian law.

In light of this, the majority of legal scholarship advocates applying the general connecting rule governing the form of legal acts. This is because the rule in this area is general and applies to all legal acts[41]. In particular, marriage contracts fall within the general wording of Article 20 of the Egyptian Civil Code, specifically the phrase 'contracts between living persons'[42]. Prior to the 2005 amendment, the Algerian legislator used a similar phrase in Article 19 of the Algerian Civil Code. After the amendment, however, Article 19 provides that:

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[36]- Articles 37(1) and 37(2) of Kuwaiti private international law (concerning foreign persons) provide that:
"Marriage matters such as documentation and religious ceremonies refer to the law of the country in which the marriage took place, or the law of the nationality of each of the spouses.
The provisions of the law of the nationality of each spouse must be respected as regards notification or publication of the marriage; however, failure to carry out such notification or publication does not entail invalidity of the marriage in countries other than those whose law was violated."

[37]- Article 14 of the Qatari Civil Code provides:
"As regards the formal matters of marriage, such as documentation and religious ceremonies, they are governed by the law of the country where the marriage took place, or by the law of the nationality of each of the spouses, or by the law of their common domicile."

[38]- Article 13(2) of the Jordanian Civil Code of 1976 as amended:
"As regards form, marriage between foreigners or between a foreigner and a Jordanian shall be considered valid if it is concluded in accordance with the formal rules of the country where it took place, or if the rules prescribed by the law of each of the spouses were respected."

[39]- Article 19(2) of the Iraqi Civil Code No. 40 of 1951 provides that:
'As regards form, marriage between two foreigners, or between a foreigner and an Iraqi, shall be considered valid if it is concluded in accordance with the form prescribed by the law of the country where it took place, or if the forms prescribed by the law of each of the spouses were respected.'

[40]- The Federal Law No. (5) of 1985 relating to the issuance of the Civil Transactions Law of the United Arab Emirates, as amended in Article 12(2), adopted the same rule contained in the Iraqi Civil Code. The Iraqi term was replaced with a national term, resulting in the following text:
'As regards form, marriage between two foreigners, or between a foreigner and a national, shall be considered valid if it is concluded in accordance with the rules of the country in which it was concluded, or if the rules prescribed by the law of each of the spouses were respected.'

[41]- Cf. Pierre Mayer, op. cit., p. 363.

[42]- Jamal Mahmoud al-Kurdi, Conflict of Laws, Mansha'at al-Ma'arif, Alexandria, 2005, pp. 284–285.

'Legal acts, in their formal aspect, are subject to the law of the place where they are concluded; they may also be subject to the law of the common domicile of the contracting parties, or to their common national law, or to the law applicable to their substantive provisions.[43]'

It should be noted that the rule of conflict of laws relating to form (Article 19 of the Algerian Civil Code)— The legal scholarship that calls for the governing of the formal conditions of marriage is an optional (facultative) connecting rule. Accordingly, the law of the state in which the marriage is concluded is not the sole law applicable to the formal conditions of marriage. It competes with other laws, such as the law of the spouses' common domicile or nationality, and the law governing the substantive conditions of marriage. The latter is the law of the spouses' nationality, pursuant to Article 11(1) of the Algerian Civil Code. This is also reflected in the 1902 Hague Convention on conflicts of laws relating to marriage, which adopted a rule of optional nature with respect to form[44].

While the aforementioned legislations make the rule of conflict of laws relating to form optional, it should be noted that some legislations give it a mandatory character. These countries include the United States of America, England, Denmark, Australia, Canada and Japan. Under the laws of these states, marriage cannot be concluded except in the form designated by the law of the place of conclusion. Conversely, other legislation makes the rule mandatory when the marriage is concluded on its territory, while treating it as optional when the marriage is concluded abroad, as is the case with Austrian, German and Polish law[45].

Finally, it should be noted that, although the Algerian legislator did not expressly provide a connecting rule for the formal conditions of a mixed marriage, Article 19 has nonetheless been applied. This is despite some scholars rejecting such an application on the basis that Article 19 applies to all contracts except marriage. Nevertheless, it should be noted that alongside the general rule set out in Article 19, the Algerian law of civil status contains special provisions[46], namely Articles 95 and 97, and Article 71 of the same law refers to this implicitly[47].

Article 95 thereof states: 'Any contract relating to the civil status of Algerian nationals and foreigners issued in a foreign country shall be deemed valid if it is drawn up in accordance with that country's usual formalities.'

Based on this provision, it is evident that the Algerian legislator has adopted the principle of locus regit actum, which is based on the notion that the law of the place where the legal act is performed determines its form. Consequently, Algerian nationals and foreigners are granted the right to draw up their contracts in accordance with the law of the country in which the act is concluded[48].

Moreover, Article 97(1) of the same Code provides: 'A marriage concluded in a foreign country between Algerian nationals, or between an Algerian national and a foreigner, shall be considered valid if it is carried out according to the customary conditions in that country, provided that the Algerian national does not contravene the fundamental conditions required by national law for marriage.'

From this provision, it can be inferred that the Algerian legislator reaffirmed the place of conclusion as the connecting factor. Accordingly, the form of the marriage is governed by the law of the country in which it is concluded. However, it should be noted that the legislator limited this rule to marriages of Algerian nationals abroad and to marriages between an Algerian national and a foreigner abroad. The

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43- Moushaa al-Fatima, op. cit., p. 49.
44- Nouria Chabrou, op. cit., p. 61; Ali Ali Sulayman, Notes on Algerian Private International Law, 2nd ed., Diwan al-Matbu'at al-Jami'iyya, Algeria, 2003, p. 70.
45- Al-Tayeb Zarouti, Private International Law: A Comparative Study with Arab Laws, Vol. 1: Conflict of Laws, Matba'at al-Kahna, Algeria, 2008, p. 154.
46- Alioushqrbo' Kamel, op. cit., p. 222.
47- Order No. 70/20, dated 13 Dhu al-Hijjah 1389 (corresponding to 19 February 1970) and containing the Civil Status Law as amended and supplemented (J.O.R.A., No. 21, issued 27 February 1970).
48- Nadia Fawdeil, Application of the Lex Loci Actus (Law of the Place) to the Form of the Act, Dar Homa, Algeria, 2006 edition, p. 170.

provision does not address marriages concluded abroad between an Algerian woman and a foreign national, nor marriages concluded in Algeria between foreigners or between Algerians and foreigners.

Therefore, legal scholarship concludes that, in these cases, the marriage of an Algerian woman to a foreign national abroad cannot be validly concluded according to the local form. The rationale behind this is to protect religious values, which prohibit a Muslim woman from marrying a non-Muslim. This is particularly pertinent given that many Algerian women seek to circumvent this prohibition and evade Algerian law by getting married in a country whose law permits it, such as France[49], since this prohibition is not provided for in French law.

Despite the approach proposed by legal scholars, another viewpoint holds that this interpretation is unfounded[50]. The argument is that an Algerian woman's respect for the conditions for marriage established by Algerian family law is sufficient to prevent her from marrying a non-Muslim.

The above analysis applies to marriages concluded abroad between an Algerian woman and a foreign national. As for cases that were not addressed — namely, marriages concluded in Algeria between foreigners[51], or between Algerians and foreigners — legal scholarship tends to advocate granting Article 97 of the Civil Status Code a dual (i.e. expanded) character. This is in line with French case law regarding the similar provision contained in Article 170(1). Accordingly, the marriage of foreigners in Algeria would be governed by Algerian law with regard to its form.

Alternatively, this issue could be resolved by referring to the general rule set out in Article 19 of the Algerian Civil Code, which allows marriage to be performed according to either the law of the place of conclusion or the law of the spouses' common domicile. If the spouses share the same nationality, the law of their common nationality would apply. It may also be concluded in accordance with the law applicable to the substantive conditions, namely the national law of each spouse, as provided for by Article 11(1) of the Algerian Civil Code.

It should be noted in this connection that the marriage of foreigners in Algeria according to the local form requires compliance with the formal conditions set out in Article 71 of the Civil Status Code. According to this article, the foreign nationals, or at least one of them, must have resided within the territorial jurisdiction of the civil status officer or notary who performs the marriage for at least one month prior to the marriage. Article 71 provides that:[52]

'The civil status officer or notary located within the jurisdiction of the place of residence of the intending spouses or at least one of them, or the domicile where one of them has resided continuously for at least one month up to the date of the marriage, shall have jurisdiction to record the marriage. This time limit shall not apply to citizens.'

Therefore, foreigners may marry in Algeria before the aforementioned authorities, provided they have resided in Algeria for at least one month.

Section Two: Legislative Position on the Connecting Factors Governing the Jurisdiction of the Diplomatic and Consular Service for Concluding Mixed Marriages

Most legislation permits members of the diplomatic or consular service to perform marriages involving their own country's nationals abroad, in accordance with their own country's laws, even if this differs from the form required by the local law of the country in which they are accredited[53].

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[49]- Cf. Issad Mohand, Droit International Privé, Tome 1, O.P.U. Alger, 1983, p. 254.
[50]- Aarab Belkacem, op. cit., p. 243.
[51]- Aarab Belkacem, op. cit., p. 239; Alioushqrbo' Kamel, op. cit., p. 221; Mohnad Issaad, op. cit., p. 299 et seq.
[52]- Law No. 14/08, dated 13 Shawwal 1435 (9 August 2014) and amending Order No. 70/20, dated 13 Dhu al-Hijjah 1389 (19 February 1970), relating to civil status. Published in the Official Journal of Algeria (J.O.R.A.) No. 49 on 20 August 2014.
[53]- Ali Ali Souleiman, op. cit., p. 72.

This competence has been affirmed by certain international instruments, including the 1978 Hague Convention on the Celebration and Recognition of Marriage, which recognises the authority of diplomatic agents in states where they are accredited[54], provided both spouses are nationals of the agents' state and local law does not prohibit such marriages. Similarly, the Algerian–French Convention, signed on 24 May 1974[55], authorised consuls to formalise marriages if the prospective spouses are nationals of the consuls' state[56].

In Algerian law, this approach has been codified in Article 96 of the Civil Status Code, which provides:

'Any contract relating to the civil status of Algerian nationals issued in a foreign country shall be considered valid if it is drawn up by diplomatic agents or consuls in accordance with Algerian law.'

Based on this provision, it appears that the Algerian legislator recognises the marriage of Algerian nationals concluded abroad by diplomatic agents or consuls in accredited states as valid, provided it is formalised in accordance with Algerian law.

Furthermore, under Article 97(2) of the Civil Status Code, the Algerian legislator granted diplomatic agents and consuls the power to perform marriages in accordance with Algerian law when the husband is Algerian and the wife is a foreign national who holds the nationality of the host state[57]. However, if the wife is not a national of the host state, the marriage may only be concluded in a country designated by decree. It is worth noting that no such decree has been issued to date.

If this is the position of the Algerian legislator, the French legislator requires that a marriage performed in France by foreign consular authorities is only valid if the spouses are both nationals of the same state and belong to the country of the consular authority that records the marriage. The same applies to marriages of French nationals abroad, which are conducted in accordance with French law[58]. However, it should be noted that Article 170 of the French Civil Code was amended by the law issued on 19 November 1901, which granted French diplomatic missions abroad the power to perform marriages between French and foreign nationals in countries specified by a presidential decree[59].

Mixed marriages concluded before diplomatic or consular authorities raise two issues. The first is whether such a marriage can be recognised in the country where it was performed, and the second is whether it can be recognised in the country of the diplomatic or consular representative.

In the first instance, the question is whether the law of the state in which the contract was concluded recognises the power of foreign diplomatic and consular authorities to formalise such marriages. If so, the marriage may be recognised in that state. For instance, French law permits foreign diplomatic missions to perform marriages in France in accordance with the laws of their respective countries, provided the individuals intending to marry are citizens of the same consular state[60]. However, if one of the prospective spouses does not hold that consular nationality, French law will not recognise the marriage. Consequently, marriages of Algerian nationals performed in France by consular or diplomatic authorities are valid and recognised in France, provided that both spouses are Algerian. However, recognition will not be granted if one spouse is French and the other is a foreign national.

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[54]- Zarouti al-Tayeb, op. cit., p. 166.
[55]- Order No. 74-75, dated 22 Jumada al-Thani 1394 (12 July 1974) relating to the approval of the consular agreement between the Government of the People's Democratic Republic of Algeria and the Government of the French Republic, signed in Paris on 24 May 1974. Published in J.O.R.A., No. 62 in 1974.
[56]- Zarouti al-Tayeb, op. cit., p. 166.
[57]- Article 97(2)–(3) of the Civil Status Law provides: This likewise applies to a marriage between an Algerian and a foreign woman that was concluded in a foreign country before diplomatic officials supervising the Algerian consular district or Algerian consuls, in accordance with Algerian laws.
However, if the foreign wife is not a national of the host country, these formalities shall be conducted only in the country determined by decree".
[58]- Cf. Pierre Mayer, op. cit., p. 365.
[59]- Al-Tayeb Zarouti, op. cit., p. 167.
[60]- Mousha' al-Fatima, op. cit., p. 50.

This assumes that the state in which the marriage is concluded allows diplomatic or consular authorities to perform marriages. If not — as under German law, which does not allow diplomatic missions to perform marriages for their nationals — then the marriage is void. Therefore, if two Algerian nationals wish to marry in Germany, they must comply with the local formal requirements for marriage; otherwise, the marriage will be considered invalid.

If this relates to the first case, the second issue is whether the marriage can be invoked in the state of the diplomatic or consular representative. To this end, the scope of authority granted to the representative by their home state must be clarified.

If the representative's home state has granted them the authority to perform such marriages, they may do so provided they comply with their home state's laws. For instance, the home state may stipulate that the prospective spouses must share the same nationality (e.g. the Netherlands or Portugal) or that at least one of them must be a national of that state (e.g. Germany). Conversely, if the representative's home state does not grant such authority, the marriage cannot be concluded in this way and therefore cannot be invoked or recognised in that state. Examples of such states include Guatemala, Peru and El Salvador[61].

Conclusion:

Based on the foregoing, it is apparent that legislation has established a rule governing the determination of the substantive conditions for a mixed marriage. These factors are consistent with the policies pursued by the relevant states, whether they are countries of origin or destination for their populations. As Algeria falls within the first category, the Algerian legislator adopted the connecting factor of the spouses' nationality. However, they did not specify how this factor should be applied in cases where the spouses have different nationalities. Nevertheless, the prevailing opinion among legal scholars is in favour of a distributed application of this connecting factor, except with regard to impediments to marriage, where a cumulative (integrated) approach should be adopted.

Furthermore, it should be noted that legislation also aimed to protect nationals of the forum state when one or both spouses held its nationality at the time the marriage was concluded — a principle adopted by the Algerian legislator in Article 13 of the Algerian Civil Code.

With regard to the rules governing the formal conditions of mixed marriages, it can be seen that, although legislation differs in how it deals with this situation, it generally adopts the customary rule that the formal requirements are governed by the law of the place where the marriage is celebrated. This is reflected in the provisions of the Algerian Civil Code and the Civil Status Code, particularly in cases where the marriage takes place outside the remit of diplomatic and consular authorities. Conversely, if the marriage is concluded before diplomatic or consular authorities, Algerian law governs the formal conditions, as this is the law of the consular agent's and the Algerian spouse's common nationality. In this context, the Algerian legislator has granted consuls the power to perform marriages between Algerian nationals and foreign nationals bearing the nationality of the host state. If the foreign spouse is not a national of the host state, the marriage can only be performed in a country designated by decree. However, no such decree has yet been issued.

Accordingly, the study concludes with the following recommendations:

- Avoid legislative 'blank declarations' by adopting the necessary implementing decrees to address the outstanding issue of determining the countries in which consuls and diplomatic missions may conclude marriages when the wife does not have the same nationality as the host state.
- Establish a legal framework for electronic official records and clarify the procedures that must be followed when a mixed marriage is conducted online.
- Align the rules with present-day realities: the "place of conclusion" connecting factor that has been relied upon is designed for the physical environment and does not adequately address the virtual environment. Therefore, it is necessary to clarify how the 'place of conclusion' is determined in such cases.

[61]- Nouria Chabrou, op. cit., p. 71.

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