

Legal Protection of the Family in Algerian Legislation

Boukaleb Sihem

University of Abdelhamid Boussouf Mila, Algeria

bouklab.s@centre-univ-mila.dz

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Abstract:

The family is considered one of the oldest institutions known to humanity; however, the concept of the family has multiple meanings, which requires careful examination of the conceptual framework of the term “family”.

The family and its formation have received great attention and protection at all levels and dimensions, starting from the revealed religions, passing through international conventions, and extending to national legislations. This research aims to shed light on the position of national legislations regarding the legal protection of the family.

Keywords: Family, legal protection, national legislations.

Introduction:

The individual is the true wealth of the nation. To preserve this wealth, the individual must be raised within a balanced and appropriate environment in order to become righteous and productive. The family environment is the first setting that embraces the individual; it is the source of values, principles, and religious and moral foundations. The individual’s personality is formed during the first years of life spent within the family. Given this profound influence of the family on the individual, and consequently on society and the nation as a whole, the family has received significant attention throughout history.

This attention has increased in the present time, particularly from a legal perspective. Regarding the Algerian legislator, it has been noted that since independence, efforts have been made to pay attention to the Algerian family and to establish numerous laws in this field. This leads us to raise the following question: “What legal measures has the Algerian legislator adopted to protect the family?”

To answer this problematic, the study relies on two sections: the first section is entitled “The Concept of the Family and Its Protection under Algerian Constitutions,” while the second section is entitled “The Protection Granted to the Family through the Family Code and the Penal Code.”

First Section: The Concept of the Family and Its Protection under Algerian Constitutions

The family is the origin and foundation of human beings. This necessitates an accurate definition of the concept of the family, as well as highlighting the protection granted to the family in Algerian constitutions.

First: The Concept of the Family

The word “family” has several meanings that have been mentioned in various linguistic dictionaries and lexicons. Among the most important meanings are the following: “al-usra” (family) is a singular noun whose plural is “usar”; it refers to the strong shield, firmness, strength, and severity of character¹. The captive (“al-asir”) is the imprisoned person; “al-asr” means tightening and binding firmly; it also refers to the strength of joints and limbs. The expression “nabatun asir” means a plant that is intertwined. All these meanings share the sense of tightening, connection, and solidity.

The family is the group connected by a common bond; it refers to a person’s relatives, clan, and closest kin, as they provide him with strength and support. In the general linguistic sense, the family means the strong and solid bond characterized by strength and the predominance of feelings of affection and mercy. Therefore, among its meanings is the “strong shield,” because the family represents the fortified protection for its members.²

In Islamic law (Sharia), the term “family” has a broad and comprehensive meaning.

It refers to the father and mother and their descendants, including sons and daughters, brothers and sisters, uncles and aunts. In other words, it is a group of individuals connected by a divine bond, which may be the bond of marriage, blood ties, or kinship.

It is worth noting that the Holy Qur’an, the Prophetic Sunnah, and ancient jurists did not use the term *family* itself; however, Islamic law regulated the family, clarified its rulings, defined the duties and rights of all its members, and granted it great importance. This is because the family in Islam is not limited only to spouses and children; rather, it extends to include a wide network of relatives connected by lineage, marriage, or breastfeeding ties, wherever they may be located.³

The term “family” raises several legal issues at the international level, because international conventions have adopted a different concept from the idea that the family consists of a husband, a wife, and children. This has led to widespread criticism from some Islamic countries. Furthermore, international human rights law has not explicitly defined the concept of the family, despite the existence of multiple definitions in international jurisprudence concerning this issue. The absence of an agreed-upon definition of the term *family* at the international level means that states may define this term according to their interests, culture, legal system, and the religious beliefs they practice.⁴

With regard to the legal definition of the family, we find that the Algerian Family Code defines the family in its Article 2, which stipulates: “The family is the basic unit of society, and it consists of persons connected by the bond of marriage and the bond of kinship.”

¹ Al-Yahya, Hamad bin Saleh, *The Family in the Holy Qur’an*, Qassim University, n.p., n.d., p. 2636.

² Okasha, Raed Jamil, and Zaitoun, Mundhir Arafat, *The Muslim Family in Light of Contemporary Changes*, 1st edition, Dar Al-Fath, Jordan, 2015, p. 26.

³ Saada, Dahmane, “Legal Protection of the Family,” *Journal of Human Sciences*, Vol. 3, No. 1, Algeria, 2019, pp. 27–28.

⁴ Fatima Najm Mohamed, “Legal Protection of the Family in Iraqi and Algerian Legislation: A Comparative Study,” *Al-Haqiqa Journal for Social and Human Sciences*, Vol. 20, No. 2, 2021, p. 39.

In this regard, Article 32 of the Algerian Civil Code provides: “A person’s family consists of his relatives, and relatives are considered to be all those who share a common ancestor.”

Accordingly, we find that the family is the first building block and the fundamental pillar of society. Within its framework, individuals are raised and their personalities are formed.¹

Therefore, the family is the foundation upon which society is built through the moral values, knowledge, and behaviors that it instills in the personalities of its members, which contributes to their dissemination throughout society. Accordingly, when the family is sound, society is sound; and when the balance of the family is disrupted, the balance of society is also disrupted. This necessitates the need to ensure the well-being of the family², because the strength and cohesion of society depend on the strength and cohesion of family relationships. The family is the first social unit in society, and it is through it that the preservation of the entire human species is achieved³. This is confirmed by Article 3 of the Algerian Family Code, which stipulates: “The family, in its life, is based on cohesion, solidarity, good relations, proper upbringing, good morals, and the rejection of social ills.”

According to Algerian legislation, the family is based on a consensual marriage contract between a man and a woman. This is in accordance with Article 4 of the Family Code, which considers lawful marriage as the sole model for family formation.⁴

Second: Protection of the Family under Algerian Constitutions

The Constitution is considered the supreme law of the state, and it must contain provisions for the protection and guarantee of human rights and freedoms in general. Among these rights, the right to marriage and the establishment of a family hold particular importance. Once a person reaches a certain age, whether a man or a woman, they have the right to marry and to establish a family by mutual consent, as well as the right to have children. The marriage contract must be registered with the competent official authorities.

All successive constitutions have provided for the protection of the family as follows:

1- The 1963 Constitution:

It is the first Algerian Constitution, issued one year after independence. This Constitution granted significant attention to the family, particularly within the framework of the socialist approach. Article 17 thereof stipulated: “The state protects the family as the basic unit of society.”

2- The 1976 Constitution:

Article 65 thereof stipulated: “The family is the basic unit of society and enjoys the protection of the state and society.”

¹ Okasha, Raed Jamil, and Zaitoun, Mundhir Arafat, previous reference, p. 27.

² Ghannawi, Zakia, “The Effectiveness of Legal Protection of the Family under Ordinance No. 05-02,” *Journal of Family Research*, Vol. 1, No. 1, Part One, 2021, p. 10.

³ Abu Abdo, Shirin Zuhair, *Features of the Muslim Family in the Holy Qur’an*, Master’s thesis, Gaza, 2010, p. 4.

⁴ Djagham, Mohamed, and Cherad, Sofia, “Legal Protection of the Family: Concept and Manifestations,” *Journal of Legal Studies and Research*, Vol. 7, No. 1, 2022, p. 343.

Through these two constitutions, which belonged to the socialist period, it can be observed that the family was granted a fundamental status and was considered a priority for the state, as it constitutes the basis for building society and its cornerstone. It was also regarded as the supporting pillar for establishing the edifice of the independent state through the preparation of youth and future generations to carry the torch of construction, within the framework of the values of solidarity and cooperation among individuals, and noble principles that safeguard the public interest of all members of the nation.¹

3- The 1989 Constitution:

During this period, the capitalist system was adopted. Article 55 of this Constitution stipulated: “The family enjoys the protection of the state and society.” This means that the state is responsible for providing protection to the family against any violation of any of its rights, whether as an entity or concerning any of its members. Any infringement of this right entails the responsibility of the state through the adoption of legal follow-up measures against the person who committed such an infringement.²

4- The 1996 Constitution:

Article 58 thereof stipulated: “The family enjoys the protection of the state and society.” Thus, it can be observed that the protection of the family is a confirmed principle whenever the Constitution is amended, and it does not change with the successive Algerian constitutions.

5- The 2016 Constitution:

Article 72 thereof stipulated: “The family enjoys the protection of the state and society. The family, society, and the state protect the rights of the child. The state guarantees the care of abandoned children or children of unknown parentage. The law suppresses violence against children. The state works to facilitate the access of vulnerable groups with special needs to the rights recognized for all citizens and their integration into social life. The family and the state protect elderly persons. The law determines the conditions and procedures for the implementation of these provisions.”

6- The 2020 Constitution:

This Constitution followed the same approach adopted by the 2016 Constitution with regard to the family and its members. Article 71 stipulates: “The family enjoys the protection of the state. The rights of the child are protected by the state and the family, while taking into consideration the best interests of the child. The state protects and guarantees the care of abandoned children or children of unknown parentage under the penalty of criminal prosecution. Parents are required to ensure the upbringing of their children, under the penalty of criminal prosecution. Children are required to fulfill the duty of showing kindness to their parents and assisting them. The law punishes all forms of violence against children, their exploitation, and abandonment. The state seeks to ensure assistance and protection for the elderly.”

¹ Saoudawi, Sadek, “The Constitutional Foundations of Family Protection in Algeria,” *Sawt Al-Qanun Journal*, No. 2, 2014, p. 241.

² Brahimi, Sarah, and Hammadi, Amal, *Legal Protection of the Family in International and Regional Conventions*, Master’s thesis, Mohamed Boudiaf University, M’sila, 2019–2020, p. 40.

Through this article, it can be observed that this Constitution reaffirmed that the family enjoys the protection of the state and society. It also focused on ensuring the protection of groups whose situation is characterized by vulnerability and weakness within the family. In addition, it granted women protection against violence in other provisions and emphasized criminal prosecution against all persons proven to have violated these rights and subjected them to infringement.

Through our examination of all Algerian constitutions, we find that the Algerian legislator, since the achievement of independence, has sought to establish the foundations of family protection and to constitutionalize this protection. This protection has not been affected by changes in the economic approach, nor by changes in constitutions and their amendments. Furthermore, protection has been provided to family members characterized by vulnerability, which has increased the effectiveness of the protection provided and expanded its scope.

Second Section: The Protection Granted to the Family through the Family Code and the Penal Code

Positive legislations have sought to establish rules regulating family relations among its members, with the aim of preserving its security and stability and ensuring the proper upbringing of its members. The Algerian legislator has sought to provide protection for the family through the laws of the Republic, including the Family Code and the Penal Code.

First: Protection of the Family in the Algerian Family Code

The Algerian legislator has established civil protection and embodied it in practice through the Family Code, whose legal provisions were formulated to clarify the rights and duties of family members, with the aim of preventing the emergence of conflicts within the family structure.

1- Unification of the Marriageable Age:

The determination of a specific age for marriage was not practiced in ancient times, due to the absence of any text in the Qur'an or the Sunnah specifying a particular age for marriage. However, positive laws have sought to regulate this issue, considering that they aim to ensure the safety and protection of the individual, given the consequences resulting from the marriage contract, which require both spouses to possess a certain level of discernment and full awareness of the results and consequences of what they are undertaking.¹

For this reason, Article 7 of the Algerian Family Code stipulates: "The capacity of a man and a woman to marry is completed upon reaching the age of 19 years. The judge may authorize marriage before that age for an interest or necessity, provided that the capacity of both parties to marry is established."

This age is also the age of legal maturity in Algerian legislation, pursuant to Article 40 of the Algerian Civil Code. The legislator has required judicial authorization before marriage for those who have not reached the legal age, in order to ensure the existence of the basic elements in both parties to the marriage, with the aim of building the family on sound and solid foundations,

¹ Mahrouq, Karima, Legal Protection of the Family between Legal Texts and Judicial Interpretations*, Doctoral dissertation submitted for the award of a PhD degree, University of the Brothers Mentouri 1, 2014–2015, p. 13.

protecting it, and ensuring its continuity. The judge determines this based on the circumstances of each case.

2- Consent to Conclude the Marriage Contract:

Consent is considered the fundamental element for the conclusion of all contracts, and particularly the marriage contract, which requires the consent of both parties, namely the husband and the wife. The legislator has given great importance to this element, as it defined the marriage contract through it. Article 4 of the Family Code stipulates: “Marriage is a consensual contract concluded between a man and a woman in accordance with Islamic law. Its objectives include the establishment of a family based on affection, mercy, and cooperation, the preservation of the chastity of the spouses, and the protection of lineage.”

Thus, marriage cannot exist, nor can its contract be concluded, without the presence of consent, and the contract becomes null in the event of its absence.¹

3- Registration of the Marriage Contract and the Right to Stipulate Conditions:

Article 22 stipulates the following: “Marriage is proven by an extract from the civil status register. In the event that it is not registered, it shall be proven by a judicial ruling. The judgment establishing the marriage must be registered in the civil status records at the initiative of the Public Prosecutor’s Office.”

This is intended to grant the contract its legal status and protect all parties to the contract, as both parties have the right to invoke the marriage contract against each other and against third parties.²

It also aims to protect what results from this marriage, namely children. We also find that the legislator has sought to expand the scope of the spouses’ will by allowing them to establish the conditions they deem appropriate and necessary to guarantee their rights. The stipulation of conditions is very beneficial for the stability of the spouses’ life in the manner that satisfies them and preserves their interests. This is provided for in Article 19 of the Family Code, which states: “The spouses may stipulate in the marriage contract or in a subsequent official contract all the conditions they deem necessary, particularly the condition of non-polygamy and the employment of the wife, unless these conditions contradict the provisions of this law.”³

Through this article, the legislator has allowed each spouse to stipulate any conditions they wish, provided that such conditions serve their interests. The article does not specify the type of these conditions, but it limits them by one requirement, namely that they must not contradict the provisions of the law.

However, these conditions must be written either in the marriage contract or in a subsequent official contract drawn up before the civil status officer or before the notary within whose

¹ Ben Sheikh, Fatima, and Abdelnabi, Mustafa, “Protection of the Wife’s Rights in the Algerian Family Code,” *Academic Journal of Legal and Political Research*, Vol. 6, No. 1, 2022, p. 1440.

² Assaoui, Fatima, “Civil Protection of the Family in Algerian Legislation,” *Journal of Legal Studies*, Vol. 8, No. 2, 2022, p. 377.

³ Fatima Najm Mohamed, previous reference, p. 53.

jurisdiction the permanent residence of the spouses or one of them is located. This was also confirmed by the Supreme Court in one of its decisions.¹

4- Independence of Financial Liability:

The independence of the spouses' financial liability is of great importance, as it allows each of them to preserve their wealth and possessions acquired before marriage, in complete independence from the financial liability of the other spouse.

In order to prevent one spouse from becoming enriched at the expense of the financial liability of the other and to avoid making the spouse a means of enrichment, the legislator has emphasized this principle. Furthermore, the financial liability of the spouse is not always positive; it may be negative when they incur debts and financial obligations towards third parties. In this case, each party to the marriage is solely responsible for paying their debts from their own private assets, without the effects of these debts extending to the other party.²

This is confirmed by the first paragraph of Article 37 of the Family Code, which stipulates: "Each spouse has a financial liability independent from that of the other."³

Accordingly, each party has the right to carry out all financial transactions, such as sale, lease, mortgage, will, and other legal dispositions. However, the legislator has allowed the spouses to agree, in the marriage contract or in a subsequent official contract, on the common property between them that they acquire during marital life, as well as to determine the shares belonging to each of them.

This is provided for in the second paragraph of Article 37 of the Family Code, which states: "However, the spouses may agree in the marriage contract or in a subsequent official contract on the common property between them that they acquire during marital life and determine the shares allocated to each of them."

The Algerian legislator has sought, through the Family Code, to establish legal rules that serve the Algerian family and protect its structure. The scope of this law's attention has extended to all members of the family. There are also numerous legal provisions and rules that cannot all be addressed here, including those related to divorce, custody, maintenance, and others.

This is aimed at preserving all the interests of the family members, balancing the solutions between them, and preventing disputes and discord. Thus, the legal protection provided by the Algerian legislator to the Algerian family is embodied, with efforts made to implement and realize it in practice.

Second: Protection of the Family through the Algerian Penal Code

Criminal sanctions are the legal means for achieving criminal protection of various values and interests. They are characterized by their severity because they affect one of the most valuable things a person possesses, namely their freedom and reputation through being characterized as a criminal. This severity makes them an effective means of achieving the greatest possible

¹ Mahrouq, Karima, previous reference, p. 37.

² Mahrouq, Karima, same reference, p. 56.

³ Ghribi, Ata Allah, "Marital Rights in Islamic Law and the Family Code," *Annals of the University of Algiers* 1, No. 32, Part One, 2018, p. 546.

protection for social values and interests, as they deter anyone who considers violating such values through the imposition of penalties.

The legislator provides criminal protection only for interests that are of great importance to society, because this type of protection represents the highest level of protection. The Penal Code is defined as the protection of individuals' rights and freedoms. It is also defined as the set of legal rules established by the legislator to specify criminal acts and determine the penalties and security measures imposed on their perpetrators.¹

The Penal Code is among the most important laws that embody the protection of the family in practice and in a highly effective manner, as it includes legal provisions that suppress crime and deter its perpetrator.²

A careful examination of the legal provisions of the Penal Code reveals that the legislator has taken into consideration the family bond that links its members. This is because some crimes are purely family-related and do not occur outside the framework of this bond. There are also crimes that may occur outside the family relationship, namely among members of society in general; however, when they occur between members of the same family, they acquire a particular character that makes their treatment different.³

The legislator always seeks to protect family ties from acts that infringe upon them in order to ensure the achievement of the best possible functioning. Accordingly, it has punished any parent who leaves the family home for a period exceeding two months and abandons all or part of their obligations with imprisonment, pursuant to Article 330 of the Penal Code. It has also punished the husband for the crime of neglecting his pregnant wife. Furthermore, the legislator criminalizes abandoning a child in any place, whether inhabited or uninhabited, pursuant to Articles 314 and 316 of the Penal Code. It also punishes the crime of adultery under Article 339 of the Penal Code, and imposes imprisonment in cases of sexual relations between relatives prohibited from marriage, which are considered acts of indecency, under Article 337 bis of the Penal Code.

Based on the foregoing, it can be said that the family relationship may constitute a constitutive element of criminalization, as is the case with the crimes of adultery, indecency between relatives prohibited from marriage, and family neglect. It may also constitute an aggravating circumstance for punishment, as in the crimes of intentional assault and battery and murder. Moreover, this relationship may constitute a mitigating circumstance, as in the crimes of assault, battery, and murder committed in a state of flagrante delicto following an act of adultery. It may also constitute an exempting circumstance from punishment, as is the case with family thefts.

It is noteworthy that criminal legislations have particularly focused on two family relationships: the marital relationship and the relationship between ascendants and descendants.

¹ Basrani, Amira, Criminal Protection of the Family Bond in Islamic Jurisprudence and Algerian Law, Master's thesis, Echahid Hamma Lakhdar University, El Oued, 2016–2017, p. 16.

² Basrani, Amira, previous reference, p. 28.

³ Mohamed Djagham and Sofia Cherad, previous reference, p. 349.

The Algerian legislator has made considerable efforts to establish the protection of the family through the Penal Code, with the aim of preserving respect, harmony, and compatibility among family members. This has been achieved by imposing penalties for crimes committed between its members, considering the family relationship as an aggravating circumstance in certain cases, while reducing the punishment in other cases in consideration of this bond and treating it as a mitigating circumstance, in order to preserve family stability and prevent its disintegration.

Conclusion:

From the foregoing, we find that the Family Code has provided a concise and comprehensive definition of the family, considering it as a basic unit. This unit constitutes the foundation upon which society is built, and when its condition is sound and its members are righteous, the entire society becomes sound and improved. Combating social ills can only be achieved through the family, which explains the efforts of all successive Algerian constitutions to protect the family, whether during the socialist or capitalist period.

Furthermore, the Algerian legislator has ensured the implementation of family protection through the Family Code, which includes legal rules and provisions that protect family members and clarify the rights and duties of each of them in order to support family stability and prevent conflicts among its members. In addition, the implementation and realization of family protection in practice have been achieved through the legal provisions of the Penal Code, which defines the punishment for crimes occurring within the family. These penalties constitute a deterrent for individuals and prevent them from committing family-related crimes.

The Penal Code has also taken into consideration the family relationship, making this bond a reason for aggravating punishment in certain cases, and in other cases a reason for reducing punishment. All of this aims to preserve the family structure, maintain its stability, and safeguard tranquility and affection among its members, which will positively affect society as a whole.

Suggestions:

- The Algerian legislator should require spouses, before the conclusion of the marriage contract, to undergo training courses that explain the proper methods of dealing with marital life and how to deal with children in the future.
- The legislator should require those intending to marry to obtain a certificate proving their psychological and mental health.
- Preventive measures should be adopted to protect the family from crime before it occurs. Among the most important of these measures are awareness campaigns highlighting the serious consequences of domestic violence and its destructive effects, which impact the entire family without excluding any of its members.
- The Algerian legislator should require that, when a family-related crime occurs, the perpetrator be referred to psychological and social specialists in order to determine the causes leading to the crime, with the aim of creating a database that can be used to develop means of reducing these crimes, which have become increasingly widespread.

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