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The Evolution of Algerian Family Law

Dr. Djerada Lakhdar [1], Dr. Amrouni Djillali [2]

[1] University Ahmed Draia Adrar, Algeria. Email: djerada.lakhdar@univ-adrar.edu.dz

[2] University Ahmed Draia Adrar, Algeria. Email: amrounidjillali2@gmail.com

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Abstract:

Allah, the Almighty, says: "Does He who created not know, while He is the Subtle, the Acquainted?" (Qur'an, 67:14).

Since humanity gained access to perception, laws, and knowledge, human beings have sought understanding. Yet, the wisdom of Allah is evident in all the systems and laws governing the universe. There is no place for chance or the spontaneous order of natural phenomena; everything occurs according to measure, as Allah has informed us.

If this order is clearly observable in the cosmic laws and the laws of nature, then the manifestation of Allah's wisdom and His management in what He has ordained as the final legislation for humanity is no less evident and explicit.

Islam has granted the family and women a status that represents a level of advancement not reached by humanity, neither in ancient nor modern times. Even the rights granted by contemporary legislation to women or relating to the family, in general, in modern societies, are considered limited when compared to the nature of the rights provided by Islamic law to Muslim women and the family. These rights are primarily derived from the Islamic perspective, which considers both men and women as mere vicegerents of Allah, obliged to obey His commands and respect His limits.

Since Allah concluded His scriptures with the Qur'an, completed His messages with Islam, and concluded the line of prophets with Muhammad (peace be upon him), this truth was affirmed. As stated in the Book of Eternity: the purpose of creating human beings is to recognize and worship Allah, their Lord. This reveals the purpose of creating this rational, thinking, and willing species in the world:

"And I did not create the jinn and mankind except to worship Me. I do not want from them any provision, nor do I want them to feed Me" (Qur'an, 51:57–58).

This doctrinal truth must not be overlooked when addressing the rules of marriage and divorce in Islamic legislation. These rules were detailed separately from worship regulations—contrary to the usual method of combining civil transactions with worship laws—highlighting their sacredness and permanence. For believers, this strengthens faith and adherence to the precepts of their religion.

It is essential to examine the care Islam devotes to the family in legislation, to understand the wisdom inherent in these laws, and to confirm their suitability to the circumstances for which they were legislated. This includes laws related to the formation of the family and its developmental stages, laws protecting it as a social entity established to preserve human progeny, and laws regulating its dissolution, along with the rights and obligations arising for both parties in this relationship.

Keywords: Algerian Family Law, Personal Status Law, Islamic Sharia, Legal Codification, Comparative Jurisprudence

Introduction:

Every country that gains independence from an occupying power is required to establish a legislative framework that aligns with its sovereignty. The application of national laws to the domain of personal status is a clear manifestation of the exercise of national sovereignty.

After independence, Algeria found itself in a legislative vacuum following its break with the French occupation. It would have been illogical for the state to declare its rejection of the occupation while remaining subject to its legal system. Moreover, there were no ready-made laws to replace the French legislation, nor were there institutions capable of drafting such laws. Additionally, the Algerian state project lacked a clear legislative model to succeed the French model, particularly regarding administrative management and organization. Consequently, it was unavoidable to maintain and continue operating under French legislation.

The process of independence was followed by efforts to codify laws. This law represents a continuation of the application of all the regulations France had introduced in the field of personal status legislation. It also preserves the Royal Decree of 10 August 1834, which mandated the application of Islamic Sharia in the domain of personal status, as well as the Decree of 31 December 1859 and the Decree of 17 April 1889, which applied Sharia in this field for Muslim Algerians. Furthermore, it incorporates the 1931 law concerning the reform of women's status in the Kabylie region and the 1959 law regulating female marriage.

Observing the volume of legislation issued during the period 1962–1984, one notices a significant number of laws covering a wide array of legislative domains, such as the Civil Procedure Code and the Penal Procedure Code. However, the Family Code was not even submitted as a draft to Parliament, despite the establishment of several committees to study it and the existence of multiple draft proposals. The only logical explanation for this delay, provided by Professor Ben Chneb, is the genuine conflict between the conservative and reformist wings, which appears to be the most plausible explanation.

It was not easy for the Algerian legislator to enact the personal status law and to decide the jurisprudential or philosophical approach that would define the Algerian Family Code and the structure of the Algerian family. By contrast with other codes, such as the civil and commercial codes, the civil law, despite Algeria's adoption of socialist policies, tended to retain an individualist orientation. In comparison with previous codes, the personal status law is the only legislation embodying Islamic Sharia, whereas other laws were inspired by Western democratic legal systems.

On 9 June 1984, the Personal Status Law was ratified. This was the first legal document to regulate this field after it had previously been left to judicial interpretation, leading to varying decisions between different courts. The law, numbered 84-11, adopted Islamic Sharia, primarily following the Maliki school of thought over other schools referenced in the preparatory documents of the law. From a constitutional perspective, the legislator based the rules of the personal status law on Articles 151, paragraph 2, and 154 of the 1976 Constitution. Article 151 recognized Islam as the state religion, while Article 154 stated that the family is the basic unit of society.

This law comprises 224 articles covering marriage and its provisions, divorce and its consequences, guardianship and its types, legal representation, inheritance rules, wills, and gifts. Most importantly, the law established Islamic Sharia as the primary source in the application of personal status law. This principle is explicitly reflected in Article 222, which provides that in cases not covered by this law, the provisions of Islamic Sharia apply. This article also introduced the principle of generalized application of Sharia without specifying which jurisprudential school has priority.

Despite varying opinions and criticisms regarding the Family Code, it can be considered a positive step. The legislative initiatives undertaken by the Algerian legislator were particularly important, considering the difficulty of reconciling a system based on socialist ideology, which prioritizes societal protection over individual interests, with personal laws that prioritize individual interests.

During the late 1970s, particularly starting in 1979, there was no consensus on the model of society to be established. That period also witnessed regressions in socialist trends. Moreover, codifying the family system was challenging due to the diversity of cultures in Algerian society and differing jurisprudential opinions within Islamic Sharia, between strict and lenient schools of thought.

In any case, any law enacted in a specific historical period must be reviewed if circumstances change. The provisions of the Family Code were derived from Islamic Sharia, namely from jurisprudential interpretations based on consensus (ijma ‘), analogy (qiyas), and juristic preference (istihsan).

Chapter One: The Concept of Personal Status and Its Historical Development

Section One: The Concept of Personal Status Law.

1. **The meaning of the term "Personal Status" (statut personnel).**[1] It refers to the legal conditions that exist between an individual and their family, and the resulting legal effects as well as moral or material obligations. Islamic jurisprudence only came to know this terminology recently, as jurists applied the name "Personal Status" to the family system and its legal provisions, in contrast to "Civil Status," which governs an individual's relationship with members of society outside the bounds of their family.[2]

2. Classical jurists did not use this term, which is essentially derived from Western legal[3] systems. Instead, they would discuss the rulings pertaining to the family and its related matters distributed across various chapters of jurisprudence, such as marriage, dowry,... ...and maintenance, divorce, lineage, guardianship, wills, inheritance, and so on.[4] All these matters fall under three main categories:[5]

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[1]It is said that **Personal Status (statut personnel)** is distinguished from **Real Status (statut réel)**, which governs financial relations and falls under the purview of Civil Law. See: Belhadj Al-Arabi, General Theory of Obligation in Algerian Civil Law, DOG, 6th Edition, 2008, p. 13 et seq. Furthermore, in Western legal systems, family law provisions are incorporated within the articles of the Civil Law as a single codification.

[2] Belhadj Al-Arabi, A Summary of Algerian Family Law, Vol. I, Marriage Provisions, University Publications Office, Algiers, 6th Edition, 2010, p. 13.

[3] The term "**Personal Status**" is of Italian-Roman origin, stemming from Latin. It permeated Arab legislations through French law, making it a colonial legacy.
Du statut réel et du statut personnel; Thesis, Paris; 1952; p. 18. Cf. (C.A.) Meaux, Du statut.

[4]Mustafa al-Siba'i, Explanation of Personal Status Law, Vol. 1, Islamic Office, Beirut, Damascus and Amman, 7th Edition, 1997, p. 11.

[5]Muhammad Taqiyya, The Development of the Legal Concept and Judicial Jurisprudence in the Field of Personal Status Law, Journal of Algerian Legal Thought, 1984, Issue 1, p. 18 et seq.

3. 2-1 Provisions of marriage and its resulting effects: dowry, maintenance, breastfeeding, custody, divorce, waiting period (‘iddah), and others. 2-2 Provisions of legal capacity, guardianship (hajr), legal agency (niyaba shar‘iyya), guardianship over minors and others, and wills with their various types. 2-3 Provisions of inheritance and related matters, known in Islamic jurisprudence as the rulings of "prescribed shares" (al-fara’id). From this, the broad scope of the term "Personal Status" in Arab-Islamic countries becomes clear to us. The Algerian Family Law issued on June 3, 1984, incorporated these three categories and their main subjects without the legislator providing a comprehensive definition for this term.[1] 2-4 The first to use this term was the Egyptian jurist Qadri Pasha, who compiled a legal corpus titled "Legal Rulings in Matters of Personal Status."[2]

Personal Status is understood as the conditions that exist between an individual and their family and the various rights and obligations arising from these conditions. This term was not known to early Muslim jurists; instead, they used a set of legal terms such as the Book of Marriage (kitab al-nikah), Divorce, Maintenance, Prescribed Shares (al-fara’id), Donations (al-tabarru‘at), and other matters related to the family.[3]

The Egyptian Court of Cassation issued a ruling in 1934 clarifying the meaning of Personal Status as the totality of natural or familial attributes that distinguish an individual and upon which the law confers a legal effect in their social life, such as being male or female, being a spouse, widowed, or divorced, being a legal father, being of full legal capacity or lacking it due to minority or insanity, or having unrestricted or restricted capacity due to legal reasons.[4] Furthermore, Article 13 of the Egyptian Law on the Organization of the Judiciary, issued in 1939, specified that matters considered part of Personal Status are: matters relating to individuals' civil status and their legal capacity...

and the family system, divorce, filiation, lineage, guardianship (wilayah), custodianship (wisayah), interdiction (hajr), as well as disputes relating to inheritances, wills, and other dispositions taking effect after death.[5]

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[1] Al-Arabi Belhadj, A Summary Explanation of the Algerian Family Law, Vol. I, Marriage and Divorce, University Publications Office, Algiers, Fifth Edition, 2007, pp. 13-14.

[2] Abdulrahman al-Sabouni, Explanation of Syrian Personal Status Law, Vol. 1, University of Damascus, 1996, 7th Edition, p. 11.

[3] Ben Shuwaikh al-Rashid, Explanation of the Algerian Family Law, Dar al-Khaldouniya, 2008, First Edition, p. 6.

[4] Al-Arabi Belhadj, Ibid., p. 14

[5] Ben Chouikh, Rachid, ibid., Dar Al-Khaldounia, 2008, first edition, pp. 6–7

3- The Algerian legislator has appended to this enumeration the matter of gifts (hiba), and certain matters related to material issues such as endowments (waqf) and wills, as they are contracts of gratuitous disposition (tabarru'at) based on the legally-attributed concept of charity (sadaqah). Hence, Personal Status law in the Algerian system encompasses disputes and matters relating to individuals' civil status and legal capacity, those pertaining to the family system such as engagement, marriage, the mutual rights and duties of spouses, dowry (mahr), the matrimonial property regime, divorce, judicial dissolution (tatliq), separation (tafriq), lineage, children's rights, provisions for maintenance of relatives, guardianship (wilayah), custodianship (wisayah), marital authority (qiwamah), interdiction (hajr), provisions regarding missing and absent persons, sponsorship (kafalah), and authorization for management, as well as disputes and matters relating to inheritances, wills, and other dispositions taking effect after death.

The Algerian legislator designated the law issued on June 9, 1984, concerning personal status, as the "Family Code" (code de la famille) instead of the old traditional designation.[1] This designation, in fact, aligns with the provisions of Islamic Sharia, aiming to regulate family law provisions in general, starting from marriage and divorce, through lineage, maintenance (nafaqah), waiting period (‘iddah), and custody (hadanah), and ending with wills, estates, inheritance, and others.[2]

In truth, the provisions contained in this law are not limited to the family; they have also encompassed an individual's civil status, their declaration of absence, provisions for missing and absent persons, interdiction, custodianship, priority (taqdim), sponsorship, gifts, wills, and endowments—all of which are rules pertaining to the individual as a person, not merely as a member of a family. These are more closely associated with personal status than with the family.[3]

- Regarding this matter, the Supreme Court has held that what is meant by "personal status" includes all cases where there is a substantive dispute concerning family relations. This includes, for example: lineage, divorce, custody,[4] matters

[1] Al-Arabi Belhaj, A Concise Commentary on the Algerian Family Code, Vol. 1, Provisions on Marriage, p. 14

[2] Its content is consistent with the requirements and objectives of family law in terms of substance and facilitation; see: El-Ghaouthi Ben Melha, Family Law in Light of Jurisprudence and Case Law, Dar Majalat Al-Qada’, Algeria, 2nd ed., 2008, p. 6.

[3] Belkheir Sadid, The Family and Its Protection in Islamic Jurisprudence and Algerian Law: A Comparative Study, Dar Al-Khaldounia, Algeria, 1st ed., 2009, p. 14.

[4] Supreme Court, Family Affairs Chamber, 15/07/1986, Case No. 39360, unpublished

consequential to marital ties (‘ismah) and matters specific to spouses,[1] judicial dissolution[2], estates and inheritances,[3] cases relating to individuals' civil status and legal capacity,[4] as well as financial matters within the scope of personal status, insofar as they, in essence, constitute a condition, ruling, or effect of the marriage contract or its termination.[5]

And despite the settled jurisprudence of the Supreme Court on this matter, it ruled in a decision dated 21/04/1998, File No. 189260, that an alimony case has no relation to personal status. Consequently, the argument taken from the violation of Article 141 of the Code of Civil and Administrative Procedure (i.e., Article 260 of the new C.C.A.P.) is unfounded.[6]

This distinction is invalid, as it is established among jurists that alimony cases are considered matters of personal status (al-aḥwāl al-shakhṣiyya), just as detention (or suspension) cases also fall within the domain of personal status, not real status (al-aḥwāl al-‘iniyya).[7]

Subsection Two: The Evolution of Personal Status Law in Arab Countries:
The frame of reference for the judiciary in early Islam during the era of the Rightly Guided Caliphs was the Book of God and the Sunnah of His Messenger, then ijtihād (independent legal reasoning) through opinion and consultation if the judge did not find a textual ruling on the matter. After this period, their fatāwā (legal opinions) became another source to which the judge would resort if he did not find the ruling in the Noble Qur’an and the Prophetic Sunnah, without being obligated to follow any specific fatwā except those upon which they had consensus. As for matters on which they disagreed, he would select from their

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[1] Supreme Court, Family Affairs Chamber, 25/12/1989, Case No. 57752, Judicial Review, 1991, Issue 3, p. 68; 19/03/1990, Case No. 59140, Judicial Review, 1993, Issue 1, p. 52.
[2] Supreme Court, Family Affairs Chamber, 11/07/1982, Case No. 26535, Judicial Bulletin, 1982, p. 240.
[3] Supreme Court, Family Affairs Chamber, 10/06/1997, Case No. 163414, Judicial Review, 1998, Issue 1, p. 115
[4] Supreme Court, Family Affairs Chamber, 11/03/1998, Case No. 153622, Judicial Review, 1997, Issue 2, p. 71.
[5] Supreme Court, Family Affairs Chamber, 10/04/2002, Case No. 275878, Judicial Review, 2003, Issue 1, p. 378.
[6] Supreme Court, Chamber [?], Judgment No. 189260, dated 21/04/1958, Journal of the Supreme Court, Special Issue, p. 214.
[7] This is because the Supreme Court, in its rulings, held that detention (i.e., suspension) has no relation to personal status, and therefore the argument is unfounded. This implies that with the enactment of the Suspension Law of 1991, there is no longer a need for its inclusion in the Family Code.

opinions the one closest to the Book of God and His Sunnah; if he did not find [a suitable opinion], he would exercise ijtihād based on his own opinion.[1]

None had considered restricting the judge's discretion, despite the attempts of ʻUmar ibn ʻAbd al-ʻAzīz and the attempts of Abū Jaʻfar al-Manṣūr with Imām Mālik. However, this latitude began to be affected by madhhab-based constraints, as the scholastic methodological approach began to dominate the judiciary in the Islamic state, especially when Abū Yūsuf, a student of Abū Ḥanīfah al-Nuʻmān, assumed the judgeship of Baghdad. 4 Consequently, the Ḥanafī school spread throughout most Islamic regions, while al-Andalus and the Arab Maghreb remained adherents to the school of Imām Mālik, and the Levant (al-Shām) adhered to the school of al-Awzāʻī and then al-Shāfiʻī. As for the Shīʻī school, it would typically emerge during periods of weakened state authority, as well as with the rise of states such as the Fāṭimid state.[2]

Thus, the judiciary in the Islamic state began adhering to a specific school, even if the judges themselves were affiliated mujtahids. This led those aspiring to judicial office to convert from their own schools to the Ḥanafī school until it became the official school of the ʻAbbāsid state, except in some regions like al-Andalus, where the judiciary followed the school of Imām Mālik ibn Anas, and the Levant, where its judiciary followed the school of its jurist Imām al-Awzāʻī for a period before its decline. When the ʻAbbāsid state weakened, the judiciary shifted from the school of Abū Ḥanīfah in many regions to other schools—such as the Shīʻī school in the Maghreb, Egypt, and the Levant during the establishment of the Fāṭimid state there. When their state ended with the rise of the Ayyūbids founded by Ṣalāḥ al-Dīn al-Ayyūbī, it was replaced by the Shāfiʻī school in Egypt and the Levant for a time, after which the Ḥanafī school returned.[3]

During the Mamlūk era, al-Ẓāhir Baybars introduced the concept of appointing four judges—one for the adherents of each school—to adjudicate among them. Nevertheless, he accorded the Shāfiʻī school a higher status than the other schools.

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[1] Muḥammad Muṣṭafā al-Sibāʻī, Family Law Provisions in Islam, al-Dār al-Jāmiʻiyyah, Lebanon, 4th ed., 1983, p. 15.

[2] Salmān Walid Khisāl, The Guide to Explaining the Algerian Family Code, Dār Ṭulayṭah, Algeria, 1st ed., 2010, p. 8.

[3]Abdelkader Ben Harzallah, Al-Khulāṣah fī Aḥkām al-Zawāj wa al-Ṭalāq [The Summary of Marriage and Divorce Rulings], Dar al-Khaldounia, Algiers, 1st ed., 2007, p. 13.
Mohamed Abu Zahra, Al-Aḥwāl al-Shakhṣiyya [Personal Status], Dar al-Fikr al-Arabi, Cairo, 3rd ed., 1957, p. 9 et seq.

This situation persisted until the Turks assumed control of Egypt, whereupon the Ḥanafī school became the predominant one.[1]

Personal status laws were not promulgated in Arab countries until the Ottoman era, during which judges in Islamic lands ruled based on shar‘ī texts and jurisprudential rulings according to the schools prevalent in those lands. The first such law issued was the Ottoman Family Rights Law of 1917, which codified family law provisions pertaining to marriage and divorce. This law is distinguished by not being confined to a specific school but rather drawing from all four Sunni schools. This was followed by the compilation produced by the Egyptian jurist Muḥammad Qadrī Pasha, titled al-Aḥwāl al-Shar‘iyya fī al-Aḥwāl al-Shakhṣiyya (Legal Rulings in Personal Status Matters), upon which jurisprudence and the judiciary heavily relied. It represents the first attempt in Arab countries to compile various issues related to the family, although it derived its substance from Ḥanafī jurisprudence.[2]
Thus, Islamic Turkey preceded other Islamic countries in codifying family law provisions[3] Subsequently, a series of other laws emerged, organizing inheritance provisions in 1943, the law of wills in 1946, and the law of guardianship over property in 1952, culminating in Law No. 01 of 2000 concerning the regulation of some conditions and litigation procedures in personal status matters.

However, with the beginning of the twentieth century, and to avoid previous contradictions and the difficulties that could arise from applying the school of Imām Abū Ḥanīfah in certain matters, Egypt began formulating personal status laws derived from Islamic jurisprudence. These laws adopted opinions from the school that aligned with the times and stipulated that if no textual ruling governed the matter before the judge, he must rule according to the preponderant opinions from the school of Imām Abū Ḥanīfah al-Nu‘mān. The inception of these laws was Law No. 25 of 1920 concerning some matters of personal status. Since that time, personal status laws in Egypt continued to be issued and evolve from the early twentieth century until the promulgation of Law No. 01 of 2000 regarding the regulation of some conditions and litigation procedures in personal status matters. All these laws are directly derived from the rulings of Islamic jurisprudence.

Following Law No. 25 of 1920 concerning the regulation of some matters of personal status, Law No. 56 of 1923 was issued, then Law No. 25 of 1929

[1] Mustafa al-Sibai, Sharḥ Qānūn al-Aḥwāl al-Shakhṣiyya [Commentary on Personal Status Law], Vol. 1, Al-Maktab al-Islami, Beirut, Damascus and Amman, 7th ed., 1957, p. 19 et seq.
[2] Ben Shuwaikh al-Rashid, Op. cit., p. 7.
[3] Abdelkader Ben Harzallah, Op. cit., p. 16.

concerning the establishment and regulation of some provisions of personal status.

It should be noted that regarding matters brought before the judge for which no text exists in the personal status laws, he must rule according to the most preponderant opinions from the school of Imam Abū Ḥanīfah al-Nuʿmān, as stipulated by the personal status laws.[1]

And the Syrian Personal Status Law of 1953, amended in 1975.[2] In Iraq, the Personal Status Law was issued in 1959 and amended many times, the last of which was in 1988. In the Hashemite Kingdom of Jordan, a new law was issued in 1976, which is currently in force, succeeding the law of 1951.

In the Kingdom of Morocco, the Mudawwanat al-Aḥwāl al-Shakhṣiyya (Code of Personal Status) was issued in 1957 and amended in 1993, then the new Mudawwanat al-Usra (Family Code) was issued in 2004 and is currently in force.[3]

In the Republic of Tunisia, the Tunisian Code of Personal Status was issued in 1956 and underwent several amendments, the last of which was in 2003.

In the Islamic Republic of Mauritania, personal status matters were uncodified, with judges applying the predominant opinion in the school of Imam Mālik, until the Code of Personal Status was issued in 2001, which is currently in force.

As for the Algerian Family Code, it is among the historically late Arab laws, issued in 1984[4] for the first time. It relied on comparative jurisprudence (fiqh), as its drafters were not restricted to a specific school but rather drew from other schools, similar to other Arab legislations.

With the issuance of the Family Law in 1984, Algeria achieved another gain in the legislative field, adding to its other laws, following a difficult process.[5]

This legislative movement in the field of codification in the Arab world and the Islamic world was based on comparative jurisprudence, aiming to establish a general and comprehensive law that benefits from different schools, to facilitate

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[1] Ramadan Ali Al-Sayed Al-Sharanbasi and Jaber Abdel Hadi Salem Al-Shafi'i, Family Law Provisions Pertaining to Marriage, Separation, and Children's Rights, Al-Halabi Legal Publications, 1st ed., 2007, pp. 17, 18, 19, Egypt.

[2] Al-Arabi Belhaj, A Concise Explanation of the Algerian Family Code, Vol. 1, op. cit., Marriage Provisions, p. 16.

[3] It was partially amended in 1993 and 2003, pursuant to Law No. 03/07 titled the "Family Code"

[4] Law No. 84/11 dated 09 Ramadan 1404 corresponding to June 9, 1984, containing the Family Law (Official Gazette No. 24).

[5] Ben Shuwaikh Al-Rashid, Op. cit., p. 8.

matters for people and to align with the spirit of Islamic legislation, which calls for removing hardship and preventing harm to society, away from blind imitation and rigidity, and without being restricted to a specific school, benefiting from all schools of ijtihād. This clearly indicates the flexibility of Islamic jurisprudence and its ability to keep pace with all modern developments, according to the requirements of the age and its new circumstances, based on the rules, principles, and general or specific rulings of jurisprudence.[1]

Accordingly, what is meant by Islamic Sharia, as mentioned in Article 1/2 of the Algerian Civil Code and Article 222 of the Algerian Family Code, is the totality of the legal solutions it contains from various Islamic schools, in a manner that suits evolving contemporary interests, and the spirit, objectives, and overarching principles of Sharia. This is an acknowledgment by the Algerian legislator of the authenticity and flexibility of Islamic jurisprudence in its broad sense, across its various schools and principles, in terms of its sufficiency and ability to respond to the diverse needs of contemporary society, due to the renewed rulings and principles it encompasses.[2]

This is a sound direction, provided that a solitary opinion lacking evidence is not adopted, or that the unification of Islamic schools is not intended to make them all a single school. Rather, what is meant here is mutual borrowing and methodological convergence between them when necessary, aiming to prevent blind imitation, sectarian fanaticism, and to combat juristic rigidity adhering to a specific school.[3]

Many researchers in Algeria have turned to studying comparative jurisprudence to know the legal rulings, by studying the various opinions to identify the most correct and suitable to the spirit of the age and comparing them with the laws in force in the Islamic world and Arab countries, aiming to derive ijtihādī rulings according to what the public interest dictates in every time and place.

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[1] Indeed, the silence of the sacred text necessitates deriving jurisprudential rulings (al-ahkam al-ijtihadiyyah) from the proofs, objectives, and universal principles of the Sacred Law (adillat al-shar‘ wa maqasiduhu wa qawa‘iduhu al-kulliyyah), or by way of assimilating that for which there is no text to that for which there is a text, due to their sharing in the effective cause (‘illah) of the ruling.

[2] Fadli Idris, "Family Law Between the Constant and the Variable," Journal of Jurisprudence, 1996, Issue 4, p. 636.

[11] Ma‘ruf Muhammad, "Family Law Between Divine Legislation and Positive Laws," Journal of Islamic Studies, Supreme Islamic Council of Algeria, 2003, Issue 3, p. 53.

[3] Chouar El-Djilali, "Non-Sectarianism and Custom as an Approach Adopted by the Algerian Legislator in Formulating Family Provisions," Journal of Jurisprudence, 2009, Issue 3, p. 301 et seq.

This is an authentic development expressing a comprehensive legal renaissance that meets our needs and protects us from blindly following foreign legislations that are distant from our reality, beliefs, traditions, and customs.[1]

Among the characteristics of the personal status laws recently issued in Arab countries is that they removed many of the grievances people complained of as a result of being restricted to a specific school, as was previously the practice in the courts legitimacy, although this has no basis in Sharia or the public interest.[2]

Subsection Three: The Historical Evolution of Algerian Family Law

A- The Colonial Era

Before France seized control (government) in Algeria, the subject of personal status was governed by the provisions of the Holy Qur'an and the Prophetic Sunnah. Judges at that time would derive rulings pertaining to this subject from these two sources. If they did not find a ruling, they exercised independent reasoning (ijtihad) and had the freedom to choose from the opinions and legal rulings (fatāwā) of the Companions that were closest to the Qur'an and Sunnah, or they could adopt their own opinion based on their personal interpretation.

However, the situation changed when Abu Yusuf assumed the judgeship in Baghdad during the era of Harun al-Rashid. The most significant aspect of this historical point was that judges became obliged to derive rulings from the Hanafi school, which was the official school of the Abbasid state. The same applied to the Ottoman state, except for the judiciary in Algeria.

It is important to note that the French colonial power found it difficult to unify the texts regulating personal status. This was due to the fact that the Turkish community, especially in Algiers, adhered to the school of Imam Abu Hanifa, while alongside it, the majority of people were subject to the Maliki school. In addition, there were tribal customs applied in the Kabylie region, as well as the Ibadi school in the M'zab (Ghardaïa and its surroundings).

Alongside this, the colonizer decreed the subjection of French settlers and other holders of French nationality, pursuant to the Décret Crémieux in 1870, as well as Algerian Jews and some Algerians who acquired French nationality (naturalisés), to French law and legal codes in matters pertaining to criminal, commercial, administrative, and procedural issues. However, France left Algerians subject to

[1] Mohamed Taqiyya, "The Evolution of the Legal Concept and Judicial Jurisprudence in the Field of Personal Status Law," Journal of Legal Thought, Algeria, 1984, Issue 1, pp. 18-19.
[2] Mustafa al-Sibai, Women Between Jurisprudence and Law, Dar al-Salam for Printing, Publishing, and Distribution, Egypt, 2003 ed., p. 37.

the rulings of Islamic Sharia in matters of personal status, as well as in their private civil transactions. For this purpose, Sharia courts were established.[1]

The French legislator, through a series of laws, also intervened in Islamic family law and the Algerian familial system. Examples of these include: the Law of May 2, 1930, concerning engagement and the age of marriage; Decree of May 19, 1931, concerning the legal status of Algerian women[2]; the Ordinance issued on November 23, 1944, concerning the organization of the Islamic judiciary; laws issued on July 11, 1957, concerning the provisions for missing persons, guardianship, interdiction, and methods of proving marriage; the Ordinance issued on February 4, 1959[3]; and the Decree issued on September 17, 1959, concerning the organization of marriage and its dissolution in Algeria.[4]

It is worth noting the attempt by "Marcel Morand," who, in 1916, drafted a project for a personal status code. However, it remained ink on paper due to the resistance of the Algerian people.

...to its creed, authenticity, and Islamic civilization, which led to the Algerian family system remaining free from foreign interference, deriving its provisions, principles, and rules from Islamic jurisprudence and the rulings of Islamic Sharia.[5]

B- The Post-Independence Era:

1- Laws Issued in the Period from 1962 to 1984:

The Principle of the Continuation of French Legislation and its Impact on the Field of Personal Status.

After independence, Algeria found itself in a legislative vacuum following its entry into a phase of rupture with the French occupation. It was illogical for the state to declare its rejection of the occupation while remaining subject to its legal system. On the other hand, there were no ready-made laws to replace the French laws, nor even institutions to enact such laws. Furthermore, the Algerian state project did not have a clear legislative model with which to succeed the French model, especially concerning public administration and its organizational

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[1] Techouar El-Djilali, Lectures on Algerian Family Law, Volume on Personal Status, p. 2: Website http://sciencejuridiques.blog-spot.com/2009/05/blog-post31.html/.

[2] .in which the French legislator ruled based on local customs at the expense of Sharia provisions.

[3] This refers to French Ordinance No. 59/274 containing provisions on marriage and divorce in Algeria.

[4] This refers to French Decree No. 59/1982 which specified the conditions for applying Ordinance No. 59/274.

[5] Loukil Mohamed Lamine, The Legal Status of Women in Algerian Family Law, Dar Houma, Algiers, no edition stated, 2004, pp. 19-20.

structure. Therefore, there was no choice but to preserve and continue applying French legislation.[1]

The state resorted to applying Law No. 62/157 issued on 31/12/1962, which stipulated the necessity of continuing to apply the laws in force, except for their colonial, racist, or public rights and freedoms-violating provisions. Between 1963 and 1984, a series of laws and ordinances related to family provisions were issued, including the Law of June 29, 1963, concerning the regulation of the age of marriage and the establishment of the marital relationship, and the ordinances issued on June 3, 1966, September 16, 1969, and September 22, 1971, concerning the method of proving marriage, until Ordinance 73/29[2] issued on July 5, 1975, abolished Law No. 62/157 as well as internal French laws.

Professor Ben Cheneb considered this law as a consecration and choice of Islamic law in the field of personal status, especially since the independence process was followed by a movement aiming to "Algerianize" the laws.[3] This law is also considered a continuation of the application of all the laws introduced by France in the field of personal status legislation, and it is equally a perpetuation of the Royal Order issued on August 10, 1834, mandating the application of Islamic Sharia in the field of personal status, as well as the Decree of December 31, 1859, and the Decree of April 17, 1889, which involved the application of Sharia Islamic Sharia in this field for Algerian Muslims, as well as the Law of 1931 containing the reform of women's status in the Kabylie region, and the 1959 law concerning the regulation of female marriage.[4]

Thus, the Algerian legislator, immediately after independence, made Islamic jurisprudence the foundation of its laws and legislation, aiming to achieve legal independence and revive legislative renewal with the goal of eliminating the flaws of legal dependency and completing the components of the national character by replacing foreign laws, which still glorified colonial ideas, with national laws.[5] This is an authentic and rational approach to fill the legal and legislative void and create a comprehensive legal renaissance by developing the legislative system, establishing the pillars of judicial independence and the rule of law, and

[1] It established the principle of the legislative and legal subordination of judges. See Official Gazette, 1973, p. 678.
[2] Benchneb: "Algerian Family Law Between Tradition and Modernity," Algerian Review of Legal, Economic and Political Sciences, No. 1, March 1982, p. 23.
[3] Ould Khisal, Op. cit., pp. 10-11.
[4] Nadia Aït Zaï, Les Algériennes, citoyennes en devenir, Éditions C.N.M., 2000, p. 198.
[5] Halima Aït Hamoudi, "Islamic Sharia as a Source of Algerian Positive Law," Journal of Jurisprudence, 2001, Issue 3, p. 123 et seq.

modernizing the organs and structures of justice using modern technological means.[1]

This situation continued until the legislator enacted the Civil Code pursuant to the Ordinance issued on 26/09/1975. Its Article 1 stipulated that the judge derives rulings from legislation; if not found, then from the principles of Islamic Sharia, then custom, then natural law and the rules of equity. Consequently, the judge became obligated to refer first to legislation, otherwise to the principles of Islamic Sharia regarding personal status. The legislator itself, pursuant to the Ordinance issued on 05/07/1975, stipulated the abolition of all laws inherited from the French colonizer, effective from 01/07/1975, and this became enforceable according to Article 1003 of the Civil Code effective from 05/07/1975.

However, despite the existence of this Civil Code, it could not cover all matters related to personal status with the provisions it contained. The same applied to the principles of Islamic Sharia, as the latter is based on numerous opinions that are sometimes different from one school to another and sometimes conflicting within the same school. This prompted the legislator to attempt codifying a family law, for which several drafts were prepared, including the 1963 draft, then 1973, then 1980, then 1982, until the legislator issued the Family Law on 09/06/1984. The factor that led to the delay in issuing the Family Law compared to other codes was the existing conflict between proponents of deriving the provisions of the Family Law from Islamic Sharia and proponents of westernizing the Family Law and deriving its provisions from Western laws.[2]

C- The Relationship between the Family Law and Islamic Jurisprudence:

It has become clear from the foregoing that the relationship between the Family Law and Islamic jurisprudence is as old as the Islamic conquest of the Maghreb lands. Given the prevalence of the Maliki school in the Maghreb countries, the provisions of the family were likewise [based on it], and matters remained as they were until the days of the French occupation. After independence, twenty-two (22) years later, the provisions of family and personal status were issued, organized, and categorized into 224 articles decreed as the "Family Law".[3]

The Algerian Family Law derived most of its provisions from the Maliki school, while also relying on other schools in some of its provisions when needed. Furthermore, this law explicitly stipulated in its Article 222 that any matter not

[1] El-Tayeb Belaïz, Judicial Reform in Algeria, Dar El Kasbah, Algiers, 2008, p. 46 et seq
[2] techouar El-Djilali, Ibid., p. 3.
[3] Bal Khayr Sadid, Op. cit., p. 14.

provided for in this law shall be referred to the provisions of Islamic Sharia, without being restricted to a specific school in doing so.[1]

The Algerian legislator also relied on some Arab laws that preceded it, with some modifications at times and deviations at others, in accordance with local interest and the customs of Algerian society.[2]

Despite the fact that the Algerian Family Law was derived from the provisions of Islamic Sharia and embodied the natural identity of the Algerian family, in addition to representing a victory over those who doubted that the provisions of Islamic Sharia are suitable to be a law that can be applied in practical reality, as is the case with modern Western laws.[3]

The Supreme Court, in many of its landmark decisions, established the principle of the absolute primacy of applying the provisions of Islamic jurisprudence in matters of personal status, without dispute.[4]

The established jurisprudence of the esteemed Supreme Court has been settled since the beginning on the principle that it is established in jurisprudence and judicial practice that matters of personal status are subject to the provisions of Islamic Sharia and nothing else.[5] And that it is impermissible to apply local customs in matters of personal status among Muslims if these customs contravene the provisions of Islamic Sharia.[6]

Furthermore, Article 2 of the Constitution of 28/11/1996, amended on 10/24/2020, explicitly stipulates that the official religion of the state is Islam.[7] Hence, the provisions of Islamic Sharia are considered an official and primary source for matters of personal status This is what the Algerian Family Law, issued on June 9, 1984, addressed after a series of legislative projects and attempts aimed at this end. The Algerian legislator confirmed this in Article 222 of the Algerian Family Law, which clearly stipulates that "All matters not provided for in this law shall

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[1] Abdelkader Ben Harzallah, Op. cit., p. 16.
[2] Bal Khayr Sadid, Ibid., p. 15.
[3] Abdelkader Ben Harzallah, Ibid., p. 17.
[4] Supreme Court, Civil and Administrative Chamber, 21/06/1987, Journal of Jurisprudence, 1986, Issue 4, p. 1193; 12/06/1986, ibid., 1986, p. 114; File No. 24/03/1971, ibid., 1972, Issue 2, p. 72; 30/12/1985, File No. 39277, Unpublished; 25/07/1993, File No. 123051, cited earlier. Nadia Aït Zaï, "Muslim Law and Kabyle Custom," Revue Algérienne, 1995, No. 2, p. 305.
[5] Supreme Court, Civil and Administrative Chamber, 12/05/1968, Journal of Jurisprudence, 1969, Issue 2, p. 345.
[6] Supreme Court, Civil and Administrative Chamber, 24/03/1971, Journal of Jurisprudence, 1972, Issue 2, p. 72.
[7] As stated in Article 4 of the 1963 Constitution, Article 2 of the 1976 Constitution, and also the 1989 Constitution.

be referred to the provisions of Islamic Sharia." Furthermore, Article 223 emphatically declares that "All provisions contrary to this law are hereby repealed."

Second Requirement: Defining the Algerian Family Law

Subsection One: Definition of the Family

Linguistically:[1] The family (al-usrah) is a strong fortress or rampart. A man's family (usratuhu) refers to his clan and his close kin upon whom he relies for support. It is also said to be a man's relatives on his father's side.

Terminologically: In truth, there has been no precise definition for "the family," as this term is more connected to sociology than to jurisprudence (fiqh) and law. Therefore, I will define the term "family" first through sociology, and then clarify its concept in both Islamic jurisprudence and Algerian law.[2]

A- Definition of the Family in Sociology:

Sociologists have found defining the family to be greatly challenging, due to the multiplicity of its forms and their constant change.[3] However, this has not prevented researchers in the social sciences from providing definitions and concepts for the family according to its various patterns and forms. The Dictionary of Sociology states that the family is: "A biological-systematic social group consisting of a man and a woman – between whom a recognized marital bond exists – and their children."[4]

From a sociological perspective, the family consists of a group of persons connected by a biological relationship based on the union of two persons of different sexes, and on reproduction from a common origin.[5]

It appears that this definition relies on the modern pattern that the family has come to represent. After it historically referred to the "tribe" (al-qabilah) or "clan" (al-‘ashirah), it now refers to the nuclear family, which is: "A social organization composed of individuals linked to one another by social, moral, blood, and

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[1] Lisān al-‘Arab, Vol. 1, p. 60, Lebanon, Dār Lisān al-‘Arab, by Ibn Manẓūr: He is Muḥammad ibn Makram ibn Manẓūr al-Ifrīqī al-Miṣrī, author of Lisān al-‘Arab. Tāj al-‘Arūs: Al-Sayyid Muḥammad Murtaḍā al-Zabīdī, 3/13, Dār Ṣādir, Lebanon.

[2] Bal Khayr Sadid, Op. cit., p. 8.

[3] Sanā’ al-Khūlī, Marriage and Family Relations, Dār al-Nahḍah al-‘Arabiyyah for Printing and Publishing, Lebanon, no year or edition stated, p. 51.

[4] Muḥammad ‘Āṭif Ghayth, Dictionary of Sociology, Dār al-Ma‘rifah al-Jāmi‘iyyah, Egypt, 1996 ed., p. 176.

[5] Ḥassān Muḥammad al-Ḥassan, Family, Kinship and Marriage: An Analytical Study of Changing Family, Kinship and Marriage Systems in Arab Society, Dār al-Ṭibā‘ah for Printing and Publishing, Lebanon, 2nd ed., 1985, p. 09.

spiritual ties."[1] This is what is commonly called Social scientists also describe the family as “the nucleus” due to its characteristics. Urban sociology researchers note that this family model is increasingly prevalent in exclusive societies.

b. Definition of the Family in Law

From a legal perspective, the family consists of all individuals connected by blood or marriage. This is stated in Article 2 of the Algerian Family Code[2]: "The family is the basic unit of society and consists of persons linked by marriage and kinship."

Furthermore, Article 32 of the Algerian Civil Code provides: "A person’s family consists of their close relatives, and all those sharing a common origin are considered close relatives."[3]

c. Definition of the Family in Islamic Jurisprudence

Classical jurists did not use the term “family”, although they employed related terms such as lineage, kinship, rahm, and asabah. The Qur’anic texts also do not use the term “family” at all; instead, they use concepts such as “house” and “household” to refer to the family.[4]

A modern jurisprudential definition states: "The family in the view of Sharia is the group whose foundation is established by lawful marriage, committed to the rights and duties between its members, and encompassing the offspring and other relatives connected to them."[5]

It should be noted that this concept leans toward the broader understanding of family, rather than the nuclear family model described earlier.

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[1] Muḥammad ʻĀṭif Ghayth, Ibid., Sociology of Law, p. 178.

[2] Law No. 84/11 dated 9 Ramadan 1404 AH, corresponding to 9 June 1984, concerning the Algerian Family Code (published in the Official Journal, Issue 24, Vol. 21, p. 990, 12 June 1984), as amended and supplemented by Order 05/02 dated 18 Muharram 1416 AH, corresponding to 27 February 2005 (Official Journal No. 15, 27 February 2005), and further amended by Law No. 05/09 dated 25 Rabi’ al-Awwal 1426 AH, corresponding to 4 May 2005 (Official Journal No. 43, 22 June 2005)

[3] Order 75/58 dated 20 Ramadan 1395 AH, corresponding to 26 September 1975, concerning the Algerian Civil Code (published in the Official Journal, Issue 78, Year 12, 24 Ramadan 1300 AH, corresponding to 30 September 1975), as amended and supplemented by Law No. 07/05 dated 25 Rabi’ al-Thani 1418 AH, corresponding to 13 May 2007 (Official Journal No. 31, Vol. 44)

[4] Salah Al-Fawal, Islamic Sociology: Qur’anic Texts for Society, Dar Al-Fikr Al-Arabi, Egypt, undated and unnumbered edition, p. 33

[5] Encyclopedia of the Family under the Care of Islam, Vol. 1, Dar Al-Masriya Lil-Kitab, Egypt, 2nd edition, 1990, p. 133

Summary of Family Definition

There is significant convergence in the linguistic, social, legal, and religious definitions of the family, which generally consider it as: a social unit consisting of a legally married couple and their children[1]

The Algerian legislator acted wisely by considering Islamic Sharia as a source of legal norms, treating it as a primary source for matters of personal status and as a subsidiary source for issues unrelated to personal status, such as civil and financial transactions (Art. 1/2 of the Civil Code of Algeria).[2]

It is an undeniable fact that Islamic Sharia has played a significant role in elucidating and establishing many issues in the field of transactions as well as in other areas. For instance, the theory of abuse of rights was established by Sharia; it was not known in Roman law and was only discovered by jurists in the late last century[3]. The theory of extraordinary circumstances is derived from the theory of necessity, as causing harm is prohibited under the noble Sharia even if done in good faith. Contracts were legislated to fulfill people's interests and needs, not to inflict harmrthermore, Sharia considers the sale of a terminally ill patient Fu [4]. equivalent to a will, and other rules exist, such as the sale with the option of inspection, preemption rights, bearing loss in sales contracts, neighborly obligations, debt transfer, among many others.

A superficial reading of Article 1 of the Civil Code may lead to the question of what the legislator intended by the phrase "principles of Islamic Sharia."

The majority of jurists agree that the primary sources of Islamic jurisprudence They rely on the verse: [7]and analogy. [6] consensus, ,hannuS eht ,na'ruQ are the[5] "O you who have believed, obey Allah and the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger,

[1] Belkheir Sadid, ibid., p. 10.
[2] Belhaj Al-Arabi, ibid., p. 20
[3] Fathi Al-Dreini, Theory of the Abuse of Rights, Al-Risala Foundation, Beirut, undated edition, 1981, p. 92 et seq
[4] Kamal Lebda', The Concept of Theory and Its Legal Evidences: The Theory of Extraordinary Excuses in Islamic Jurisprudence, A Comparative Study, Master's Thesis, Faculty of Social and Islamic Sciences, Islamic University of Constantine, 1996, p. 2
[5] Fiqh (Jurisprudence) linguistically: knowledge of a matter and understanding it; technically, it is the knowledge of legal rulings from their detailed evidences
[6] Ijma' (Consensus) linguistically: determination and agreement; technically, it refers to the agreement of the jurists of the Ummah of Muhammad (peace be upon him)
[7] Qiyas (Analogy) linguistically: estimation; technically, it is the application of a ruling from an original case to a new case based on equivalence of the effective cause

if you should believe in Allah and the Last Day. That is better and best in outcome."[1]

The sources of legislation in the Family Code are derived from Islamic Sharia, as stated in Article 105 of the Constitution, where the Qur'an and the Sunnah are considered the primary sources in any jurisprudential school or Islamic thought, and their application is universally accepted. There are additional agreed-upon sources in jurisprudence, including consensus and analogy. Some jurists oppose consensus, believing it cannot occur after the era of the Companions, whereas the majority of jurists agree on the use of analogy[2].

Analogy (Qiyas) is a legitimate proof according to the majority of jurists and a source of Islamic legislation. Allah Almighty said:

"Do they not then reflect on the Qur'an? If it had been from other than Allah, they would have found within it much discrepancy. And when a matter of security or fear comes to them, they broadcast it; but if they had referred it back to the Messenger and to those in authority among them, those who derive its rulings from them would have known it. And were it not for the bounty of Allah upon you and His mercy, you would have followed Satan, except for a few." (Qur'an, 4:82-83)[3]

Here, from the first verse, the affirmation of Ijtihad (independent reasoning) is evident in: "Do they not then reflect on the Qur'an?" The second verse refers to the derivation of particular rulings from the fundamental sources of Sharia and their detailed evidences: "But if they had referred it back to the Messenger and to those in authority among them, those who derive its rulings from them would have known it..." And analogy (Qiyas) is nothing other than this.[4]

There are other sources over which there is scholarly disagreement, such as Istihsan (juridical preference), Masalih al-Mursalah (public interest), the sayings of the Companions, custom ('Urf), and what was legislated by those before us. Since some jurists have studied another crucial aspect in Islamic jurisprudence, namely the "fundamental rules," it is necessary to mention them in this study, given that the legislation in the Personal Status Law is derived from Islamic Sharia.[5]

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[1] Qur'an, Surah An-Nisa, Ayah 59
[2] Qasim Yusuf, Principles of Islamic Jurisprudence, Dar Al-Nahda Al-Arabiya, Beirut, p. 171
[3] Qur'an, Surah An-Nisa, verses 82 and 83.
[4] Qasim Yusuf, same reference, pp. 196–197.
[5] Qasim Yusuf, same reference, p. 171.

A. Fundamental Rules in Islamic Jurisprudence: [1] They are limited to six rules: matters are judged according to their objectives, no reward except by intention, hardship brings ease, harm must be removed, certainty is not overruled by doubt, and custom is authoritative.

The rule most relevant here is “harm must be removed” (Al-Darar Yuzal). Its origin is narrated by Ahmad and Ibn Majah from Ibn Abbas (may Allah be pleased with him) that the Prophet (peace be upon him) said: "There should be neither harm nor reciprocating harm." [2]Here, it is clear that Islamic Sharia seeks to remove harm from individuals and communities in the application of Sharia rulings. According to the Hadith, it is considered a principle of Sharia from which many legal rulings, including some statutory ones, have been derived.[3]

However, it must be noted that a judge’s recourse to Islamic jurisprudence in the absence of a legislative text should be only to the extent that it does not conflict with the general principles of positive law, in order to maintain the coherence of statutory legislation[4].

Despite all this, some have considered the current Family Law to be an unjust law based on the principle of inequality between men and women in rights, arguing that it favors men at the expense of women. Objections to the Family Law have even extended to international forums and conferences, as occurred at the International Conference on Population held in the Arab Republic of Egypt in 1994, and the International Conference on Women held in Beijing, the capital of China, in 1996. These parties continue to call upon the competent authorities to intervene and repeal this law, claiming that it has returned the Algerian family to the Middle Ages.

This law was amended pursuant to Order No. 02/05 dated 8 Muharram 1426 AH, corresponding to 27 February 2005. Accordingly, the new amendment affected an estimated total of 41 legal provisions through repeal, amendment, or new additions. Legal scholars and politicians differed in their positions regarding these

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[1] Rules (Qawa’id: plural of Qaidah), in the Arabic language, refer to a foundation; as linguists say: “The rules of the house are its foundation.” In Islamic jurisprudence terminology, it denotes the governing principle, which is the universal command applicable to all its particulars, meaning that a set of similar rulings falls under this universal command or principle. These rulings collectively trace back to a single origin, which is the Qur’an

[2] From Sunan Ibn Majah, Book of Judgments, Chapter “Regarding One Who Harms His Neighbor,” Hadith No. 2331

[3] Manal Mahmoud Al-Mashni, Khula’ in the Personal Status Law, Dar Al-Thaqafa for Publishing and Distribution, Amman, 1st ed., 2008, p. 97

[4] Belhaj Al-Arabi, same reference, pp. 20–21.

amendments, as each party expected its proposals and viewpoints to be embodied in the provisions of the amended law .[1]

In this regard, we do not support the view expressed by some commentators that the Algerian Family Law was influenced by French law,[2] as the reality is entirely different from such claims, given that the legislative material relating to personal status is rich within Islamic Sharia. The Algerian legislator derived family law provisions primarily from Islamic jurisprudence, with strength and authenticity, far removed from imitation, rigidity, or reliance on legal systems that do not correspond to Algerian reality, taking into account national data as well as evolving regional and international developments.[3]

The jurisprudence of the (Supreme) Court has established that trial judges in matters of personal status are not required to cite legal provisions explicitly in their judgments, insofar as they are required not to contravene them.[4] Accordingly, the failure to mention specific legal articles does not affect the validity of the challenged decision, provided that the operative part of the ruling is consistent with the law and the facts presented.[5]

In any event, the purpose of referring to the provisions of Islamic Sharia lies in applying the principles most compatible with the texts of the Algerian Family Law. This reference to the principles of Islamic Sharia renders the judge's task difficult whenever he seeks to exercise juristic reasoning (ijtihad) in accordance with the facts of the case before him.[6]

Finally, it should be noted that family matters are subject to the provisions of Islamic Sharia, which take precedence over custom (Articles 1 and 222 of the Family Code and Article 1/2 of the Civil Code). Consequently, customs (les coutumes) cannot prevent the application of the law in personal status cases, a principle long established in the jurisprudence of the Supreme Court.[7]

Section Three: The Nature of Algerian Family Law

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[1] Abdelkader Ben Harzallah, same reference, pp. 17–18

[2] Cf. (C) Boutems, French Influence in the Draft Family Code in Algeria, Revue Algérienne, 1982, No. 1, pp. 5 et seq.

[3] Cf. (A) Mahiou, Rupture or Continuity of Law in Algeria, Revue Algérienne, Special Issue, 20th Anniversary

[4] Supreme Court, Personal Status Chamber, 12/11/2008, Case No. 466390, Majallat Al-Mahkama Al-'Ulya, 2008, Issue No. 2, p. 319.

[5] Supreme Court, Personal Status Chamber, 21/04/1998, Case No. 189234, Ijtihad Qada'i – Personal Status, Special Issue, p. 176.

[6] Belhaj Al-Arabi, same reference, p. 32.

[7] Supreme Court: 30/12/1985, Case No. 39277, unpublished; 24/03/1971, Nashrat Al-Qada', 1972, Issue No. 2, p. 72; 12/06/1968, Nashrat Al-Sunna, 1968, p. 114

Article One of the Family Code provides that: “All relationships among family members are subject to the provisions of this law.” Article Two of the same law defines the family as follows: “The family is the basic unit of society and consists of persons bound by the marital bond and kinship.” Article Three further provides that: “The family bases its life on cohesion, solidarity, good companionship, sound upbringing, good morals, and the rejection of social vices.”

From this, it becomes clear that Family Law is closely connected to social and civilizational concepts, as well as to moral and religious values, and that it maintains a strong relationship with economic and political factors, as well as with customs, traditions, and prevailing social practices. On this basis, Algerian Family Law remained, during the colonial period, embedded in the collective conscience of the people, distant from foreign systems and imported laws, deriving its foundations and rules from Islamic legislation and national identity in all its components, despite the calamities and hardships inflicted upon the country by colonialism.

From this perspective, the protection of the family—which constitutes the nucleus of society—through a rational policy and appropriate means is, in fact, the protection of society as a whole.[1]

This raises the question: does Family Law belong to private law or to public law? And what is its position within the two fundamental divisions of law?

The division of law into public and private law is of great practical importance, due to the specific rules that distinguish public law from private law. This importance is evident in several areas, including contractual privileges, public property, the nature of legal rules, and judicial jurisdiction.[2]

Private law governs relations among individuals, as well as certain non-financial rules such as those relating to rights closely attached to personality, and the rules governing family relations connected to family rights. These rights are those granted to an individual by virtue of being a member of a specific family. The exercise of these rights by family members is, in practice, close to being an obligation that must be fulfilled.

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[1] **Belhaj Al-Arabi**, Al-Wajiz fi Sharh Qanoun Al-Usra Al-Jaza’iri, Vol. 1, Marriage and Divorce, O.P.E., Algeria, 5th ed., 2007, pp. 25–26

[2] **Belhaj Al-Arabi**, Al-Wajiz fi Sharh Qanoun Al-Usra Al-Jaza’iri, Vol. 1, Rules of Marriage, O.P.E., Algeria, 6th ed., 2010, p. 33.

In Algeria, the greater part of family rights is regulated by provisions based on Sharia, with reliance on civil law rules for the remainder.[1]

Public law is the set of rules that regulate relationships of whatever kind whenever the State is a party thereto in its capacity as the holder of authority and sovereignty, whether with natural persons, private legal persons, or in relations between the State and one of its branches, or among these branches themselves.[2]

Private law, on the other hand, is the set of rules that regulate relationships of whatever kind among individuals, or between individuals and the State acting as a legal person that does not exercise sovereignty or public authority.[3]

This is because non-Islamic States subject matters of family law to civil law, whereas Islamic States subject them to the provisions of Sharia.[4]

Accordingly, Family Law is considered an independent branch of private law, possessing its own distinct identity characterized by flexibility, adaptability, and harmony, far removed from rigidity and complexity.[5] Its connection to the provisions of Islamic Sharia, as well as to rules derived from customs, traditions, morals, emotions, sentiments, and civilizational ideas, constitutes significant indicators distinguishing it from other legal fields.[6]

The eminent French jurist Jean Carbonnier explained this reality by stating that Family Law is governed more by the hypothesis of "non-law" than by legal concepts and formal law; "non-law" (le non-droit) constitutes the foundation of the family sphere, while law represents the exception.[7] Hence, Family Law possesses a special nature that distinguishes it from other branches of law.[8]

With regard to the family, there are areas in which the State intervenes in family relations primarily for the purpose of protection, thereby placing such intervention

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[1] **See**: Mohamed Saïd Jaafour, Introduction to Legal Sciences: A Concise Guide to the Theory of Law, Dar Houma, Algeria, no edition, 2004, p. 74.
[2] **Al-Ghawthi Ben Malha**, Family Law in the Light of Jurisprudence and Case Law, O.P.E., Algeria, 2nd ed., 2008, pp. 8–9
[3] **Habib Ibrahim Al-Khalili**, Introduction to Legal Sciences (General Theory of Law), 2nd ed., 1983, p. 13
[4] **Ishaq Ibrahim Mansour**, The Theories of Law and Right, O.P.E., Algeria, 1993 ed., p. 43.
[5] **Fodil Saad**, Commentary on Algerian Family Law, National Book Institution, Algeria, no edition, 1985, p. 13
[6] **Cf.** (E) Pontavice, L'autonomie du droit de la famille, 1974, p. 10 et s.; and (H) Batiffol, Existence et spécificité du droit de la famille, in Tome 20, 1975, p. 7 et s
[7] **Cf.** (J) Carbonnier, Essais sur les lois, 1979, p. 167 et s.
[8] **Cf.** (J) Carbonnier, Flexible droit, 1971, p. 28 et s.

under the umbrella of public law. Accordingly, it may be said that Family Law draws from both divisions: public law and private law.[1]

On this basis, most of the rules contained in Family Law are mandatory rules connected to public order, and it is not permissible to agree on their violation.[2]

Furthermore, the Algerian legislator has established specific criminal sanctions aimed at protecting the family, whether directly or indirectly.[3]

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1. Qur'an, Surah Al-Mulk, verse 14.
2. Qur'an, Surah Al-Dhariyat, verses 57–58.
3. Qur'an, Surah An-Nisa, verse 59.
4. Qur'an, Surah An-Nisa, verses 82–83.
5. Sunan Ibn Majah, Book of Judgments, Chapter: "Concerning Anyone Who Causes Harm to His Neighbor," Hadith No. 2331.
6. Rules (Al-Qawa'id): Plural of "Qaa'ida." In Arabic, it means foundation. In Islamic jurisprudence, it refers to the governing principle applicable to all its details; a collection of similar rulings ultimately deriving from a single source, the Qur'an.
7. Fiqh: Linguistically, knowledge and understanding; technically: knowledge of Islamic rulings derived from their detailed evidence.
8. Ijma' (Consensus): Linguistically, determination and agreement; technically, agreement of the jurists of the Ummah of Prophet Muhammad (peace be upon him).
9. Qiyas (Analogy): Linguistically, estimation; technically, applying a ruling of an original case to a new case due to the equality of the underlying reason ('illa).

II. Islamic Jurisprudence References

[1] **Belhaj Al-Arabi**, op. cit., p. 33.
[2] **Al-Ghawthi Ben Malha**, op. cit., p. 9.
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