



Door 6

FRANCO-ALGERIAN DIVORCE

Marriage not consumed, marital or child abuse, property disputes, family discord, French and Algerian law provide for cases of divorce and separation from bed and board. It is undoubtedly in this area that the precarious situation of the Algerian woman is the most alarming, the husband being entitled to repudiate a wife, on which we will spend briefly given the extensive research already done on this subject, then on the cases of divorce, their conditions and their effects.

THE UNILATERAL RUPTURE OF THE MATRIMONIAL LINK

In Algeria, as in France, the marriage is dissolved by the death of one of the spouses and the legally pronounced divorce. Muslim law, however, provides for another form of rupture of its own. The hypothesis is, in the context of this study, school, given the very low number of French-Algerian women (and even less Franco-Algerian) living in Algeria, the Muslim repudiation being contrary to the international public order, as the *Court of Cassation* has just reaffirmed. Apart from this extreme case, in Algerian law as well as in French law, divorce can occur as a result of another kind of unilateral initiative: marriage for misconduct; Finally, he can intervene by mutual agreement: divorce requested by one and accepted by the other spouse, divorce on joint request. The specifics for the Algerian woman repudiated or divorced as to the effects of the breakdown of the conjugal link will be mentioned.

THE REPUDIATION IN ALGERIAN LAW OF THE FAMILY

Claiming ancient precedents (in Roman law, the consortium competed with repudium), but also medieval Western (in the Middle Ages, "*The Church condemns adultery, even more seriously when it is committed with the wife of the neighbor or consummated with a Jewess, a pagan or a woman of servile condition*"). In the latter case, if the union results in the birth of a child, the penitential forces the husband to enfranchise the woman and / or the child. Provide for the repudiation of wives for adultery because, as *Philippe de Novare* points out in the mid-thirteenth century, when women "*are mad and villainy of their bodies,*" they not only "*dishonor themselves and degrade themselves same, but also dirty their lineage*". In this act of extramarital flesh, it is not only the couple who is threatened, but all the members of the family on whom the opprobrium reflects.

It must be seen as the source of the dissolution of the conjugal bond for fault rather than stopping at the repudiation), the Islamic repudiation (*talak*) dates back to the seventh century according to the study of *Roula El-Husseini Begdache*; the Maghreb rights have all been the subject of reforms, this thesis will not be exploited for comparative contemporary rights, because it does not cover the comparative Franco-Algerian law of marriage, whatever it is necessary to invest in the Sacred law, *the Qoran* and in *the shari'a* which designates the law in its most all-encompassing version, that is to say all the moral, religious and legal norms contained in *the Qur'an* and *the Sunnah* which is known to us through *hadiths* attributed to the prophet of Islam, Muhammad's *fikh* (jurisprudence) drawn from *the shari'a* by scholars, rulers and judges (*fukahâ*) during the history of Muslim societies and the technical term designating the science of *the shari'a*.

This is not helpful to us as it doesn't deal with repudiations mixed marriages, and the Algerian Family Code, which deals only with the dissolution of marriages between Algerians, in the silence of the regulatory power over the private international law of marriages (Article 31.

The very interesting research on *El-Husseini's* qualifications is thwarted by French civil law. Moreover, only Islamic marriage can be broken by repudiation: "*In fact, the celebration of a civil marriage between Muslim spouses undermines the faculty of repudiation regardless of the personal status of those concerned. As a result, a Muslim married civilly can not repudiate his wife. The question may arise in the case where a foreigner of Muslim status, married civilly in France, would be tempted to repudiate his wife in his country of origin. According to our analysis, this approach is impossible to the extent that the faculty of unilateral termination of marriage could not arise, since the Islamic marriage contract where it originated has not been concluded*".

It is a basic condition, note that after the "*triple repudiation*", the husband can not take back his wife after a certain period of time and after his wife has remarried and these second weddings have themselves been broken and this to avoid any abuse of the repudiation procedure offered to the husband.

The rule of conflict of French laws in the matter of divorce proceeds from Article 309 of the Civil Code, a unilateralist provision, according to which "*Divorce and separation from bed and board are governed by French law: - when the one and the other spouses are of French nationality; - where the spouses have both their domicile in France; - when no foreign law is competent, while the French courts are competent to hear about divorce or legal separation*". The present study on mixed marriages, the French judge will reject the repudiation.

The hypothesis of a bi-national wife, French and Algerian, was confronted with the jurisprudence of the *French Court of Cassation* which ruled in favor of the application of the only French law. The Algerian Code of 1984 doesn't answer the question, nor does it deal head-on with Islamic repudiation, an issue implicitly included in the rules governing divorces but actually governed by Muslim law. However, it does develop the consequences, mainly heritage.

OTHER DIVORCES ON UNILATERAL REQUEST

Generally, in Algerian law, divorce is "*dissolution of marriage*" in the Algerian Family Code of 1984. "*It intervenes by the will of the husband or at the request of the wife within the limits of the cases provided for in Articles 53 and 54*" (Article 48). The door is open to the Islamic repudiation mentioned above, the only will of the man opposing a limited petition for divorce. Nevertheless, the Algerian Family Code has legalized the civil divorce: it can only be established by judgment preceded by an attempt to conciliate the judge, which can not exceed a period of 3 months (Article 49). The wife may be "resumed" - as the divorced wife - by the husband, without judicial act at the conciliation, on act after judgment of divorce (Article 50).

Following a provision strongly inspired by Quran law: "*Any man having divorced (hear repudiated) his wife three times in succession can not resume after she remarried with someone else, that she is divorced or dies after having cohabited*" (Article 51). The counterpart of unilateral divorces and unfounded repudiations consists in a compensatory allowance without calling into question the unilateral act of will: the woman is entitled to damages for the injury she has suffered, she has in principle custody children and must return to his marital guardian; if he doesn't accept this return, it is up to the husband to provide, the right to housing of the woman and children "*according to his possibilities*". Two exceptions remain: "*Is excluded from the decision, the conjugal home if it is unique. However, a divorced woman loses that right once she is remarried or convicted of immoral misconduct duly established*" (art. 52). The fate of the woman is therefore suspended at the will of the husband and his rights are themselves tenuous; it is clearly seen with the legal retirement.

In French law, historically, divorce could be requested by a spouse unilaterally subject to acceptance by the other, where the former stated "*a set of facts, proceeding from both, which make the maintenance of communal life intolerable*". This provision was reformed to make the divorce more peaceful: (see Article 233 Civil Code "*Divorce can be requested by either or both of the spouses when they accept the principle of marriage breakdown without regard to the facts giving rise to it. This acceptance is not subject to retraction, even by way of appeal*"); therefore, the judge, if he is convinced that each of the spouses has freely given his consent, pronounces the divorce and rules on its consequences (Article 234); second hypothesis: the definitive alteration of the marital bond, giving rise to a claim for unilateral divorce (Article 237). This alteration

must be final and result from the cessation of the community of life between the spouses, when they have been separated for two years during the assignment for divorce (Article 238).

The most common case of unilateral opening of divorce applications in French law is fault-based divorce (Articles 242 to 246 Civil Code). The first of these articles provides, since January 1st, 2005, that "*Divorce may be requested by one of the spouses when facts constituting a serious or renewed violation of the duties and obligations of the marriage are imputable to his spouse and render intolerable the maintenance of the common life.*". The case law is abundant on the old article 242, very similar to the new one. There is little difference, therefore, with the new version: the case law prior to the 2004 reform is mutatis mutandis transferable in 2006. Only the excessive zeal affecting the practice of religion, when it is a source of disruption in family life. **Fanaticism** and religious extremism can be dangerous for the family. Excesses of all kinds are. (Qur'an, "*Those of your women who fornicate, have four of you testify against them. If they testify, then confine these women in your houses until death recalls them or may Allah order another order for them*".

In Algerian law, the wife has the choice between seven cases of divorce petitions: In general principle, for "fault or assimilated", of which one must exclude a case, disability preventing the achievement of the purpose intended by the marriage (procreation) (article 53, Al 2, 2005 alg fam code).

1. "for non-payment of maintenance ordered by judgment unless the wife knew the indigence of her husband at the time of the marriage (...);
2. "For refusal of the husband to share the wife's bed for more than four months". In Muslim law, it is undisputed that the consumption of marriage operates as soon as "the transfer of the wife to the matrimonial home, the isolation in the nuptial chamber, the closing of the door (*khulwa char3ia* ...";
3. "For the conviction of the husband to an infamous penalty of deprivation of liberty for a period exceeding one year, of a nature to dishonor the family and make it impossible to live together and the resumption of conjugal life" (Article 243 C civ): (divorce) "*may be requested by one spouse when the other has been sentenced to one of the penalties (L. n ° 92-1336 of 16 Dec. 1992, art 136)*" provided for by Article 131-1 of the Criminal Code".
4. "For absence of more than one year without valid excuse or maintenance pension". (Should we think that divorce can not be requested even after one year if the husband continues to pay the maintenance pension?).
5. "For any loss legally recognized as such in particular by the violation of Articles 8 and 37";
6. "For any immoral misconduct seriously wrong". (Adultery, incest or other crimes against children, spousal violence, so difficult to prove ... In French law, the right to compensation cumulative and distinct from divorce.
7. The abandonment of the matrimonial home under Algerian law by one of the spouses may lead to a court-ordered divorce giving entitlement to damages in favor of the party who suffers the loss (Article 55 , 2005 alg fam code). French jurisprudence has also made it a cause of divorce on the basis of Article 242 of the Civil Code, since this abandonment of family is fickle and unjustified, which is supremely appreciated by the judges of the merits.

DIVORCES BY MUTUAL AGREEMENT

In French law, it could be said of divorce on joint request of the spouses that it is the sweetest formula of dissolution of the conjugal bond. It is governed by Articles 230 and 232 of the Civil Code, which were reformed in 2004 (Article 231 repealed), which may be jointly demanded by the spouses when they agree on the breakdown of marriage and it's the effects of the divorce (article 230). Therefore, he is homologous the convention and pronounces the divorce insofar as he has acquired "*the conviction that the will of each of the spouses is real and that their consent is free and enlightened.*" He can nevertheless refuse the homologation and to pronounce the divorce "*if it notes that the convention preserves insufficiently the interests of the children or one of the married couple*" (art 232 C. civ.)

To be closer to divorce, legal separation may be a case of unilateral or bilateral rupture. The wife is here again largely disadvantaged. The 2005 Algerian family code provides that the

wife may separate from her spouse "for compensation (*khul'a*) after agreement on it. In case of disagreement, the judge orders the payment of a sum the amount of which can not exceed the value of the parity dowry at the time of the judgment "(Article 54). Original provision, it is provided that "if the disagreement is aggravated between the two spouses and if the wrong is not established, two arbitrators must be appointed to reconcile. The two arbitrators, one chosen from the relatives of the husband and the other from those of the wife, are appointed by the judge for the said arbitrators to submit a report on their office within a period of two months. (Article 56). Lastly, divorce judgments are not subject to appeal except in their material aspects (Article 57).

The French civil code governs, in articles 296 and following, legal separation, which, according to this first provision, can be pronounced at the request of one of the spouses in the same cases and under the same conditions as the divorce. **A counterclaim** for divorce can be made by the spouse against whom the legal separation is sought (article 297 new). In principle, legal separation does not dissolve marriage by itself, but ends the duty of cohabitation (article 299 new). Legal separation always entails the separation of property (article 302, Al 1). The duty of help remains. The effects are, otherwise, those of the divorce which is known to protect the interests of each spouse (article 304). Separation from bed and board can end with the voluntary resumption of life together; it will be noted by notarial act or declaration to the registrar. In addition, "*the separation of property subsists unless the spouses adopt a new matrimonial regime (...)*" (section 305).

Finally, in all cases of separation from bed and board, it can be converted into divorce by mutual consent (article 307 new). French case law regulates the conflict of laws when the spouses are of different nationalities: the divorce is subject to the law of their common domicile if they are both integrated in the local environment by an establishment effective in the same country; on the other hand, if they live separately in different countries, the divorce is governed by the only law of the forum regularly seized of the divorce.

THE EFFECTS OF THE FRANCO-ALGERIAN DIVORCE

The effects of Algerian divorce on women consist essentially in **the legal retirement** of the divorced or divorced wife. The rule is recommended presumptions of paternity known in Western rights. Four articles of the Algerian Family Code are devoted, overflowing the right of the divorce; "*The non-pregnant woman divorced after consummation of the marriage is bound to observe a legal retreat, the duration of which is three periods of menstrual purity. The legal retirement of the divorced having despaired of her menses is three months from the date of declaration of the divorce*" (Article 58); "*The legal retreat of the pregnant woman lasts until her deliverance. The maximum duration of the pregnancy is ten months from the day of the divorce or the death of the husband*" (Article 60); finally, "*The divorced wife and the one whose husband has died must leave the matrimonial home during his legal retirement period only in case of immoral misconduct duly established. The divorced woman is also entitled to **alimony** through out the legal retirement period*" (section 61).

This overview of the rights of marriage and divorce, if it forms only an incomplete fresco of the comparative law of the Franco-Algerian family, gives the measure of the gap between, on the one hand, customary provisions draped in civil law considered obsolete and undeniably detrimental to the rights of women, which are not equal to those of men in Algeria, and criticisms of conservative Muslims attached to their faith and tradition, considering too permissive French law.

The meeting of an Algerian and a French person calls into question the unilateralism of two rights with such dissimilar roots. Either a spouse submits to the civil or sacerdotal imperatives of his spouse, or he is condemned to live in hiding, without the knowledge of the families, which is not the object of the institution of marriage, regrouping social development of solidarities - but also conflicts - complex interpersonal.

QUESTIONS:

- TRANSLATE THE UNDERLINED TERMS INTO ARABIC.
- GIVE AN ABSTRACT (IN ARABIC) TO THE TOPIC.