



# PREMARITAL MEDICAL EXAMINATION BETWEEN LEGAL OBLIGATION AND CONSENT OF THE PARTIES WITHIN THE FRAMEWORK OF ALGERIAN FAMILY LAW

<sup>1</sup>Zekkour Ferhat Said , <sup>2</sup> Yousfat Ali Hachem

<sup>1</sup>zekkour-said@univ-adrar-dz

The Laboratory of Law and Local Development, University of Ahmed Draia, Adrar

<sup>2</sup>[yousfatali@yahoo.com](mailto:yousfatali@yahoo.com)

The Laboratory of Law and Local Development, University of Ahmed Draia, Adrar

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## Abstract:

*This study seeks to shed light on the impact of the Algerian legislator's requirement for premarital medical examinations and its influence on the consent of those involved in concluding the marriage contract. The premarital medical examination plays an effective role in protecting the family and society, as it contributes to reducing hereditary diseases and decreases the number of divorce cases caused by defects. The Algerian legislator has mandated the performance of this medical examination before marriage, requiring marriage applicants to provide a medical certificate free from any defect or disease that could pose a risk incompatible with the objectives of marriage. Furthermore, those responsible for drafting the marriage contract must ensure that the parties are aware of the examination results. However, the marriage contract cannot be refused for medical reasons contrary to the will of those involved.*

**Keywords:** *Premarital medical examination, contagious diseases, hereditary diseases, consent.*

## INTRODUCTION:

The premarital medical examination is, in fact, one of the newly emerging issues, prompted by modern scientific advancements. It has become possible to predict the occurrence of serious hereditary and infectious diseases using modern techniques and equipment that can confirm the presence or absence of such conditions. These developments led the Algerian legislator to impose the requirement for couples intending to marry to undergo a premarital medical examination.

The medical examination is considered one of the effective means of preventing contagious and hereditary diseases, as well as providing psychological reassurance for a happy marital life. It serves the ultimate goal of marriage, which is the preservation of offspring by ensuring the health of both spouses before the birth of children as the fruit of the marriage.

The Algerian legislator introduced the mandatory premarital medical examination under the new amendments of 2005, as a preventive measure before marriage, aimed at avoiding the material and moral damages that could result from separation after marriage.

Based on this, the following research question can be posed: What is the impact of the Algerian legislator's requirement for a premarital medical examination on the will of the parties involved in concluding the marriage contract?

To answer this question, we decided to study the Algerian legislator's requirement for a premarital medical examination (Chapter One) and the role of consent in the marriage contract (Chapter Two). We concluded the study with a summary presenting the key findings and recommendations.

The study employs two methods: the descriptive method, when discussing the concepts related to premarital medical examinations, and the analytical method, when addressing the implications of certain legal provisions relevant to this topic.

**Chapter One: The Requirement of Premarital Medical Examination by the Algerian Legislator**

The Algerian legislator has required individuals planning to marry to undergo a premarital medical examination, as specified in Article 7 bis of the Algerian Family Code (1) and Executive Decree 06-154, which defines the conditions and procedures for applying the aforementioned article (2).

### **Section One: The Concept of Premarital Medical Examination**

To understand the concept of the premarital medical examination, it is necessary to define it both linguistically and technically, as well as outline the legal conditions that must be met. This will be addressed in two subsections:

#### **Subsection One: Definition of Premarital Medical Examination**

The term "premarital medical examination" has gained significant attention recently, becoming a major concern for those intending to marry, due to fears surrounding its results. Therefore, it is important to study this topic. We will begin with (1) the linguistic definition, and then (2) the technical definition.

##### **1. Linguistic Definition**

The term "examination" derives from the root meaning "to search" or "investigate." For example, it is used in the context of testing a student's knowledge, or searching for hidden faults (3). The word can refer to a thorough inquiry or investigation (4). "Medical" refers to anything related to medicine, and a "physician" is a professional who is knowledgeable in medical science (5).

##### **2. Technical Definition**

There are several definitions of the premarital medical examination. Below, we present the most prominent ones:

The medical examination, as defined by medical professionals, is: "An assessment of a person's health condition as a preventive measure that helps maintain health and allows for early detection of diseases in their initial stages." (6)

It is also described as: "A set of psychological, cultural, and social guidelines, along with medical tests. It is a comprehensive premarital consultation that reviews the applicant's medical history, aiming to provide couples with advice on the potential transmission of diseases to their offspring, as well as offering options and alternatives for planning a healthy family." (7)

Another definition states: "It is an examination conducted by a doctor on a patient to identify the cause and diagnose the disease." (8)

However, the Algerian legislator does not provide a specific definition for the premarital medical examination. Instead, it outlines the procedure and conditions in Articles 1 to 7 of Executive Decree No. 06-154, which defines the conditions and procedures for applying Article 7 bis of Law No. 05-02, which amended and supplemented the Algerian Family Code (9).

In conclusion, the premarital medical examination can be defined as: "A medical examination for those intending to marry, aimed at detecting infectious and hereditary diseases, with the purpose of protecting future offspring from various hereditary conditions."

#### **Subsection Two: Conditions for the Premarital Medical Examination**

Since Article 7 bis of the Algerian Family Code refers to regulations to define the conditions and procedures for the premarital medical examination, we will explore these conditions through the aforementioned Executive Decree No. 06-154, which include:

##### **1. Timing of the Premarital Medical Examination**

It is believed that the timing of the premarital medical examination for the couple may present an obstacle. However, to avoid misunderstandings or multiple interpretations, and to prevent the couple from having to undergo the examination more than once, it is recommended that the examination takes place before the marriage contract, during the engagement period. This ensures that any illness affecting one or both parties after the contract does not become a sufficient reason for divorce. Moreover, it preserves the dignity of the examination and the honor of the fiancée and her family, protecting them from any harm, embarrassment, or offense to her character, femininity, and modesty (10).

Additionally, to ensure that this medical precaution before marriage remains justified and encourages individuals to pursue marriage, it enables the parties involved, whether the prospective groom or bride, to choose alternatives if the results are discouraging.

This perspective aligns with the Algerian legislator's approach, which mandates the conduct of a premarital medical examination before entering into a marriage contract. It requires individuals intending to marry to present a medical certificate dated no more than three (3) months prior to the date of the civil marriage contract before the notary or civil status officer. The legislator has stipulated this timeframe as sufficient to identify any existing illnesses in both parties and to determine the possibility of their treatment.

## **2. Location of the Premarital Medical Examination**

Article 2, paragraph 2 of Executive Decree No. 06-154 states: "The certificate referred to in this article shall be issued by a physician, according to the model attached to this decree." (11) This text indicates that the Algerian legislator did not specify a particular location for conducting the premarital medical examinations. The mention of "physician" as a general term implies that individuals intending to marry can undergo these examinations in any medical facility, whether public or private.

## **3. Contents of the Premarital Medical Examination**

The Algerian legislator, in accordance with Article 3 of Executive Decree No. 06-154, addresses certain medical tests that are part of the premarital medical examination, which include:

### **A. Comprehensive clinical examination.**

Among the examinations conducted on individuals intending to marry under the framework of the premarital medical examination, according to the Algerian Family Law, is the comprehensive clinical examination, which is mandatory. A physician may not issue the medical certificate without conducting this examination, as stipulated in Article 3/1 of Executive Decree No. 06-154, which states: "The physician may not issue the medical certificate referred to in Article 2 except based on the results of:

- A comprehensive clinical examination (12).
- Blood type analysis.

According to Algerian law, the medical examination does not only focus on the comprehensive clinical examination but also necessarily includes blood type analysis. A physician cannot issue the medical certificate without conducting or prior to conducting the blood type analysis of the individual intending to marry, as specified in Article 3/2 of Executive Decree No. 06-154: "The physician may not issue the medical certificate referred to in Article 2 except based on the results of blood type analysis (ABO Rh factor)." (13)

In this context, it is evident that the Algerian legislator has made the medical examination mandatory concerning the comprehensive clinical examination and blood tests, while the screening for serious infectious or hereditary diseases is optional.

## **Section Two: The Legal Nature of the Obligation of the Premarital Medical Examination**

The Algerian legislator has assigned the medical examination the nature of a requirement and obligation, which is evident from Article 7 bis of the Algerian Family Law, which states: "Individuals intending to marry must provide a medical document dated no more than three months prior to confirm their freedom from any disease or any factor that may pose a risk that contradicts marriage."

The notary or civil status officer must ensure before drafting the marriage contract that both parties have undergone the medical examinations and that they are aware of any diseases or factors that may pose a risk contradicting the marriage. This must be indicated in the marriage contract.

The conditions and methods for implementing this article are determined through regulations.(14)"

This means that the Algerian legislator has stipulated that a marriage contract requires a medical certificate dated no more than three months prior, confirming the absence of any disease or any factor that may pose a risk that contradicts marriage. This is done to take the necessary and preventive medical precautions to ensure the health of both spouses from hereditary, infectious, or sexually transmitted diseases that may affect their health in the future or that of their children when they conceive (15). This requirement did not exist in the family law before its amendment and

supplementation. By requiring the medical certificate prior to marriage, the Algerian legislator has aligned with Arab legislations and foreign countries that have preceded it in this area after confirming the positive effects this requirement has on families and society (16).

Moreover, some have argued that this medical certificate does not concern the virginity of women, as virginity or chastity is not a condition for marriage (17); rather, it pertains to diseases that pose a risk that contradicts marriage (18).

What also indicates that the Algerian legislator has adopted the obligation of the premarital medical examination is what Article 2 of Executive Decree No. 06-154 states, which outlines the conditions and methods for applying the provisions of Article 7 bis of Law No. 84-11: "Each applicant for marriage must provide a medical certificate dated no more than (3) months confirming their submission to the medical examinations specified in this decree. The certificate referred to in this article is issued by a physician according to the attached model of this decree."

Additionally, Article 6 of the same decree states, "The notary or civil status officer may not draft the marriage contract except after the applicant for marriage presents the medical certificate referred to in this decree."

Furthermore, the legislator has mandated in Article 1/7 of the aforementioned decree that both the notary and the civil status officer ensure, by listening to both parties simultaneously, that they are aware of the results of the examinations each has undergone and any diseases or factors that may pose a risk contradicting marriage, and this must be indicated in the marriage contract (19).

Therefore, the premarital medical examination is a legal condition aimed at completing the formal procedures for the marriage contract (20). Despite its necessity, it is not a condition for the validity of the contract (Article 9 bis of the Family Law) (21). Additionally, the health of both spouses from diseases is not a condition, as the notary and civil status officer may not refuse to formalize the marriage contract for medical reasons contrary to the wishes of the parties involved in the marriage contract (22).

After understanding the concept of the premarital medical examination and its legal nature, I will now address the significance of consent in the marriage contract and the legal effects that this medical examination may have on the consent of the parties before and after marriage.

## **Chapter Two: The Significance of Consent in the Marriage Contract**

Discussing the realization of consent in the marriage contract in general requires certain conditions to be met for the contracting parties, such as the necessity for both spouses to be known to one another, ensuring there is no ambiguity regarding their identities. Specifically, the Algerian legislator requires both parties to be aware of the results of the premarital medical examination.

Given that the marriage contract is distinct from other contracts due to the difficulty of reverting the parties to their previous states before the contract, ensuring consent is imperative. Therefore, we will address the reinforcement of the position of consent as an essential element in the marriage contract (First Section), and the effects of the premarital medical examination on this consent (Second Section).

### **First Section: Reinforcing the Position of Consent as an Element in the Marriage Contract**

Article 04 of the Family Law states: "Marriage is a consensual contract between a man and a woman in accordance with Islamic law..." Additionally, Article 09 of the amended Algerian Family Law states: "Marriage is concluded by the mutual consent of the spouses." This implies that the legislator has limited the foundations of the marriage contract to the exchange of consent between the spouses only. Thus, it becomes clear that the Family Law considers that marriage has only one essential element, which is the exchange of consent, meaning both parties must express their willingness to marry (23).

Expressing consent or will signifies the contracting party's intention to produce a legal effect. Internal or psychological desires can only be inferred from external expressions. This consent must be expressed by a person who is neither insane nor coerced.

According to Article 09, the marriage contract is governed by the principle of the will, both for adult women and minors, where coercion is not permissible. This guarantees that the adult woman's freedom to conclude the marriage contract is dependent on her expression of consent and her

position in defining her status in this contract. For minors, the guardian does not have coercive power but can prohibit marriage provided it does not conflict with the judge's permission for the minor to marry. Consequently, the legislator abolished marriage by proxy by repealing Article 20 of Law 84-11, granting women the right to conclude their marriage contracts, which implies the adoption of gender equality in all aspects related to concluding a marriage contract.

This consent is not merely the opposite of coercion, as that would not constitute an essential element but rather a condition. Instead, it refers to the exchange of offer and acceptance that indicates consent. This was affirmed by the Algerian legislator in Article 10, which defines consent as follows: "Consent is established by an offer from one party and acceptance from the other, expressed in any wording that signifies marriage in accordance with Islamic law. The offer and acceptance are valid even if expressed by a person who is incapable, in any manner that indicates marriage linguistically or traditionally, such as writing or gestures." Based on the legislator's restriction of the elements of marriage to consent alone—expressed through offer and acceptance—we will focus our discussion solely on this element. Through Article 10 of the Family Law, it is evident that the element of consent in the marriage contract consists of offer and acceptance, which aligns perfectly with Islamic jurisprudence (24).

Regarding the effect of the absence of consent, the Algerian legislator addressed this in Article 33, Paragraph 1 of the Algerian Family Law, which states: "Marriage is invalid if the element of consent is absent." This implies that if the element of consent is lacking, the marriage is deemed absolutely void due to the deficiency of its fundamental element, as there can be no marriage without sound consent and full freedom in choice (25).

Furthermore, a marriage contract in which the element of consent is absent produces no effects, neither legally nor religiously, and it has no existence whatsoever. The spouses must separate. However, as an exception to this rule, Article 40 of the Algerian Family Law stipulates the establishment of paternity to protect the rights of the child.

## **Section Two: Effects of the Premarital Medical Examination on the Consent of the Contracting Parties in the Marriage Contract**

Understanding the effects of the premarital medical examination on the consent of the contracting parties necessitates dividing these effects into two phases: before and after marriage. Therefore, we will discuss this in two subsections:

### **Subsection One: Effects of the Premarital Medical Examination**

Since the premarital medical examination is a formal procedure that must be completed before finalizing the marriage contract in front of a civil status officer or a notary, referring to Article 07 bis of the Algerian Family Law reveals that it mandates the completion of the premarital medical examination or the submission of a medical certificate indicating that the contracting parties are free of any diseases or factors that may contradict the marriage contract.

Moreover, the Algerian legislator has obligated those responsible for drafting the marriage contract, as stated in Article 7/1 of the aforementioned decree, to present a medical certificate that is free from any diseases or defects that may contradict the objectives of the marriage contract, under the penalty of obligation. This means that it is a mandatory formal procedure, and the contract cannot be concluded without it (26).

However, there are cases where this procedure is not required, such as in the case of customary marriages (27). The reasons for the prevalence of customary marriage, alongside other social factors, mean that when a marriage is conducted customarily, the parties involved do not typically pursue the premarital medical examination, which they will likely overlook. It then falls upon the contracting parties or those with an interest to establish the marriage before the court.

The judiciary, in turn, bears the burden of proving the existence of a customary marriage to protect the wife's interests primarily and to establish the paternity of the children. It also addresses an existing situation that needs to be corrected: the absence of the formal procedures required by law to finalize the contract (28).

In this case, the premarital medical examination will not affect the consent of the contracting parties in the marriage contract, as it merely reflects the actual health status of the contracting parties,



who then have the option to continue or separate. In any case, the contract will be validated to protect the wife's interests and the paternity of the children (29).

#### **Subsection Two: Effects of the Medical Examination After Marriage**

The text of Article 07, in its final paragraph of Executive Decree 06-154 dated May 11, 2006, clearly states: "The notary or civil status officer may not refuse to conclude the marriage contract for medical reasons against the will of the parties concerned."

From this text, it is evident that the premarital medical examination does not constitute merely a formal procedure; its results do not affect the conclusion of the marriage contract.

Since the Algerian legislator considers the premarital medical examination a formal procedure that must be adhered to by those involved in concluding the marriage contract, the contract drafter is obliged to inform the contracting parties of all results from the medical examinations. If the examination reveals that one or both parties have a disease and they do not object to proceeding with the contract, their consent prevents the drafter from objecting. The essence of a marriage contract is its consensual nature (30).

This raises the question: what is the purpose of mandating a medical examination if the will of the contracting parties is the foundation for concluding the marriage contract?

The essence of the premarital medical examination is to clarify the medical condition of each prospective spouse, thereby determining the possibility of marriage. This is the desired outcome of the medical examination. If it reveals that one or both spouses are ill, whether with contagious diseases or hereditary conditions—which is often the focus of the medical examination—marriage becomes impossible due to the risks these illnesses pose to their lives, especially in the case of contagious diseases (31).

The premarital medical examination in Algeria is merely a procedure that offers advice and guidance to those intending to marry. It leaves the parties free to conclude the marriage contract, having no effect on their consent, which reinforces the fact that the marriage contract is a consensual agreement (32).

Moreover, failure to comply with this examination may result in the forfeiture of either party's right to seek divorce if a disease, as outlined in the premarital medical examination, is discovered. This is equivalent to waiving a right that the legislator has granted them (33).

The Algerian legislator regards the medical examination as a means to disclose the parties' health status and the extent of the disease's risk to both individuals and future generations. This creates uncertainty for those involved in the contract, leading them to reconsider their situation and introducing a sense of hesitation. This, in itself, is a gain for the legal system, as it ensures that the results of the examination have a relative impact on the decision to conclude the contract.

This also becomes evident when activating the role of the guardian in marriage, especially concerning women, particularly those who are not of legal age. If the examination reveals a disease incompatible with marriage, allowing unrestrained consent while disregarding rational considerations would prevent the person responsible for concluding the contract from proceeding, regardless of the examination's findings. The guardian, in this case, represents reason. According to what is prescribed by law, the guardian, being close to the wife, assesses matters through the lens of reason, law, and the welfare of the ward. Thus, they can prevent their ward from marrying if the prospective spouse is unsuitable due to a condition that contradicts the intended purpose of marriage—namely, the illness revealed by the medical examination. The guardian serves as a rational barrier against unrestrained consent. Women often do not weigh the consequences of their decisions and may let emotions guide them, unlike their guardians. However, the points made about the guardian apply to the wife if the intended spouse is ill.

#### **Findings:**

From the above, we can extract the key findings reached through this study in the following points:

1. The Algerian legislator has mandated the premarital medical examination, as evident in Article 7 bis of the Family Code. However, this obligation is not accompanied by any punitive measures in case of non-compliance.

2. The premarital medical examination does not affect the consent of the parties to the contract. If both spouses wish to proceed with the marriage contract, they may do so, and no one can prevent them from doing so. This is clear in Article 07 of the aforementioned Executive Decree 06-154.

3. The Algerian legislator implicitly does not require adherence to the findings of the premarital medical examination as long as the concerned parties are willing to proceed with the marriage.

4. The premarital medical examination is a legal requirement for concluding the marriage contract before the civil status officer or notary, and its absence does not affect the validity of the marriage contract.

For these reasons, we propose the following recommendations:


1. The Algerian legislator should address the inconsistencies within the text of Article 7 bis, paragraph 01 of the Family Code and Article 7 of the aforementioned Executive Decree 06-154 concerning the content of the medical certificate.

2. There is a need to rephrase Article 07 bis of the Algerian Family Code regarding the requirement of the medical certificate before marriage, in line with Articles 06, paragraph two, 18, and 22 of the same law.

3. Raising awareness about the risks of the premarital medical examination is essential, emphasizing the need to conduct it before completing the marriage contract procedures. Additionally, highlighting factors that contribute to the sustainability of married life and how to address and resolve marital issues should be prioritized through seminars, training sessions, and workshops for those intending to marry.

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