

Enforcement of Child Custody Following the Dissolution of a Mixed Marriage under Algerian Law

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Abstract

Mixed marriage gives rise to a broad range of legal difficulties in determining the law applicable to a dispute, owing to the divergence—and lack of harmonisation—of conflict-of-laws connecting factors across jurisdictions. While certain states treat nationality as the decisive connecting factor for identifying the competent law where a foreign element exists in matters of personal status, others rely on domicile. Moreover, differences in characterisation (qualification) from one state to another constitute a further impediment for the seised judge when applying the conflict rules embedded in the forum's legal system. Child custody, as a legal consequence of the dissolution of marriage by divorce, stands out as one of the most significant issues confronting the judge—not only in determining the governing law, but also at the stage of enforcing custody determinations as recognised by the forum, including rights of access/visitation, child maintenance, and the relocation of the minor to a foreign state. Accordingly, the present study seeks to delineate the principal difficulties encountered by the seised judge and to address the modalities for enforcing foreign custody judgments rendered abroad.

Keywords: Child custody; divorce; mixed marriage; legal difficulties; foreign judgments.

Introduction:

Child custody, as a legal consequence of the dissolution of the marital bond, raises significant legal and practical difficulties after the spouses' separation—particularly where they reside in two different states or where they hold different nationalities. In such circumstances, laws compete to determine the law governing custody, rights of access/visitation, maintenance, the relocation of the child to a foreign country, and the mechanisms ensuring the child's return.

Neither Algerian law nor most Arab legislations lays down a specific conflict-of-laws rule for custody (with the exception of Tunisian law). Since custody is treated as an incident of marriage, it is therefore subject to the connecting rule governing the dissolution of marriage—namely, the husband's nationality at the time proceedings are instituted, as set out in Article 12 of the Algerian Civil Code. However, where one of the spouses was Algerian at the time the marriage contract was concluded, Algerian law alone applies pursuant to Article 13 of the same Code.

The issue of determining the applicable law does not generally arise where the dispute is brought before the Algerian judge, since Algerian law is applied directly whenever one spouse was Algerian at the time of marriage. The difficulty emerges, however, when the dispute is submitted to a foreign judicial authority, in which case a foreign law may be deemed applicable—particularly where the mother is a foreign national and custody is awarded to her, with the consequence that the child may

be raised in a religion other than that of the father, contrary to what is envisaged by Article 62 of the Algerian Family Code.

In determining the law applicable to custody, the guiding connecting factor is consistently the best interests of the child. In doctrine, legislation, and case law alike, this criterion is regarded as the most suitable standard for child protection: whenever a given law ensures the necessary protection of the child, it ought to be applied; conversely, where it fails to secure the child's interests, it should be set aside. The Algerian legislature has expressly endorsed this approach in organising the order of priority among those entitled to custody, while taking into account the child's interests.

Notwithstanding the contemporary trend favouring the paramount (superior) interests of the child as the governing criterion in conflict-of-laws matters, this approach has been criticised—most notably because the concept of the child's interests lacks conceptual clarity: what is deemed to serve the child's interests in one country may not be so regarded in another. Furthermore, confining the child's interests to only two laws—namely, the law governing the effects of divorce and the child's personal law—may prove difficult in practice. The judge may fail to identify such an interest and, as a result, may be compelled to search for the law that affords the strongest protection to the child.

Accordingly, states may seek to resolve conflicts in custody matters through multilateral or bilateral agreements, such as the Algerian–French agreement concerning the children of Franco-Algerian mixed marriages concluded in 1988¹, the 1989 Convention on the Rights of the Child, and the 1961 Hague Convention relating to the protection of minors.

The principal objective of these instruments is to protect the child and to secure the child's interests—an objective that is ordinarily realised only by ensuring the child remains close to the parents and is not separated from them, save in necessary cases where separation is required to safeguard the child's best interests.

Following separation, a further difficulty may arise as to the extent to which a non-Muslim mother is entitled to custody of her children. This difficulty is amplified by the statutory requirement—enshrined by the Algerian legislature in the Family Code—that the child be raised in the father's religion, in addition to the broader problem of religious disparity between custodian and child, and the problem of enforcing foreign custody judgments issued by foreign courts, which often conflict with public policy and morals in Algeria and with the principles of Islamic Sharia.

This gives rise to the following research question: What are the principal legal difficulties confronting the Algerian judge in the enforcement of custody judgments?

To address this question, the present study is divided into two sections: the first examines the difficulties associated with exercising custody following the dissolution of a mixed marriage; the second addresses the difficulties related to enforcing foreign custody judgments before the national (Algerian) judge.

2- Issues in the Exercise of Custody Following the Dissolution of a Mixed Marriage

Most legal systems concur in awarding custody to the mother provided that the substantive statutory requirements are satisfied; failing that, custody shifts to the father, who in any event retains a right of access/visitation. This is the prevailing solution where the spouses share the same religion. Where the spouses' religions differ, however, the situation is altogether different, as a controversy arises regarding the extent to which a non-Muslim mother is entitled to custody of her children.

Thus, in the event of a divorce between a Muslim Algerian husband and a non-Muslim foreign wife, the mother's right to custody may, in this framework, be deemed forfeited by reason of the religious disparity vis-à-vis the father's creed. A rule of this kind is neither familiar to nor endorsed by secular

Western legal systems, which generally do not treat an individual's religious status as a legally operative criterion².

2-1- The Requirement of Religious Unity Between the Custodian and the Child in the Attribution of Custody, and the Effect of Change of Religion

Doctrinal opinion, judicial practice, and even legislative approaches have diverged as to whether religious unity between the custodian and the child constitutes a condition for awarding custody, and whether a subsequent change of religion affects custody entitlement—particularly insofar as this requirement is often framed, in classical Islamic juristic discourse, as being closely connected to public policy considerations. This is examined below.

2-1-1- The Position of Islamic Jurisprudence, Algerian Legislation, and Algerian Case Law on the Requirement of Religious Unity

2-1-1-1- Islamic Jurisprudence

Islamic jurisprudence articulated specific rules for situations where the custodian's religion differs from that of the child, notably regarding the right of a non-Muslim mother to custody of her children from a Muslim husband. Jurists split into two principal positions: one holding that religious difference does not extinguish custody, and the other holding that it does.

A- Religious difference extinguishes custody.

The Shāfi'īs, Hanbalīs, and Imāmī jurists take the view that a non-Muslim may not have custody of a Muslim child. Their argument proceeds from the premise that custody constitutes a form of wilāyah (guardianship/authority), analogous to guardianship in marriage; accordingly, such authority cannot, in principle, be vested in a non-Muslim over a Muslim³—invoking, inter alia, Qur'ān 4:144 and the Prophetic maxim that “Islam prevails and is not prevailed over.” They further reason that custody is legislated to protect the child's interests; it should therefore not be established in a manner that defeats that interest or exposes the minor to a greater harm, particularly in relation to religion. On this view, no exception is made for the mother or any other female custodian: where the child is Muslim, the custodian must be Muslim.

Conversely, they consider the custody of a non-Muslim child by a Muslim custodian permissible, on the basis that it does not inflict a comparable harm upon the child—especially given that relations between Muslims and others are, in their framing, governed by justice and freedom of belief.

B- Religious difference does not extinguish custody.

The Hanafīs and Imām Mālik maintain that religious difference does not affect women's entitlement to custody so long as the custodian otherwise satisfies the requisite conditions—whether she is the mother or another female entitled person. They thus do not require that the custodian of a Muslim child be Muslim, relying on an evidentiary inference drawn from the Prophet's practical precedent in which a child was placed between his Muslim father and his polytheist mother who refused to enter Islam; they argue that, had religious difference extinguished her entitlement, such an arrangement would not have occurred. Accordingly, they do not stipulate religious unity between the custodial mother and the child; women's custody may therefore be established between Muslims and non-Muslims, and likewise among non-Muslims inter se.

Nevertheless, this entitlement—specifically for a dhimmī (non-Muslim under Muslim protection) woman over a Muslim minor—would lapse if either of the following contingencies materialises: (a) if the child becomes capable of religious discernment; some jurists estimate this at seven years, considering that Islam may validly be professed by the child at that age; (b) if there is a credible fear that the child will become habituated to disbelief—for example, if the

custodian inculcates the tenets of her religion, takes the child to places of worship, feeds the child pork, gives the child wine, or the like. Where such fear is established, the child is removed from the non-Muslim custodian and entrusted to those more entitled to custody in a manner consistent with the father's religion, so as to avert the harm that might ensue from raising the child outside Islam.

In the same direction, Dār al-Iftā' al-Miṣriyyah has issued opinions stating that difference of religion does not, in itself, negate the right of custody: where the child is Muslim and the custodian is non-Muslim—whether adhering to a revealed religion or otherwise—she may retain custody provided she is otherwise qualified and meets the necessary conditions, unless it is feared that the child will become accustomed to a religion other than Islam. More recently, it has indicated that religious unity between custodian and child is *recommended* but not a strict condition, since custody is fundamentally grounded in compassion and care; the custodian's right persists despite religious difference unless the child's religion is thereby endangered, in which case custody is withdrawn because the custodian is no longer deemed trustworthy in safeguarding the child's religious upbringing—trustworthiness (*amānah*) being one of the conditions of custody.

2-1-1-2- The Algerian Legislator

The Algerian legislator has not addressed, in explicit terms, the question whether religious unity between the custodian and the child constitutes an autonomous legal requirement for attributing custody. Rather than formulating a direct rule conditioning custody on identity of religion, Algerian positive law adopts an indirect normative technique: it regulates custody through a set of substantive obligations that, in practice, may perform a function similar to a religious-unity condition, without stating it as such.

In this respect, Algerian legislation has essentially confined itself to articulating the core conditions and duties attached to the custody regime. Two requirements are particularly prominent and recur as decisive criteria in both doctrinal interpretation and judicial reasoning:

- Raising the child in the father's religion. Custody is conceived not merely as physical care but as a comprehensive responsibility encompassing education, moral formation, and religious upbringing. By requiring that the child be brought up in the father's religion, Algerian law embeds a strong identity-protection dimension within custody, aimed at preserving the child's religious affiliation and cultural continuity. In practical terms, this requirement may operate as a constraint on the custodian's conduct and environment, especially where the custodian is of a different religion or resides in a non-Islamic setting.
- Exercising custody within Algerian territory. Algerian legislation further reinforces the above requirement by linking custody to territorial considerations, treating residence within Algeria as a mechanism that facilitates paternal access, oversight, and the effective implementation of conditions related to the child's upbringing. Territorial anchoring also serves to reduce enforcement risks, such as unilateral relocation or difficulties in securing the child's return, and to ensure that Algerian judicial supervision remains effective.

Accordingly, while Algerian law does not proclaim a formal rule of religious unity between custodian and child, it establishes a custody framework in which religious upbringing and territorial exercise are central. These legislative choices shape the custody outcome indirectly: they can preserve custody for a non-Muslim mother so long as the statutory duties are not compromised, yet they also provide legal grounds for withdrawing custody where the child's religious upbringing, paternal oversight, or the enforceability of the custody arrangement is deemed to be at risk.

2-1-1-3- Algerian Case Law

Algerian judicial practice has exhibited divergences regarding whether religious unity is required between the custodial mother and the child. One decision, for example, did not impose such unity: Decision No. 52221, dated 01/03/1989, issued by the Family Affairs Chamber of the Supreme Council, affirmed—in substance—that, as a matter of both Sharia and law, the mother has priority in the custody of her child even if she is non-Muslim, unless there is a fear for the child's religion; adjudicating contrary to that principle was treated as a breach of applicable legal rules.

By contrast, many other decisions have treated the foreign mother's residence in a non-Islamic foreign country as contrary to Algerian public policy. Yet residence in an Islamic foreign country has not been regarded as, in itself, a ground for forfeiture of custody; hence, custody may be awarded to a non-Muslim foreign mother residing in an Islamic country so long as the child's religious interest is not incompatible with the principles and values prevailing in that Islamic environment. In this vein, the Islamic Higher Council held, in one of its determinations, that where the custodial mother resided in France—and out of concern for the daughters' Islamic creed—custody should be awarded to the father residing in Algeria, while emphasising that custody is not a final arrangement and that, should the mother return to the homeland, she may seek custody anew.

Other decisions, however, have stabilised on the view that custody should revert to the father where the mother resides abroad. In a 1989 decision of the Personal Status Chamber of the Supreme Court (Decision No. 52207), the court refused to grant exequatur to a foreign judgment awarding custody to a mother residing outside the country, reasoning that awarding custody in such circumstances could alter the child's beliefs and distance the child from religion and customs.

2-1-2- The Effect of Change of Religion on Custody Entitlement

Where one of the parties changes religion, this may have an immediate and direct impact on entitlement to custody: the custodian may become legally qualified for custody—or, conversely, may lose such qualification. This may occur, for example, where a non-Muslim foreign parent embraces Islam, or where the custodian renounces Islam. In this regard, the following hypotheses may be distinguished⁴:

A- The father embraces Islam while the mother does not.

In this scenario, the mother remains eligible for custody, unless there is a fear for the child's religion. The children are treated as Muslims by virtue of the father's Islam; the religious status of the Muslim father is imputed to them, and they are accordingly regarded as adhering to Islam, like their father.

B- The mother embraces Islam while the father does not.

Where a non-Muslim mother—whether Algerian or foreign—embraces Islam, her custody does not lapse, nor is her legal capacity to exercise custody invalidated. In Sharia terms, the child is deemed to follow the Muslim parent of the two⁵.

C- The custodian apostasises from Islam.

Apostasy from Islam is treated, in classical juristic doctrine, as an offence punishable by death; according to the majority of jurists, no distinction is drawn, for purposes of the prescribed penalty, between men and women. Consequently, an apostate is not deemed eligible to exercise custody. Where custody is vested in a woman, her right to custody is thereby forfeited. A fatwa issued by Dār al-Iftā' al-Miṣriyyah likewise states that an apostate woman is not qualified for custody. This impediment, however, ceases upon a return to Islam—unless it is established that the professed return is merely formal or collusive, undertaken solely to recover legal capacity for custody.

2-2- Raising the Child in the Father's Religion and Exercising Custody within Algerian Territory

2-2-1- The Requirement of Raising the Child in the Father's Religion

This requirement is embraced by legal systems grounded in a religious reference framework, with the aim of preserving the child's creed. It serves to safeguard the Islamic identity of the Muslim child under custody and presupposes that the child must be provided with an environment conducive to practising religion freely.

The Algerian legislator enshrined this requirement in Article 62 of the Algerian Family Code, which provides that: *"Custody is the care of the child, his education, and the undertaking of his upbringing in the religion of his father, as well as ensuring his protection and preserving his health and morals."* Should this requirement be compromised, custody is forfeited by the custodian pursuant to Article 67 of the same Code, which stipulates: *"Custody shall lapse from the custodian upon the failure of one of the conditions set out in Article 62 above ..."* The rule prohibiting a Muslim woman from marrying a non-Muslim likewise reinforces this requirement, with the consequence that children born of a mixed marriage are, within this legal framework, treated as Muslims.

However, the application of this requirement may be confronted with a number of practical and legal difficulties, notably:

- the condition of residence in Algeria for the exercise of custody may be insufficient, in itself, to secure upbringing in the father's religion, since the influence of a non-Muslim foreign mother may be comparable to the influence of a non-Islamic foreign environment; the mother may seek to instil her religion in the child and may perform religious rites in the child's presence in a manner that affects the child;
- the wording of Article 62, which insists on upbringing the child in the father's religion, raises the question of the legal solution where the father apostasises—whether he is Algerian or a foreign Muslim;
- foreign judgments may not be granted exequatur where they are contrary to public policy and morals, pursuant to Article 605 of the Code of Civil and Administrative Procedure; conversely, judgments rendered by Algerian courts may be denied recognition/enforcement abroad on the ground that the foreign judge does not legally recognise religious status as a relevant criterion;
- there is a normative divergence between Islamic states and Western states as to the content of the best interests of the child, since the requirement of raising the child in Islam is generally not treated as a legally operative consideration in Western jurisdictions.

2-2-2- The Requirement that Custody Be Exercised within the National Territory

The Algerian legislator provided for this requirement in **Article 69 of the Algerian Family Code**, which states: *"If the person entrusted with custody wishes to settle in a foreign country, the matter shall revert to the judge, who shall either confirm custody in his/her favour or withdraw it, having regard to the best interests of the child."*

This requirement is justified by several considerations, foremost among which is enabling the father to exercise access/visitation rights, as well as enabling him to exercise oversight over the child's upbringing. Requiring custody to be exercised within Algerian territory is thus presented as a guarantee that the child will be raised in the father's religion. Accordingly, an interplay—and functional complementarity—appears between the two conditions adopted by the Algerian legislator. A number of judicial decisions have further indicated that custody awarded to the mother is effectively constrained by the requirement of raising the child in the father's religion and by the father's visitation

rights where the parents do not reside in the same state. Case law has likewise taken residence in Algeria into account when attributing custody.

3- Issues Relating to the Enforcement of Foreign Custody Judgments before the Algerian Courts

The enforcement of foreign judicial decisions before the Algerian courts is contingent upon satisfying the conditions laid down in Article 605 of the Code of Civil and Administrative Procedure. The matter, however, is not free from difficulties that may confront the Algerian judge.

How, then, is a foreign judgment rendered abroad to be treated before the Algerian judiciary? Unconditional recognition of foreign judgments runs counter to the principle of state sovereignty, insofar as it may be perceived as submission to the sovereign authority of the state that rendered the decision, thereby undermining sovereignty. Yet, the refusal to enforce such judgments would, in turn, generate instability in international dealings and cross-border legal relations. The following sections therefore examine the conditions for enforcing foreign judgments before the Algerian judge, as well as the obstacles that may arise in practice.

3-1- Conditions for the Enforcement of Foreign Judgments Relating to Custody before the Algerian Judge

A foreign judgment may be defined, in private international law, as a judicial determination rendered by a foreign judicial authority that produces legal effects in the state of origin. Yet, as a matter of principle, such a decision does not automatically carry executory force beyond the territory of the issuing state. Enforcement is inseparable from the exercise of public authority: it may entail coercive measures against persons or property, and thus falls within the sovereign prerogatives of the enforcing state. For this reason, Algerian law subjects the domestic enforceability of foreign judgments—particularly in sensitive family matters such as custody—to a prior judicial authorisation mechanism, traditionally referred to as the grant of the enforcement formula (*exequatur*).

Within this framework, *exequatur* is not designed to reopen the merits of the foreign dispute or to substitute the Algerian judge's assessment for that of the foreign court. Rather, it operates as a filter of admissibility, ensuring that the foreign judgment satisfies minimum requirements of legitimacy, finality, and normative compatibility before it may be implemented within Algerian territory. This is especially significant for custody judgments, whose effects extend beyond patrimonial rights to questions of residence, parental authority, contact arrangements, and the child's identity and welfare. The Algerian judge is therefore called upon to reconcile two competing imperatives: on the one hand, the need to facilitate the circulation of judgments in order to preserve legal certainty in cross-border family relations; on the other hand, the duty to protect the essential jurisdictional boundaries and fundamental values of the Algerian legal order.

The domestic legal basis for this control is laid down in Article 605 of the Code of Civil and Administrative Procedure, which enumerates the conditions under which foreign orders, judgments, and decisions may be granted *exequatur* and become enforceable in Algeria. The article establishes a set of cumulative requirements—relating, *inter alia*, to jurisdiction, finality, absence of conflict with prior Algerian decisions, and compatibility with *ordre public*—that the foreign judgment must satisfy before enforcement can be authorised. Importantly, this domestic regime applies in the absence of a governing treaty framework.

Where, however, an international treaty or bilateral/multilateral agreement ratified by Algeria governs recognition and enforcement, the treaty rules operate as *lex specialis* and prevail over the domestic provisions. In that event, the conditions and procedures set by the applicable instrument are

controlling, and Article 605 is applied only to the extent that it is not displaced by the treaty regime. This treaty primacy reflects Algeria's commitment to judicial cooperation in international matters, while preserving, through carefully defined safeguards, the state's capacity to refuse enforcement where fundamental principles would otherwise be compromised.

3-1-1- Where No International Agreement Exists

In the absence of an applicable treaty or ratified international agreement, the Algerian system relies on domestic exequatur control as the gateway through which foreign judicial decisions may acquire enforceable effect within the national territory. The underlying premise is that a foreign judgment—however valid and effective in the state of origin—does not automatically produce executory force in Algeria, because enforcement is a manifestation of state authority (*puissance publique*) and therefore remains, in principle, territorially bounded. Exequatur thus functions as a judicial authorisation by which the Algerian judge confirms that the foreign decision satisfies a minimum set of legal and normative guarantees, thereby allowing execution measures to be pursued domestically.

From a functional standpoint, this mechanism serves two complementary objectives. First, it enables the international circulation of judgments, preventing cross-border private relations from being destabilised by purely territorial conceptions of judicial authority. Secondly, it safeguards fundamental requirements of the Algerian legal order—jurisdictional boundaries, legal certainty, and *ordre public*—by subjecting enforcement to limited judicial scrutiny. Importantly, this scrutiny is not intended to reopen the merits of the dispute (*révision au fond*), but rather to verify compliance with conditions that justify recognition and enforcement at the level of principle.

According to Article 605 of the Code of Civil and Administrative Procedure, foreign orders, judgments, and decisions may not be enforced in Algeria unless they are first granted an enforcement formula (*exequatur*) by a competent Algerian court. In substance, *exequatur* is granted only if the following cumulative requirements are satisfied:

- **Jurisdiction/competence:** the foreign judgment must not infringe rules of jurisdiction or competence. This condition reflects the idea that enforcement cannot be granted where the foreign court's assumption of jurisdiction is incompatible with Algerian jurisdictional expectations, particularly where Algerian courts would regard themselves as having an overriding or exclusive link to the dispute. In practice, this requirement operates as a control on the foreign court's international competence, ensuring that the dispute was not removed from the Algerian judicial sphere through an artificial or abusive choice of forum. It also supports fairness: parties should not be subjected to a foreign forum lacking a legitimate jurisdictional connection.
- **Finality and *res judicata*:** the foreign decision must have acquired the force of *res judicata* in the state of origin. The requirement of finality is central to enforcement because an executory act should not be based on a decision that remains susceptible to reversal through appeal or extraordinary review. The Algerian judge therefore verifies, as a matter of principle, that the judgment is binding and definitive under the originating legal system. This condition is also connected to procedural justice: the stability of rights and obligations must be established before coercive enforcement measures are authorised.
- **Absence of conflict with prior Algerian decisions:** the foreign judgment must not conflict with an order, judgment, or decision previously issued by Algerian courts. This condition is designed to protect legal certainty and to prevent the enforcement of incompatible outcomes within the same legal order. It embodies, in effect, the concern that the Algerian enforcement

system should not become a vehicle for producing contradictory legal realities—particularly in sensitive family matters where conflicting custody or maintenance orders can generate immediate and severe practical consequences.

- **Compatibility with Algerian public policy and public morals (ordre public):** the foreign judgment must not contravene Algerian public policy or morals. This is the most structurally significant—and often the most litigated—ground of refusal. It recognises that, while Algeria accepts the cross-border circulation of judicial decisions, it will not enforce outcomes that strike at the foundational principles of its legal and social order. In custody disputes, this control may become especially salient when the foreign ruling entails consequences perceived as incompatible with core Algerian commitments regarding family structure, parental authority, religious upbringing, or child protection as framed by domestic norms. Crucially, ordre public control is not a disguised merits review; rather, it targets the intolerable effect of enforcement within Algeria.

Read together, these conditions reveal that Article 605 establishes a filtered model of judicial cooperation: foreign decisions are presumptively eligible for enforcement, but only once they pass threshold controls that protect the integrity of the Algerian legal order. The exequatur judge, therefore, does not substitute Algerian law for the foreign law applied on the merits, nor does he reassess the factual findings of the foreign court; his role is to verify that enforcement will not undermine jurisdictional legitimacy, finality, consistency of judgments, or public policy.

Finally, Algerian practice—consistent with the logic of ordre public—may allow for partial enforcement where only a segment of the foreign judgment is problematic. In family disputes, a foreign decision may be enforceable insofar as it concerns divorce or certain financial consequences, while enforcement may be refused for the custody component if that component is deemed incompatible with Algerian public policy. This possibility illustrates the pragmatic orientation of the exequatur system: it seeks to preserve international legal continuity where possible, while containing only those effects that the Algerian order cannot accept.

A- The foreign judgment must not contravene rules of jurisdiction.

A distinction may be drawn between two forms of jurisdiction:

(a) **Territorial (jurisdictional) competence.** The foreign court must have been competent under its own law, and Algerian courts must not also be competent. If Algerian courts are competent, exequatur will, in principle, be refused on the ground that the foreign judiciary lacked competence according to the jurisdictional rules of Algerian law.

(b) **Legislative (choice-of-law) competence.** The foreign court must have complied with rules governing legislative competence, notably by giving effect to Algerian conflict-of-laws rules where the forum's conflict rules so require. Failing that, the foreign court would be regarded as having breached the principle of legislative competence, and exequatur will not be granted.

The Algerian legislator has not, however, specified in Article 605 the precise nature of the required competence: whether it presupposes subject-matter and territorial competence, or whether it suffices that the foreign court possessed international jurisdiction. This contrasts with Egyptian and French legislation, which expressly adopts a “negative (exclusive) jurisdiction condition,” requiring that national Egyptian/French courts not be competent over the dispute.

B- The foreign judgment must have acquired res judicata effect.

This means that the judgment must be final—i.e., no longer open to appeal by ordinary or extraordinary means—since a non-final judgment may be set aside. This requirement is grounded in

basic principles of justice. Certain decisions are commonly excepted, such as preliminary measures (e.g., the appointment of an expert), which may be carried out by way of judicial cooperation/letters rogatory, and provisional decisions such as those relating to maintenance.

C- The foreign judgment must not conflict with an Algerian decision previously rendered.

This condition reflects the notion of prior adjudication in respect of the same matter sought to be enforced. Its purpose is to prevent contradictory judgments, avoid inconsistencies, and avert the enforcement of conflicting decisions across more than one state.

D- The foreign judgment must not violate Algerian public policy or public morals.

Foreign judgments that fail to respect the foundational principles upon which Algerian society is built are not deserving of recognition; consequently, exequatur must be refused and such judgments cannot be enforced within Algerian territory. They may be set aside on the basis of Article 24 of the Algerian Civil Code where they contravene public policy and morals, or where jurisdiction was procured through fraud on the law.

The foreign judgment may be excluded in its entirety, or only in the part that violates public policy and morals. Thus, exequatur may be granted to the portion relating to divorce, while being refused for the portion specifically relating to custody.

3-1-2- Where an International Treaty/Agreement Exists

Where an agreement exists between Algeria and another state concerning the enforcement of foreign judgments, the provisions of that agreement are applied, as they prevail over domestic law. This hierarchy is affirmed by the Algerian Constitution in Article 131⁶, which provides in substance that *treaties ratified by the President of the Republic in accordance with the constitutional procedures prevail over statutory law*. In the same vein, Article 608 of the Code of Civil and Administrative Procedure, dealing with the enforcement of foreign enforceable instruments, states that the application of the rules set out in Articles 605 and 606 does not prejudice the application of international treaties and judicial agreements concluded between Algeria and other states.

Algeria has accordingly concluded a range of bilateral and multilateral instruments as a deliberate policy choice to manage the practical consequences of transnational private disputes and to reduce the uncertainty generated by divergent conflict rules. In private international law, treaties operate as *lex specialis*: they partially displace reliance on purely domestic exequatur provisions by supplying predictable channels for recognition, cooperation, and enforcement. In doing so, they promote legal certainty, curb opportunistic forum shopping, and enhance the effectiveness of judicial decisions beyond the territory of the issuing state—an objective that is particularly pressing in family disputes, where delay and fragmentation can translate into immediate harm for the child and the parties.

Bilateral agreements are typically designed to create a framework of mutual judicial assistance capable of supporting the entire lifecycle of cross-border litigation. They may streamline service of process abroad, facilitate the taking of evidence through letters rogatory, enable access to legal aid, and clarify the procedural route for recognition and enforcement. They also function as instruments of institutional trust: by aligning minimum procedural guarantees—such as due notice, adversarial process, and finality—bilateral treaties reduce the perceived “sovereignty cost” of enforcing foreign decisions. Within this logic, the Algerian–French Agreement of 27 August 1964 and the Algerian–Moroccan Agreement of 15 March 1963 are emblematic of treaty-making shaped by dense human mobility and enduring private-law ties, aiming to make cross-border judicial cooperation operational rather than merely aspirational.

At the multilateral level, cooperation instruments pursue a more ambitious goal: the gradual emergence of regional coherence in judicial practice and, in some cases, the approximation of conflict-of-laws solutions. The attempt by Maghreb states to elaborate an agreement on legal and judicial cooperation among the members of the Arab Maghreb Union, signed at Ras Lanuf (Libya) on 9–10 March 1991, reflects this integrative aspiration. Even where multilateral initiatives do not fully harmonise substantive connecting factors, they can still reduce friction by establishing shared procedures, common channels of communication between authorities, and a baseline commitment to reciprocal assistance. In effect, they seek to transform fragmented domestic responses into a coordinated system in which judgments circulate with fewer formal obstacles.

In custody disputes specifically, treaty-based cooperation is not a purely technical matter: it directly shapes the feasibility of prompt enforcement, the preservation of contact rights, and the management of relocation or return scenarios. A robust treaty framework can facilitate faster coordination between courts and competent authorities, reduce duplication of proceedings, and narrow the space for contradictory judgments to emerge. At the same time, these instruments generally preserve a calibrated safeguard for *ordre public*, allowing the enforcing state to refuse outcomes that strike at fundamental principles, while still encouraging recognition whenever compatibility can be maintained. The practical value of Algeria's treaty network, therefore, lies in its capacity to balance two imperatives that otherwise collide in cross-border custody cases: the protection of national public policy and the need for effective transnational justice that prevents custody determinations from becoming territorially confined and socially disruptive.

3-2- Practical and Doctrinal Obstacles to the Enforcement of Foreign Custody Judgments

The comparatively limited enforcement, in Algeria, of foreign judgments relating to child custody is not merely an issue of procedural technique; rather, it reflects deeper normative frictions between legal systems, as well as structural constraints inherent in cross-border family litigation. At its core lies the Algerian approach to the best interests of the child, an approach that is not treated as a free-standing, culturally neutral standard, but is instead articulated through a set of substantive requirements that are perceived as indispensable to the child's welfare. Algerian law tends to associate the child's interests, in custody matters, with the requirement that the child be raised in the father's religion and with the effective exercise by the father of parental authority and oversight. These elements are viewed as protective guarantees: they preserve the child's identity, ensure moral and educational supervision, and maintain continuity with the father's social, religious, and cultural environment. On this construction, custody is not simply about daily care; it is also about safeguarding a framework of values and identity that the Algerian legal order treats as integral to child protection. Western legal systems, by contrast, generally conceptualise the best interests of the child through a markedly different lens. In many secular jurisdictions, religion is not considered a legally determinative criterion, and the "religious status" of the parents is seldom treated as a relevant connecting factor or as a ground for allocating custody. As a result, custody determinations may place stronger emphasis on psychological stability, continuity of care, the child's attachment to the primary caregiver, and the practical ability to provide a secure environment—while leaving religious upbringing to private family autonomy, subject only to broad concerns such as harm, neglect, or coercion. In that context, the father's absence—whether due to relocation, separation, or limited involvement—does not necessarily carry the same legal significance. A foreign judge may conclude that the child's interests are satisfied by remaining with the mother abroad, even where this entails living in a non-Islamic environment, because the decisive factor is continuity of care, schooling, and

emotional stability, not the preservation of a religious framework. This divergence in value priorities explains why custody judgments circulate with difficulty between Algeria and certain foreign jurisdictions: each system perceives itself as protecting the child, yet they do so through different—and sometimes incompatible—legal assumptions.

Against this background, Algerian legislation entrenches the requirement that the child be raised in the father's religion and, in practice, often links it to an additional territorial safeguard, namely that custody be exercised within Algerian territory or under conditions that make paternal access and oversight meaningfully possible. This legislative architecture has direct implications at the enforcement stage. When a foreign custody judgment is presented for enforcement, Algerian courts do not assess it solely through the technical prism of finality, authenticity, or due process; they also scrutinise its substantive compatibility with the Algerian conception of *ordre public* (public policy). The result is that foreign judgments that appear, from the foreign forum's perspective, to reflect an appropriate best-interests analysis may be denied *exequatur* in Algeria because their operative consequences are seen as undermining fundamental values protected by the Algerian legal order.

In practical terms, Algerian courts have refused to grant *exequatur* where the foreign decision awards custody to a mother residing in a non-Islamic foreign state in a manner that, in the Algerian judge's assessment, exposes the child to risks concerning religious upbringing, identity formation, or moral protection, or that effectively neutralises paternal access and oversight. In one decision attributed to the Supreme Council, the judge expressly connected the child's interest to public policy, relying on Article 24 of the Algerian Civil Code. The court reasoned that where the mother's creed and habitual residence diverge from the father's creed and residence, awarding custody to the mother may be incompatible with Algerian public policy, since it may distance the child from the father's religion and social environment. This line of reasoning illustrates a crucial feature of Algerian enforcement practice: public policy is not invoked as an abstract reservation; it is operationalised through concrete concerns—religion, residence, parental authority, and identity—treated as indispensable components of child protection.

Moreover, Algerian courts may adopt an approach of partial recognition: a foreign judgment may be recognised or enforced with respect to certain aspects (for instance, dissolution of marriage or ancillary financial consequences) while being refused *exequatur* in relation to custody or relocation. This possibility reflects the idea that public policy objections may attach to specific operative effects rather than to the foreign decision as a whole. Yet, even partial recognition can produce legal fragmentation: the divorce may be effective, while custody remains contested, leaving the parties in a state of practical uncertainty and opening the door to renewed litigation before Algerian courts.

The enforcement obstacles are not one-directional. Algerian custody judgments themselves, especially those grounded explicitly in religious and moral considerations, frequently encounter resistance abroad. A foreign judge may refuse *exequatur* for an Algerian decision on the ground that it conflicts with the foreign forum's own public policy. In secular legal orders, a decision withdrawing custody from a mother solely, or primarily, because she is non-Muslim or resides in a non-Muslim country may be viewed as discriminatory or incompatible with equality norms and with the foreign conception of child welfare. Consequently, a judgment that the Algerian system regards as protective—because it preserves the father's religious framework and keeps the child within a culturally aligned environment—may be regarded abroad as contrary to fundamental principles of the foreign legal order. This reciprocal refusal of recognition produces a jurisdictional stalemate, in which

each forum views the other's solution as unacceptable under its public policy, thereby undermining the cross-border effectiveness of custody determinations.

In addition, the enforcement stage is often complicated by the practical realities of transnational family life. Custody disputes are frequently intertwined with issues of relocation, immigration status, schooling, and the child's day-to-day integration into a host society. When a child has been living abroad for an extended period, foreign courts may treat the child's habitual residence as having shifted, and may regard the child's stability and integration as decisive. Algerian authorities, however, may focus on ensuring the father's meaningful involvement and on avoiding outcomes perceived as assimilating the child into a non-Islamic setting. The longer the child remains abroad, the more sharply these logics can collide, and the more difficult enforcement becomes, particularly where the requested measures would require the child's return or would materially alter the child's living arrangements.

A further difficulty arises from conflicts of international judicial jurisdiction in custody matters. It is not uncommon for each state's courts to assert international competence: the foreign forum may claim jurisdiction based on the child's residence or habitual residence; Algerian courts may claim jurisdiction based on nationality, the father's residence, or the protective dimension of parental authority. When both jurisdictions proceed, parallel proceedings may be initiated and two judgments may be rendered, each claiming legitimacy and each reflecting the public policy of its issuing forum. This scenario leads to contradictory judgments, which in turn severely complicates recognition and enforcement. From the standpoint of legal certainty, contradictory judgments are particularly damaging in custody matters, because they produce immediate, real-world consequences for the child's residence, schooling, and contact with each parent. They also incentivise forum shopping and strategic litigation, as each parent may seek to obtain a favourable judgment in the forum whose substantive conception of custody aligns with their preferred outcome.

Finally, these obstacles reveal a structural point: custody enforcement is not a purely private dispute between parents, but a field in which the state's conception of public order, identity, and child protection is deeply implicated. As long as public policy is understood in markedly different ways—especially with regard to religion, parental authority, and the territorial anchoring of custody—foreign judgments in custody will continue to face significant barriers in Algeria, and Algerian judgments will likewise face barriers abroad. The practical consequence is a circulation deficit of custody decisions, which undermines predictability for families in mixed marriages and reinforces the need for clearer conflict-of-laws solutions and more effective bilateral or multilateral cooperation mechanisms.

Conclusion:

Child custody in the context of mixed marriage constitutes one of the most sensitive and practically consequential questions in cross-border family disputes. It generates a dense set of legal problems and operational constraints for the Algerian judge, both when identifying the foreign law applicable to custody and its ancillary effects, and when dealing with the recognition and enforcement of custody determinations rendered abroad. In practice, the custody question is rarely isolated: it is typically intertwined with issues of visitation/access, maintenance, the child's relocation, and the preservation of the child's identity and social environment—thereby magnifying the legal stakes of any choice-of-law or enforcement decision.

These difficulties stem, first, from the lack of convergence among states with respect to connecting factors and the architecture of their conflict rules. Some legal systems favour nationality, others

domicile or habitual residence; moreover, divergences in characterisation (qualification) further complicate the application of conflict rules and may lead to different results depending on the forum seised. Secondly, the problem is intensified by the variability in the substantive content of public policy and public morals as understood by Islamic and non-Islamic jurisdictions. In custody matters in particular, Algeria tends to articulate the child's welfare through requirements that protect religious upbringing and ensure effective parental oversight, whereas secular Western systems frequently adopt a different conception of the child's interests, one that treats religion as a non-determinative factor. The consequence is a recurring pattern of reciprocal refusal of recognition: foreign custody judgments may be denied exequatur in Algeria, while Algerian judgments may be denied recognition abroad. In light of these structural tensions, the study proposes a set of recommendations intended to reduce the practical obstacles associated with custody in mixed marriages and to enhance the predictability of outcomes:

- Adopt a dedicated conflict-of-laws rule for custody in mixed marriages in Algerian legislation. A specific connecting rule would reduce uncertainty, limit judicial discretion, and provide clearer guidance on the applicable law, instead of treating custody merely as an accessory consequence of divorce.
- Promote harmonisation of conflict rules among Arab states in personal status matters. Greater alignment would reduce contradictions and procedural competition between Arab courts, curb parallel proceedings, and facilitate the recognition of judgments within the region.
- Rebalance the custody framework so that religious and moral interests receive paramount consideration alongside the child's welfare. The study recommends limiting the tendency to treat the "best interests of the child" as an exclusive and self-sufficient standard, and instead emphasising the protection of the child's religious and moral formation, while enabling fathers to raise their children in accordance with Islamic teachings as a preventive safeguard against apostasy.
- Assess child maintenance with reference to living standards in both states. This approach would mitigate the economic disparities that often accompany cross-border separations and would reduce inequities in the child's material conditions where one parent resides in a higher-cost environment.
- Conclude bilateral and multilateral agreements with states hosting significant Algerian migrant communities. Such agreements should be designed to improve judicial cooperation, clarify jurisdictional bases, and streamline recognition and enforcement procedures, thereby limiting the recurring deadlock caused by public policy objections on either side.

Overall, reducing enforcement difficulties in mixed-marriage custody disputes requires both internal legislative refinement—through clearer connecting rules and coherent custody standards—and external cooperation, through treaty-based mechanisms capable of reconciling differences in conflict rules and managing the public policy divide in a manner that protects the child while ensuring legal certainty for families spanning more than one jurisdiction.

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