

Judicial Procedures for the Protection of the Sexual Inviolability of the Child between Islamic Jurisprudence and Algerian Law

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Abstract

This study examines the judicial procedures for protecting the sexual inviolability of the child, a subject of considerable importance in view of the child's status within society as a physically vulnerable person whose intellectual maturity is not yet complete, thereby making him or her susceptible to various forms of sexual violation. Hence, the following research problem is posed: To what extent are the judicial procedures for protecting the sexual inviolability of the child under Algerian law effective, compared with the judicial rulings in Islamic jurisprudence concerning the protection of honor and sexual inviolability? The study concludes that the judicial procedures provided under Algerian law correspond, in most respects, to the rulings of Islamic jurisprudence. This is addressed by examining the guarantees of procedural protection before the Public Prosecutor's Office and the guarantees of judicial protection before the courts.

Keywords: judicial procedures; sexual inviolability of the child; means of proof; juvenile judge; initiation of proceedings.

Introduction

In the second half of the twentieth century, numerous international organizations devoted considerable effort to drafting legal texts, whether general in nature or relating exclusively to the child, with a view to establishing special protection for children on account of their physical and mental immaturity, since children constitute one of the social groups most exposed to assault in its various forms.¹ including sexual assaults.

This was affirmed by the Convention on the Rights of the Child of 1989, which stressed the need for all States Parties to undertake to respect the rights of the child and to provide protection from all forms of sexual assault, as well as care, as stipulated in article 34 thereof: "States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these

¹The Covenant on the Rights of the Child in Islam, adopted by the Thirty-Second Islamic Conference of Foreign Ministers, Sanaa, Yemen, June 28-30, 2005.

purposes, States Parties shall, in particular, take all appropriate national, bilateral, and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.”

Article 17 of the Covenant on the Rights of the Child in Islam² also provides that: “States Parties shall take all necessary measures to protect the child from exploitation in all its forms, particularly sexual exploitation.”

Thus, Islamic states, including Algeria, have sought, through ratification of this covenant, to provide guarantees of criminal protection for the child against anything that violates his or her modesty and sexual inviolability, through special protective procedures in accordance with shari‘a and legal texts. These procedures consist of judicial procedures and precautionary and punitive measures.

Given the importance of judicial protection for the child, we have devoted our study to “Judicial Procedures for the Protection of the Sexual Inviolability of the Child between Islamic Jurisprudence and Algerian Law.”

First: The Importance of the Subject

The subject of judicial protection procedures for the sexual inviolability of the child is of great importance, given the child’s position within society as physically weak and lacking complete mental maturity, which makes him or her vulnerable to sexual violations in their various forms. The child does not possess the awareness or resistance that would enable him or her to defend himself or herself or to understand the reality of what he or she is subjected to. Regrettably, these crimes are often accompanied by an assault on the life of the victim. This has led to the rise of certain voices calling for attention to be paid to repelling these assaults and to applying the severest penalties to their perpetrators.

The importance of this subject is further increased by the need to seek the necessary means of ensuring judicial protection capable of providing children with a secure life that preserves their sexual inviolability and morals.

Second: The Research Problem

In light of the foregoing, and given the importance of the subject, its study requires engagement with the following research problem:

To what extent are the judicial procedures for protecting the sexual inviolability of the child in Algerian law effective in relation to the judicial rulings contained in Islamic jurisprudence for the protection of sexual inviolability?

In order to answer this research problem, it is necessary to raise several subsidiary questions, which we set out as follows:

²Suhail Hussein al-Fatlawi, *The United Nations: Achievements and Failures*, vol. 3 of *Encyclopedia of International Organisations* (Jordan: Dar al-Hamid for Publishing and Distribution, 2011), 94.

- What are the guarantees of judicial protection for the sexual inviolability of the child before the Public Prosecutor's Office?
- What are the guarantees of judicial protection for the sexual inviolability of the child before the juvenile judge?
- What are the procedures for initiating public proceedings for the protection of the sexual inviolability of the child?
- What is the role of means of proof in protecting the child's right?

Third: Reasons for Choosing the Subject

The principal reasons that motivated me to research this subject may be identified in the following points:

A. Subjective Reasons

An attempt to contribute to finding supportive solutions for the protection of children by disseminating jurisprudential and legal awareness within society, thereby helping to limit this phenomenon.

B. Objective Reasons

1. The scarcity of jurisprudential and legal research on this subject, which is regarded as new and recent, thereby requiring study and clarification, as well as the tracing of its constituent parts in the books of Islamic jurisprudence and Algerian law.

Fourth: The Objectives of the Subject

The study primarily aims to evaluate the legislature's criminal policy regarding the judicial protection of the child's sexual inviolability, in comparison with rulings of Islamic jurisprudence, to identify deficiencies and propose appropriate solutions.

- To clarify the guarantees of judicial protection for the sexual inviolability of the child before the Public Prosecutor's Office.
- To clarify the guarantees of judicial protection for the sexual inviolability of the child before the juvenile judge.
- To clarify the role of means of proof in protecting the child's right.
- To clarify the guarantees of compensation for the child for harm suffered.

Fifth: Previous Studies

After tracing and investigating the subject of judicial procedures for the protection of the sexual inviolability of the child between Islamic jurisprudence and Algerian law, and after reviewing the subjects of scholarly dissertations published on the Internet, I did not find anyone who had written on this comparative subject, apart from general topics dealing with the protection of sexual inviolability in Islamic law and other topics dealing with the criminal protection of the child in general. Among these are the following:

1. "The Methodology of the Qur'an and the Sunna in Protecting Sexual Inviolability from Zinā and Its Causes," a subject by the student Muhammad al-Salih al-Atiq, a master's dissertation, King Abdulaziz University (1399 AH/1979 CE). This study addressed the methodology of Islam in protecting sexual inviolability through an explanation of the

Qur'anic verses and prophetic hadiths relating to the subject of protecting sexual inviolability.

In my study, however, I shall address the judicial procedures for protecting the sexual inviolability of the child in Islamic jurisprudence, as well as legal protections in Algerian criminal legislation.

2. *The Criminal Protection of the Child in Algerian Law*, a master's thesis, University of Abou Bekr Belkaid, Tlemcen (2009–2010 CE). This thesis discussed the substantive and procedural criminal protection of the juvenile child in general.
3. Likewise, *The Criminal Protection of the Child Victim*, a doctoral thesis by Hedyat Hammas, University of Abou Bekr Belkaid (2014–2015 CE), in which she discussed the criminal protection of the child victim in general. I, however, shall devote my research subject to the judicial procedures for protecting the sexual inviolability of the child from sexual assaults in Algerian criminal law, in comparison with the rulings of Islamic jurisprudence.

Sixth: The Methodology of the Subject

To study this subject, I shall rely on the following methodology:

1. **The inductive method:** through tracing the jurisprudential and legal texts and opinions relating to this type of protection, benefiting from their content, and discussing what is contained therein.
2. **The descriptive analytical method:** through describing, explaining, and analyzing the sharī'a and legal texts relating to the content of the study.
3. **The comparative method:** through comparing the aspects of judicial protection found in Islamic jurisprudence and Algerian law.

Seventh: The Research Plan

Thus, in order to study the subject of judicial procedures for protecting the sexual inviolability of the child, we have divided this research paper into two sections:

Section One: Guarantees of Procedural Protection before the Public Prosecutor's Office

Section Two: Guarantees of Judicial Protection before the Judiciary

Governments in Arab and Islamic countries have issued criminal laws and regulations, some of which have been adopted verbatim from the West, while others accord with the noble sharī'a. Regulations and laws have emerged in the field of sharī'a-based criminal procedure that address people's interests, respond to existing developments and contemporary techniques, and fall under the umbrella of the sharī'a.³

In view of this conformity, we shall confine our discussion to the judicial procedural protection provided for in Algerian law, except where it departs from the rulings of Islamic law, in which case we shall state the ruling of the sharī'a.

From this standpoint, the right of recourse to the judiciary is considered a fundamental right of persons under the law. Consequently, a child who has been subjected to assault may have recourse

³Muhammad al-Zuhayli, *Criminal Procedure*, vol. 1 (Damascus: Dar al-Fikr, 1436 AH/2015 CE), 28.

to the judiciary, which provides him or her with procedural guarantees before the Public Prosecutor's Office in the first subsection and with procedural guarantees before the juvenile judge in the second subsection.

Section One

Guarantees of Procedural Protection before the Public Prosecutor's Office

The scope of protection from which minor victims benefit is not limited merely to the criminalization of assaults committed against them; rather, it extends to the procedural aspect. The young age of victims requires amendments to public proceedings to provide them with protection. In response to the demands of civil society for the protection of the child, given the material and moral harm caused by crimes committed against children, criminal legislation⁴ has allowed them access to justice to obtain their rights, through the initiation of public proceedings in the first branch and recourse to means of proof to establish those rights in the second branch.

First Subsection

Initiation of Public Proceedings

As soon as an offense occurs, a legal relationship arises between the state and the offender, consisting in the establishment of the state's right to punish; the means of doing so is public action. The public action is "the claim for the imposition of a penalty for an offense that has occurred, brought by the Public Prosecutor's Office as the representative of the community."⁵

The initiation of public proceedings in favor of the child victim is considered the first step in protecting his or her legal rights.⁶ The initiation of public proceedings in favor of the child victim may take several forms, as will be explained below.

First Branch: Initiation of Proceedings by the Public Prosecutor's Office

The general rule is that the Public Prosecutor's Office initiates public proceedings.⁷ As the public prosecuting authority representing society, whether by submitting a request to the investigating judge through the opening of an investigation pursuant to article 67 of the Algerian Code of Criminal Procedure, or by summoning the accused to appear before the court, in application of article 333 of the Algerian Code of Criminal Procedure.⁸

The law has, however, introduced an exception to this general rule, as it has required other parties alongside the Public Prosecutor's Office for the initiation of public proceedings, as stated in article

⁴The law issued in France on June 17, 1998, concerning the prevention and repression of sexual offences committed against minors, or what may be called the criminal protection of minor victims.

⁵Abdallah Ouahybia, *Commentary on the Code of Criminal Procedure: Inquiry and Investigation* (Algiers: Dar Houma, 2011), 48.

⁶Muhammad Mahmoud Said, *The Victim's Right to Initiate Public Proceedings* (Cairo: Dar al-Fikr al-Arabi, 1982), 381.

⁷See article 29 of Law No. 06-22 of December 20, 2006, containing the Code of Criminal Procedure, *Official Gazette*, no. 84, December 24, 2006, p. 4, amending and supplementing Ordinance No. 66-155 of 18 Safar 1386, corresponding to June 8, 1966.

⁸Abderrahmane Khalfi, *Criminal Procedure in Algerian and Comparative Legislation* (Algiers: Dar Belqis, 2015), 136.

1 of the Algerian Code of Criminal Procedure: “The public action for the application of penalties shall be initiated by the judiciary or by the officials entrusted therewith by law ...”

It is noticeable from the provisions of the Algerian Code of Criminal Procedure that the Algerian legislature has not attached importance to the category of child victims of crime at this stage, as they are treated in the same manner as adult victims.

It has, however, established protection for victims of sexual assaults in the procedures of inquiry and investigation, as it requires the public prosecutor, the investigating judge, or the judicial police officer to comply with audio-visual recording when hearing a child victim of sexual assaults. The recording is then deposited as sealed evidence and destroyed within one year of the expiry of the public action, and an official report is drawn up to that effect.⁹ Anyone who broadcasts or copies the recording is punishable by imprisonment for one to three years and a fine of DZD 25,000 to DZD 50,000.¹⁰

Second Branch: Initiation of Public Proceedings by the Injured Party

The general rule in the initiation of public proceedings is that it falls within the competence of the Public Prosecutor’s Office. However, the law permits persons injured by the offense to initiate such proceedings in accordance with article 1(2) of the Algerian Code of Criminal Procedure.¹¹ Nevertheless, where the person injured by the offense is a child, two situations must be distinguished.

A. Commission of the Offense by a Stranger

Where the person who committed the offense is a stranger to the child, the child’s guardian acts on the child’s behalf in initiating public proceedings.¹² This guardian is one of the parents or any person having authority over the child’s care. Proceedings are initiated by way of a civil-party claim or by direct summons to appear.

1. The Civil-Party Claim

What is meant by a civil-party claim is the personal initiative taken by the victim in submitting his or her complaint before the investigating judge for the purpose of initiating public proceedings in order to undertake criminal prosecution and obtain compensation for the harm committed by the offender against him or her.¹³ It is therefore a general principle that criminal legislation in contemporary legal systems converges on.¹⁴ It may be used by any person without restriction. Its exercise, however, requires formal conditions, namely the submission of the complaint,¹⁵ the

⁹See article 46 of Law No. 15-12 relating to the Protection of the Algerian Child.

¹⁰See article 136 of Law No. 15-12 relating to the Protection of the Algerian Child.

¹¹“... The injured party may also initiate this action in accordance with the conditions specified in this law.”

¹²See Abdelaziz Saad, *Conditions for Exercising the Civil Action before Criminal Courts* (Algiers: National Office for Educational Works, 2002), 52-53. See also article 40 of Law No. 07-05 of May 3, 2007, containing the Civil Code, *Official Gazette*, no. 31, May 13, 2007, p. 3, amending and supplementing Ordinance No. 75-58 of 20 Ramadan 1395, corresponding to November 26, 1975.

¹³See article 72 of the Algerian Code of Criminal Procedure.

¹⁴Ali Jaru, *Encyclopedia of Criminal Procedure*, vol. 1 (2006), 177.

¹⁵See article 72 of the Algerian Code of Criminal Procedure.

deposit of security,¹⁶ and the choice of domicile,¹⁷ as well as substantive conditions at the time of submitting the complaint, namely the occurrence of the offense and the existence of harm, together with the existence of a causal link between the offense and the harm,¹⁸ Provided that no judicial prosecution has already taken place.

In Islamic jurisprudence, however, direct prosecution is confined to offenses involving an infringement of a mixed right that combines the rights of God and the servant, such as theft, false accusation of zinā, and retaliation. The victim therefore appears directly before the judiciary to claim his or her private right, and the consequence of this is the establishment of a claim relating to the right of God. The evidence for this is the hadith of Safwan ibn Umayya, when a person stole his cloak; he seized him and brought him to the Messenger of God, peace and blessings be upon him. The thief confessed, and the Messenger of God, peace and blessings be upon him, ordered that his hand be cut off. Safwan said: "I did not intend this, O Messenger of God; it is charity to him." The Messenger of God, peace and blessings be upon him, said: "That should have been before you brought him to me".¹⁹ Safwan's pardon of the prescribed punishment, together with his donation of the garment, was therefore of no avail, because direct prosecution had resulted in the establishment of a claim relating to the right of God Most High. The Shāfi'īs, however, considered punishment by the prescribed penalty for false accusation of zinā, or discretionary punishment for harm, to be a right belonging to the person falsely accused, and it is enforced only if he or she requests it.²⁰

2. Direct Summons to Appear

The Algerian legislature has established for the civil claimant a mechanism for simplifying procedures and investigating the offense committed against him or her, by submitting a complaint before the public prosecutor together with a direct summons to appear,²¹ In accordance with Article 337 of the Algerian Code of Criminal Procedure.²²

What may be observed is that the scope of use of the summons to appear is narrow and does not include offenses of sexual assault against children. The legislature should therefore have broadened this scope to include all offenses in which the child is the victim to provide comprehensive protection for the child.

This requirement that the victim submit a complaint to the Public Prosecutor's Office in order to initiate proceedings accords with Islamic jurisprudence, which divides infringed rights into the

¹⁶See article 75 of the Algerian Code of Criminal Procedure.

¹⁷See article 76 of the Algerian Code of Criminal Procedure.

¹⁸See article 1(2) of the Algerian Code of Criminal Procedure; article 72 of the Algerian Code of Criminal Procedure.

¹⁹Abu Dawud, previously cited, "Chapter on One Who Steals from a Secure Place," hadith no. 4394, vol. 4, 138. Al-Albani classified it as authentic.

²⁰Muhammad al-Zuhayli, *Sharia Criminal Procedure*, vol. 1 (Damascus: Dar al-Fikr, 1436 AH/2015 CE), 87.

²¹Tayeb Semati, *Protecting the Rights of Crime Victims during Criminal Proceedings in Algerian Legislation* (Algiers: Al-Badie Foundation, 2008), 222.

²²Article 337 bis provides: "The claimant may summon the accused directly to appear before the court in the following cases: 1. abandonment of the family; 2. failure to hand over the child; 3. violation of the sanctity of the home; 4. defamation; 5. issuance of a cheque without funds ..."

right of God, in respect of which proceedings may be brought by way of *ḥisba* by any Muslim, by the *ḥisba* authority, or by the Public Prosecutor's Office; and the right of servants, namely the rights of individuals, in respect of which proceedings are brought only at the request of the victim, that is, the injured party, or his or her guardian if he or she is a minor, or his or her heirs if he or she is deceased.²³

B. Commission of the Offense by One of the Parents

Where the child is the victim of an offense committed by one of his or her parents, the matter becomes more difficult because the minor child may not bring an action to defend himself or herself owing to the absence of legal capacity. The matter must therefore either be left in the hands of the other parent, or the child must wait until he or she reaches the age of majority.

1. Bringing the Action by the Non-Offending Parent

If the child is subjected to a sexual assault by one of his or her parents, the other parent is constituted as a civil party in order to defend the child's rights and support the child in all procedures for bringing the action and attending the hearings until judgment is delivered.

The problem, however, arises where the other parent is unable to bring the action out of fear of the other party, or where the child is subjected to harm by both parents together.

In view of this situation, it was necessary to find someone to represent the child before the judiciary and to be constituted as a civil party, pursuant to article 90 of the Family Code,²⁴ which provides that where the guardian's interests conflict with the minor's, the judge shall appoint a special administrator.²⁵ However, the legislature did not clarify the duties of the special administrator, as it did for the testamentary guardian.²⁶ and the curator,²⁷ Both of whom possess the same authority as the guardian. The legislature provided that they are appointed by the court of its own motion or at the request of any interested party whenever it is established that there is a conflict between the guardian and the minor.

It may be observed that there is a legal vacuum regarding the regulation of the special administrator. We have not found any legal rule in the Codes of Civil and Criminal Procedure regulating his or her duties, apart from what is found in the Family Code. The Algerian legislature should, therefore, like the French legislature, have set out this matter in detail, given its importance and its role in protecting the rights of the child.

2. Bringing the Action by the Child Himself or Herself

The Algerian legislature introduced an amendment in order to correct the previous position and to establish justice for the child victim. It laid down special provisions on limitation, as Article 8 bis of the Algerian Code of Criminal Procedure provides that: "The limitation periods for public

²³Muhammad al-Zuhayli, *Sharia Criminal Procedure*, previously cited, 73.

²⁴Ordinance No. 05-02 of February 27, 2005, containing the Family Code, *Official Gazette*, no. 15, February 27, 2005, p. 18, amending and supplementing Law No. 84-11 of 9 Ramadan 1404, corresponding to June 9, 1984.

²⁵See article 90 of the Algerian Code of Criminal Procedure.

²⁶See article 92 of the Algerian Code of Criminal Procedure.

²⁷See Abdelwahab Boudersa, *The General and Specific Conditions for the Admissibility of Actions between Theory and Practice*, 2nd ed. (Algiers: Dar Houma, 2006), 169.

proceedings relating to felonies and misdemeanors committed against a minor shall run from the date on which he or she reaches civil majority.” This is nineteen full years, pursuant to article 40(2) of the Algerian Civil Code.

With the issuance of this amendment, the child, upon reaching the age of majority and acquiring full legal capacity, became able to understand the nature of the acts of which he or she had been a victim, as well as to emerge from the state of silence in which he or she had remained especially where he or she was the victim of sexual assault and to be constituted as a civil party and claim compensation for the harm suffered.²⁸

After public proceedings have been initiated, the Public Prosecutor’s Office and the investigating authorities bear the responsibility of exerting effort to ensure the rights of the victim, especially where the victim is a child, by activating the means of criminal proof.

Second Subsection

The Role of Means of Proof in Protecting the Child’s Right

The legislature establishes a general principle, namely that the human being is presumed innocent until the contrary is proved. Islamic jurisprudence has therefore charged the claimant with proving his or her right against the defendant so that the judge may rule against him. It has emphasized the importance of evidence and proof. The Prophet, peace and blessings be upon him, said: “Were people to be given according to their claims, men would claim the property and blood of others; rather, the burden of proof is upon the claimant, and the oath is upon the one who denies.”²⁹ The law provides that the accused is innocent until their guilt is established. Hence, the importance of proof and the presentation of evidence before the judiciary becomes apparent, and evidence, or the means of proof, constitutes the backbone of adjudication; the judge relies upon it for conviction or acquittal.³⁰ The criminal judge has full discretion to assess the evidence submitted to him in the criminal case, to weigh it, and to give preference to some of it over the rest.³¹ Because the examination of offenses committed against minors, especially offenses of a sexual nature, is often difficult owing to the young age of the victims and the possibility of manipulating, influencing, and directing them.

The means of proving offenses committed against the sexual inviolability of the child do not differ from the general means of proof. Evidence may be oral, material, written, or scientific. Oral evidence consists of confession and testimony; material evidence consists of inspection and search; written evidence consists of reports and records drawn up by the judicial police officer; and scientific evidence consists of medical expertise and genetic fingerprinting.³²

²⁸Hedyat Hammas, *Criminal Protection of the Child Victim: A Comparative Study*, PhD diss., Faculty of Law and Political Science, University of Abou Bekr Belkaid, Tlemcen, 2014-2015, 332.

²⁹Al-Bukhari, previously cited, "Chapter: Indeed, Those Who Exchange the Covenant of God and Their Oaths," hadith no. 4552, vol. 6, 35.

³⁰Muhammad al-Zuhayli, *Sharia Criminal Procedure*, previously cited, vol. 2, 33-34.

³¹See article 212 of the Algerian Code of Criminal Procedure.

³²Kamel Mohamed Farouk, *Police Technical Rules for Investigation and Criminal Inquiry* (Riyadh: Naif Arab University for Security Sciences, 1999), 75.

Given the secrecy and concealment surrounding offenses of sexual assault against children, the criminal judge's reliance on testimony alone is insufficient unless it is supported by medical expertise.

First Branch: Testimony

Testimony has importance and evidentiary value in sexual offenses. It means providing information about the offense to the investigating authority.³³ Testimony is a declaration by the witness concerning a matter that he or she saw, heard, or perceived by any of his or her senses.³⁴ However, the Algerian legislature, like other legislatures, has determined the value of certain testimonies given without first taking an oath and has regarded them merely as statements for guidance by which the judge may be led towards the truth. This is due to the legislature's limited confidence in such testimony, either because of a kinship relationship, as in the case of family members and relatives, or because of deficient discernment, as in the case of minors.³⁵ The judge may assess the testimony of minors according to his conviction, especially where the minor is the victim of sexual assault.

In Islamic jurisprudence, however, for testimony to be accepted, its conditions must be fulfilled.³⁶ Among them, the majority. The testimony of children and minors is therefore invalid, pursuant to the words of the Most High: "... But if the one upon whom the right falls is of limited understanding, weak, or unable to dictate himself, then let his guardian dictate with justice. Moreover, bring to witness two witnesses from among your men..." (Qur'an 2:282). A minor is not among men, pursuant to the Prophet's saying, peace and blessings be upon him: "The pen has been lifted from three: from the sleeper until he wakes, from the minor until he grows up, and from the insane person until he regains reason or recovers".³⁷ Moreover, if he is not entrusted with preserving his own property, then it is all the more appropriate that he should not be entrusted with preserving the rights of others. Mālik, in one opinion attributed to him, and according to one narration from Aḥmad, held that the testimony of minors concerning one another is permissible in cases of wounds, regarding the state in which they inflicted wounds upon one another, because what is apparent is their truthfulness and precision. However, if they disperse, their testimony is not accepted, because there is a possibility that they may have been prompted.³⁸

Second Branch: Medical Expertise

Practical reality has demonstrated the importance of expertise in proving offenses committed against the child, and sometimes even in enabling the court to identify their perpetrators. Without

³³Abdallah Ouhaybia, previously cited, 370.

³⁴Tayeb Semati, previously cited, 46.

³⁵Article 228 of the Code of Criminal Procedure provides: "The testimony of minors who have not completed sixteen years of age shall be heard without the taking of an oath."

³⁶Ibn Rushd al-Qurtubi, *The Distinguished Jurist's Primer*, edited by Abd al-Majid Tuama Halabi, 1st ed., vol. 2, pt. 2 (Beirut: Dar al-Marifa, 1418 AH/1997 CE), 424.

³⁷Al-Bukhari, *Sahih al-Bukhari*, "Chapter: The Insane Man and the Insane Woman Are Not Stoned," vol. 8, 165.

³⁸Ousama Ali Mustafa, *Principles of Sharia Criminal Procedure* (Jordan: Dar al-Nafais, 1425 AH/2005 CE), 462. See Muhammad ibn Qudama, *Al-Mughni*, vol. 14 (Cairo: Cairo Library, 1388 AH/1968 CE), vol. 10, 167. See also Ibn Rushd, previously cited, 424.

it, the rights of many child victims of crime would be lost, especially in relation to offenses of sexual exploitation, which may be proved through laboratory analysis of deoxyribonucleic acid from, for example, the offender's semen, owing to the absence of witnesses or other means of proof.³⁹

The general trend in contemporary criminal proof adopts general evidence that establishes the judge's personal conviction, subject to the general conditions of each means of proof. This applies fully to felonies, misdemeanors, and contraventions that are subject to discretionary punishment in Islamic jurisprudence. In the field of ḥudūd and retaliation, however, adherence is required to the means and conditions specified in Islamic law, and it is impermissible to depart from them, such as the requirement of four male witnesses.⁴⁰ to prove the offense of zinā.⁴¹

Given that the judge is the principal guarantor of the best interests of the child, as a primary criterion in all procedures or measures he takes for the benefit of the child, he must adopt a policy of broadening the assessment of means of proof in view of the obscure circumstances in which cases involving a child victim are revealed.⁴²

For the protection of the child, the law has granted him or her the right to compensation for harm and has allowed the juvenile judge to intervene to take the necessary measures to protect him or her. This is what we shall explain in the following subsection.

Section Two

Guarantees of Procedural Protection before the Judge

An offense causes substantial harm, especially to the child. It is therefore necessary to provide appropriate and sufficient compensation. However, there are no special provisions concerning such compensation; rather, it is subject to the general provisions contained in the Code of Criminal Procedure relating to compensation for harm resulting from the commission of an offense.⁴³ In the first branch.

A child who has been the victim of assault by his or her ascendants, however, does not need compensation, but rather assistance that removes him or her from the danger threatening him or

³⁹The physician's task here consists in establishing the materiality of the assault, determining its circumstances, assessing the possibility of infection with diseases such as AIDS, and determining the possibility of pregnancy. Physicians may also resort to examining fingerprints or DNA in order to identify the assailant. The expert physician may also be appointed to estimate the age of juvenile accused persons or victims where birth certificates cannot be obtained. See Jamal Wafa, *Medical Expertise in the Criminal Field*, graduation dissertation for the Higher School of the Judiciary, 27.

⁴⁰Ibn Rushd al-Qurtubi, previously cited, vol. 2, 439. See also Muhammad ibn Farhun al-Yaamuri, *Guidance for Judges on the Principles of Adjudication and Methods of Judgments*, vol. 1 (Riyadh: Dar Alam al-Kutub for Printing, Publishing, and Distribution, 1423 AH/2003 CE), 226. Ibn Hazm al-Zahiri, Hammad, Ata, and the Ibadis differed on this matter and stated: "The testimony of women is admissible like that of men in hudud and qisas." See Ibn Hazm, *Al-Muhalla bi-l-Athar*, vol. 10 (Beirut: Dar al-Fikr, n.d.), 268. See Ibn Qudama, previously cited, vol. 12, 362-63; Ibn al-Humam, *Fath al-Qadir*, vol. 7 (Beirut: Dar al-Fikr, n.d.), 343-44.

⁴¹Muhammad al-Zuhayli, *Sharia Criminal Procedure*, previously cited, 46.

⁴²Mansour al-Qadiri Jaraya, "The Judge and Human Rights," *Journal of Judiciary and Legislation*, no. 8 (October 2003): 498.

⁴³See articles 2, 3, and 239 of the Algerian Code of Criminal Procedure.

her. For this reason, the law has allowed the juvenile judge to intervene to take the protective measures necessary to remove the child from the sphere of danger in which he or she is living, in the second branch.

First Subsection

Compensation for Harm Suffered by the Child

An offense entails harm to any person who falls victim to it. If that person is a child, however, the resulting harm is necessarily more serious and has profound consequences that may continue for a long time, or for life.

Harm is the injury that affects a person as a result of an infringement of one of his or her rights or of a legitimate interest.⁴⁴ Harm resulting from an offense has been divided into three types: material harm, which affects a person's property; bodily harm, which affects his or her body; and moral harm, which affects his or her feelings or honor. This is the most precise classification.⁴⁵

For this reason, positive legislations have been concerned with recognizing compensation for harm resulting from sexual assaults,⁴⁶ through what is known as the ancillary civil action.

First Branch: The Meaning of the Ancillary Civil Action

An offense gives rise to a public right belonging to the community to institute a public action to punish the offender. A second action may also arise from it, known as the ancillary civil action,⁴⁷ brought by the person harmed by the offense, in which he or she claims compensation for the harm suffered as a result of the offense.⁴⁸ The general rule is that this action is brought before the civil courts. However, its particular nature, namely its dependence on public action,⁴⁹ gives the injured party the right, by way of exception, to have recourse to the criminal courts in order to claim his or her right. The dependence of the civil action on the public action does not cause it to lose its particular and independent nature; it is therefore subject to provisions specific to it.

About limitation, the limitation period for the ancillary civil action is subject to the provisions of civil law,⁵⁰ set at fifteen years from the date on which the harmful act occurred.⁵¹ Where the child is the victim, pursuant to article 8 bis of the Algerian Code of Criminal Procedure, the minor may

⁴⁴Larbi Belhadj, *The General Theory of Obligation in Algerian Civil Law*, 4th ed., vol. 2 (Algiers: University Publications Office, 2007), 143.

⁴⁵Abdallah Ouhaybia, previously cited, 151.

⁴⁶*Ibid.*, 151.

⁴⁷See article 1(2) of the Algerian Code of Criminal Procedure.

⁴⁸Sexual assault against a child entails material harm, such as defloration, which causes physical pain, in addition to the possible transmission of sexually transmitted diseases. Moral harm may also affect the victim's honour, reputation, and dignity, and may leave psychological pain that cannot be measured, especially in the case of a child. Other considerations also arise, namely that virginity is considered, for a girl, one of the dearest things she possesses, as it is a symbol of purity, chastity, and honour; she may therefore suffer shock and depression, which may sometimes lead her to immorality or prostitution. See Nasrin Abdelhamid Nabih, *Sexual Crime* (Alexandria: New University House, 2008), 39.

⁴⁹The dependence of the civil action on the public action means its dependence in terms of procedure, so that it is subject to the Code of Criminal Procedure and to the criminal courts, and both actions are decided by a single judgment. For further details, see Abdelaziz Saad, *Conditions for Exercising the Civil Action*, previously cited, 7-18.

⁵⁰Article 10 of the Algerian Code of Criminal Procedure.

⁵¹Article 33 of the Algerian Code of Criminal Procedure.

bring the public action from the date on which he or she reaches civil majority, and the limitation periods are calculated from the date on which he or she reaches that age.

The civil claimant may waive his or her civil right at any stage of the proceedings. Waiver of the civil action does not entail the suspension or postponement of the public action. Therefore, the two actions do not expire together, just as the extinction of the public action does not prevent the civil action from remaining in existence.⁵²

The civil claimant may be the person assaulted, that is, the victim, and may also not be the victim but rather a person harmed by the offense.⁵³ Such as the harm suffered by the child's ascendants as a result of the offense committed against the child. The child's father may therefore be constituted as a civil claimant to seek compensation for the harm suffered by him.⁵⁴

The civil claimant may also be the victim's representative. This applies to the child victim, who is not legally qualified to exercise his or her civil rights and is therefore represented by the guardian, testamentary guardian, or judge, as the case may be⁵⁵.

As for the Code of Criminal Procedure, no provision is included that obligates the representation of the child before the judiciary in the absence of the guardian. The Algerian legislature should therefore have equated the two situations, namely the child offender and the child victim, in order to preserve the rights of the child victim, who is more deserving of care and attention.

Second Branch: The Aim of the Ancillary Civil Action

The aim of the ancillary civil action is compensation for the harm suffered by the claimant as a result of the offense.⁵⁶ Whether the harm is material or moral, financial or monetary value cannot erase these effects. Nevertheless, monetary compensation remains the only available remedy for the victim. Compensation must therefore be adequate and comprehensive in respect of all these considerations, so that the child's guardian can cover the costs of treatment and facilitate the child's rehabilitation and reintegration into society.⁵⁷ The assessment of compensation falls within the judge's discretionary authority, provided it does not exceed the civil claimant's request.⁵⁸ In assessing compensation, the judge may rely on medical expert reports and social assistants' reports before ruling on the proposed amount.⁵⁹

Despite enabling the injured party to obtain compensation in order to cover, as far as possible, the harm suffered as a result of the offense, it is often difficult to obtain compensation from the offender for several reasons: either because the latter is insolvent, because he or she is unable to pay compensation, or because he or she remains unknown in the first place. For this reason, the idea

⁵²Philippe Conte and Jean Larguier, *Criminal Procedure*, 22nd ed. (Paris: Dalloz, 2010), 143, cited in Hedyat Hammas, previously cited, 350.

⁵³Article 2(1) of the Algerian Code of Criminal Procedure provides: "Everyone who has personally suffered harm."

⁵⁴See Tayeb Semati, previously cited, 27.

⁵⁵Abdelaziz Saad, *Conditions for Exercising the Civil Action*, previously cited, 52.

⁵⁶Abderrahmane Khalfi, *Lectures on the Code of Criminal Procedure* (Algiers: Dar al-Huda, 2012), 129-30.

⁵⁷Hedyat Hammas, previously cited, 355.

⁵⁸Abdallah Ouhaybia, previously cited, 152.

⁵⁹Ali Filali and Ahmed El Khamlichi, *Commentary on the Code of Criminal Procedure: Trial and Methods of Appeal*, vol. 2 (Rabat: New Knowledge Press, 2001).

emerged that the state has an obligation to compensate the victim. This obligation rests on both legal and social bases.⁶⁰ The claim for compensation is brought before an administrative, rather than a judicial, authority. From this arose a special compensation system based on social solidarity rather than on liability.⁶¹

The majority of Western legislation is based on social principles. As for Algerian legislation, it has not recognized the state's authority to compensate victims in all offenses but has limited compensation to special categories of victims.⁶² such as compensation for harm suffered by a worker as a result of an occupational accident, compensation for victims of terrorism, and compensation for traffic accidents.⁶³

If we carefully consider Article 140 bis 1 of the Algerian Civil Code, which provides that: "Where the person responsible for bodily harm is absent, and the injured party has had no part in it, the state shall assume responsibility for compensating this harm," this provision does not, however, provide the necessary legal protection. The state's obligation to compensate only for bodily harm is insufficient, since sexual assault against children often causes psychological harm that requires a long period of treatment. Who, then, bears responsibility for this matter?

It would therefore be appropriate for the Algerian legislature to introduce provisions and mechanisms that guarantee this category its rights when the offender is unknown or insolvent. The judge must assess the harm suffered by the victim psychologically and physically.⁶⁴

The provisions of the civil action connected with the criminal action, the allocation of jurisdiction over it to the criminal courts or the civil courts, and all the details set out previously have no shari'a text governing them. They were dealt with by the shari'a judiciary under its general jurisdiction, owing to the small number of actions and the simplicity of procedures, with the entire matter being left to the Muslim ruler and the holder of authority to organize according to need and interest and to distribute jurisdiction among the courts, which the jurists recognized in the past. The holder of authority issues instructions, regulations, and laws in a manner that serves people's interests and needs and secures justice and equality among them. It thus becomes clear to us that all the rulings detailed above accord with the shari'a foundations and conform to the principles of the shari'a; they are therefore lawful, valid, and acceptable.⁶⁵

A child who has been the victim of assault by his or her ascendants does not need compensation, but rather assistance that removes him or her from the danger that threatened him or her. The law therefore allowed the juvenile judge to intervene in order to protect the child's interests.

⁶⁰See Tayeb Semati, previously cited, 301-2.

⁶¹Genevieve Viney, "Les differentes voies de droit proposees aux victimes," Archives de politique criminelle 24, no. 1 (2002): 27-40, cited in Hedyat Hammas, previously cited, 3.

⁶²Tayeb Semati, previously cited, 311.

⁶³See Abdelaziz Saad, Conditions for Exercising the Civil Action, previously cited, 150-51.

⁶⁴Hamo Ibrahim Fakhar, previously cited, 296-97.

⁶⁵Muhammad al-Zuhayli, Sharia Criminal Procedure, previously cited, 147.

Second Subsection

The Intervention of the Juvenile Judge

The juvenile judge is regarded as the backbone of juvenile justice, since he combines investigation and judgment. Although he is a criminal judge, he does not always issue criminal judgments.⁶⁶ He investigates the delinquent minor and the minor in moral danger and takes the necessary measures to protect the fundamental freedoms of this vulnerable group.⁶⁷ These measures may be punitive measures, such as a judgment depriving the father or mother of parental authority where either is convicted of committing, as principal or accomplice, certain offenses, including the offense of intentional harm committed against the child, the offense of abandonment of the family, the offense of indecent assault, or incitement of minors to debauchery and prostitution.⁶⁸

Given that it is a serious measure, judgment imposing this penalty has often been made discretionary,⁶⁹ Rather than being mandatory, it is subject to the judge's discretion, who assesses the danger to which the child is exposed.

They may also be protective measures aimed at protecting the child in accordance with Law No. 15/12 on the Protection of the Child. The juvenile judge may take such measures concerning a child exposed to danger. They are of two types: measures that keep the child within his or her family environment and measures that remove the child from it.

First Branch: Measures to Keep the Child in His or Her Family Environment⁷⁰

The judge has the priority of keeping the minor in his or her natural environment as far as possible. This measure is considered one of the least complex, since it does not affect parents' right to exercise parental authority; they retain all the rights and duties associated with it. In addition, it serves the child's interests, given the psychological shocks and suffering that may result from uprooting the child from his or her family environment.

Second Branch: Removing the Child from the Usual Environment

Some measures remove the child from his or her usual family environment; these fall into two types: placement with a natural person and placement with a legal person.

A. Placement with a Natural Person

In Article 40 of Law No. 15/12, the Algerian legislature set out measures that also fall within the framework of educational assistance and are taken by the juvenile judge. These consist of returning the minor to his or her father or mother who does not exercise the right of custody over him or her,

⁶⁶Abdallah Ouhaybia, previously cited, 156.

⁶⁷Zedouma Drias, *The Protection of Juveniles in the Algerian Code of Criminal Procedure* (Cairo: Dar al-Fikr for Publishing and Distribution, 2007), 113.

⁶⁸See articles 272, 330(3), 332, 337 bis, 344(4), and 394 of the Algerian Penal Code, Law No. 14-01 of February 4, 2014, containing the Penal Code, Official Gazette, no. 7, February 16, 2014, p. 4, amending and supplementing Ordinance No. 66-156 of 18 Safar 1386, corresponding to June 8, 1966.

⁶⁹Except in the offence of incest, where the law requires that the judgment rendered against the father or mother include the loss of parental authority or legal guardianship. See the final paragraph of article 337 bis of the Algerian Penal Code.

⁷⁰These measures are provided for in articles 29 and 40 of Law No. 15-12. They correspond to article 375-2 of the French Civil Code, which establishes that the first measure to be taken is to keep the child within his or her family.

or placing him or her with a person other than the parents, such as one of his or her relatives or a trustworthy family. The Algerian legislature did not specify the duration of the placement measure but rather established a maximum limit for all protective measures, which must not extend beyond the minor's reaching the age of criminal majority.⁷¹

It must also be recalled that, where the child is placed with a third party, the minor's parents are required to comply with the duty of maintenance towards him or her, unless their poverty is established. The juvenile judge determines the monthly amount of this contribution to maintenance, which is paid directly to the third party to whom custody of the child has been entrusted, in addition to the family allowances accruing to the minor, which are likewise paid directly to those persons.⁷² The recipient is responsible for the child placed with him or her and incurs criminal liability if he or she abandons the obligation to care for and preserve the child.

B. Placement with a Legal Person or Institutional Placement⁷³

The placement measure aims to remove the child from his or her family environment and place him or her in a special institution for protection. It is a measure that affects the right to family life and impairs parents' rights. However, recourse is not had to this measure except in exceptional cases in which the child cannot remain within his or her family surroundings. The Algerian legislature has fixed the duration of this measure at six months if it is adopted provisionally during the investigation.⁷⁴ If, however, it is adopted definitively, its duration must not exceed the date on which the minor reaches the age of twenty-one.⁷⁵ The juvenile judge may also amend the measures or withdraw them automatically, or at the request of the child himself or herself, or at the request of his or her legal representative or of the public prosecutor, or of his own motion, within a period not exceeding one month from the date on which the request is submitted.⁷⁶ After the investigation is completed, the juvenile judge sends the file to the public prosecutor for review and, where appropriate, summons the child, his or her legal representative, and the lawyer eight days before the case is considered.⁷⁷ On the day fixed for the hearing, which takes place in the judge's office and is conducted in the presence of all the parties, as well as any person whose testimony is necessary for the case, with a view to reaching the most appropriate solution, the juvenile judge may also exempt the minor from attending the hearing whenever necessity and interest so require.⁷⁸ Before adopting measures of definitive placement, the juvenile judge studies the child's personality through a social inquiry, medical, mental, and psychological examinations, and observation of the child's behavior.⁷⁹ Whether placement is provisional or definitive, the centers in which a child

⁷¹See article 42 of Law No. 15-12 of July 15, 2015, relating to the Protection of the Algerian Child, Official Gazette, no. 39, July 19, 2015.

⁷²See article 44 of Law No. 15-12 relating to the Protection of the Algerian Child.

⁷³Articles 36 and 41 of Law No. 15-12 relating to the Protection of the Algerian Child.

⁷⁴Article 37 of Law No. 15-12 relating to the Protection of the Algerian Child.

⁷⁵Article 42 of Law No. 15-12 relating to the Protection of the Algerian Child.

⁷⁶Article 45 of Law No. 15-12 relating to the Protection of the Algerian Child.

⁷⁷Article 38 of Law No. 15-12 relating to the Protection of the Algerian Child.

⁷⁸Article 29 of Law No. 15-12 relating to the Protection of the Algerian Child.

⁷⁹Article 34 of Law No. 15-12 relating to the Protection of the Algerian Child.

exposed to danger is placed, pursuant to articles 36 and 41 of Law No. 15/12, consist of a specialized center for the protection of children in danger, a service responsible for child assistance, and a hospital center or institution if the child requires health or psychological care.

This accords with the care prescribed in Islamic jurisprudence for minors and persons of unsound mind, and with the existence of special rulings suited to their condition, in line with the principles of social solidarity and health care for them. This was supported by the General Assembly of the United Nations' "Declaration of the Rights of the Child of 1909 CE", particularly regarding children with disabilities, and was then affirmed in the first paragraph of Article 7 of the Islamic Declaration of Human Rights.⁸⁰

It provides that: "Every child has, from the time of birth, rights due from the parents, society, and the state to custody, upbringing, and material, health, and moral care. The fetus and the mother must also be protected and given special care."

At this point, it may be said that the rules relating to the procedural protection of the child victim of sexual assaults are characterized by their limited scope. The rules of general law are those most often applied to minors, whereas some of the amendments introduced to these procedures in their favor, represented by article 46 of Law No. 15/12, amount to no more than an exception to the general rules applicable to all victims. Hence, we call upon the legislature to allocate protective measures to the child victim independently of those for the juvenile offender.

These general rules have, for the most part, corresponded to the rulings of Islamic jurisprudence on felonies, misdemeanors, and discretionary contraventions. In the field of *ḥudūd* and retaliation, however, the *sharī'a* requires adherence to the legally prescribed means and conditions, and it is impermissible to depart from them.

It is worth noting that all procedures that accord with the age, realize the public interest, conform to the general principles of Islamic law, and fall within its numerous sources are consistent with the care prescribed in Islamic jurisprudence for minors, and with the existence of special rulings suited to their condition within the principles of social solidarity and proper care for them.

In addition to procedural protection, both Islamic jurisprudence and Algerian legislation have adopted precautionary measures to protect and prevent the child from exposure to sexual assaults, and each has prescribed deterrent penalties for anyone who violates the sexual inviolability of the child.

Conclusion

After this overview of the judicial protection procedures for the sexual inviolability of the child, as provided for in the rulings of Islamic law and recognized by the Algerian legislature, it becomes clear to us that this subject is of great importance, an importance arising from the central focus of the study around which the research revolves, namely the judicial protection of the sexual inviolability of the child.

⁸⁰Muhammad al-Zuhayli, *Sharia Criminal Procedure*, previously cited, 361.

Thus, at the conclusion of this research, we have reached the following principal findings and proposals:

First: Findings

1. The Algerian legislature has not attached importance to the category of child victims of crime at the stage of initiating public proceedings, as they are treated in the same manner as adult victims.
2. As for the procedural protection of the child victim, the child has not received sufficient attention, as the texts have overlooked his or her rights and legal status in the proceedings, apart from certain provisions that we found, despite the issuance of Law No. 15/12 on the Protection of the Child, which itself did not establish special protection for the child victim, except for what is contained in article 46 thereof.
3. The Algerian legislature has established protection for victims of sexual assaults in inquiry and investigation procedures.
4. Any person may use the civil-party claim without restriction. Its exercise, however, requires formal conditions, namely the submission of the complaint, the deposit of security, and the choice of domicile, as well as substantive conditions at the time of submitting the complaint, namely the occurrence of the offence and the existence of harm, together with the existence of a causal link between the offence and the harm, provided that no judicial prosecution has already taken place. In Islamic jurisprudence, however, direct prosecution is confined to offenses involving an infringement of a mixed right that combines the rights of God and the servant, such as theft, false accusation of zinā, and retaliation. The victim therefore appears directly before the judiciary to claim his or her private right, and the consequence of this is the establishment of a claim relating to the right of God.
5. The means of proving offenses committed against the sexual inviolability of the child do not differ from the general means of proof. Evidence may be oral, material, written, or scientific.
6. The general trend in contemporary criminal proof adopts general evidence that establishes the personal conviction of the judge, subject to general conditions in each means of proof. This applies fully to the fields of felonies, misdemeanors, and contraventions that correspond to discretionary punishments in Islamic jurisprudence. In the field of ḥudūd and retaliation, however, adherence is required to the means and conditions specified in Islamic law, and it is impermissible to depart from them.
7. The Algerian legislature has sought to protect the child exposed to danger and the juvenile offender from anything that violates his or her sexual inviolability through the imposition of social and judicial protection aimed at protecting the child and rehabilitating and reintegrating him or her into society. However, we have observed a similarity between the protection prescribed for the child victim and that prescribed for the juvenile offender, which may affect the behavior and morals of the child victim, especially where they are present in a unified protection center.

8. Before adopting measures of definitive placement, the juvenile judge studies the child's personality by means of a social inquiry, medical, mental, and psychological examinations, and observation of his or her behavior. The child exposed to danger is placed in the special centers provided for pursuant to articles 36 and 41 of Law No. 15/12. This accords with the care prescribed in Islamic jurisprudence for minors and persons of unsound mind, and with the existence of special rulings suited to their condition, in line with the principles of social solidarity and health care for them.
9. The general procedural rules have, for the most part, corresponded to the rulings of Islamic jurisprudence in the field of felonies, misdemeanors, and discretionary contraventions. In the field of ḥudūd and retaliation, however, the sharīʿa requires adherence to the legally prescribed means and conditions, and it is impermissible to depart from them.

Second: Proposals

After presenting the principal findings, we deemed it appropriate to pause to consider a set of proposals that may help remedy the deficiency in Algerian legislation regarding judicial procedures for protecting the sexual inviolability of the child in both the Code of Criminal Procedure and Law No. 15/12 on the Protection of the Child. So, we call upon the legislature to:

1. Introduce provisions and mechanisms guaranteeing this category its rights where the offender is unknown or insolvent. The judge must assess the harm suffered by the victim psychologically and physically.
2. Enact special rules for the procedural protection of the child victim of sexual assaults.

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