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The Development of Algerian Family Law Since Independence: The Role of Judicial Reasoning (*ijtihad*) in Shaping Its Provisions

Abstract

This paper explores how Algerian family law has evolved since independence, particularly through legislative reforms and judicial contributions that have shaped the regulation of marriage. It pays close attention to the amendments introduced in the 2005 revision of the *Family Code*, examining both the motivations behind the changes and their practical implications. Central to the study is the role of judicial *ijtihad*—not as a theoretical concept, but as a lived practice through which judges respond to legal gaps and ambiguities, especially in the dynamic and sensitive field of personal status law.

Drawing on legislative texts, judicial reasoning, and historical context, the study argues that while the Algerian legislator has made important strides toward legal clarity and modernization, it remains necessary to recognize and institutionalize the interpretive work done by the judiciary. Ultimately, the paper highlights the complementarity between legislative authority and judicial reasoning in serving the evolving needs of Algerian families.

Keywords: *Algerian family law, judicial ijtihad, marriage and divorce provisions, post-independence*

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Müstəqillikdən sonra Əlcəzair ailə hüququnun inkişafı: Məhkəmə mühakiməsinin (*ictihad*) onun müddələrinin formalaşmasında rolu

Xülasə

Bu məqalədə Əlcəzair ailə hüququnun müstəqillikdən bəri necə inkişaf etdiyi, xüsusən də qanunvericilik islahatları və nikahın tənzimlənməsini formalaşdıran məhkəmə töhfələri vasitəsilə araşdırılır. Burada *Ailə Məcəlləsinin* 2005-ci il redaksiyasında təqdim edilən düzəlişlərə diqqət yetirilir, həm dəyişikliklərin arxasındakı motivasiyalar, həm də onların praktiki təsirləri təhlil olunur. Tədqiqatın mərkəzində məhkəmə ictihadının rolu durur — nəzəri bir konsepsiya kimi deyil, hakimlərin hüquqi boşluqlara və qeyri-müəyyənliklərə, xüsusən də şəxsi status hüququ sahəsində dinamik və həssas sahələrdə cavab verdiyi canlı bir təcrübə kimi.

Qanunvericilik mətnlərinə, məhkəmə mühakiməsinə və tarixi kontekstə əsaslanaraq, tədqiqat göstərir ki, Əlcəzair qanunvericisi hüquqi aydınlıq və modernləşmə istiqamətində mühüm addımlar atsa da, məhkəmə tərəfindən aparılan şərh işlərinin tanınması və institusionalaşdırılması zəruridir. Nəticə etibarilə, məqalə Əlcəzair ailələrinin inkişaf edən ehtiyaclarını ödəməkdə qanunvericilik hakimiyyəti ilə məhkəmə mühakiməsi arasındakı qarşılıqlı tamamlayıcılığı vurğulayır.

Açar sözlər: *Əlcəzair Ailə Hüququ, Məhkəmə İctihadı, Evlilik və Boşanma Müddəaları, Müstəqillik Sonrası*

Introduction

Research in the field of family affairs constitutes a rich and multidisciplinary subject, addressed by various disciplines such as sociology, psychology, and law. Within the legal domain, family matters have been codified into a distinct body of legislation commonly referred to as Family Law, or more traditionally, Personal Status Law. This body of law is designed to secure the interests of individuals, families, and society at large, ensuring their stability and safeguarding them from harm in all times and contexts. Given that societies undergo constant transformation, family legislation, too, cannot remain static; rather, it evolves in response to emerging social realities and the lived experiences of individuals and families.

The amendment of legislation in general and of family law in particular often arises out of legal necessity and pressing social contingencies. Such developments compel lawmakers to revise existing codes to reflect the political, economic, and social circumstances affecting the state.

Research

Among the key factors contributing to the reform of Algeria's Family Code is judicial *ijtihad* (independent legal reasoning), which has played a pivotal role in developing provisions relating to marriage and divorce, especially in cases where statutory texts were absent, vague, or open to multiple interpretations—either in terms of language or meaning.

In light of these developments, the present study seeks to address the following research questions:

- What are the major historical stages in the development of Algerian family legislation post-independence?
- What are the most significant amendments to the Algerian Family Code regarding the essential elements of the marriage contract?
- How has judicial reasoning (*ijtihad*) influenced and shaped these legal developments?

To address these questions and meet the objectives of the study, the research is structured around two main sections:

- Section One: The evolution of Algerian family legislation following independence – a historical overview.
 - Subsection 1: Milestones in family law reform projects in Algeria after independence.
 - Subsection 2: Foundational principles introduced in the 2005 amendment.
- Section Two: The influence of judicial *ijtihad* on the amendments to the Algerian Family Code concerning the essential elements of marriage.
 - Subsection 1: Key amendments relating to the essential elements of the marriage contract.
 - Subsection 2: The impact of judicial reasoning on the development of marital provisions.

1. The Evolution of Algerian Family Legislation After Independence – A Historical Overview

The first codified legal text addressing matters of marriage and divorce and regulating family life in Algeria was issued on 4 February 1959 under Ordinance No. 56/274. After the country gained independence, this law continued to be applied under Law No. 62/157 of 31 December 1962. However, it excluded all colonial, racist, or ideologically biased provisions that contradicted public freedoms and Islamic principles. Indeed, the Algerian family structure has long been rooted in a normative framework characterized by its Islamic identity—both prior to and after French colonization—which had attempted to replace these values with Western ideals, albeit unsuccessfully.

Following independence in 1962, Algeria began to reform its legal system, particularly in areas connected to sovereignty and national identity. This included the promulgation of new laws. Like other branches of law, family legislation underwent successive amendments through proposed reform projects, culminating in the framework we see today. These developments will be examined in Subsection 1, followed by a discussion of the key principles underlying the 2005 reforms in Subsection 2.

1.1. Milestones in Algerian Family Law Reform After Independence

Between 1979 and 1984, several attempts were made to draft a unified family code. These proposals reflected an ideological tug-of-war between two competing visions: one advocating

expanded freedoms and rights for Algerian women, and the other insisting on strict adherence to Islamic law (Sharī'a) as the principal source of regulation (Masoudi & Ben Guecha, 2013, pp. 3–4).

Algeria persisted in its effort to eradicate all colonial remnants and assert its legal sovereignty by affirming the application of Islamic legal principles in the area of family law. The Supreme Court supported this direction in numerous decisions, affirming the primacy of Islamic jurisprudence (Hamrsh, 2014, p. 72). At the same time, as Algerian families gradually transitioned away from traditional models toward more modern structures, the growing societal demand for a rule-based, legally organized family life became a defining characteristic of the post-independence era (Nehaili, 2010, p. 195).

Eventually, Algeria enacted a fully integrated Family Code in 1984 under Law No. 84-11. This legislative achievement reaffirmed the country's commitment to Islamic law as the foundational source of its personal status system.

The 1984 law addressed key matters such as marriage, divorce, and their legal consequences. It also covered guardianship (*niyāba shar'iyya*), inheritance law, and endowments (*waqf*), including donations such as gifts (*hiba*) and wills (*waṣiyya*) (Ben Chouikh, 2004, p. 115).

Despite its grounding in Islamic jurisprudence, the 1984 Family Code was met with divergent reactions. While some welcomed it, others opposed it. This divergence ultimately led to the promulgation of Ordinance No. 05-02 of 27 February 2005, amending Law No. 84-11 of 9 June 1984. Yet, this reform too has been subject to ongoing critique. Many argue that it was hastily enacted under political and circumstantial pressure and failed to address the underlying structural issues affecting Algerian families (Ben Sghir, 2008–2009a, p. 7).

Others have rejected the amendment outright, pointing to specific articles that they view as incompatible with Islamic legal principles.

One of the key advantages of the 1984 law and the 2005 amendment is that they were drafted as a limited and clearly structured set of legal provisions. This made it significantly easier for both judges and litigants to determine the applicable rulings in disputed cases. Prior to this codification, there were no specific statutory articles through which litigants could identify their rights and obligations. Judges, instead, had to rely on dispersed rulings found across various classical *fiqh* (Islamic jurisprudence) texts, which lacked uniformity and accessibility (Ben Chouikh, 2008, p. 9).

1.2. Foundational Principles of the 2005 Amendment

The key principles and objectives that the Algerian legislature sought to enshrine in the 2005 amendment to the Family Code were concisely articulated by then Minister of Justice, Tayeb Belaiz, during the second plenary session of the People's National Assembly on Monday, 14 March 2005. These may be summarized as follows:

- The necessity of affirming the values and principles of the Algerian people as enshrined in the Constitution, particularly those of justice, equality, the enjoinder of good, and the prohibition of evil—foundational principles that govern Algerian society.
- The urgent need to revise the Family Code in response to pressing social realities that had emerged within the evolving structure of the Algerian family—challenges requiring immediate legal intervention due to their practical urgency.
- The removal of Algeria's reservations to certain provisions of international conventions and the harmonization of its family law with comparative legislation from other Islamic countries in the region.

These amendments represented a significant legislative step forward, through which the Algerian legislator sought to correct certain textual shortcomings and legal ambiguities found in the 1984 Code. The changes were also responsive to the evolving realities of the family unit, particularly in light of mounting calls for the protection of women's and children's rights and the realization of gender equality.

The prolonged and often contentious debate surrounding the drafting of the Family Code delayed its issuance. Nevertheless, the law—once promulgated—represented a legislative achievement for Algerian society as a whole, and a practical tool for both judges and litigants. Even if the law did not

attain perfection, it succeeded in filling a long-standing legal vacuum in the area of family regulation and brought an end to the inconsistency in judicial rulings that had prevailed since independence, particularly in matters related to marriage, divorce, and their attendant legal consequences (Laderaa, n.d., p. 85).

2. The Impact of Judicial Ijtihād on the Amendments to the Algerian Family Code Relating to the Essentials of the Marriage Contract

The Algerian Family Code has undergone multiple legislative revisions, particularly in response to shifts in family life and changing modes of social organization. These changes were further catalyzed by growing advocacy for women's and children's rights and calls for gender equality. In this context, the legislature undertook a series of reforms, including the amendment, repeal, and introduction of several provisions topics that will be addressed in Subsection 1. Additionally, judicial ijtihād played a decisive role in shaping the legislative outcomes of these reforms, as will be explored in Subsection 2.

2.1. Amendments to the Algerian Family Code Relating to the Essentials of the Marriage Contract

The 2005 amendment to the Family Code brought about changes to 42 articles (Algeria, 1984/2005). These included the introduction of new articles (designated with terms such as mukarrar and mukarrar 1, meaning "repeated" or "1 bis"), modifications to the language and

structure of existing provisions (marked as mu'addal, i.e., "amended"), and the complete repeal of others (designated as mulghā, or "repealed").

The revised Family Code was reorganized into four main parts (books):

1. Marriage and its dissolution
2. Legal guardianship (al-wilāya al-shar'iyya)
3. Inheritance
4. Donations, including wills (waṣiyya), gifts (hiba), and endowments (waqf).

The first book, dealing with marriage, was subdivided into two sections: the first addressing the conclusion of marriage, and the second addressing its dissolution. The section on marriage was itself divided into five chapters. Notably, the first chapter originally addressing both engagement (khiṭba) and marriage was reorganized by Ordinance No. 05-02 of 27 February 2005 into the following three subsections:

- Section I: Engagement, covering Articles 4–6
- Section II: Marriage, covering Articles 7–17
- Section III: The Marriage Contract and Its Proof, covering Articles 18–22

The second chapter addressed impediments to marriage, the third dealt with invalid or defective marriages, the fourth outlined the rights and duties of spouses, and the fifth discussed lineage (nasab).

From this restructuring, it is evident that the first three sections concern the formation of the marriage contract, which underwent significant reform—both through amendments and the introduction of new provisions. The remaining two chapters relate to the legal consequences of marriage, and they too witnessed changes in several key articles.

The revision process paid particular attention to the legal elements constituting the marriage contract, with a focus on marital guardianship (wilāya) and polygyny. It also reviewed the different legal mechanisms for the dissolution of marriage, including various forms of annulment (faskh). Beyond these highly debated points, the amendment addressed other pressing but less publicly contested issues such as:

- Mandatory medical certification prior to marriage
- The regulation of artificial insemination
- The distribution of assets acquired during marriage
- The right of the custodial mother to remain in the marital home until the enforcement of the father's obligation to provide alternative housing
- The possibility of assigning guardianship over minors to the custodial parent

It is also worth noting that in revising the Family Code, the legislature took into account the

jurisprudence of the Supreme Court, incorporating some of its legal interpretations into the statutory framework particularly in areas such as compensatory divorce.

2.2. The Role of Judicial Ijtihād in the Development of Marital Provisions

Judicial ijtihād refers to the legal resolution reached by a court in cases where the applicable statutory provision is either absent, ambiguous, or insufficient.

It is also defined as the exertion by a judge of the utmost intellectual and interpretive effort to arrive at a presumptive ruling on a practical legal issue (Boubchir, n.d., p. 155). The outcome of such judicial reasoning is binding upon the disputing parties (Ayach, 2020–2021, p. 6).

In the domain of personal status law, judicial ijtihād plays a pivotal role in the application and actualization of legal norms. It is considered the "spirit of the law," as it serves to interpret and clarify provisions whose meaning may be obscure or difficult to ascertain. It also functions as a mechanism for addressing legal gaps in cases where no explicit ruling exists once the judge has exhausted all primary and subsidiary sources of the law.

This function, however, is bound by well-established principles and limitations that the judge must observe and not exceed.

Judicial decisions issued by the courts constitute a form of legal capital; they reflect the living application of the law. These rulings embody the operative force of the legal system, as statutes themselves remain inert until transformed into applied judgments. The decisions upheld by the Supreme Court—and upon which its jurisprudence has become consistent—represent the judiciary's interpretive orientation and doctrinal methodology. Such rulings, when repeatedly affirmed and adopted by higher courts, come to be recognized as judicial precedents (*mabādi' qaḍā'iyya*) (Ghajati, 2013–2014, p. 4).

The process of judicial ijtihād, entrusted to judges in the absence or ambiguity of legislative provisions, is not unbounded. Rather, judicial discretion is subject to legislative constraints outlined by the Algerian legislator. These include the following:

✓ Restriction to the Text and Legislative Intent

Where the statutory provision is ambiguous or unclear, the judge is required to interpret the text in light of its linguistic, grammatical, and syntactical structure. In cases of ambiguity, the judge must also consider the legislator's intent to arrive at the correct interpretation. Nonetheless, limited scope is granted to the judge to reason not only from the literal wording of the provision, but also from its broader implications. This is reflected in Article 1 of the Algerian Civil Code, which states: "The law applies to all matters for which its wording or its meaning provides a provision."

✓ Adherence to Subsidiary Sources of Law

The second paragraph of Article 1 of the Civil Code states: "If no legislative provision exists, the judge shall rule in accordance with the principles of Islamic law; failing that, in accordance with custom; failing that, in accordance with the principles of natural law and rules of equity."

Thus, in the absence of an applicable statutory provision, the Algerian judge is bound to apply the following hierarchy of sources: (1) principles of Islamic law, (2) customary norms, (3) principles of natural law, and (4) rules of equity.

Within this framework, the judge's role is to resolve legal disputes by analyzing both the facts and the applicable legal norms. This requires a sequential, integrated process of observation, inference, reasoning, and legal evaluation. The judge must identify the facts, search for the relevant legal rule, and apply it through a logical and reasoned process (Ben Sghir, n.d.b, pp. 94–96).

From this examination, it becomes clear that the Algerian legislator has intentionally left certain issues unregulated in the positive law, thereby allowing the judiciary whether at the level of the Family Affairs Section of the Court of First Instance, the Family Chamber of the Court of Appeal, or the Supreme Court to adjudicate such matters.

The resulting body of judicial decisions constitutes a form of jurisprudence-based law—functionally filling the role of legislation in cases where legal texts are absent or unclear. These rulings provide operative guidance to judges handling family law disputes, and thereby illustrate the judiciary's significant contribution to the development of marital and divorce provisions.

However, despite the substantial impact of judicial *ijtihad*, the legislator does not formally recognize it as a source of law within the Algerian legal system. Thus, one may say that the legislative and judicial authorities operate in a complementary relationship to achieve the spirit of justice (Fridja, 2004, p. 14).

The judge is legally and ethically bound to exercise *ijtihad* in cases where the applicable legal provision is either missing or unclear— particularly in response to the ever-changing realities of family life and newly arising circumstances that require adjudication. The judge must engage in interpretive reasoning and issue a conclusive ruling; abstention from judgment is not an option. This position is underscored by the words of the Chief Justice of the Supreme Court, Mr. Azzouz Nasser, who stated in a special issue of the *Judicial Ijtihad* journal of the Personal Status Chamber:

“It is firmly established that judicial *ijtihad* by the Supreme Court serves to interpret legal provisions when they are open to multiple readings... Our hope is that this volume, now accessible to all, will serve as a further contribution to the evaluative work of the Supreme Court—so that no one may claim the absence of judicial precedent in this domain, nor remain ignorant of it among those judges entrusted with upholding the law.” (Supreme Court, 2001, p. 17).

Conclusion

At the conclusion of this modest study—through which I have sought to shed light on the most significant developments that have shaped Algerian family law since independence, as well as the continuing role of judicial *ijtihad* in the field of personal status law— it is possible to summarize the main findings and offer a number of recommendations.

Key Findings:

1. Since independence, Algerian family law has undergone legislative reforms that have contributed meaningfully to the development of national legal sovereignty and institutional authority.
2. Codifying family provisions within a distinct legal framework comprising clear and specific articles has greatly facilitated judicial practice. Prior to codification, judges had to rely on the rulings of Islamic jurisprudence, drawn from expansive legal treatises replete with doctrinal detail and jurisprudential divergence among the various *madhāhib* (legal schools).
3. The successive amendments and revisions of the Family Code since its post-independence enactment reflect the legislator’s responsiveness to new challenges arising within the family and society at large—necessitating ongoing legislative intervention and reform.
4. Judicial *ijtihad* is an indispensable mechanism in cases where no clear statutory provision exists or where the legal text is ambiguous or insufficiently defined.
5. Despite the practical recourse to judicial reasoning and interpretive jurisprudence in such cases, the Algerian legislator does not currently recognize judicial *ijtihad* as a formal source of law.

Recommendations:

1. The Algerian legislature should reconsider the status of judicial *ijtihad*, recognizing it as a subsidiary source of legislation in situations where legal provisions are absent or unclear. It should be expressly incorporated into the hierarchy of legal sources.
2. Legal scholars and researchers specializing in family law should devote greater attention to systematizing and documenting judicial decisions in the field of personal status. This effort would enhance accessibility and deepen scholarly engagement with case law in the Algerian context.

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