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Definition of a marriage contract

Marriage contract is a **matrimonial relation** and **institution** that legalized or legislate **intercourse relation** (the sexual activities between a male and female), until they shall become one flesh, for the object of **procreation of kids**, promotion of love, mutual support, and creation of families. So, the marriage according to this concept takes two individuals and creates a new single entity.

This is in fact, the true and literal meaning of the word “**Nikhah**” as an Arabic sense which is literally translates to: “The marriage among (between) the different sexe, and has **the connotation** (significance, indication, implication) of a civil contract that shall seek **to legitimize** (give legitimacy, legalize) the relationship and **maintain** (remain, keep, preserve) order in society.

In addition to empowering women, it becomes the husband's duty to respect his wife with a ‘**Mahr**’ (dower), as a symbolic and **mandatory** (obligatory, compulsory, binding) payment proving due respect (due regard) to the woman.

The marriage should be based on **sound foundations** (sound bases) and is **intended to** (aims to) create a family, not based on **mere interest**, or civil act. It is a **religious duty**. Everyone must marry in order to fulfil one's desire for **the legal protection of families**.

Marriage In Algerian society and the rest of Islamic societies is based on Islamic “shari’a” **background**. its most (majority) family legal provisions have been derived (contrived, inferred) from various **codified** and **uncodified** Islamic shari’a sources. The Quran; the Prophetic Sunnah; Islamic jurists’ consensus “Ijma’a”; analogy (identification) Qiyas; custom “Urf”; precedents; equity; and various legislation which **are not contrary** (are not in violation) to Sharia.

In the same vein, there are four major **Sunni schools of thought**: Hanifa, Hambali, Maliki, and Shafi. These four schools **recognize** (acknowledge, admit,

confess) **one another's validity**, and they have **interacted** (reacted, combined) in legal **debate** (discussion, dispute, Islamic jurist wrangling) over the centuries.

we need to know that the marriages among (between) Muslims, are not just **wedding ceremonies**, but formal contracts known as “Nikah” as we mentioned above. These contracts **consist** of an **offer** and **acceptance** commonly (usually) referred to as “Ijab” and “Qabul” by **both spouses** or **their guardians willingly**. Similar to any contractual relationship, **mutual consent** (agreement, approval) is also critical in (crucial importance in) marriage. Mahr (dower) is a sum of money that **the groom** (bridgroom) has to pay to **"the bride"**, helping to express respect and hope on the groom's side. Even though the Nikah may be conducted (made) in secret, **witnesses** are mandatory, usually two Muslims males.

The **polygamy** (polygamous) system, furthermore(moreover), permits a man **to have up** (have as many as) to four wives, but only on the condition that he can maintains for all of them.

The Algerian family legislator through Article 2 of the Family Law (code) treats (considers) that the family is the basic unit of society and is based on the union of a couple who are related by marriage, which constitute sufficiently close family connections to make them **eligible (competent, capable)** for **family reunification** (family reunion).

It also defines marriage in the article 4 of the Family Law (code) which states that: “The marriage is a **consensual contract** concluded (accomplished) between a man and a woman in legal form (in accordance with Islamic law.).

THE MARRIAGE PURPOSE

The second paragraph in the article 4 of the Family Law (code) stipulates:

“...Among its purpose is **to found** (start, built, create) a family based on affection, kindness and mutual help; to provide moral protection for the spouses and to preserve family and **kinship ties** (link, connection).”

Marriage is one of the most significant pillars of Islam, it is based on love and mercy and **cohabitation** (coexistence between spouses). it is considered the utmost (extreme) necessity for producing a harmonious society and seeking happiness in personal life.

Marriage **addresses** (treat, deal with, handle, fix) the biological necessities, like sexual activity and forming stable relationships. these processes are considered essential for the functioning of societies for **reducing moral decay** (moral decline, moral decadence).

The marriage therefore, should not be taken **lightly**. just on a **whim** (fantasy, fancy). Allah has enjoined (imposed, decreed, mandatory) marriage for three basic reasons:

1- Enable a man and a woman to live together and experience love and happiness, within Islamic rules.

2- To produce children, and provide a stable and righteous (good, veracious...) environment for their upbringing (education, nurture, feeding...).

These two reasons are **self-explanatory**; both take into consideration (take into account) the natural urges (reason, purpose) of human beings.

3 -To provide a legal union which safeguards (protections, guarantee) society from **moral and social degradation**.

This point **looks beyond** (consider more) the individual, and establishes marriage as the most important tool for creating an ideal society.

This ideal society such as stability, development, accomplished by understanding that one of the most important moral values in Islam is **chastity** (righteousness) the purity of both individuals, and the whole society Islamic regards marriage as the means by which man's natural **urges** and **needs**, both physical and emotional, are controlled and satisfied at the same time.

Uncontrolled (absolute, unlimited) satisfaction of physical desire is simply not permitted in Islam. **Adultery** and **fornication** are grave **sins** (act of evil/wickedness).

A Muslim man has satisfied his physical desires through a legal contract of marriage, which **carries with** (hold, convey) it the **additional responsibilities, duties** and **liabilities** of family and children for the rest of his life.

1.1. The result of this **restriction** (limitation, constraint) is the creation of a society whose **morals** are **protected**. In fact, the Holy Qur'an mentions the marriage contract (nikah) by the word "**ihسان**", which means a "**fortress**". The man who contracts marriage is a "muhsin", that is he builds a **fortress**. The woman who marries him is a "muhsinah", which means that she has come into the protection of that "fort", in order to protect herself and their morals.

Marriage engagement “khitba” -Courtship; betrothal:-

The marriage contract based on what is known as: “**the prelude or propose of marriage**”. We can say that it's crucial factor in determining the **sustainability** or **dissolution** of marriage. Since it enables each spouse to get to know and understand the other better, of course, according the rules set down by Islamic Shariah with **prescribed** (specified; fixed) ethical principles.

1. Definition of “khitba” engagement :

Engagement “khitba” as an Arabic term refers literarily to **the man's asking to approach and marry with a woman**. It is commonly said: the man is engaged or betrothed to a woman.

We conclude at first, that the marriage engagement “Khitba” is such a merely man seeks and sending the proposal to lady's hand, or expressing his strong desire for establishing a legal relationship with her. This proposal is typically happened between the man wishing to marry and the woman's families or relatives. In some situation, a man can also approach to the woman directly but keeping the limits of modesty (shyness; timidity; decency). The man request might be accepted or rejected. hence, if admissible it does not legally bind the two parties in a commitment.

Secondly, we can say that the engagement “Khitba” refers to the promise from a man with the intention for marrying a certain woman, where it implies (mean) mutual promises and agreements between the future spouses.

The Engagement also indicates a commitment and agreement to marry at a future time. which just makes it such a merely preliminary step towards marriage and a chance for each party to know the other more, during this period, a couple is said to be fiancés (from the French), “betrothed”, “intended”,

“affianced”, “engaged to be married”, or simply “engaged”, future brides and grooms.

The Oxford Advanced Learners' Dictionary described “khitba” as an agreement to marry someone; and the period during which two people are engaged betrothal (to somebody).

Islamic jurists' “fuqaha’” consensus “Ijma’a” refers that the engagement is a promise commitment and agreement from a man or his agent for marrying a certain woman or her guardian or agent, either express or implied.

In legal terms, the Algerian family legislator had not deal with the definition of engagement, obviously, that the role of providing precise definitions or explanations of legal terms is generally deal by legal scholars and jurists, rather than lawmakers and legislators, whose primary role is to establish laws and regulations.

According to which the Algerian family law, the engagement “khitba” is a promise of marriage” Art. 5 of the Family Code.

The legal nature of engagement “khitba”:

One of the keys distinctions between **engagement** vs **marriage** is the **legal and social implications**. Despite signifying a serious intention to marry, engagement is typically regarded as a **non-binding arrangement**. Both parties retain **the autonomy** (independence, freedom) **to withdraw** from the engagement without **legal ramifications** (consequence; result; effect), **distinguishing** (distinctive; discriminatory) it from a formal marriage contract, and the commitment is more **symbolic** than **contractual**, which facilitates the development of a deeper understanding between them and **navigate** (cross;

pass) potential challenges, regarding their values, beliefs and **aspirations** (desire; hope ; longing) before entering for a future **marital relationship** which is considered as “**legally binding institution of marriage**”.

In terms of **legal obligations**, the nature of engagement is constituted as: “**a mutual promise between two couples (man and women) to marry in the future**”; this promise does not carry the same legal weight as a marriage contract is. It is an **informal commitment** to marry, but it does not create any **enforceable legal obligation** on the parties involved.

We observe that both Islamic shariah' and law **grants** (give, award, allow) a certain level of **uniqueness** (singularity) to engagement. While it does not **elevate** engagement to the status of a marriage contract that would **permit intimacy** between the engaged couple, it nonetheless holds a status above mere social customs by reducing certain **restrictions** (limitation) to fulfill the intended purpose of engagement within Sharia.

In Islamic approach, the marital engagement, although it is not legally **equivalent** to marriage, However, this does **not undermine** the importance of the engagement, as it is a serious commitment between two individuals with the intention to marry in the future. It is more than a temporary or insignificant agreement, it is still a meaningful social and personal commitment, often involving emotional and familial responsibilities.

The both Islamic jurists' and legal system emphasizes that engagement does not constitute a marriage obligation, instead, underscores the informal and non-binding nature of engagement as promise between two couples intending to marry. This jurisprudential and legal consensus highlights that engagement lacks (absence) the binding contractual elements found in marriage. This therefore,

makes engagement as a preliminary agreement that can be **dissolved** (finish, conclude, terminate) without legal consequence.

This is the approach adopted by the legislator in defining engagement as stated: **“the Engagement is a promise for marriage, from which either party may withdraw”**. This approach referenced in Article 5 ensures that the legal nature of engagement is not only socially recognized but also legally consistent with Islamic legal principles.

The Algerian **Supreme Court** emphasizes the distinct status of engagement in Islamic jurisprudence as well as in **legal interpretation**, where it stated in its decision dated 25-12-1989: **“In Islamic law, engagement is a promise to marry, not a contract. Even if both parties consent, it does not permit them to intermingle; thus, engagement is neither a contract nor a marriage and entails no legal obligations.”**

This explanation underscores the legal and religious characterization of engagement as a flexible, non-binding commitment with specific social limitations, affirming the freedom for both parties to withdraw.

Breach of engagement refers to the decision by one or both couples engaged **to desist** (refrain, abstain from, leave off) from the engagement and not **to pursue** (to strive, to follow) toward marriage. Either party is permitted to end the engagement “khitba”, if they decide that the marriage will not fulfill the **intended** (purposeful, meant) benefit or if reasons **arise** (emerge, grow) that justify the decision to withdraw.

Despite the fact that engagement is such a merely a promise for marriage, enforcing the engaged couple into marriage is **far more serious** (Considerably

more critical) and **harmful** (damaging, detrimental) than the physical and psychological harm arising from the engagement renunciation.

Therefore, if the person does not feel comfortable with Carrying the marriage forward, there is no **impediment** (obstacle, barrier) in this case to exercising the right of retraction or withdrawal, based on the fact that it is just a promise of marriage any of the two engaged couples has the right to revoke it. However, this retraction may cause certain social and financial consequences, particularly if gifts were exchanged or certain **expenses incurred** (costs caused, expenditures made, amounts spent).

The consequences of withdrawing from the engagement “khitba”:

The exercise to the right to desist from the engagement by one or both couples engaged **may Nonetheless** (may still), lead to various legal and religious consequences, regardless of whether this right is exercised **appropriately** (adequately, accordingly, correctly, suitably) or not. This will be addressed in detail in the second section.

3.5.3.1 The dower fate in cases of engagement breaking:

In Islamic “sharia’a”, the dowry “mahr” is considered to be essential for the marriage contract, it is actually, **an amount** (quantity, sum, total, dozens) of money given by the groom to the bride symbolizing a formal commitment to the marital relationship.

The Islamic jurists’ consensus that the wife **entitled** (authorized, eligible) the dower (mahr) over her husband under the marriage contract. Consequently, if the engagement is cancelled the groom is entitled **to recover** (to take back) the dowry paid to his bride. If the dowry has been consumed or destroyed, he is

entitled whether its equivalent in value if it is fungible (exchangeable, replaceable, convertible), or its **assessed** (evaluated) value if it is a non-fungible (rigid) item (article, object).

By **extrapolating** (concluding, generalize, making an educated guess) the Algerian legislator, we notice that it has chosen overlooked (neglected, ignored, passed over) addressing **the fate** (destiny) of the dowry given to the fiancée "In the case of the engagement withdrawal". Thus, the legislative omission (oversight, skip) leaves a legal vacuum (legal gap, loophole, legislative void, lawlessness) considering the fate of the dowry given to the fiancée in the case of the engagement withdrawal, which may potentially lead to contradictory judicial decisions.

Nevertheless, it can be **inferred** (implied, presumed, concluded) the dowry fate in case of the engagement withdrawal from the Article 9 bis of the Family Code, which stipulates that the dowry "Sadaq" is considered one of **the conditions** for **the validity of marriage**, and it is only rightfully claimed (correctly alleged) by the fiancée after her **conclusion of the marriage contract**. Additionally, Article 16 of the Family Code imposes that the wife is entitled to **the full dowry** upon **consummation** of the marriage, and half of it if divorce occurs before consummation.

This framework reinforces that the dowry is **contingent** (conditional) upon the **establishment** of a **valid marriage contract**, underscoring that, in the absence of such a contract, **no legal entitlement** to the dowry exists for the fiancée. These provisions emphasize **the binding nature** of the dowry only within the context of **a finalized marriage**, **aligning** (straighten (up), in position with) with the

principle that engagement alone does not establish **enforceable marital rights** or obligations.

On the other hand, through the implementation of the article 222 of the Family Code, which refers us to the Islamic law “Sharia’a” as a fundamental source of family law as we mentioned earlier.

This article allows for the application of Islamic jurisprudence to issues **not explicitly covered** by the Family Code itself. Islamic law provides further guidance on matters such as the dowry and **its handling** (treatment, management) in cases of engagement withdrawal. This approach aims to **harmonize** national law with Islamic principles, thereby filling gaps and ensuring fair and culturally sensitive solutions.

The Algerian judiciary in the Supreme Court decision dated July 13th 1993, affirmed that: “the Wife's legally required to Half of the Dowry in Case of divorce before **Consummation**”. Therefore, in case of a divorce before the marriage has been consummated (i.e., before the couple has had sexual relations), the wife is entitled to half of the dowry. This law recognizes the financial aspect of the dowry in the marriage contract, which is typically given by the husband to the wife. If the marriage is **dissolved** (disband, disestablish, dismiss) before consummation, the wife is still entitled to half of the dowry as compensation.

A contrario “By implication of the contravention”, the woman isn't entitled any portion of the dowry before the marriage contract.