

*Protection of the Children in Custody according to the Family
Law and Penal Code*

حماية الطفل المحضون في ظل قانون الأسرة وقانون العقوبات



Faitma Aissaoui, Yahiaoui Nabil

Akli Mhand Oulhaj University - Bouira , f.aissaoui@univ-bouira.dz

University of Algiers -Algiers-, : myahiaoui-n@yahoo.fr



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Abstract:

If children in general need protection as they are the weak party in the family, their need for protection becomes greater in case of the disintegration of the family through the dissolution of the marital bond between the parents. This because the effects of divorce and the conflict between the one who has the right of custody and the one who is obligated to provide alimony would be reflected on him.

If the protection of the child in custody is one of the priorities of the Algerian family law, the Penal Code also makes it one of its most important priorities. This is evident through its criminalization of the acts that harm the child in custody

Keywords: child;protection;custody;divorce;family;negligence.

ملخص:

إذا كان الطفل بصفة عامة يحتاج إلى حماية باعتباره الطرف الضعيف في الأسرة، فإن حاجته إلى الحماية تصبح أشد في حالة تفكك الأسرة عن طريق انحلال الرابطة الزوجية

بين الأبوين، حيث تتعكس عليه آثار الطلاق والصراع بين من له حق الحضانة ومن هو ملزم بالنفقة.

وإذا كانت حماية الطفل المحضون من أولويات قانون الأسرة الجزائري فإن قانون العقوبات يجعلها من أهم أولوياته أيضا ويظهر ذلك من خلال ما تضمنه من تجريم للأفعال التي تضر بالطفل المحضون.

كلمات مفتاحية: طفل، الحماية، المحضون، الأسرة، الطلاق، الإهمال.

1- Corresponding author: Aissaoui Fatma: f.aissaoui@univ-bouira.dz

INTRODUCTION

Children are the fruit of marriage, and the spouses are obligated to cooperate and stand in solidarity in order to raise and preserve them financially and morally, and to guarantee them a decent life in which their human and legal rights are respected. The family is the adequate environment for a child's development¹; thus, the parents have the responsibility to protect him\her and provide the necessary living conditions for his\her development within the limits of their capabilities.²

The protection of children in custody is considered one of the most important concerns of researchers because preserving them is a concern for the family and society. Today's child is tomorrow's man, and the child in custody needs special care, including appropriate legal protection. Therefore, the Algerian legislator did not only stipulate custody provisions in the family law; but, also, supported them by penal provisions in the Penal Code, and lastly issued a child protection law.

Hence, the importance of this research appears in that it is linked to child protection and family protection, which in itself is protection for society as a whole. It aims to know the extent of adequacy of the legal texts in guaranteeing protection for the child in custody according to the Algerian legislation and the extent of harmony between the family law, the penal code, and the child protection law in protecting him\her from the negative effects of divorce between parents.

Accordingly, we raise the following problem: To what extent has the Algerian legislator succeeded, in the Family Code and the Penal Code, to guarantee protection for the child in custody?

To answer this problem, we relied on the descriptive approach in setting definitions, and the analytical approach in analyzing legal texts in order to reach results. We also divided the topic into two axes:

The first axis: The Protection of children in custody in the family law.

The second axis: The guarantees of children in custody in the Algerian Penal Code.

1.The first axis: The Protection of children in custody in the family law.

The protection of the child in custody appears in the Family Code, whether in stipulating that the child in custody's interest is taken into account when granting or dropping custody, or in guaranteeing the child in custody's right to housing and visitation.

1.1 Taking into account the interest of the child in custody when granting or dropping custody

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Custody, according to Article 62 of the Family Code³, is “taking care of the child, educating him, raising him in the religion of his father, and ensuring his protection and preservation of his health and morals.” As for the child in custody, it refers to every child who has not yet custody as follows: the mother, then the father, then the maternal grandmother, then the paternal reached the full age of eighteen⁴, and whose custody is assigned to whoever deserves it according to the conditions stipulated by the law.

The legislator arranged those who have the right to grandmother, then the maternal aunt, then the paternal aunt, then the closest relatives in degree. It is worth to note that this order was issued in Article 64 of Order 05-02⁵. Whereas, before the amendment, the text of this article was as follows: "The mother is more entitled to custody of her child, then her mother, then the aunt, then the father, then the father's mother, then those closest in degree, taking into account the interest of the child in all of that, and when the judge rules on the right of custody, he must rule on the right of visitation." It is noted that the father was given priority over the maternal grandmother and maternal aunt, as well as the

priority of the paternal grandmother over the maternal aunt.

The motive for amending the arrangement, like the old text, was believed to be the change in the Algerian society and its shift towards a materialistic society. Relatives other than parents are no longer welcoming the custody of others' child. It is also logical for the father to be the custodian of the child after his mother since no one can perform the duty of custody like parents.

However, this order can be overtaken if the interest of the child in custody requires so, or if the person charged with the custody is not qualified for it⁶. This has been proven by conclusive evidence, as the legislator granted the judge wide discretion to choose the most suitable person to exercise custody, and required that the interest of the child in custody be taken into account when granting or dropping it.⁷

It is also worthy to point out that custody is falls on the mother if she marries a non-mahram relative⁸, provided that this does not harm the interests of the child in custody. It does not fall on the father if he marries someone other than the mother, knowing that the child in custody, in this case, stays with his stepmother more than he stays with his father; therefore, the jurisprudence of the Supreme Court has taken this into account when it ruled to assign the custody of the girl to her mother who is married to a non-mahram relative after the father remarried.⁹

It should be noted that a woman's work has raised several problems about her right to custody just like her right to alimony, given that her work outside the home affects the duty of education

and care required by custody. The Supreme Court ruled in this matter through the following: “that the work of the custodial woman does not necessitate dropping her right to custody unless there is proven evidence that the child in custody is deprived of his right to care and protection. Moreover, custody is not a right of the custodians only, but it is a right of the child as well, according to jurisprudence and justice”¹⁰. This latter is what is stipulated in Article 67 of the Family Law, which emphasized that a woman’s work cannot represent a reason for forfeiting her right to custody, taking into account the interests of the child in custody.

Accordingly, the interest of the child in custody must be given priority, as stipulated by the legislator and judicial jurisprudence. The working woman cannot retain her right to custody unless the interest of the child is achieved¹¹. At the same time, custody cannot be dropped from her just because she is a worker.

The custodian mother’s residence in a foreign country is also considered one of the reasons that may lead to forfeiting the right to custody because it would be impossible for the father to exercise his right to supervision, and because it also affects his right to visitation. However, the legislator refers the matter of assigning and dropping custody in this case to the judge¹², who must take into account the interests of the child.

Custody is also forfeited if it is not claimed after one year without an excuse, as stipulated in Article 68 of the Family Code. In this case, the judge has the discretion whether to accept the

excuse or not.

Based on the above, it becomes clear to us how the legislator granted the judge of family affairs broad powers to grant or drop custody, while the interest of the child in custody must always be taken into account, even if the custodian is not chosen according to the stipulated order. The legislator also focused in this aspect on the reasons for custody and its objectives, without giving us a precise definition of interest, but he did not set criteria that can be used to verify the interest of the child in custody. Thus, we automatically return to the general rule found in the Islamic law in accordance with Article 222 of the Family Code.¹³

1.2 The right of the child in custody to alimony, housing, and visitation

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Although the right to housing is included in alimony, in the case of divorce it would have special importance. The right to visitation is not only for the parents, but rather a right of the child in custody, too.

Alimony for the child in custody refers to the money spent on him for food, clothing, treatment, study, housing, and all the necessities of life according to custom and habit, which is what is stipulated in Article 78 of the Family Code. The alimony of the

son in custody continues until he reaches the age of maturity, while for the daughter it continues until marriage. This duty essentially falls on the father, but, in the case of his incapacity, it is borne by the mother. However, it may fall on the child in custody if he\she dispenses with it by earning money.

In the case of divorce, the father must provide the mother, if she is a custodian, with suitable housing for custody. If this is not possible, he must pay the rent. To increase the protection of the child in custody, the custodian remains in the marital home until the father implements the judicial ruling related to housing¹⁴. Moreover, the obligation to provide housing for the custodian is limited to the mother only and not for the rest of the custodians. This housing must be independent from the residence of the divorced person and his family, appropriate for the social environment in which the child in custody lives, and close to the custodian's family to protect her.¹⁵

This is because housing is considered part of the child's alimony, which is obligatory for his father and is not waived unless the child can earn money¹⁶. If the father is unable to provide housing, he must pay rent allowance. The Supreme Court has ruled that the custodian is entitled to rent allowance even if she is a worker, because the child's expenses and housing are borne by his father. The rent allowance begins to take effect from the date of pronouncement of the ruling that grants custody.¹⁷

The judge must stipulate in the ruling granting custody the right to visitation¹⁸ as the child in custody has the right to

communicate with his father for a certain duration during periodic appointments. This later is considered a right and duty at the same time, as the father must visit the child in custody on those appointments in order not to cause him psychological harm.¹⁹

Finally, it is worth to note that, in accordance with Article 65, the period of custody expires at the age of ten (10) years old for males, and at the age of marriage for females. The judge may extend custody for the male to the age of sixteen (16) if the custodian is a mother who has not remarried.

In the case of divorce, the judge grants sponsorship to the one to whom custody of the children is assigned. If we know that the mother has the right to custody of the children according to the aforementioned Article 64, then according to Article 87, sponsorship is hers whenever custody is assigned to her. Consequently, the mother would be responsible for the harmful actions caused by the child whenever custody is assigned to her because she is the one in charge of care and control.²⁰

If sponsorship over the minor includes sponsorship over oneself and money as well, then the person to whom custody is assigned has the right to sponsorship over the money of the child in custody, too. Thus, the custodian takes charge of the financial affairs of the child in custody for the sake of protecting them from loss.²¹

To guarantee the rights of the child in custody, the custodian who has the right of sponsorship is responsible for managing the child's money in accordance with the requirements of the public

law. Nevertheless, he\she must request permission from the judge if the disposal falls within the following cases:

-Selling the property, partitioning it, mortgaging it, and conducting reconciliation.

-Selling movables of special importance.

- Investing the minor's money through lending, borrowing, or participation in a company.

- Renting the minor's property for a period of more than three years, if it extends for more than one year after he reaches the age of maturity.²²

In authorizing, the judge must take into account:

- The case of necessity and interest.

-The property must be sold at public auction.²³

If the interests of the child in custody and the interests of the custodial guardian are contradicted, the judge shall, automatically, appoint a manager, or upon the request of someone who has an interest.²⁴

Thus, it is clear to us that the amendment of the Family Law in 2005 has supported the rights of the child in custody by stipulating the rearrangement of the ones who have the right to custody, and not considering a woman's work as a reason for losing her custody, in order to consolidate the right of women to work, granting sponsorship to those who have the right to custody, and granting the judge discretionary authority to take into account the interests of the child when granting or withdrawing custody.

The legislator, in the Family Law, is blamed for not

determining the conditions that must be met by the custodian in order for him to be eligible for custody. He, also, did not specify for us who are the closest relatives by degree, and in the case that they are not qualified, to whom custody should be assigned. Moreover, in case that the father does not implement the ruling that requires housing and the waiting period (Al Iddah) is ended, then here it is not permissible for the mother to remain with the father in the same house, according to Islamic law. In all of these problems, we rely on the Islamic law in accordance with Article 222 of the same law.

2. The guarantees of the children in custody in the Algerian Penal Code

The legislator was not satisfied with the protection stipulated for the child in custody in the Family Code, but rather supported it with a penal protection in the Penal Code that appears in stipulating a group of crimes through which he protects him, namely: submitting a child to a refuge or charitable institution, the crime of neglecting the children, the crime of abandoning children and exposing them to danger, the crime of selling children, the crime of not extraditing a child, and the crime of not paying alimony. Here we will limit ourselves to studying the crime of not extraditing a child and the crime of not paying alimony because of their direct connection to child custody.

2.1 First: The crime of not extraditing a child

This crime is considered a guarantee for the implementation

of the Family Law's provisions that are related to the right to custody and the right to visitation. Below we discuss the elements of this crime and the penalty prescribed for it.

Elements of the crime of not extraditing a child

The crime of not handing over a child is stipulated in Article 328 of the Algerian Penal Code: "The father, mother, or any other person who does not hand over a minor whose custody has been decided by a ruling subject to expedited execution or a final ruling to whomever has the right to claim him, as well as anyone who kidnapped him from those entrusted with his custody or from the places in which he\she placed him, or removed him from him or those places ,or forced others to kidnap or deport him, shall be punished by imprisonment from one month to one year and a fine of 20,000 to 100,000 DZD, even if this occurred without fraud or violence to those who have the right to claim him. The prison sentence increases to three years if the parental authority has been waived."

Through this article, we deduce the elements of this crime and the penalty prescribed for it

1-Elements of the crime of not extraditing a child

This crime requires the presence of its special element, in addition to the material element and the moral element

A- The special Element

It is required that the following be present:

- The child must be in custody and at the nursery age, which is 10 years old. As for the girl, she must reach the age of marriage

(19 years). The age of custody can be extended to 16 years for the boy at the request of the mother (Article 65, Criminal Procedure Law)

-The perpetrator must be a father, mother, or any other person to whom the custody is assigned.

- It is required that a judicial ruling be issued with immediate or final enforcement, including the granting of custody to whoever deserves it. It also determines the right of visitation for the other spouse, and the time and place of the visit.

B- The material element

The material element of this crime is represented in refraining from handing over the child to the person who has the right to two custodies based on a decision issued by the judiciary that is subject to immediate or final enforcement. The abstention of the convict from handing over the minor must be proven by means of a judicial report.

This crime also takes another form, which is the kidnapping of a minor from the one who has the right to custody. It is also the case that kidnapping occurs by deceit or coercion or without them. As for the third form, it is represented in removing the child from the places in which he was placed or forcing others to kidnap or deport him\her.

C- The moral element

It refers to the presence of criminal intent in committing this crime, which requires the perpetrator's knowledge of the judicial ruling and his intention not to implement the ruling.

2-The penalty prescribed for the crime of not extraditing a child

The penalty for this crime is imprisonment from one month to one year and a fine from 20,000 to 100,000 DZD. The penalty of imprisonment can reach three years if parental authority has been removed from the perpetrator.

It should also be noted that the public lawsuit related to this crime is restricted by the filing of a complaint by the victim, and this latter's forgiveness puts an end to any follow-up.

2.2 Second: The crime of not paying alimony

It was previously mentioned that the alimony of the child is obligatory for the father, unless he is able to earn money²⁵, until he reaches the age of maturity, and it continues if he is incapacitated due to a mental or physical illness or studying. It is obligatory for daughters until they are married, and is waived by their ability to earn money. In case of the father's incapacity, it becomes obligatory for the mother if she is able to provide it²⁶. This includes food, clothing, treatment, housing or rent, and all what is considered a necessity according to customs and habits.²⁷

This obligation continues to be one of the father's duties even if the child is under the custody of others. If the father fails to fulfill his duty for the child in custody, the person who has custody - as the sponsor of the child - may file a lawsuit against him demanding alimony. If he refuses to implement the final ruling requiring him to pay the amount of alimony for the child in custody, after a period of two months, the crime of non-payment

of alimony is committed.

Below we discuss the elements of the crime of not paying the alimony, followed by follow-up and punishment.

1- Elements of the non-payment of alimony crime

It can be summarized as follows:

A- The legal element:

According to the principle of legality, which indicates that there is no crime or punishment except by a text, the crime of not paying the alimony is stipulated in Article 331 of the Algerian Penal Code : “Anyone who deliberately abstains, for a period exceeding two months, from providing the sums stipulated by court to support his family, and from paying the full value of the alimony stipulated for him to his wife, ascendants, or descendants, shall be punished by imprisonment for a period of six months to three years and a fine of fifty thousand to three hundred thousand dinars, despite the issuance of a ruling against him to oblige him to pay alimony to them...”

The text of Article 331 criminalizes and punishes for the act of non-payment of alimony and it is the legal element of the crime of non-payment of alimony.

B- The special element

In addition to the general elements, the crime of non-payment of alimony requires the presence of a special element which consists of the following:

- The issuance of a judicial ruling that obligates the father to pay alimony: the previously mentioned Article No.331 did not

stipulate that the ruling must be issued by a specific judicial authority. Thus, the misdemeanor of not paying alimony is committed against the husband, whether the ruling is issued by elementary courts, judicial councils, or by the president of the court. The ruling can, also, be issued by a foreign judicial authority in accordance with the conditions stipulated in Articles 320-325 of the Code of Criminal Procedure²⁸ as the ruling may be final, or non-final but subject to expedited enforcement.²⁹

- Notifying the husband of the ruling, in accordance with the conditions stipulated in Article 894 of the Civil and Administrative Procedures Code.

- The convict's refusal to pay the full amount of the amount decided for a period exceeding two months. The crime remains valid even if he pays part of the amount before the end of the two-month period. The calculation of this period begins from the date of notifying the ruling to the person concerned, but it is customary for it to begin from the date of the end of the stipulated twenty-day period that is stipulated in the report of obligation to pay and the issuance of a report of refusal to pay.

C- The moral element

The crime of not paying alimony is an intentional crime that is not based on error. Rather, a criminal intent must be present, with its two elements that are knowledge and will. The legislator considered the presence of criminal intent to be presumed in this crime, hence, the accused must prove that his refusal was for a legitimate reason. However, this later cannot include misconduct,

laziness, or drunkenness as an acceptable excuse, but rather evidence of a bad intention for not paying.

2- Follow-up and penalty

Regarding local jurisdiction, the paragraph 3 of Article 331, stipulates that the court of the domicile or place of residence of the person decided who is to receive alimony is also concerned with jurisdiction. However, if the beneficiary of alimony lives abroad, then the rules of general jurisdiction shall be applied, which makes it easier for him\her so that he\she is not burdened by traveling to the court.

In addition to this, the legislator has designated this crime with special procedures, including the permissibility of mediation before filing a lawsuit.³⁰ Article Two of the Child Protection Law defines this as: “a legal mechanism that aims to conduct an agreement between the unruly child and his legal representative on the one hand and the victim or those who have rights on him\her on the other hand. It, also, aims to end prosecutions, make reparation for the harm suffered by the victim, put an end to the effects of the crime and contribute in reintegrating the child.”

Article 37 bis 2 of the Civil and Administrative Procedures Law³¹ considered the crime of refraining from paying alimony as one of the crimes in which mediation may be conducted. Criminal mediation is an attempt to reconcile the parties of the lawsuit by a third person in order to repair the victim’s harm and put an end to the existing dispute.³²

Accordingly, in the crime of non-payment of alimony, it is

permissible to conduct mediation between the spouses without initiating a public lawsuit, based on a written agreement between them that is signed by the public prosecutor, the police officer, and the spouses. The mediation agreement is considered binding on both parties and cannot be subject to appeal. Additionally, it has the status of an executive document. If the mediation agreement is not implemented within the legal deadlines, the Public Prosecutor may take whatever measures he deems appropriate based on the characteristic of suitability, without prejudice to the penalties to which the person who abstains from implementation is exposed.³³

This helps in protecting the family ties, and allows the victim to demand compensation for the damages she\he suffered from as a result of this crime.

The penalty prescribed for this crime is imprisonment from six months to three years and a fine from fifty thousand to three hundred thousand Algerian dinars. Moreover, it is worth mentioning that the victim's forgiveness has no effect in putting an end to the criminal prosecution unless all the due amounts are paid.

We conclude from the above that, even though it covered all the needs of the child in custody in the family law, the protection of the child in custody is not completely realized unless it is supported by penal protection. This latter was adopted by the Algerian Penal Code, which criminalized and punished for the non-implementation of custody provisions, and subjected these crimes to special rules that are consistent with the necessity of

preserving family ties and the familial atmosphere of the child in custody.

CONCLUSION

Protecting the child in custody is a humanitarian duty before it is a legal obligation. He\she has nothing to do with the problems that led to the separation of the parents, and therefore he\she must not bear the consequences of that separation alone.

Through this research paper, we reached the following results:

- The Algerian legislator obligated the parents to protect and care for the child in custody despite the dissolution of the marital bond between them.
- The father is obligated to bear the expenses of the child in custody.
- The mother has the priority to gain the custody of children in the case of divorce.
- The father is obligated to provide housing for the mother so that she exercises custody.
- The need to take into account the interest of the child in custody in any decision taken by the judge regarding him.
- If a parent does not adhere to his\her obligations towards the child in custody, he\she will be subject to criminal penalties.

Accordingly, we offer the following recommendations:

- Raising the custody age until the child reaches the age of maturity.
- Amending the legal text that forfeits the mother's custody of the child if she marries a non-mahram relative.

- Providing more flexible mechanisms for visiting the child if the parents live in two different countries.
- Establishing a legal text that shows us the ruling of the custodian if she is a non-Muslim mother.
- Toughening penalties for the crimes related to child custody.

Marginalization

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2 Article 5 of the same law.

3 Law No. 84-11 of June 9, 1984, which includes amended and supplemented by Order No. 05-02 of February 27, 2005.

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