

The Crime of Failure to Surrender a Child to the Person Entitled to Claim Custody Under Algerian Law

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Abstract

The Algerian legislator addressed the offence of failure to surrender a child to the person legally entitled to claim custody under Article 327 of the Algerian Penal Code, separately from its second form provided for under Article 328 of the same Code. This approach reflects the necessity of ensuring criminal protection for the child under custody, with the aim of reinforcing the principle of safeguarding the child's best interests in general and ensuring compliance with legal and judicial decisions in particular.

Article 327 identifies the constituent elements of the offence, which may be summarized in three components: the preliminary condition, the material element, and the moral element. The preliminary condition relates to the persons involved in the offence, namely: the victim, who must be a child; the offender, who may be any person other than the parents to whom the child has been entrusted for care; and the injured party, consisting of any person legally entitled to claim the child. The material element consists of the refusal or failure to surrender the child, while the moral element is represented by the existence of criminal intent and the offender's deliberate will to commit the act.

Keywords: Child Custody, Algerian Family Code, Algerian Penal Code, Failure to Surrender a Child.

Introduction

Given that the primary objective of child custody, from the perspective of social welfare, is to ensure the proper upbringing and care of the child, the Algerian legislator has surrounded custody with a comprehensive legal framework. This framework consists of a set of legal rules

and provisions governing custody while consistently taking into account the best interests of the child. In addition, the judiciary has been entrusted with the responsibility of safeguarding those interests.

Accordingly, when adjudicating divorce cases and determining custody arrangements, the Family Affairs Judge grants the non-custodial parent visitation rights at specified times. The purpose of such arrangements is to preserve family ties and ensure the psychological well-being and balanced development of the child.

In order to guarantee these rights, protect the child in custody, and safeguard custody rights in general, the Algerian Penal Code contains legal provisions that protect such rights and penalize non-compliance with final judicial decisions concerning the custody and future care of the child. These provisions also sanction violations of the natural and preferential right to the custody and care of a child, even in the absence of a judicial decision on the matter. This approach is based on the principle that the best interests of the child in custody must be protected through the imposition of criminal sanctions on any person who refuses to surrender the child to the individual legally entitled to claim him or her after the child has been placed under that person's temporary care. Any contrary position would constitute an infringement of custody rights and legal custody arrangements.

Since the welfare of children in custody has long been one of the principal concerns of societies, legal systems, and humanitarian organizations advocating for children's rights particularly in the present context marked by increasing divorce rates the following question arises:

To what extent is the criminal policy adopted by the Algerian legislator effective in protecting the family structure and the best interests of the child against the offence of failure to surrender a child to the person legally entitled to claim custody?

From this central issue emerge two subsidiary questions:

- What are the constituent elements of this offence?
- Are the prosecution procedures and criminal sanctions sufficient to protect the person legally entitled to claim the child, even in the absence of a judicial decision concerning custody?

In order to address the principal issue and its subsidiary questions, this study is divided into two main sections. The first examines the constituent elements of the offence, while the second discusses the procedures of prosecution and the applicable penalties.

First: Constituent Elements of the Offence

The offence of failure to surrender a child to the person legally entitled to claim custody is provided for under Article 327 of the Algerian Penal Code, which states: “Any person who fails to surrender a child placed under his or her care to those legally entitled to claim the child shall be punished by imprisonment from two to five years.”

An analysis of this provision reveals the extent of the protection afforded by the legislator to children's rights, security, and stability on the one hand, and to the rights of persons legally entitled to claim the child on the other. The constituent elements of the offence may be divided

into three components:¹ the preliminary condition (A), the material element (B), and the moral element (C).

A. The Preliminary Condition: The examination of this condition focuses on three essential elements:

1. The Victim (A Child): Article 327 expressly refers to a child as the victim of the offence. However, it does not precisely define the child contemplated by the provision. Consequently, some legal commentators have attempted to determine the child's age by analogy with Article 442(3) of the Algerian Penal Code, suggesting that the relevant age should be seven years. This reasoning is based on the fact that both provisions concern a child placed under the special care of another person². Nevertheless, Article 42(2) of the Algerian Civil Code establishes the age of discernment at thirteen years.

Such an interpretation is not persuasive, since analogy is generally not accepted in criminal law, where judges are bound by the principle of strict interpretation of criminal provisions unless the legislator expressly provides otherwise. Furthermore, judicial precedents offer no clarification on this issue.³

Accordingly, the term “child” should be understood in its general sense as referring to any minor who has not yet attained the age of majority.

2. The Offender: The offender is a third party, namely any person other than the child's parents who has been entrusted with the child's care by an individual legally responsible for the child. This category includes, among others, a nanny, a legal guardian, a wet nurse, a childcare institution, or a boarding school. The parents themselves are not covered by this offence. The French Court of Cassation has held that the offence cannot be committed by either parent, even after divorce or legal separation⁴. This is because parents are, by their very nature, responsible for the care of their child⁵ and are not considered persons to whom the child has been entrusted by another. Their custody results from parentage rather than from a delegation of care. Moreover, where one parent refuses to surrender the child to the other following divorce, the conduct falls within the scope of Article 328 of the Algerian Penal Code rather than Article 327.⁶

For example, if a father refuses to surrender a child to the mother, who enjoys priority in custody pursuant to Article 64 of the Algerian Family Code⁷, and such refusal occurs before the issuance

¹ Lankar Mahmoud, *Criminal Protection of the Family – A Comparative Study*, PhD thesis in Criminal Law, Faculty of Law, University of Mentouri – Constantine, 2010, pp. 167–168.

² Nabil Sakkar, *The Mediator in Crimes Against Persons*, 1st ed., Dar El Hoda, Aïn M'lila, 2009, p. 214.

() Ahsan Bousquia, *The Concise Guide to Special Criminal Law*, 15th ed. (2012/2013), Vol. 1, Dar Houma, Algeria, p. 195.

³ Makki Derdour, *Special Criminal Law in Algerian Legislation*, 1st ed., Vol. 2, 2005, p. 147.

⁴ Cass. crim., 22-03-1900, D. 1900. 1. 184.

Cited in: Lankar Mahmoud, previous reference, p. 167.

⁵ Nabil Sakkar, previous reference, p. 214.

⁶ Makki Derdour, previous reference, p. 147.

⁷ Article 64 of the Algerian Family Code states: “The mother has priority in the custody of her child, ...”

of a judicial decision granting her custody rights, the father cannot be prosecuted for the offence under consideration. Prior to the issuance of a judicial ruling determining custody, both parents enjoy equal rights with respect to the care and retention of the child. In situations where custody is disputed and uncertainty exists as to which parent has priority, criminal sanctions cannot be imposed until the competent judicial authority has determined which party is legally entitled to custody.

3. The Injured Party

The injured party is any person who is legally entitled to claim the child. In addition to the parents, this category includes any individual vested with custody rights over the child, such as a legal guardian. This applies regardless of whether that person personally entrusted the child to a third party or not, and irrespective of whether the child came into the defendant's care directly or indirectly.

B. The Material Element (Failure to Surrender the Child)

The material element of this offence is constituted by a negative act, namely the offender's refusal or failure to surrender the child, that is, to return the child to the person legally entitled to claim him or her. The offence consists in withholding a child who has been placed ¹under the offender's care from those who are legally entitled to demand the child's return.²

The refusal must be repeated and persistent for the offence to be established. A mere refusal upon the first request does not, in itself, constitute the criminal conduct required by law. Such conduct must instead manifest as a clear and deliberate opposition that leaves the person legally entitled to recover the child with no alternative but to seek judicial intervention in order to overcome such resistance and obstruction³. This principle was affirmed by the Algerian Supreme Court in the following ruling: "It is legally established that any person who fails to surrender a child placed under his care to those who are legally entitled to claim the child shall be punished by imprisonment for a term ranging from two to five years. In the present case, it was found that the appellant had not expressly refused to surrender the two girls, nor had he resorted to any manoeuvre intended to deprive the mother of her visitation rights. (...) Consequently, the conviction of the accused for the misdemeanour of failure to surrender a child constitutes a violation of the law due to the absence of the material element of the offence, thereby warranting the quashing of the judgment."⁴

C. The Moral Element

This offence is an intentional crime requiring the existence of general criminal intent, which is composed of knowledge and will. In this context, the offender must deliberately refuse to surrender a child who was voluntarily entrusted to his or her care. Accordingly, the offence is

¹ Mohamed Subhi Najm, *Explanation of the Algerian Penal Code (Special Part)*, 4th ed., Office of University Publications, Algeria, 2003, p. 69.

² Ahsan Bousqi'ah, previous reference, p. 195.

³ Lankar Mahmoud, *op. cit.*, p. 168.

⁴ Supreme Court decision, Criminal Division, dated 14/07/1996, Case No. 130691, *Judicial Review Journal*, Issue 01, 1997, p. 153.

established only where the person under whose care the child has been placed intentionally refuses to return the child to the person legally entitled to claim him or her, or deliberately refuses to disclose the child's whereabouts.¹ In this regard, French case law has held that the offence is not established where the accused places himself in a situation in which surrendering the child becomes impossible as a result of his own negligence, fault, or lack of supervision, such as where the child escapes or runs away from his residence.²

Therefore, the moral element of this offence is based on two essential components:³

- The accused's knowledge that the person requesting custody or recovery of the child is legally entitled to do so;
- The accused's deliberate intention to refrain from surrendering the child.

The French Court of Cassation has further affirmed that the requisite criminal intent in this offence consists of the deliberate refusal to surrender the child to the person legally entitled to claim him or her, irrespective of the motive underlying such refusal, provided that no actual or imminent threat exists to the child's safety or health.

Second: Prosecution Procedures and Penalty

Where all the constituent elements of the offence discussed above are present, the party refusing to surrender the child is deemed to have committed the misdemeanour of failure to surrender a child to the person legally entitled to claim him or her, thereby becoming liable to prosecution (A) and punishment (B).

A. Prosecution

The Algerian legislator has not established specific procedural rules governing the misdemeanour of failure to surrender a child to the person entitled to claim him or her. Nevertheless, by reference to the general provisions of the Algerian Code of Criminal Procedure, the following observations may be made:

1. Jurisdiction

Like most offences affecting family relations, this offence has been classified by the Algerian legislator as a misdemeanour. Consequently, subject-matter jurisdiction belongs to the Misdemeanours Division of the criminal courts.

With regard to territorial jurisdiction, the competent court is that of the place where the child was legally required to be surrendered. This is because the offence constitutes a simple omission, and therefore the place of commission is deemed to be the location where the legal obligation to surrender the child should have been fulfilled.⁴

¹ Ahsan Bousquia, op. cit., p. 195.

Nabil Saqr, op. cit., p. 215.

² Mekki Derdour, op. cit., p. 148.

Cass. crim., 13 May 1953, D. 1953. 1. 673.

³ Mohamed Abdelhamid El-Alfi, *Family Crimes and Criminal Protection of Family Bonds*, 1st edition, University Publications House, Alexandria, 1999, p. 79.

⁴ A simple omission offence is based on the mere failure to act, without requiring the occurrence of a direct positive result. Since the law imposes the obligation of delivery under penalty of sanction, the offence is

2. Direct Summons

The Algerian legislator considers the failure to surrender a child to the person legally entitled to claim him or her to be a punishable offence whenever its constituent elements are established. In order to safeguard this right, the Algerian Code of Criminal Procedure has laid down procedural mechanisms aimed at protecting the injured party through the initiation of public criminal proceedings.

The institution of criminal proceedings transforms the case from a state of procedural inactivity into one of active prosecution, thereby enabling the judicial police authorities to undertake procedural measures that formally set the public action in motion.¹

With respect to the offence under consideration, public criminal proceedings may be initiated through the procedure of direct summons (citation directe), as provided for under the provisions of the Algerian Code of Criminal Procedure.²

The direct summons is served through a judicial bailiff (huissier de justice), requiring the defendant to appear before the court on the hearing date set by the Public Prosecutor. This procedure follows the submission of a request to the Public Prosecutor, which must precisely identify the opposing party. In addition, the amount determined by the Public Prosecutor must be deposited with the court registry.³

3. Attempt (Inchoate Offence): The Algerian legislator has not criminalised the attempt of this offence.

C. Penalty

1. Punishment

Article 327 of the Algerian Penal Code provides that this offence is a misdemeanour punishable by imprisonment from two (2) to five (5) years, in addition to optional supplementary penalties applicable to misdemeanours.⁴

2. Aggravating Circumstances

The Algerian legislator has not provided for any aggravating circumstances in relation to the misdemeanour of failure to surrender a child to the person entitled to claim him or her. However, reference to French legislation reveals that Article 227-9 of the French Penal Code provides for two aggravating circumstances:

constituted and considered complete once the omission occurs. Territorial jurisdiction is determined by the place where the omitted act should have been performed (i.e., delivery), which is therefore deemed the place of commission of the offence.

¹ Fodil El-Aich, *Commentary on the Code of Criminal Procedure*, 1st edition, Dar El-Badr, Algeria, 2008, p. 27.

² When the Public Prosecutor receives police investigation reports, he examines whether they contain all procedural steps, verifies issues of jurisdiction, and considers the nature and classification of the offence as well as the age of the accused. The use of direct summons by the Public Prosecutor applies only to facts constituting a misdemeanour committed by an adult, or an offence (contravention) whether committed by an adult or a minor.

³ Abdelbaki Bouziane, *Criminal Protection of Family Ties in Algerian Legislation*, Master's thesis in Criminal Sciences and Criminology, Faculty of Law, University of Tlemcen, 2009–2010, p. 91.

⁴ Ahsan Bousquia, *op. cit.*, p. 195.

- Retaining the child for more than five (5) days without informing those entitled to claim him or her of the child's whereabouts;
- Keeping the child outside the territory of the Republic.

Furthermore, Article 121-7 of the French Penal Code provides for the aggravating circumstance of complicity, the provisions of which apply where one of the constitutive acts of complicity is established.

Conclusion

From the foregoing, it may be concluded that the Algerian legislator has regulated the offence of failure to surrender a child to the person legally entitled to claim him or her under Article 327 of the Algerian Penal Code separately from its second form provided for in Article 328 of the same Code. This approach differs from that of the French legislator, who combined both forms into a single offence under Article 227-5 of the French Penal Code.

From the analysis of Article 327 of the Algerian Penal Code, the constitutive elements of the offence may be identified as follows: a precondition (the victim being a child, the offender being any person other than the parents to whom the child has been entrusted for care, and the injured party being any person legally entitled to claim the child), the material element consisting of the refusal to surrender the child, and the moral element consisting of intent and will.

In conclusion, the underlying cause of this offence, in principle, is the voluntary and consensual decision of the parents to place their child under the care of a third party. However, it is evident that the persistence of such offences is encouraged by judicial rigidity resulting from legislative shortcomings and the absence of sufficient safeguards to deter such conduct. In particular, the Algerian legislator has not explicitly defined the age of the child concerned by the offence, nor is there any relevant judicial interpretation in this regard. Moreover, the provision is limited to defining the elements of the offence and prescribing the penalty, without providing specific procedural rules or aggravating circumstances, unlike the French legislator.

Accordingly, it is recommended that these shortcomings be addressed through legislative reform of Article 327 of the Algerian Penal Code, particularly by defining the age of the child concerned by the offence, as well as by drawing on French legislative developments with respect to aggravating circumstances.

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