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The Effect of the Absence of Witnessing on the Marriage Contract - A Sharia and Legal Study -

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Abstract:

The marriage contract is regarded as one of the most serious contracts and one of the most consequential in the life of the individual and society. For this reason, the Sharia has surrounded it with a set of safeguards that ensure its protection and preserve its objectives, foremost among them witnessing it. The jurists unanimously agreed as to its legitimacy, though they differed regarding its legal ruling and the extent to which it is considered a condition for the validity of the contract.

This study seeks to address a number of issues connected with witnessing in the marriage contract. Its central problem revolves around clarifying its Sharia ruling, the conditions of the witnesses, the extent to which public announcement may suffice in its place, and the Sharia and legal effects resulting from its absence before consummation and after consummation.

These issues have been addressed in two integrated chapters: the first is devoted to the conceptual framework, dealing with the definition of the marriage contract and clarifying the concept of witnessing therein; while the second chapter examines the conditions of witnessing, the rulings relating to its absence, and its effects.

Keywords: marriage, nikah, contract, witnessing, family, law…

Introduction:

Praise be to Allah, Knower of the unseen and the seen, who created and proportioned, ordained and guided, and made humankind in pairs, male and female. I bear witness that there is no god but Allah alone, without partner, and I bear witness that Muḥammad is His servant and messenger, the chosen and beloved one. May Allah's blessings and peace be upon him, his family, his Companions, and those who follow them in righteousness until the Day of Judgment, with abundant peace.

To proceed:

The marriage contract is among the noblest of contracts in rank and among the greatest in effect, for by it life is organized and the family is made upright, and scarcely any sound person free of impediments can do without it. In view of its elevated status and lofty position in Islamic Sharia, and indeed in various positive laws, including the Algerian Family Code, it has been singled out with a number of characteristics distinguishing it from other contracts, especially regarding the manner of its formation.

Among the most prominent of these characteristics is the requirement of witnessing at the time of its conclusion, which prompted me to address this subject in light of the rulings of Islamic Sharia and the Algerian Family Code.

Importance of the Study:

The importance of this study lies in its connection to an essential condition of a contract that is among the gravest of contracts and the most far-reaching in human life. Its importance is further manifested in the scholarly contribution it may offer toward clarifying the issues raised by certain amendments affecting the pillars and conditions of the marriage contract in the Algerian Code on Family, together with the hoped-for benefit from its findings and from the proposals and recommendations to which it leads.

The Research Problematic:

In pursuit of the objectives of this study, the following problem is raised:

What is the true nature of witnessing in the marriage contract in both Islamic jurisprudence and the Algerian Family Code? What is its Sharia and legal ruling? What is the effect of its absence, and what is the position of Islamic Sharia and the Algerian Family Code on this matter?

Objectives of the Study:

This study aims to achieve the following:

1. To contribute to the preparation of a sound academic study from which benefit may be drawn both theoretically and practically.
2. To clarify the ruling on stipulating witnessing in the marriage contract and remove the ambiguity surrounding it.
3. To propose suitable solutions to certain issues contained in the Code on Family.

Methodology of the Study:

In order to achieve the intended objectives, a number of scientific methods required by the nature of the subject were employed. The inductive method was used through tracing the views of the jurists and surveying the relevant Sharia and legal texts. The comparative method was also adopted by first presenting the Sharia foundations and then clarifying the legal position as the one applied before the Algerian courts, in order to show the extent of its conformity with or divergence from the rulings of Sharia, while sometimes leaving the aspect of agreement or disagreement apparent due to its clarity.

Plan of the Study:

To realize the aim sought by this study, the research has been divided into an introduction, two chapters, and a conclusion.

As for the introduction, it sets out the subject of the study, its importance, its problem, and its methodology.

The first chapter is devoted to the conceptual framework, in which the most important terms related to the subject are presented, foremost among them the marriage contract and witnessing thereof.

The second chapter addresses the conditions of witnessing the marriage contract, the ruling on its absence, and its effects.

The study concludes with a conclusion containing the principal findings, supported by a number of proposals and recommendations.

1. Conceptual Framework

1.1 The Marriage Contract

The purpose of clarifying the terms of the study is to define them precisely in order to remove ambiguity when establishing rulings. Accordingly, this section addresses the marriage contract and witnessing the marriage contract.

1.1.1 Definition of the Marriage Contract Linguistically

The term *ʿaqd al-zawāj* (marriage contract) is a genitive compound whose understanding depends on understanding its two components. Therefore, it is necessary to define each word separately and then define it as a compound that has acquired a specific meaning when used absolutely.

First: Definition of *ʿAqd* (Contract) Linguistically

In the Arabic language, *ʿaqd* is used to mean several things, the most important of which are the following (Ali ibn Ismail ibn Sidah, 1996, p.22; Ali ibn Ismail ibn Sidah, 2000, p.166; Ismail al-Jawhari al-Farabi, 1987, p.510):

- firmness and solidity;
- accumulation and gathering;
- tying and fastening;
- conclusiveness and firmness;
- covenant;
- obligation and bindingness.

All of these meanings return to one underlying notion indicating: "tightening and strength of firmness" (Aḥmed ibn Fares, 1986, p.86), as Ibn Fares - may Allah have mercy on him - stated.

Second: Definition of *Marriage* Linguistically

Marriage and *nikāḥ* are terms that have one meaning in technical usage. However, the jurists of Islamic Sharia more frequently use the term *nikāḥ*, whereas commentators on personal status laws use the term *marriage*. This is despite the fact that both terms appear in the Noble Qur'an. Therefore, I shall define both *nikāḥ* and *marriage* linguistically, and then mention their technical meaning.

a. Marriage (*zawāj*) in language:

Means pairing. As for *zawj* (spouse/pair), it means (Ismail al-Jawhari al-Farabi, p.320; Ibn Durayd Moḥammed ibn al-Ḥassan, 1987, p.473; Moḥammed ibn Aḥmad al-Azhari, 1964, p.42; Aḥmed ibn Faress al-Razi, p.35; Ali ibn Ismail ibn Sidah, p.526; al-Jawhari, p.320): husband, counterpart, category, kind, companion, likeness, pattern, and the brocade placed on an animal.

All of these expressions are united by one meaning: the pairing of one thing with another, because "the letters "Z", "W", and "J" in Arabic form a root indicating the conjunction of one thing with another" (Aḥmed Ibn Fares, p.35; Aḥmed al-Fayoumi al-Ḥamaoui, p.642; Ibn Faress, p.844; Djameleddine Ibn Manẓour al-Ansari, 1414 AH, p. 626; Muḥammad ibn Yaʿqūb al-Fayrūzābādī, 2005, p. 844).

b. Nikāḥ in language:

Means (Aḥmed al-Fayoumi al-Ḥamaoui, p.642; Ibn Fares, p.844; Djemeleddine Ibn Manẓour al-Ansari, 1994, p.626; Moḥammed ibn Yakoub al-Fayrouzabadi, 2005, p.246; Ibn Faress, p.844): intermixing, interpenetration, joining, combining, reliance, predominance, sexual intercourse, and cohabitation. *Al-nakḥ* with fatḥah means sexual intercourse; *nikāḥ* may denote the contract without intercourse — one says *nakaḥtu* meaning "I married" — and it is also used to denote intercourse.

1.1.2 Definition of the Marriage Contract Technically

It has already been explained that *marriage* and *nikāḥ* are used technically to denote one meaning. Accordingly, marriage — as synonymous with *nikāḥ* — will first be defined in Islamic jurisprudence, and then in the Algerian Family Code.

First: Definition of the Marriage Contract in Islamic Jurisprudence

I shall limit myself to mentioning one definition from each of the four well-known schools of jurisprudence, and then select a comprehensive and exclusive definition:

a. According to the Hanafis: Ibn al-Humoum defined it as: "a contract instituted for the purpose of owning enjoyment of the female" (Kameleddine Ibn al-Humoum, p.186).

b. According to the Malikis: Ibn Arafa defined it as: "a contract concerning merely the enjoyment of pleasure with a human female, not entailing compensation for her value upon prior proof, and not with knowledge on the part of the contracting party of her prohibition if prohibited by the Book according to the well-known view, or by consensus according to the other view" (Moḥammed Ibn Arafa al-Tounissi, 2014, p.187).

c. According to the Shafiis: Aḥmed Salama al-Kalyoubi said: "A contract entailing the permissibility of intercourse by the words *inkāḥ* or *make marriage*; it is ownership of usufruct, not ownership of utility" (Aḥmed al-Kalyoubi et al., 1995, p.207).

d. According to the Hanbalis: Manour ibn Younes al-Bahouti stated: "A contract in which the words *inkāḥ* or *get married* are considered in general, and whose subject matter is the benefit of sexual enjoyment" (Manour al-Bahouti & Manour ibn Younes al-Bahouti al-Ḥanbali, 2004, p.319).

Upon reflection on these definitions, it becomes clear that most of them focused on marriage as a contract yielding the permissibility of enjoyment and intercourse, in a manner that may suggest that enjoyment is its sole intended purpose. This, however, is open to criticism, for this contract has other objectives no less important, and indeed they may be more elevated (Moḥammed Abou Zahra, 1957, p.16).

To overcome the problems that may arise from those definitions, Abdelouahab Khallef defined it by adding important qualifications, saying: "***A contract that renders lawful the enjoyment of each spouse by the other in the lawful manner, and establishes for each of them rights against the other and obligations upon him or her***" (Abdelouahab Khallef, 1938, p.13).

Second: Definition of Marriage in the Algerian Code of Family

The Algerian Code on Family defines marriage in Article 4 as follows: "Marriage is a consensual contract concluded between a man and a woman in the Sharia-prescribed manner; among its objectives are the formation of a family founded upon affection, mercy, cooperation,

the safeguarding of the spouses' chastity, and the preservation of lineage"[1] (Article 4, Ordinance N°.05-02, 2005).

It is apparent from this article that the Algerian law, in its latest 2005 amendment, added an important qualification to the marriage contract, namely consent, whereas in the old 1984 law it had been defined as "a contract concluded between a man and a woman in the Sharia-prescribed manner...".

Thus, it made marriage a consensual contract formed between a man and a woman, thereby affirming the negation of coercion. It also restricted it by requiring that it be in the Sharia-prescribed form, in order to exclude every unlawful relationship, even if based on mutual consent, such as zina, and likewise to exclude marriage to those permanently or temporarily prohibited.

1.2 Witnessing in the Marriage Contract

In this section, witnessing — as derived from testimony — is defined by first explaining its linguistic meaning, then its technical meaning according to the jurists of Islamic Sharia, and secondly according to legal jurists.

1.2.1 Definition of Witnessing Linguistically

In language, ishhād (witnessing) is derived from shahadah (testimony), and it has multiple meanings which, in sum, refer to: presence, knowledge, and notification. Ibn Fares stated: "The letters "CH", "H", and "D" form a root indicating presence, knowledge, and notification; none of its derivatives depart from what we have mentioned... and al-mashhad is the gathering place of people."

Among the meanings of witness in language also is: definitive reporting of what has been known or witnessed in order to manifest the truth. It also carries the meaning of presence and direct observation, and of oath, as in His Allah's saying: "Then the testimony of one of them shall be four testimonies [sworn] by Allah" [al-Nour: 6].

1.2.2 Definition of Witnessing Technically

Since this study is comparative in nature between Sharia and law, it is necessary to define witnessing — or testimony — technically according to the jurists of Islamic Sharia first, and then explain its concept in the Algerian Code on Family if present, or according to legal jurists.

First: Definition of Witnessing According to the Jurists of Islamic Sharia

The jurists of Islamic Sharia differed in defining testimony due to their disagreement over certain rulings connected with it. Accordingly, I shall mention one definition from each of the four schools of jurisprudence, and then attempt to prefer the definition most suitable to the context.

a. **Hanafis:** Kameleddine Ibn al-Humoum defined it as: "truthful reporting to establish a right by using the term testimony in a judicial session".

1- Article Four: Amended by Order N°.05-02 dated February 27th, 2005 (Official Gazette: 19); drafted in accordance with Law N°.84-11 dated June 9th, 1984 as follows: *Marriage is a contract between a man and a woman in accordance with Sharia, aimed at establishing a family based on affection, mercy, cooperation, the chastity of the spouses, and the preservation of lineage*.

b. Malikis: Ibn Arafa defined it as: "a statement such that the judge is obliged, upon hearing it, to rule according to its implication if its speaker is upright together with plurality, or if its claimant swears an oath".

c. Shafiis: Aḥmed Salama al-Kalyoubi said: "A report of a right belonging to another against another by the wording 'I testify'".

d. Hanbalis: Mansour ibn Younes al-Bouhouti defined it by saying: "It is reporting what one knows by the wording: 'I testify' or 'I have testified.'"

Upon reflection on these definitions, it becomes clear that they converge on a number of essential elements from which a comprehensive definition of testimony may be formulated.

Thus, I say: testimony is truthful reporting of a right belonging to another against another in a judicial session by the wording "I testify," such that it obliges the judge to rule in accordance with it.

Second: Definition of Witnessing in the Algerian Code on Family

No definition of witnessing or testimony appears in the Algerian Cod on Family, nor in the Civil Code, nor in the Code of Civil and Administrative Procedure. Likewise, the Egyptian and Syrian laws are devoid of such a definition, because the task of the law is to state rulings, conditions, and pillars, not to expound definitions and legal boundaries, except exceptionally when ambiguity exists concerning a particular term.

Accordingly, I shall present some definitions from legal jurists and commentators, limiting myself to only two for the sake of brevity and by way of indication of others.

Among those who defined witnessing — or testimony — from among legal commentators are:

1. **Djamil al-Charkaoui**, who said: "Statements made before the court after taking an oath" (Djamil, 1959, p.101).
2. **Abdelmounim Faradj**, who said: "A person's report in a judicial session of an event issued by another from which a right accrues to a third party" (Faradj, p.228).

It may be observed regarding these two definitions that they generally accord with the definitions of the Sharia jurists, with only slight differences, namely the requirement of an oath and the omission of the term of testimony.

It may also be noted that the subject matter of witnessing according to the jurists of Islamic Sharia is a right, whereas its subject matter according to legal scholars is an event.

The connection between the linguistic and technical meanings — whether among the jurists of Sharia or legal jurists — appears close. Witnessing is derived from testimony, which itself is derived from observation in the sense of direct perception, and from presence in the sense of attendance; for the witness is only called a witness because of his presence at the event at the time of bearing testimony, and then his presence to render it when dispute arises before the judiciary.

Hence, witnessing in technical usage does not depart from this linguistic origin, for it means bringing one who establishes the event and testifies to it in order to document it and preserve its legal effects.

2. Rulings Relating to Witnessing in the Marriage Contract

2.1 The Ruling on Witnessing the Marriage Contract and the Wisdom Behind It

In this section, I examine the ruling on witnessing the marriage contract according to the jurists of Sharia and the Algerian Family Code, and then mention some of the wisdoms behind its legislation.

2.1.1 The Ruling on Witnessing the Marriage Contract in Sharia and Law

First: The Ruling on Witnessing the Marriage Contract in Islamic Jurisprudence

Ibn Rochd said: "Abou Ḥanifa, al-Shafii, and Malek agreed that testimony is a condition in marriage, but they differed as to whether it is a condition of completion, to be required at consummation, or a condition of validity, to be required at the time of the contract. They also agreed that secret marriage is impermissible" (Ibn Rochd, 2004, p.44)

Three schools agreed that witnessing is a condition for the validity of the marriage contract, such that it is invalid without it, based on the Prophet's statement: "There is no marriage except with a guardian and two upright witnesses" (Al-Bouaihiki, No.7557).

However, the Malikis held that it is recommended at the time of the contract and required at consummation; if witnessing is present before consummation, the marriage is valid.

Based on the foregoing, the majority of jurists — except the Malikis — maintain that testimony is a condition for the validity of the contract at the moment of its formation, such that the witnesses hear the offer and acceptance. If the contract lacks this, it is defective, based on the Prophet's statement: "There is no marriage except with a guardian and two upright witnesses," and because it is a condition accompanying one of its pillars.

The Malikis, by contrast, hold that witnessing is a condition for the validity of marriage, but they do not require it to coincide with the contract. Rather, it is sufficient that it occurs before consummation, while it remains recommended to perform it at the time of the contract. If no witnessing exists up to the time of consummation, the contract is defective, and consummation is a sinful act necessitating dissolution. Thus, according to them, it is a condition for the permissibility of consummation, not for the very formation of the contract; and herein lies the point of disagreement between them and the majority.

The gist of the matter is that the disagreement between the majority and the Malikis does not concern the original requirement of witnessing, but rather the timing of its realization: according to the majority, it is a condition of validity concurrent with the contract, while according to the Malikis it is a condition for the permissibility of consummation, although its concurrence with the contract is recommended (Ibn Rochd, p.44).

Second: The Ruling on Witnessing the Marriage Contract in the Algerian Code on Family

In its original formulation, the Algerian Family Code considered the presence of two witnesses to be one of the pillars of the marriage contract, pursuant to Article 9 thereof (Law N°.84–11, 1984, Article 9).

However, this characterization was changed by the 2005 amendment, whereby Article 9 bis (Ordinance N°.05–02, 2005, Article 9 bis) provided that witnessing is a condition of validity rather than a pillar of the contract, thereby conforming to the view of the majority of jurists.

As for the timing of witnessing, the law adopted the view of the majority requiring it at the time of concluding the contract, with the two witnesses hearing the offer and acceptance,

thereby differing from the well-known Mālikī position that regards it as a condition for the permissibility of consummation rather than for the very formation of the contract.

The law also did not require public proclamation or announcement, being satisfied with formal witnessing in accordance with the prescribed legal procedures.

2.1.2 The Wisdom Behind Witnessing the Marriage Contract

Through examining the jurists' reasoning when discussing the requirement of witnessing in the marriage contract, a number of wisdoms and objectives may be extracted, among which the following may be mentioned: (Al-Baghdadi, p.746)

- ***Demonstrating the seriousness and importance of the marriage contract***, for witnessing is only required in contracts of great significance due to the grave Sharia and social consequences attached to them.
- *Bringing it out of secrecy* by making it known among people, in order to avert suspicion and doubt, especially in the absence or death of the husband and the appearance of pregnancy, thereby protecting honor and preserving lineage.
- ***Distinguishing the lawful from the unlawful***; for in marriage, what indicates manifestation and announcement has been legislated, unlike fornication, which is predominantly marked by concealment and secrecy.
- ***Documenting it and preserving its legal effects***; by witnessing, marriages are protected against denial and repudiation, lineage is established, and the rights and obligations arising therefrom are safeguarded, thereby fulfilling the objective of preserving progeny and property together.

2.2 Conditions of Witnessing the Marriage Contract and the Ruling on Its Absence

This section, in its first branch, addresses the conditions that must be fulfilled for witnessing to be legally recognized in Sharia; the second branch examines the effects resulting from the absence of valid witnessing from the contract and clarifies the rulings arising therefrom.

2.2.1 Conditions of Witnessing the Marriage Contract in Sharia and Law

Since witnessing is a condition for the validity of the marriage contract, it is not recognized in Sharia or in law unless it fulfils its prescribed conditions and occurs in the legally accepted form.

This branch is therefore devoted to clarifying the most important of these conditions, beginning with the Sharia standards as established by the jurists, and then the legal conditions.

First: Conditions of Witnessing the Marriage Contract According to the Jurists of Islamic Sharia

The generality of jurists agreed on the necessity of certain conditions in the two marriage witnesses, while differing regarding others, as follows:

a- Agreed-Upon Conditions

- Islam:

It is required that the two witnesses to the marriage contract be Muslims; thus, the marriage of Muslims is not validly concluded upon the testimony of a non-Muslim. Al-Kessani reported consensus on this, saying: "The originn of testimony and the Islam of the witness became a condition in the marriage of two Muslim spouses by consensus" (Al-Kessani, 1911, p.398).

The basis of this consensus is God's saying: {And Allah will never grant the disbelievers a way over the believers} [al-Nisssa: 141]. The manner of reasoning is that testimony is a type of authority and establishment, and it contains an element of control inasmuch as Sharia effects result from it. Allah almighty has negated that disbeliever should have a way over believers. This indicates the non-acceptance of the testimony of a non-Muslim over the marriage of Muslims, and consequently their contract cannot be proved by it (Al-Ini, 2000, p.609).

- Legal Capacity (*taklīf*):

The testimony of a minor or an insane person is invalid, due to the absence of the basis of legal responsibility in them, namely reason and puberty; for there is no legal responsibility where either is absent. The evidence for this is the Prophet's statement:

"The pen has been lifted from three: from the insane person until he regains sanity, and from the child until he reaches puberty..." (Abu Daoud, 4/139–140, N°.4398; Al-Tirmidhi, 2/438, No.1446).

In this regard, Ibn Koudam al-Makdissi said: "It is not validly concluded on the testimony of two boys, because they are not from among those competent to testify (...), nor is it concluded on the testimony of two insane persons, nor anyone else whose testimony is not accepted; for his existence is like his non-existence" (Al-Makdissi, 1997, p.350).

- Number:

It is required that the witnesses be two or more, based on the Prophet's statement: "There is no marriage except with a guardian and two upright witnesses," which is explicit in requiring plurality.

According to the Malikis, public announcement suffices, and this implies a number sufficient to spread the news publicly.

02- Disputed Conditions

I shall limit myself to the most prominent conditions established by jurists, old and modern, and which remain relied upon in most contemporary legislation, foremost among them the Algerian Family Code.

- Uprightness (*adalah*):

The jurists agreed that uprightness of the two witnesses is required, and that marriage is valid with the testimony of two upright witnesses. They differed regarding the testimony of a transgressor (*fassek*): Malek and Abou Ḥanifa held that marriage is valid with such testimony (Ben Hbira, 2002, p.128), whereas al-Shfii — and this is also the view of al-Awzai, Soufiane, Aḥmed, and a group of the early generations — required that the two witnesses be upright, such that the contract is not valid without this (Al-Baghdadi, 2009, p.299).

- Freedom:

The majority of jurists required freedom in the marriage witnesses; thus, the testimony of a slave is invalid according to al-Shafii and Aḥmed. Abou Ḥanifa, however, disagreed and permitted his witnessing, validating the contract thereby (Ben Hbira, p.128).

- Masculinity:

The Malikis, Shafiis, and Ḥanbalis required masculinity in the marriage witnesses, and therefore the testimony of women is not valid in marriage according to them. The Ḥanafis, however, permitted the testimony of one man and two women (Al-Kassani, p.527).

- That the two witnesses not be ascendants or descendants of either spouse:

The Shafiis deem marriage validly concluded with the testimony of the two sons of the spouses, as well as their two fathers and even their enemies.

Ḥanbalis, however, stipulate that the two witnesses be neither ascendants nor descendants of the spouses; therefore, according to them, the testimony of the father of the husband or wife, or of their sons, is invalid (Al-Makdissi, 1997, p.350).

- Soundness of the senses:

What is meant here is sound hearing, sight, and speech.

The Ḥanafis held the testimony of a mute person valid if he hears and understands.

The Shafiis required hearing and sight in the witness.

As for the Hanbalis, they required that the two witnesses be hearing and speaking persons, so that the testimony of a deaf person is invalid according to them (Zhili, p.8586).

Second: Conditions of Witnessing the Marriage Contract in the Algerian Family Code

The Algerian law did not devote independent provisions to explaining the conditions of witnesses. However, these may be inferred from some of its articles, such as Article 9 bis of the Family Code and Article 33 of the Civil Status Law. They are as follows:

- Islam:

This is not expressly stated in the Algerian Family Code. However, Article 222 thereof (Law N°.84–11, 1984, Article 222) which refers matters lacking an express text to the rulings of Islamic Sharia, requires the conclusion that Islam is a condition for witnesses; indeed, this must be adopted.

- Capacity:

This is achieved by combining the two elements of age and reason. Ordinance N°.70–20 provides in Article 33 that the witness must not be less than 21 years old: "The witnesses mentioned in civil status certificates must be at least 21 years of age, whether they are relatives or not" (Ordinance N°.70–20, 1970).

- Plurality:

One witness is not sufficient for witnessing a marriage contract; rather, the presence of two upright witnesses is required, in order to fulfil the purpose of documentation and to avert the possibility of collusion or error. Article 9 bis of the Algerian Code on Family expressly requires the presence of "two witnesses" among the conditions of the marriage contract, in conformity with what has been established by the majority of jurists regarding the requirement of plurality in testimony (Ordinance N°.05–02, 2005, Article 9).

- Masculinity:

The Algerian Code on Family does not expressly require masculinity; it merely mentions the number of witnesses. However, Algerian case law has consistently adopted the view of the majority regarding this condition, as stated in the decision of the Supreme Court dated 15 December 1988 (No. 43889), which held: "… and the testimony accepted in marriage is the testimony of two upright male witnesses; therefore, adjudicating contrary to this principle is contrary to the rulings of Islamic Sharia" (Supreme Court of Algeria, 1988, N°.4388.

- Uprightness:

The Algerian Code on Family does not expressly stipulate uprightness in the witnesses. However, Algerian case law — as appears from Decision N°.43889 mentioned above —

adopted the view of the majority in requiring it, making the testimony acceptable in marriage that of two upright witnesses.

- That the two witnesses not be the sons of the spouses:

This is inferred from Article 64 paragraph 3 of the Code of Civil and Administrative Procedure, which prohibits the testimony of ascendants and descendants; this therefore extends to the marriage contract[2] (Law Nº.08–09, 2008, Article 64).

Among the judicial applications confirming this is Decision Nº.84334 issued by the Supreme Court on 29 September 1992, which stated: "… it is legally established that relatives may be heard except for children in actions relating to matters of personal status and divorce" (Supreme Court of Algeria, 1992, Nº.84334).

2.2.2 The Effect of the Absence of Witnessing on the Marriage Contract in Sharia and Law

The absence of one of the conditions of witnessing, or its complete absence in the marriage contract, gives rise to Sharia and legal effects. This branch addresses that issue, beginning with the Sharia aspect and then the legal aspect.

First: The Effect of the Absence of Witnessing According to the Jurists of Islamic Sharia

The jurists agreed that the absence of witnessing together with a stipulation of secrecy, and the absence of a guardian in relation to the woman, leads to the invalidity of the marriage contract. Ibn Taimia said: "If he marries her without a guardian and without witnesses, and they conceal the marriage, then this is an invalid marriage by agreement of the imams" (Ibn Taimia, 1995, p.102).

Al-Naouaoui also transmitted consensus, saying: "The ummah unanimously agreed that if a contract is concluded secretly without testimony, it is not formed" (Al-Naouaoui, 1973, p.190).

As for the absence of witnessing alone from the marriage contract, the jurists differed concerning it:

The majority — among the Hanafis, Shafiis, and some Hanbalis — held that witnessing is a condition for the validity of the contract; accordingly, in its absence, the marriage is not formed and its legal effects do not arise. They relied on the ḥadith: "Those prostitutes are the ones who marry themselves without proof" (Al-Tirmidhi, Nº.3132).

The Malikis, however, distinguished between the state of the contract and that of consummation. They did not make witnessing a condition for the formation of the contract, but rather a condition for the lawfulness of consummation. Thus, the contract is invalidated upon its absence at consummation, not at formation. They relied on the ḥadith: "Publicize this marriage, hold it in the mosques, and beat the tambourines for it" (Al-Tirmidhi, Nº.1089).

Thus, the Malikis, and the Hanbalis according to one narration, hold that the presence of witnesses at the conclusion of the marriage contract is not required. Therefore, if the

2- Article 64 of Law Nº.08–09 of 18 Safar 1429 AH, corresponding to 25 February 2008, on the Code of Civil and Administrative Procedure states that *cases of nullity of non-judicial acts and procedures as to their subject matter are exhaustively limited to the following: lack of legal capacity of the parties; and lack of capacity or authority (mandate) of the representative of a natural or legal person.*

marriage contract is concluded without witnesses and then made public, it is valid (Al-Karafi, 1994, p.542; Al-Mardaoui, 1956, p.102; Al-Harani, 1981, p.41).

Among those who adopted this view was Ibn Hazm. It is also the view of Ibn Omar, al-Hassan ibn Ali, and Ibn al-Zoubair among the Companions — may Allah be pleased with them — and of Abderrahman ibn Mahdi and Abou Thawr among the jurists (Ibn Hazm, p.48; Ibn El-Moundher, 2004, p.33).

Based on the foregoing, it is clear that the jurists agreed on the prohibition and invalidity of secret marriage when it occurs, and they also unanimously recognized the requirement of witnessing in general.

Their disagreement concerns only the time at which it is required, not the original requirement itself. The majority invalidates the contract if it is concluded initially without witnessing, whereas the Malikis do not rule it invalid at the point of formation, but only at consummation if witnessing is absent.

They also differed as to whether public announcement can take the place of witnessing. The Malikis held that proclamation — such as a wedding feast and the beating of tambourines — suffices in its stead (El-Gharbani, 2002, p.573).

Second: The Effect of the Absence of Witnessing on the Marriage Contract in the Algerian Code on Family

The Algerian law regulates the effect of the absence of witnessing in amended Article 33 of the Code on Family, which provides: "If the marriage is concluded without two witnesses, a dower, or a guardian where required, it shall be dissolved before consummation and no dower shall be due; but it shall be established after consummation with the dower of equivalence" (Ordinance N°.05–02, 2005, Article 33).

Prior to the latest amendment, the matter was dealt with in Articles 32 and 33 of the same law.

The judiciary has likewise adopted a specific position on this matter. Accordingly, the effect of the absence of the element of witnessing in the marriage contract — before the amendment — may be divided into three situations: (Belaoued, 2019)

a. Case of dissolution of marriage: if the element of witnessing is absent and this is discovered before consummation, the contract is dissolved and the wife is not entitled to any dower.

b. Case of establishing the marriage despite the absence of witnessing: this is provided for in Article 33 of the Algerian Family Code. If the contract is concluded without witnesses and consummation subsequently occurs, the marriage is established with the dower of equivalence. This ruling is a particularity unique to Algerian law, departing from the majority of jurists, who do not validate marriage through consummation where witnessing is absent.

c. Case of nullity of the marriage contract: Article 33 of the Algerian Family Code provides for the nullity of the marriage contract where the condition of witnessing is absent together with the absence of another pillar (consent, guardian, or dower), whether this is discovered before consummation or after it.

The judiciary has affirmed this principle, as in the Supreme Court decision dated 08 October 1984, No. 34137, which states: "… and it is legally established in Sharia that a marriage which does not fulfil the pillars prescribed by Sharia is void..." (Supreme Court of Algeria, 1984, N°.4).

Conclusion:

At the end of this study, the principal findings may be summarized as follows:

- ✓ The jurists' definitions of *nikeḥ* are almost confined to its being a contract that renders intercourse and enjoyment lawful, making that its primary purpose. However, this conception is open to reconsideration, for enjoyment, though a recognized objective, is not the only one; rather, it is accompanied by higher objectives, such as the preservation of lineage and the protection of society.
- ✓ The four schools agreed that witnessing is a condition in the validity of marriage, and that it is not formed without two witnesses other than the guardian. The disagreement between the Mālikīs and the majority concerns only the time at which it is required: it is a condition for the validity of the contract according to the majority, and a condition for the validity of consummation according to the Malikis.
- ✓ The jurists of the four schools agreed on requiring two witnesses for the validity of the marriage contract, and that consummation does not validate the contract when they are absent because of the explicit text to that effect.
- ✓ The Algerian Family Code uniquely held that the marriage contract may be established despite the absence of the element of witnessing where consummation has occurred, thereby differing from the majority of jurists; for none of those who required witnessing is known to have validated marriage by consummation when this condition is absent.
- ✓ The testimony of a non-Muslim is not accepted in the marriage of Muslims.
- ✓ The testimony of one lacking legal capacity, such as a minor or an insane person, is not accepted due to the absence of capacity.

In light of the findings of this study, a number of recommendations and proposals may be presented that would enhance harmony between the objectives of Sharia and legal regulation, and reduce the practical issues resulting from the absence of witnessing, including the following:

- ✓ The necessity of reconsidering certain provisions of the Algerian Family Code relating to the establishment of marriage where witnessing is absent, in a manner that achieves greater consistency with the preponderant juristic principles and prevents circumvention of the requirements of the Sharia marriage contract.
- ✓ Emphasizing the entrenchment of witnessing as an essential safeguard rather than a merely formal one, by narrowing the exceptional cases in which the contract is recognized despite its absence, in order to protect family stability and preserve lineage.
- ✓ Strengthening the procedures for the official documentation of marriage contracts and intensifying supervision over their conclusion, thereby limiting the phenomenon of undocumented or secret marriages and closing the door to future judicial disputes.
- ✓ Promoting Sharia and legal awareness of the importance of witnessing and public announcement in the marriage contract through religious platforms, educational institutions, and the media, in order to correct erroneous perceptions that reduce the aim of marriage to mere enjoyment.
- ✓ Calling for field and judicial studies to monitor the practical effects resulting from the establishment of marriage in the absence of witnessing, and to measure the extent of its impact on family stability and the protection of rights.

- ✓ Proposing training courses for notaries, civil status officers, and imams in order to unify the practical understanding of the rulings and conditions of witnessing, and to ensure the proper application of legal texts in light of the objectives of Sharīʿah.
- ✓ Thus, the purpose of witnessing is fulfilled not as a merely formal procedure, but as a Sharīʿah and legal safeguard that preserves the integrity of the family and protects the stability of society.

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