

المصادر المادية لقانون الأسرة الجزائري - المادة 8 نموذجاً -

Material Sources of Algerian Family Law - Article 8 as an Example-

Les sources matérielles du droit de la famille algérien - Exemple de l'article 8-

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Abstract:

The phenomenon of polygamy is one of the most important issues in personal status, addressed by Algerian legislation in family law, where its provisions are found in Article 8 of the Family Law, as amended by Order 05/02. Due to the importance of the phenomenon and the debate it raises, it was necessary to research the material sources upon which the Algerian legislator relied in formulating Article 8. Considering Algerian custom, it is evident that there is a difference in societal views on the matter from one region to another. For example, in the southern regions of Algeria, polygamy is considered normal, whereas in the northern regions and major cities, it is seen as abnormal and deviating from the norm. This indicates that the Algerian legislator was wise in Article 8 of the Family Law, taking into

account Algerian custom that accepts polygamy by allowing it, while also considering the custom that does not accept polygamy by placing restrictive conditions. Thus, it is realized that custom is one of the sources of Article 8 of Algerian family law. Examining Arab laws that range from prohibition to permission of polygamy, and since these laws preceded Algerian family law, it is not excluded that they are one of the sources relied upon by the Algerian legislator in formulating Article 8. As for Islamic law, it addressed the issue of polygamy in a way that ensures the rights of all, yet the Algerian legislator did not solely rely on it as a source but only took a part of it. It is one of the sources relied upon by the Algerian legislator. Therefore, the Algerian legislator relied on multiple sources in formulating Article 8 of the Family Law, including Sharia, custom, Islamic law, and Arab laws.

Keywords: Sources- Material - Family Law- Article 8- Polygamy

- Abstract in French:

La polygamie est l'une des questions les plus importantes en matière de statut personnel, traitée par le législateur algérien dans le droit de la famille, où ses dispositions se trouvent à l'article 8 du Code de la famille, tel que modifié par l'ordonnance 05/02. En raison de l'importance du phénomène et du débat qu'il suscite, il était nécessaire de rechercher les sources matérielles sur lesquelles le législateur algérien s'est appuyé pour formuler l'article 8. En examinant la coutume algérienne, il est évident qu'il existe une différence de perception de la question d'une région à l'autre. Par exemple, dans les régions du sud de l'Algérie, la polygamie est considérée comme normale, tandis que dans les régions du nord et dans les grandes villes, elle est considérée comme anormale et déviante de la norme. Cela signifie que le législateur algérien a été sage dans l'article 8 du Code de la famille, en tenant compte de la coutume algérienne qui accepte la polygamie en la permettant, tout en tenant compte de la coutume qui ne l'accepte pas en imposant des conditions restrictives. Ainsi, il est réalisé que la coutume est l'une des sources de l'article 8 du droit de la famille algérien. En examinant les lois arabes qui vont de l'interdiction à la permission de la polygamie, et étant donné que ces

lois ont précédé le droit de la famille algérien, il n'est pas exclu qu'elles soient l'une des sources sur lesquelles le législateur algérien s'est appuyé pour formuler l'article 8. Quant à la loi islamique, elle a abordé la question de la polygamie d'une manière qui garantit les droits de tous, mais le législateur algérien ne s'est pas uniquement appuyé sur elle comme source, mais n'en a pris qu'une partie. C'est l'une des sources sur lesquelles le législateur algérien s'est appuyé. Par conséquent, le législateur algérien s'est appuyé sur plusieurs sources pour formuler l'article 8 du Code de la famille, notamment la charia, la coutume, la loi islamique et les lois arabes.

Mots clés : Sources - Matérielles - Droit de la famille - Article 8 - Polygamie.

- Abstract in Arabic:

تعد ظاهرة تعدد الزوجات من أهم مسائل الأحوال الشخصية، وتناولها المشرع الجزائري في قانون الأسرة، حيث جاءت أحكامها في المادة 8. والمعدلة بالأمر 02/05، ونظرا لأهمية الظاهرة والجدل الذي تثيره وجب البحث عن المصادر المادية التي استند إليها المشرع الجزائري في صياغته للمادة 8، فبالنظر إلى عرف الجزائريين يتبين أن هناك اختلاف في نظرة المجتمع للمسألة من جهة لأخرى، ففي الجنوب الجزائري مثلا يُنظر لتعدد الزوجات على أنه أمر عادي، أما في المناطق الشمالية والمدن الكبرى فتعدد الزوجات أمر غير عادي وخروج عن المألوف، ما يعني أن المشرع الجزائري كان حكيما في المادة 8 من قانون الأسرة، حيث أخذ بالعرف الجزائري الذي يتقبل تعدد الزوجات بإجازته للتعدد، وراعى العرف الذي لا يتقبل تعدد الزوجات بوضع شروط تقييده، ومنه ندرك أن العرف هو أحد مصادر المادة 8 من قانون الأسرة الجزائري، أما القوانين العربية فقد أوردت جلّها مسألة تعدد الزوجات، وتراوحت بين المنع والإجازة، وبما أنّ القوانين التي ذكرناها سبقت قانون الأسرة الجزائري فلا يستبعد أن تكون مصدرا من المصادر التي استند إليها المشرع الجزائري في صياغته للمادة 8، أما الشريعة الإسلامية فقد تناولت مسألة تعدد الزوجات بشكل يضمن حقوق الجميع، إلا أن المشرع الجزائري لم يعتمد عليها كمصدر وحيد، بل أخذ جزءا منها فقط، فهي أحد المصادر التي اعتمد عليها المشرع

الجزائري، فالمشرع الجزائري اعتمد على مصادر متعددة في صياغته للمادة 8 من قانون الأسرة . وهي الشريعة الإسلامية والعرف والقوانين العربية .

Keywords: - مصادر- المادية - قانون الأسرة - المادة 8 – تعدد الزوجات.

- Introduction:

Care for the family is a matter that all regulations and laws have sought, considering it the cornerstone of society, and preserving it means preserving the community. This care is included in the books of Islamic jurisprudence as well as personal status laws. One of the most important details addressed by most laws and regulations, which directly impacts the stability of the family, is the issue of polygamy.

"Polygamy" is a term that refers to a man marrying more than one woman at the same time. It is a phenomenon with social and cultural dimensions, as well as religious, psychological, and instinctual motivations. The interpretation and acceptance of this phenomenon vary from one society to another and even within the same society. For example, in Algerian society and some regions, there are those who accept the idea of polygamy without hesitation, while in other regions, it is considered among the prohibited practices that are not forgiven.

The Algerian legislator, like other Arab legislators, addressed polygamy in the Family Law 11/84, dated June 9, 1984, amended, and supplemented by Order No. 05-02 dated February 27, 2005, with Article 8 specifically dedicated to this matter. However, the provisions of this article continue to generate much debate due to the sensitivity of the subject and the conflicting interests of the two pillars of marriage (the man and the woman). While a man may believe that it is his right to marry more than one wife for various reasons, his desire may clash with his first wife's belief that she has the right of the exclusivity of her husband, seeing no justification for polygamy. All parties are keen on avoiding the disruption of family unity. We should not overlook the ideological differences among various segments of

society, with some advocating for deriving the provisions regarding polygamy from Islamic Sharia, while others call for gender equality and adherence to Western laws. This ongoing debate adds to the complexity for the Algerian legislator, prompting us to explore the material sources that the Algerian legislator relied upon when formulating Article 8 of the Algerian Family Law. Given the absence of an explanatory memorandum guiding us in this matter, we will, therefore, delve into the phenomenon of polygamy in the customs of Algerians to understand the societal perspective on this phenomenon. Then, we will explore the provisions of some Arab and Islamic laws, addressing what was stipulated by most of the previous Arab laws before the Algerian Family Law, regarding the issue of polygamy. Additionally, we will examine the rulings on this phenomenon in Islamic Sharia. In conclusion, we will examine which of these sources the Algerian legislator relied on when formulating Article 8 of the Algerian Family Law. Therefore, the focus of our investigation will be: What are the material sources that the Algerian legislator relied upon in formulating Article 8 of the Family Law? Did the legislator rely on a single source, or were there multiple sources?

To address this issue, we consider the following elements:

1. Concepts related to research terminology.
2. Polygamy in Algerian law and custom.
3. Polygamy in some Arab laws, Islamic laws, and international agreements.
4. Polygamy in Islamic Sharia.

1- Concepts Regarding Research Terminology:

In this section, we will define the key terms mentioned in the research title, which include: Sources, Material, Law, and Family. We aim to understand these terms both in language and within the context of research

1.1- In Language:

1.1.1 -Sources:

Sources can be defined as the plural form of 'source,' which refers to what something emanates from. It is also known as the 'origin of news or information' (Ben Hadia & Yahi, 1984, p. 54). In linguistics, 'source' is defined as: "The origin of the word from which verb roots emanate (Ali AlKabeer, 1984, pp. Part 27, Pages 2013-2411) Thus, sources of things are the fundamental origins from which they arise .

1.1.2 -Material:

Derived from the material thing, material is attributed to substance and is contrasted with literary and spiritual aspects.

- Material refers to what constitutes a thing and supports its existence. It is defined as 'everything that exists to serve another,' and the material of a thing consists of its principles and elements from which it is formed .

1.1.3- Law:

Law, in language, means system, and it refers to the repetition of a specific command at a constant and known pace. This command is considered subject to a fixed and known system. The word 'law' has moved to our Arabic language with its original Greek root, 'kanun,' meaning 'straight stick.' This explains its transition to other languages with the sense of 'straight.' It has been expressed in French as the word 'droit' (Al-Dawliah, 2018).

1.1.4 - Family:

The term 'family' has many definitions, including:

- Family from a man: the lower lineage, 'and we strengthened their bonds,' meaning their joints (Ahmad Al-Zawi, p. 20).
- And the family is the relatives of a man or a woman, and its plural is 'usar' (Ben Hadia & Yahi, 1984)
- The term 'family' is derived from 'asr,' which means the bond that binds the captive. It is said: 'asara,' 'yāsiru,' 'asran,' means "He bound him and took him as a captive". The family of

a man is his close relatives because he relies on them and seeks refuge in them. It is the tribe of the man and the people of his household (Ibn Manzur, p. 2 . p.41).

1-2- In terminology:

1.2.1- Material Sources:

In terminology, 'material sources' are defined as a compound. They are identified as 'the sources from which the law emanates; they are the primary materials from which the content of the law is formed, and they are referred to as the genuine sources of the law' (Ali, 2010, pp. 182-191) .

1.2.2- Law:

The definitions of 'law' are diverse, and among jurists, the concept of law has been categorized into a general and a specific meaning. The general meaning of the law is: 'A set of organized rules that regulate the behavior and relationships of individuals in society in a binding manner.' In the specific sense, it is: 'Any rule or set of rules established by the legislative authority to regulate a specific matter,' such as public employment law, labor law, and national service law. (Al-Dawlah, 2018)

Furthermore, law, in its general sense, is defined as a set of abstract and binding general rules and provisions that are organized to regulate relationships among members of society. These are the rules that ensure that relationships between individuals operate within a single and consistent framework, preserving order (Al-Rifai, 2007, p. 8).

1.2.3- Family:

Atiya Saqr defined it as: 'The group that is established through legal marriage, committed to the rights and duties between its two parties, and the offspring and relatives associated with it.' (Saqr, 2006, p. 37).

It is the primary cell in society, serving as the natural and social environment in which individuals are supported. Its role is in nurturing children according to socially accepted values to achieve integration into the social structure. It is the source of ethics and the

primary support for regulating behavior, serving as the first framework in which individuals receive their initial lessons in social life (Al-Khouli, 1983, p. 50).

In Islam, the family represents the smallest unit in society, and it is the fundamental building block in the community. It collaborates with other structures to achieve the goals of succession. It is an instinct and a social tradition. Deviating from adherence to its legal provisions and ethical norms leads to the breakdown and collapse of the social fabric. It is governed by values of piety, forgiveness, virtue, and others (Al-Olwani, 1434 AH - 2013 AD, p. 73).

Now that we have defined some of the research terms, we will present the issue of polygamy in Algerian family law to understand its formulation and provisions. Subsequently, we will investigate its material sources, starting with custom, to understand how Algerian custom views polygamy.

2- Polygamy in Algerian Law and Customs:

In this section, we will address two aspects: polygamy in Algerian law and polygamy in Algerian customs.

2.1 - Polygamy in Algerian Law:

After gaining independence, the Algerian legislator immediately adopted Islamic jurisprudence as the foundation for its laws and regulations, aiming to achieve legal independence and contribute to legislative development. The goal was to overcome the flaws of legal subordination and complete the elements of national identity. The legislator excelled when considering Islamic Sharia as a source of legal principles, considering it an original source for personal status matters. The Islamic jurisprudence is considered the foundation of family legislation according to Articles 222 and 223 of the Family Law. It sanctioned polygamy in the Family Law (belhaj, 2010, p. 20), addressing it in Article 8 of the previous Algerian Family Law (11/84) which states as follows:

"Marriage to more than one wife is permissible within the bounds of Islamic jurisprudence when there is a legitimate justification, and the conditions and intentions of justice are met. This is done after informing both the current and prospective wives, with each having the right to file a legal suit against the husband in cases of deception and the right to demand divorce in case of non-consent." (Qanoun Al-Osra Al-Jazairi, Article 8) .

The text suggests that the Algerian legislator has allowed polygamy within the limits of four wives and restricted it with the following conditions:

- Legal justification.
- Intention of justice.
- Conditions of justice.
- Knowledge of both the former and subsequent wives.

However, the recent amendment (05-02) has encompassed this article, and its text now reads as follows: "

Article 8: Marriage with more than one wife is permitted within the bounds of Islamic law when there is a legal justification, provided that the conditions and intention of justice are met. The husband is required to inform the former wife and the woman he intends to marry and submit a marriage license request to the court where the marital residence is located.

The court president may grant permission for the new marriage if he is assured of their consent, and the husband proves the legal justification and his ability to provide justice and the necessary conditions for married life (Al-jazairi, Law No. 84/11 dated 09/06/1984, which includes the Family Law, amended and supplemented by Decree No. 05-02 dated 27/02/2005, Article 8)

The new amendment highlights the following:

- The legislator has retained the permissibility of polygamy and restricted it with the same conditions outlined in Article 8 of Law 11-84, which are:
 - The existence of legal justification.

- The fulfillment of conditions and the intention of justice.
- The obligation to inform the former wife and the woman the husband intends to marry.

Additionally, it introduced further conditions, including:

- The necessity of obtaining a prior license from the judge.
- The authority responsible for granting permission for polygamy is the court president of the marital residence or the location of the marital home.
- The court president is obligated to ensure the consent of the first wife and the woman the husband intends to marry, as well as verifying the husband's ability to provide justice and meet the necessary conditions for marriage life.

So, the new amendment imposes judicial oversight, allowing the judge to prevent or reject the license. This comes after hearing both the husband and his first wife, ensuring the justifications for polygamy, and verifying the fulfillment of its legal conditions, including the capacity for expenditure and justice between the wives. The judge's decision is subject to appeal by interested parties, leading to monitoring the extent to which the justification aligns with the provisions of the law. Subsequently, a reasoned judgment is issued, explaining the legal grounds for rejecting polygamy.

The new amendment also added Articles 8 repeated and 8 repeated 1, which state the following:

Article 8 repeated: "In case of deceit, each wife is permitted to file a legal suit against the husband to demand divorce."

Article 8 repeated 1: "The new marriage is annulled before consummation if the husband fails to obtain a license from the judge, according to the conditions stipulated in Article 8 above." (Al-jazairi, Law No. 84/11 dated 09/06/1984, which encompasses the Family Law, amended and supplemented by Decree No. 05-02 dated 27/02/2005, Article 8 reiterated - 8 reiterated 1)

The noteworthy point is that the new text is a step forward in curbing the phenomenon of polygamy, including its restrictions and conditions (belhaj, 2010, pp. 191-192).

2.2- Polygamy in Algerian customs:

Customs are among the most important sources of law, as the law is enacted to regulate prevalent practices within societies and organize them. We will examine polygamy in Algerian customs and determine whether the Algerian legislator has adopted custom as a source for Article 8 of the Algerian Family Law or not.

The vast geographical expanse of Algeria, along with the diversity of its customs, traditions, and rich cultures, has led to varying perspectives on polygamy from one region to another. In some areas, especially in northern Algeria, polygamy is considered an exception, practiced by only a few. It is often met with disrespect from the community, strong opposition from the first wife and her family, and, at times, can lead to family breakdowns and legal recourse. The polygamist and his first wife may be stigmatized within the community, becoming subjects of public and private discussions.

In contrast, in other regions of Algeria, such as some areas in the southern part, the situation is entirely different. Here, polygamy is considered the norm, and having only one wife is seen as an exception. Marrying more than one wife is a prevalent characteristic of society. Women in these areas do not feel any hesitation in sharing their husbands with another woman. They are not criticized for improving the well-being of their co-wives, raising their husband's children, or treating them no differently than their own. Polygamy is widely accepted and embraced by the community.

An article in 'Al-Shorouk' website stated: 'Polygamy in Algeria... Welcomed in the South and Rejected in the North.' It reflects a reality dictated by customs, traditions, and laws. In most cases, wives in central regions only discover their husbands' engagement in polygamy after his death when the 'secret wife' emerges to claim her children's rights. On the other hand, in

some southern regions, wives do not mind sharing one husband, living together in a common household where children play together and share the same meals.

Most wives in the central regions and major cities refuse to allow their life partners to embark on the experience of remarriage. Merely contemplating it would disrupt the harmony of marital life. Thus, the option of polygamy is considered the most suitable solution, pursued by most men. They employ various legal tricks and strategies to achieve their desired goals silently.

The president of the National Association for the Advancement and Protection of Women and Youth believes that husbands in the northern cities and major states are inclined towards polygamy in secret, unlike the southern regions where the population adheres to Islamic Sharia by marrying up to four women. This practice has become ingrained in their society and is considered normal. The nature of the desert culture, deeply rooted in their heritage, and their upbringing in an environment where multiple wives are common allow them to approach polygamy naturally. Additionally, their reliance on tribal systems and extended family support facilitates this, as family court systems are largely absent in those areas (Mijrab.Yassin M., 2017).

Some lawyers argue that 'the law alone cannot address the phenomenon of polygamy in Algerian society.' They believe that accumulated traditions and prevailing mentalities often diverge from the intended implications and meanings established by amendments to family law. In the absence of social awareness and civilization, and under the dominance of specific traditions, deceptive practices persist. Taking advantage of the characteristics of Algerian women, in many cases, the first wife is compelled to accept the situation to maintain family stability and consider the well-being of the children.

However, social developments have given rise to new trends that feature the gap between the spirit of the law and emerging ideas. Some voices are encouraging polygamy or leaning towards married men under the pretext of their experience and life achievements. This is

coupled with the perception that the second wife, being occupied with work and life's concerns, might not require the same amount of time and attention as the first wife, who can supposedly fulfill the desired needs.

According to some sociologists, it has become necessary to reconsider a range of matters, including societal concepts related to the idea of polygamy, especially among women (Bleidi, 2018).

Polygamy exists in Algerian society, yet the acceptance and inclination towards it vary from one region to another. The Algerian legislator demonstrated wisdom by aligning with the prevailing customs within the country. Instead of outright prohibiting polygamy, the legislator did not leave it unrestricted. The law follows the custom that deems polygamy unacceptable, but it doesn't completely prohibit it to align with the custom that accepts polygamy. Therefore, the prevailing custom in Algeria regarding polygamy is considered one of the most significant sources influencing Article 8 of the Algerian Family Law.

3- Polygamy in some Arab and Islamic laws and international agreements:

As polygamy is one of the most important aspects of personal status, no Arab or Islamic law or code has been devoid of addressing it, despite their differences in how they approach and range between prohibition and permission, as we will see. After its presentation, we will determine whether it is a source for Article 8 of the Algerian Family Law or not.

3.1- Polygamy in Some Arab and Islamic Codes and Laws:

Most Arab laws and codes have addressed polygamy. The Ottoman Family Rights Law discussed the matter in Article 42, stating: 'A man with more than one wife must treat them equally and justly' (Madda 42, Qanoun Huquq Al-a'la Al-Othmani) Similarly, the legal provisions in the personal status of Muhammad Qadri Pasha, mentioned in Article 19, state: 'A free man is allowed to marry four women in one contract or in separate contracts' (Al-Ibani, 1427 AH - 2006 AD, p. 79).

As for the Egyptian personal status laws, polygamy is mentioned in Article 11, and its text is reiterated: "The husband is required to declare his social status. If he is married, he must specify in the declaration the names of the wives under his guardianship and their places of residence."

The notary must notify them of the new marriage in a document associated with the acknowledgment, and the wife whose husband remarries has the right to seek divorce if she incurs material or moral harm that makes the continuation of the marital relationship difficult for her. Even if it was not stipulated in the contract that he should not marry another woman, if the judge cannot reconcile between them, he divorces her with an irrevocable divorce. The wife's right to seek divorce for this reason expires one year after she becomes aware of his marriage to another unless she has explicitly or implicitly consented to it. Her right to seek divorce is renewed each time he marries another. If the new wife was unaware that he was married to someone else and it later becomes apparent, she also has the right to request similar legal action." (Qanoun Al-Ahwal Al-Shakhsiya Al-Misri, Article 11 repeated).

The Jordanian Personal Status Law addresses polygamy in Article 13, and its text is as follows:

"The judge must verify the following before contracting the marriage of a married person:

- The financial capacity of the husband to pay the dowry.
- The husband's ability to provide for those he is obligated to support financially.
- Informing the prospective wife that that the man who wants to marry her is already married to another."

The court is responsible for notifying the first wife or wives, if the husband has more than one wife, of the marriage contract after it has been conducted, in accordance with the Law of Sharia Judicial Procedures." (Qanoun Al-Ahwal Al-Shakhsiya Al-Ordoni raqm 15 Li Sanat 2019, Article 13).

The Syrian Arab Personal Status Law discusses polygamy in Article 17, stating: "The judge is not allowed to permit a married man to marry another woman unless he has a legitimate reason and is financially capable of supporting both wives." (Qanoun Al-Ahwal Al-Shakhsiya Lil-Jomhoriya Al-Arabiya Al-Souriya 59/1953 Al-Sader Fi 07/09/1953, Article 17)

As for the law that prohibited polygamy, it is the Tunisian law, specifically in Article 18 of the Tunisian Personal Status Code, which states:

- Polygamy is prohibited.
- Anyone who gets married while already in a marital relationship and before legally ending the previous marriage is punishable by imprisonment for one year and a fine of two hundred and forty thousand francs, or one of the two penalties, even if the new marriage is not contracted in accordance with the provisions of the law.

Anyone who is married in violation of the forms stipulated by Law No. 3 of the year 1957, dated 4 Muharram 1377 (August 1, 1957), related to the regulation of civil status, and enters a second marriage while continuing to have intercourse with his first wife, shall be punished with the same penalties.

- A husband who deliberately enters a marriage contract with a person targeted for the penalties stipulated in the preceding two paragraphs shall be punished with the same penalties." (Majallat Al-Ahwal Al-Shakhsiya Al-Tunisiya, Chapter 18)

Moroccan Personal Status Code addresses the issue of polygamy in its articles:

- Article 40 and its text: Polygamy is prohibited if there is fear of injustice among the wives. It is also prohibited if the wife includes a condition in the marriage contract prohibiting the husband from taking additional wives.
- Article 41: The court shall not permit polygamy:
 - If the petitioner fails to substantiate an exceptional objective justification.
 - If the petitioner does not possess sufficient resources to support both families and guarantee all rights, including financial support, housing, and equality in all aspects of life.

- Article 42: In the absence of a condition prohibiting polygamy, the person desiring it shall submit a request for permission to the court. The request must include a statement of the exceptional objective reasons justifying it, and it should be accompanied by a declaration regarding his financial situation.

- Article 43: The court summons the intended wife for marriage to attend. If she is personally notified but fails to attend or refuses to accept the summons, the court sends her a warning through the court clerk, notifying her that if she does not attend the specified session mentioned in the warning, the court will proceed with the husband's request in her absence. Furthermore, the request can be adjudicated in the absence of the wife intended for marriage if the public prosecutor's office affirms the impossibility of obtaining a residence or a place of residence where she can be summoned. If the reason for the wife not receiving the summons is due to the husband intentionally providing an incorrect address or distorting the wife's name, the husband is subject to the penalty stipulated in Article 361 of the Criminal Law upon the request of the affected wife.

- Article 44: The discussion takes place in the counseling room in the presence of both parties. They are heard to reconcile and reform after investigating the facts and presenting the required statements.

The court may grant permission for polygamy with a reasoned decision not subject to appeal if it is proven to have an exceptional objective justification, and its legal conditions are met, subject to conditions for the benefit of the wife and their children.

- Article 45: If the court, through discussions, determines the impossibility of continuing the marital relationship and the first wife insists on seeking a divorce, the court shall determine an amount to fulfill all the rights of the wife and their children, which the husband is obligated to spend on them. The husband must deposit the specified amount within a period not exceeding seven days. The court issues, upon deposit, a divorce judgment, and this judgment is not subject to any appeal in its part that terminates the marital relationship. The

failure to deposit the mentioned amount within the specified period is considered a withdrawal of the request for permission for polygamy. "If the husband insists on requesting permission for polygamy, and the first wife does not agree and does not seek divorce, the court applies the separation procedure outlined in Articles 94 to 97 thereafter.

- Article 46: In the case of permission for polygamy, the marriage contract with the intended wife is not concluded until the judge notifies her that the person intending to marry her is already married to someone else, and she consents to it. This notification ensures an expression of consent in an official record (Al-Qanoun 3/70 Bemathabat Modawanat Al-Osra Al-Maghribiya Al-Sader Fi 2004, Articles 40-41-42-43-44-45-46).

The Iraqi legislator addressed polygamy in the Iraqi Personal Status Law in paragraph 4 of Article 3, which states:

Paragraph 4: Marrying more than one woman is not permissible except with the permission of the judge, and the following two conditions must be met to grant permission:

- The husband must have sufficient financial means to support more than one wife.
- There must be a legitimate interest.

Paragraph 5: If there is fear of injustice among the wives, polygamy is not allowed, and the discretion in this matter is left to the judge.

Paragraph 6: Anyone who conducts a marriage contract with more than one wife contrary to what is mentioned in paragraphs 4 and 5 shall be punished with imprisonment for a period not exceeding one year or a fine not exceeding 100 dinars, or both.

Paragraph 7: An exception to the provisions of paragraphs 4 and 5 of this article allows marriage with more than one wife if the intended wife is a widow." (Qanoun Al-Ahwal Al-Shakhseya Al-Iraqi 188 li-am 1959, Article 3)

The Kuwaiti Personal Status Law mentioned polygamy in Article 21, states: 'A man is not allowed to marry a fifth wife before his marriage with one of his four wives is dissolved, and her waiting period has expired.' (Qanoun Al-Ahwal Al-Shakhseya Al-Kuaiti, Article 21).

Arab laws have varied between prohibition and permission in accordance with Islamic Sharia. Some laws allow polygamy with the condition of obtaining a license from the judge. The first to advocate for the necessity of regulating and controlling polygamy in the Islamic world was the jurist and reformer Muhammad Abdu in 1897. He proposed to the Ministry of Justice at that time to place polygamy under the supervision and control of the court. According to his suggestion, a man who already has a wife should not be allowed to marry another woman without the court's approval. This possibility should not be granted to a man who cannot ensure justice among multiple wives or lacks the financial ability to support more than one wife. Although this proposal was accepted by the Ministry of Justice, it was rejected by the King of Egypt at that time in 1926 (Badreya, 1987, pp. 460-487).

3.2 – Polygamy in international conventions:

One of the most significant agreements that explicitly addresses polygamy is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW is considered an international treaty aimed at abolishing all forms of discrimination against women. It was adopted as a draft law in 1979, signed in 1980, and entered into force in 1981. The convention was established to reject discrimination, ensure equality, and commit countries to the agreed-upon provisions. The thirty articles of the agreement, emphasize gender equality in all political, economic, social, cultural, and civil fields. The number of countries that have signed the agreement is 190, with only 5 countries choosing not to sign it.

In Article 21 of the CEDAW agreement, it states:

'Some of the States Parties that recognize polygamous marriage, either in accordance with a religious law or a customary law, also permit civil marriage, which is a marriage to one wife by definition. Where civil marriage is not available, women in societies where polygamy is practiced may have no choice but to enter a form of marriage that may at least be considered, if not already become, a polygamous marriage, irrespective of their wishes. The Committee

concluded in General Recommendation No. 21 that polygamy is incompatible with the agreement and should be 'discouraged and prohibited.'

(cedaw, 2013).

The number of Arab countries that have signed this agreement is twenty, including: Morocco, Algeria, Tunisia, Libya, Egypt, Lebanon, Jordan, Saudi Arabia, Iraq, Kuwait, Yemen, Comoros, Mauritania, the United Arab Emirates, Djibouti, Bahrain, Syria, Oman, Qatar, and Palestine. The signing indicates the commitment of these countries to the provisions of the agreement. Algeria, as we have seen, is one of the countries that signed this agreement, making it obligated to consider its provisions, especially in legislation. However, Article 21 of the agreement explicitly calls for the prohibition of polygamy. Yet, as we observed, the Algerian legislator did not explicitly prohibit polygamy as demanded by the agreement. Despite this, the conditions imposed on polygamy in Algerian law lean towards a restrictive direction that may pave the way for prohibition.

Thus, the 'CEDAW' agreement is not a direct legal source for Article 8 of the Algerian Family Law.

4 - Polygamy in Islamic Sharia:

Algerian society adheres to the Islamic religion, and Islam is the state religion as stated in the Algerian constitution. Islamic jurisprudence forms the basis for laws and regulations in Algeria. How does Islamic Sharia address polygamy?

Islamic Sharia permits polygamy within specific limits and under several conditions. A man is allowed to marry two, three, or four wives, but he is not allowed to have more than four wives simultaneously. The Sharia emphasizes equality among the wives in terms of rights and obligations, and it obliges the man to treat his wives with justice to the best of his ability (Wafi, 1367 AH-1948 AD, p. 82).

A man is allowed to marry up to four wives, provided there are no prohibited blood relations between them. It is forbidden for him to marry a fifth wife until he divorces one of his

existing wives, and she completes her waiting period (iddah), whether the divorce is revocable or irrevocable. This prohibition is mentioned in the Quran, the teachings of the Prophet (Hadith), and is a consensus among Islamic scholars (Al-Sabouni, 2000, p. 185).

4.1 - From the Quran:

"And if you fear that you shall not be able to deal justly with the orphan-girls then marry (other) women of your choice, two or three, or four; but if you fear that you shall not be able to deal justly (with them), then only one or (the slaves) that your right hands possess. That is nearer to prevent you from doing injustice" (Sourah Al-Nisaa, Verse 3). If any of you fear that he will not be able to deal justly with the orphans, then he should marry from those that seem good to him of [other] women, two or three or four. However, if you fear that you will not be just, then [marry only one] or those your right hand possesses. That is more suitable that you may not incline [to injustice], and Allah is ever Gracious towards you. And His saying, 'two or three or four,' meaning, marry whichever women you choose, two, or three, or four, as per your preference - one, two, or three wives (Al-Mobarkafouri, 1420 AH - 1999 AD, p. 272).

He says: "You will never be able to do perfect justice between wives even if it is your ardent desire, so do not incline too much to one of them (by giving her more of your time and provision) to leave the other hanging (i.e. neither divorced nor married). And if you do justice, and do all that is right and fear Allâh by keeping away from all that is wrong, then Allah is Ever Oft-Forgiving, Most Merciful" (Sourah Al-Nisa, Verse 129). Meaning, people, you will not be able to treat all women equally in all aspects. Even if the physical division (of time) is made for a night and a day, there will inevitably be differences in love, desire, and intimacy, as explained by Ibn Abbas, Ubaydah As-Salmani, Mujahid, Al-Hasan Al-Basri, Ad-Dahhak, and Ibn Muzahim (Al-Mobarkafouri, 1420 AH - 1999 AD, p. 329).

4.2 - From the Prophet's Sunnah (traditions):

It is narrated from Al-Harith ibn Qais that he embraced Islam while having eight wives. He mentioned this to the Prophet Muhammad (peace be upon him), who advised him, 'Choose four of them' (Abu Dawood Al-Sajestani, 2009, p. Part 1 Ed. 1 Page 556) .

It is narrated from Abdullah bin Umar, may Allah be pleased with them both, that Ghailan bin Salamah Al-Thaqafi embraced Islam, and he had ten wives who also embraced Islam with him. The Prophet, peace be upon him, commanded him 'to choose four of them (Sonan Ibn Maja Al-Joz' Al-Awal Kitab Al-Nikah - Bab Fadl Al-Insaf - Hadeeth Raqam 1841).

4 .3- Unanimites:

There has been a consensus within the Muslim community without any dispute since the revelation of the Quran until our present time, that Islamic Sharia permits polygamy. Understanding the wisdom behind this is essential when considering that this Sharia is comprehensive, applicable to all nations, and spans different eras. The legislation of such laws must provide solutions for every existing or anticipated situation (Abu Zahra, 1369 AH-1950 AD, pp. 187-188).

The practice of polygamy is recognized by Islam and some earlier religions. Several prophets and messengers of Allah, including Ibrahim, Ya'qub, Dawud, and Sulaiman, married more than one wife. The last of them was our Prophet Muhammad, peace and blessings be upon them all. Islam came while people were allowed to practice polygamy without specific restrictions or limits. However, unrestricted polygamy can lead to imbalance, injustice, and imbalance in family and societal structures. Therefore, Allah in the Quran allowed polygamy as a principle due to reasons prevalent in various societies but placed three conditions to prevent harm and injustice, ensuring stability in both family and society.

Sharia has stipulated the following conditions for engaging in polygamy:

- Not exceeding the maximum limit of four wives: This is based on the meaning of the verse 'Marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only one].' (Quran 4:3) The number four is the maximum limit,

and this consensus is agreed upon by the scholars. However, some Shia factions argue that combining up to nine wives simultaneously is permissible, contending that the meaning of 'two, three, or four' is inclusive of combining two, three, and four. Most scholars reject this interpretation, emphasizing that if Allah intended nine, He would have explicitly mentioned it without using the terms 'two, three, or four'. The Quran has explicitly mentioned numerical values exceeding four in different contexts. For example, Allah says: 'When Joseph said to his father, 'O my father, indeed I have seen [in a dream] eleven stars and the sun and the moon; I saw them prostrating to me.' (Surah Yusuf - 12:4) (Sourah Yusuf, Verse 4) This indicates that the meaning of 'two, three, or four' allows people to marry two, three, or four wives (Al-Ghiryani, pp. 536-541) .

- Ensuring justice among the wives: This means providing the level of fairness that a person is capable of and able to achieve, settling matters equitably among the wives in material aspects such as financial support and good treatment. This is in accordance with the Quranic verse: 'But if you fear that you will not be just, then [marry only one] or those your right hand possesses. That is more suitable that you may not incline [to injustice]' (Sourah Al-Nisaa, Verse 3). Allah has ordered limiting oneself to one wife if a person fears injustice and the inability to treat the wives justly.

- Financial capability: It is not permissible according to Sharia to proceed with marriage, whether to one or more wives, except with the presence of the ability to afford the expenses of marriage, cover its costs, and continue fulfilling the obligatory financial support for the wife by the husband (Al-Zuhayli, 1430 AH - 2009 AD, pp. 172-173).

Islamic Sharia has allowed polygamy in a way that preserves the rights of everyone. It neither prohibited it altogether nor allowed it without regulation. Instead, it legalized and regulated it. This is not surprising for a law suitable for every time and place, and a religion to which falsehood cannot approach from before it or from behind it. Polygamy, seen by some as a remedy and preventative measure without harm, was permitted by Allah to spare society

from problems that may have no solution without this system. Islam, however, did not make polygamy an obligatory practice for every Muslim. Rather, as Al-Sabouni states, in the Quranic verse 'And you will never be able to be equal between wives, even if you should strive to do so. So do not incline completely [toward one] and leave another hanging.' (Quran 4:129), there is a warning to men about the difficulty of achieving absolute justice between wives, and as a result, Islam views monogamy as the ideal form of marriage. And it is necessary to clarify the meaning of the inability to be just as intended in this verse, according to the understanding of the scholars of jurisprudence and interpretation. They explained it as the impossibility of equal love, as stated in the verse 'So do not incline completely [toward one].' The psychological inclination refers to love, and achieving justice in matters of the heart is often impossible to control.

The Prophet Muhammad, peace and blessings be upon him, explained this concept when he expressed a greater affection for Lady Aisha due to her knowledge and intelligence. After dividing his time and resources among his wives as much as possible, he would pray, 'O Allah, this is my division in what I control, so do not hold me accountable for what You control, and I do not control.'

"Umar ibn al-Khattab, may Allah be pleased with him, also used to say: 'O Allah, as for my heart, I do not control it. As for everything else, I hope to be just.'

We do not deny that some individuals may misuse this right and act arbitrarily in its application. Nevertheless, the drawbacks of not allowing polygamy and the consequences that arise from that are more dangerous to society, families, and individuals than the drawbacks of arbitrary use of this right. This is because there are no moral constraints if the need for polygamy arises and it is prohibited, while there are legitimate constraints if a person abuses the permissible right. These constraints guide the individual towards lawful and proper behavior (Al-Sabouni, 2000, pp. 191-192).

-Conclusion:

Polygamy is a highly sensitive matter and regulating it in the law is a challenging task. This has led the Algerian legislator to exert efforts in formulating Article 8 of the Algerian Family Law to find a balanced formula that aligns with prevailing customs and complies with Arab laws without deviating from the provisions of Islamic Sharia.

The following results can be reached:

- Polygamy is an ancient phenomenon in societies in general, and in Algerian society in particular.
- Islam came and regulated polygamy to safeguard the rights of all.
- Islam allowed polygamy and restricted it with conditions to safeguard the rights of all family members.
- Only a few Arab laws have abolished polygamy (Tunisian law), while most have allowed polygamy either with general Islamic conditions or with Islamic conditions plus the judge's permission.
- The Algerian legislator aligns with Arab laws in permitting polygamy.
- The narrowing occurring in Article 8 (Conditions) was an attempt by the Algerian legislator to position itself centrally between Islamic Sharia, Arab positivist laws, and international agreements.
- Some argue that the conditions specified in Article 8 were introduced to safeguard women's rights, although this can only be achieved in accordance with Islamic Sharia.
- Requiring a judge's permission in cases of polygamy in Algerian family law prevented or reduced manipulation of polygamous relationships, thereby closing the door on those who manipulate and those unable to bear the responsibility.
- The Algerian legislator stipulated conditions for engaging in polygamy but did not criminalize the polygamist or prescribe any punishment for them, unlike what we observe in the case of the Tunisian legislator, for example.

- The Algerian legislator established controls on polygamy to reduce its prevalence, but this proved unsuccessful. Due to the lack of correlation between the religious contract (allowing for multiple marriages) and the civil contract (which exists for documentation and safeguarding rights), polygamy spread through the religious contract (considered valid) without the civil contract, known as customary marriage. This is encouraged by the provisions of Article 22 of the Algerian Family Law.

In Article 8 of the Algerian Family Law, the Algerian legislator drew on various sources. They concurred with permitting customary polygamy prevalent in the country, as well as adhering to both Arab and Islamic laws. By specifying the allowed number, they aligned with Islamic Sharia. It is noteworthy in the details of the article that the Algerian legislator closely approached what the Moroccan legislator outlined, despite the latter providing more detailed provisions. It is hoped that the Algerian legislator will follow suit in elaborating on these matters. The tightening of polygamy regulations aligns with the context of what is stipulated in international agreements (CEDAW).

We can also propose the following recommendations:

- Avoid, in legislation in general, and particularly in family law, relying on international treaties, as it may cause confusion among individuals in a Muslim society closely connected to their religion.
- Amend the articles of the Algerian Family Law, especially Article 8, in accordance with Islamic Sharia, as Sharia does not accept differentiation. Selectively incorporating certain aspects while neglecting others leads to inconsistencies in judgments. Relying on the provisions of Islamic Sharia closes the door to criticisms and gains acceptance among the majority due to the sanctity of Islamic Sharia in the Algerian society.
- Establishing marriage contract registries overseen by religious figures would enable the simultaneous execution of both religious and civil contracts (like what is present in Egypt).

- Provide detailed specifications in the legislation of legal articles, including explicit mention of all expectations. This helps clarify ambiguities, avoid excessive interpretations, and prepares for contingencies.
- Minimize the discretionary authority of judges and provide explicit clarification of issues, especially in personal matters.
- Attempt to issue an explanatory memorandum by the Algerian legislator to clarify the sources of legislative texts for family law provisions, thereby removing ambiguity, like what the Tunisian legislator has done.

References

- 1) Abu Dawood Al-Sajestani, S. I.-A. (2009). Sonan Abi Dawood. Beirut: Dar Al-Alameya.
- 2) Abu Zahra, M. (1369 AH-1950 AD). Al-Ahwal Al-Shakhseya. Egypt: Dar Al-Fikr Al-Arabi.
- 3) Ahmad Al-Zawi, A.-T. (n.d.). Mokhtar Al-Qamos. Libya/Tunisia: Al-Dar Al-Arabiya Lelketab.
- 4) Al-Dawliah, M. A.-Q. (2018, 11 26). <https://www.droitentreprise.com/>. Retrieved from Majallat Al-Qanoun Wal Amaal Al-Dawliah.
- 5) Al-Ghiryani, A.-S. A.-R. (n.d.). Modawanat Al-Fiqh Al-Maliki Wa Adellatoh. Al-Rayyan Foundation.
- 6) Ali AlKabeer, A. .. (1984). Lisan Al-Arab. Cairo: Daar Al-Maaref.
- 7) Ali, A. S. (2010). Mohadarat Fi Alnazariya Al-amma Lil-qawaneen Wa Tatbeqatiha Fi Al-Qawaneen Aljazairiya. Chlef/Algeria: Hassiba Ben Bou Ali University.
- 8) Al-Ibani, M. Z. (1427 AH - 2006 AD). Sharh Al-Ahkam Al-Sharia Fi Al-Ahwal Al-Shakhsiya Li Mohammad Qadri Basha. Egypt: Dar Al Salam Printing and Publishing.
- 9) Al-jazairi, Q. A.-O. (Article 8). Law No. 84/11 dated 09/06/1984, which includes the Family Law, amended and supplemented by Decree No. 05-02 dated 27/02/2005.
- 10) Al-jazairi, Q. A.-O. (n.d.). Law No. 84/11 dated 09/06/1984, which encompasses the Family Law, amended and supplemented by Decree No. 05-02 dated 27/02/2005, Article 8 reiterated - 8 reiterated 1.
- 11) Al-Khouli, S. (1983). Al-Osra Wa Al-Hayat Al-Aliya. Egypt: Dar Al-Marifa publishing.

- 12) Al-Mobarkafouri, S. A.-R. (1420 AH - 1999 AD). Al-Misbah Al-Moneer Fi Tahtheeb Tafseer Ibn Katheer. Riyadh: Dar Al Salam for Publishing and Distribution.
- 13) Al-Olwani, Z. (1434 AH - 2013 AD). Al-Osra Fi Maqased Al-Sharia - Qadaya Al-zawaj Wa Al-Talaq Fi America. Virginia: International Institute of Islamic Thought.
- 14) Al-Qanoun 3/70 Bemathabat Modawanat Al-Osra Al-Maghribiya Al-Sader Fi 2004. (Articles 40-41-42-43-44-45-46).
- 15) Al-Rifai, A. M. (2007). Madkhal Lil-Oloom Al-Qanoniya. Banha: Banha University.
- 16) Al-Sabouni, A. A.-R. (2000). Ahkam Al-Zawaj Fi Al-Fiqh Al-Islami. Dubai United Arab Emirates: Dar Al-Qalam.
- 17) Al-Zuhayli, W. (1430 AH - 2009 AD). Al-Fiqh Al-Islami Wa Adellatoh. Damascus: Daar Al-Fikr.
- 18) andre chapelle. (1979). les fontions de l'orde public en droit international. paris.
- 19) Badreya, A. (1987). Markaz Al-Maraa Fi Qawaneen Al-Ahwal Al-Shakhseya. Algerian Journal of Legal, Economic and Political Sciences, pp. 460-487.
- 20) belhaj, A.-A. (2010). Al-Wajeez Fi Sharh Qanoun Al-Orsa Al-jazairi. Algeria: Office of University Publications.
- 21) Ben Hadia, A. B.-B., & Yahi, J. B.-H. (1984). Al-Qamoos Al-Jadeed Li Attollab. Algeria / Tunisia: Algerian National Company for Books / Tunisian Distribution Company.
- 22) Bin Hadia, A. B. (1984). AlQamoos Aljadeed Li Attolab. Algeria/Tunisia: Alsharika Alwataniya Aljazairiya Lil-kitab / Alsharika Altunisya li-Tawzi'.
- 23) Bleidi, S. (2018, 05 20). alarab.co.uk.
- 24) cedaw. (2013). Watheeqaat Al-Qadaa Ala Jamee' Ashkal Al-Tamyeez Ded Al-Maraa. United Nations.
- 25) Ibn Manzur, I. M.-e. (n.d.). Lisan Al-Arab (Vol. 1). Beirut: Dar Lisan Al-Arab.
- 26) Madda 42. (Qanoun Huquq Al-a'la Al-Othmani). Qanoun Huquq Al-a'la Al-Othmani.
- 27) Majallat Al-Ahwal Al-Shakhsiya Al-Tunisiya. (Chapter 18).
- 28) Mijrab.Yassin M., Z. (2017, 11 02). echoroukonline.com. Retrieved from Al-Shorouk.
- 29) Qanoun Al-Ahwal Al-Shakhseya Al-Iraqi 188 li-am 1959. (Article 3).
- 30) Qanoun Al-Ahwal Al-Shakhseya Al-Kuaiti. (Article 21).
- 31) Qanoun Al-Ahwal Al-Shakhsiya Al-Misri. (Article 11 repeated).
- 32) Qanoun Al-Ahwal Al-Shakhsiya Al-Ordoni raqm 15 Li Sanat 2019. (Article 13).

- 33) Qanoun Al-Ahwal Al-Shakhsiya Lil-Jomhoriya Al-Arabiya Al-Souriya 59/1953 Al-Sader Fi 07/09/1953. (Article 17).
- 34) Qanoun Al-Osra Al-Jazairi. (Article 8). Qanoun Raqam 11/84 Al-Moarrakh Fi 09/06/1984.
- 35) Saqer, A. (2006). Mawsoat Alosra Tahta Riyat Al-Islam - Marahel Takween Al-Orsa. Cairo: Wahba Bookshop.
- 36) Sonan Ibn Maja Al-Joz' Al-Awal Kitab Al-Nikah - Bab Fadl Al-Insaf - Hadeeth Raqam 1841. (n.d.).
- 37) Sourah Al-Nisa. (Verse 129).
- 38) Sourah Al-Nisaa. (Verse 3).
- 39) Sourah Yusuf. (Verse 4).
- 40) Wafi, A. A.-W. (1367 AH-1948 AD). Al-Osra wa Al-Mojtama. Egypt: House of Arab Book Revival.