


UDC: 7203.01

LBC: 63.3(2)6-7; 65.497; 71; 71.1

MJ № 309

 10.33864/2617-751X.2025.v8.i5.27-42

## LEGAL CONSEQUENCES FOR FOSTER CHILDREN IN THE ALGERIAN PERSONAL STATUS LAW

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**Abstract.** The purpose of this study is to explain the ambiguous legal points of the status of the foster child (makfoul) under Algerian legislation. Although the Algerian legislator has developed legal texts that provide protection for the foster child, this protection does not address the issue of foster care (kafalah) in all aspects, due to the existence of legal gaps that complicate the status of the foster child before the Algerian administration and judiciary, and hinder the progress of his interests. As a result, there is a lack of equality between foster children and legitimate children in terms of the principle of protecting the child's interest, whether from the material aspect, where the foster child is deprived after divorce of the right to obtain maintenance to meet his needs, or from the moral aspect, where he is deprived of the emotional relationship that binds him to the foster spouse (kafale's spouse), because there is no proof of his legal capacity to request the right of visitation.

**Keywords:** Foster child, child protection, kafalah

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**To cite this article:** Chemmam, M., Hairech, N., & Djeriou, M. A. [2025]. LEGAL CONSEQUENCES FOR FOSTER CHILDREN IN THE ALGERIAN PERSONAL STATUS LAW. “Metafizika” journal, 8(5), pp.27-42.

<https://doi.org/10.33864/2617-751X.2025.v8.i5.27-42>

**Article history:**

Received: 01.05.2025

Accepted: 03.06.2025

Published: 04.08.2025




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## ПРАВОВЫЕ ВЫВОДЫ ДЛЯ ДЕТЕЙ, НАХОДЯЩИХСЯ ПОД ОПЕКОЙ, ОТРАЖЕННЫЕ В ЗАКОНЕ АЛЖИРА О ЛИЧНОМ ПОЛОЖЕНИИ (СТАТУСЕ)

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**Абстракт.** Цель настоящего исследования заключается в разъяснении неоднозначных правовых моментов статуса приемного ребенка (makfoul) по алжирскому законодательству. Хотя алжирский законодатель разработал правовые тексты, обеспечивающие защиту приемного ребенка, эта защита не затрагивает вопрос о приемном воспитании (кафала) во всех аспектах, в связи с наличием правовых пробелов, которые усложняют статус приемного ребенка перед алжирской администрацией и судами и препятствуют продвижению его интересов. Как результат, существует отсутствие равенства между приемными детьми и законнорожденными детьми с точки зрения принципа защиты интересов ребенка, будь то в материальном аспекте, где приемный ребенок после развода лишен права на получение алиментов для удовлетворения своих потребностей, или с моральной точки зрения, когда он лишен эмоциональных отношений, которые связывают его с приемным супругом (супругой Кафеля), потому что нет доказательств его правоспособности требовать права на посещение.

**Ключевые слова:** приемные дети, защита детей, кафала

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**Цитировать статью:** Чеммам, М., Хайрех, Н., & Джериу, М. А. [2025]. ПРАВОВЫЕ ВЫВОДЫ ДЛЯ ДЕТЕЙ, НАХОДЯЩИХСЯ ПОД ОПЕКОЙ, ОТРАЖЕННЫЕ В ЗАКОНЕ АЛЖИРА О ЛИЧНОМ ПОЛОЖЕНИИ (СТАТУСЕ). Журнал «Metafizika», 8(5), с.27-42.

<https://doi.org/10.33864/2617-751X.2025.v8.i5.27-42>

**История статьи:**

Статья поступила в редакцию: 01.05.2025

Отправлена на доработку: 03.06.2025

Принята для печати: 04.08.2025




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## ƏLCƏZAIR ŞƏXSİ VƏZİYYƏT (STATUS) QANUNUNDA QƏYYUMLUQ HİMAYƏSİNDƏ OLAN UŞAQLAR ÜÇÜN HÜQUQİ NƏTİCƏLƏR

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Məhəmməd Əmin Ceriv\*\*\*

**Abstrakt.** Bu araşdırmanın məqsədi, Əlcəzair qanunvericiliyində qəyyum (makfoul) statusunun qeyri-müəyyən hüquqi məqamlarını izah etməkdir. Əlcəzair qanunvericisi qəyyumluqdakı uşaqlar üçün qoruma təmin edən hüquqi mətnlər hazırlasa da, bu qoruma qəyyumluq (kəfalət) məsələsini bütün aspektlərdə əhatə etmir, çünki bununla bağlı hüquqi boşluqlar var ki, bu da qəyyumluq himayəsində uşağın Əlcəzair idarəsi və məhkəməsi qarşısındakı statusunu çətinləşdirir və onun maraqlarının irəliləməsini əngəlləyir. Nəticədə, qəyyum uşaqları ilə qanuni uşaqlar arasında uşağın marağının qorunması prinsipi baxımından bərabərsizlik mövcuddur, istər maddi tərəfdən, burada qəyyum uşaq boşanma sonrası ehtiyaclarını qarşılımaq üçün müavinəti almaq hüququndan məhrumdur, istərsə də mənəvi tərəfdən, burada o, qəyyum həyat yoldaşı (kafale'nin yoldaşı) ilə arasında olan emosional münasibətdən məhrumdur, çünki onun bu hüququ tələb etmək üçün hüquqi qabiliyyətinin sübutu yoxdur ziyaret etmə.

**Açar sözlər:** uşaq himayəsi, uşaq müdafiəsi, kafala

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**Məqaləyə istinad:** Şemmam, M., Hireş, N., & Ceriv, M. Ə. [2025] MÜASİR CƏMİYYƏTİN SOSİAL-MƏDƏNİ İNKİŞAFINDA TRANSFORMATİV DİALOQUN ROLU. “Metafizika” jurnalı, 8(5), səh.27-42.

<https://doi.org/10.33864/2617-751X.2025.v8.i5.27-42>

**Məqalənin tarixçəsi:**

Məqalə redaksiyaya daxil olmuşdur: 01.05.2025

Təkrar işlənməyə göndərilmişdir: 03.06.2025

Çapa qəbul edilmişdir: 04.08.2025



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## **1.Introduction**

The protection of children is one of the most important topics addressed by various legislations, especially those related to foster care. Whether the child is a foundling or of unknown parentage, or if his parents are known and unable to care for him and raise him, due to social, economic or health conditions that obligate them to place him with someone who can care for him physically or morally.

Most Islamic countries have adopted the kafalah system in their legislation, as opposed to adoption, which is forbidden by Islam, due to the evils of adoption [The disadvantages of adoption according to Islamic law: Mixing genealogies, depriving a child of his identity, and depriving the heirs of their right to their inheritance. See: Allal Amal / Adoption and foster (a comparative study between Islamic law and positive law) / Master's thesis / University of Tlemcen / 2008-2009 /p.10]. Studies have proven that children raised on the basis of false filiation suffer from psychological complexes that lead them to envy society and commit crimes [Dr. Osama Al-Hamawi / Adoption, the issue of foundlings and the reasons for establishing parentage (a comparative jurisprudential and social study) / Damascus University Journal / Vol. 23 / Issue 2 / 2007 / p.521; Zawawi Farida / The extent to which Executive Decree 92/24 regarding the change of surname conflicts with the principles of Islamic Sharia / Judicial Journal / Issue 2 / 2000 / p.69].

Algeria is a Muslim country, and Islamic law is the second source by which the judiciary is governed. As stipulated in Article 1 of the Algerian Civil Code, which regulates kafalah issues in the Algerian Family Code, considering it a form of alternative care recognized by Islamic law for a child who has lost the care of his or her parents, regardless of his or her status, whether he or she is of known or unknown parentage.

This is why both Sharia and law address the situation of children in need of care and protection, and provide an opportunity for those who are benevolent and charitable to be able to submit their requests to take care of these children, once they meet the legally defined conditions.

However, although the Algerian legislator has established a legal framework that provides protection for the foster child, this protection does not affect all aspects, due to the existence of legal loopholes that complicate the progress of the interests of the foster child in front of the administration and the judiciary. Furthermore, from the social and psychological point of view, it deprives the foster child of basic rights that every child needs, such as the right to visitation and maintenance, resulting in inequality between the foster child and the legal child in terms of protecting the interests of the child. Therefore, it is necessary to add legal provisions regarding the effects of foster care that provide psychological and social protection for the foster child, in addition to

administrative and judicial protection, to provide the necessary care in both material and moral aspects.

We therefore pose the following questions: What are the legal shortcomings related to the protection of the foster child in the Algerian Family Code. What issues have been overlooked by the Algerian legislator that would ensure greater protection for this child and how can these shortcomings be addressed?

We answer these issues in this research, while proposing solutions that we deem appropriate for them, according to the following plan:

**Section I:** Consequences related to the foster person's conditions

**First requirement:** The gender of the fosterer

**Second requirement:** Age of the fosterer

**Third requirement:** Marriage of the fosterer and the consent of the spouse [le conjoint]

**Fourth requirement:** The case of an Algerian requesting to foster a foreign child

**Section II:** Consequences related to the status of the fostered child

**First requirement:** Assignment of custody of the fostered child after divorce

**Second requirement:** The right of visitation for the fostered child

**Third requirement:** The right to maintenance for the fostered child

**Fourth Requirement:** The status of the fostered child by the wife

**Conclusion**

**2.Section I: Consequences related to the foster person's conditions**

The Algerian legislature has stipulated a set of conditions for the fosterer to accept his/her foster; however, the legal texts containing these conditions have some gaps and ambiguities, the impact of which is evident in the practical aspect of foster cases. These legal issues are explained below through the gender of the fosterer (first requirement), the age of the fosterer (second requirement), the consent of the spouse if the fosterer is married (third requirement), and the case of an Algerian foster's request to foster a foreign child (fourth requirement).

**2.1.First requirement: The gender of the fosterer**

Article 116 of the Algerian Family Code [Law No. 84-11, dated June 09, 1984, containing the Family Code, amended and supplemented by Ordinance No. 05-02, dated May 04, 2005] defines kafalah as: “*A voluntary obligation to take care of a minor child, in terms of maintenance, upbringing and care, as a father takes care of his son and it is done through a legal contract*”.

While Islamic jurisprudence has considered kafalah to be a personal obligation on the part of the fosterer, whether a man or a woman [Ben Attia Bouabdallah, The provisions of the foundling between Islamic jurisprudence and Algerian law, Master's thesis, University of Oran, 2001-2002, p.109, cf. Allal Amal / Adoption and sponsorship (a comparative study between Islamic

law and positive law) / previous reference / p.32 and p.51], the Algerian legislature has left vague terms when drafting the articles on kafalah, making it a personal voluntary obligation on the part of the fosterer, who must be a man, as is clear from the phrase “the father of the child” [Emilie B ARRAUD/Kafala transnational. Terms and conditions for the training of Kafilate families in France/Publisher Presses de sciences Po(P.F.N.S.P) Autrepart 2011/1 n°57-58/p248 site article <https://www.cairn.info/revue-autrepart-2011-1-page-247.htm>], or article 118 of the Family Code, in which it is stated that: (The fosterer must be a Muslim) [Nabil Sakr / Family law, text, jurisprudence and application / Encyclopedia of legal thought / Dar Al-Huda printing, publishing and distribution / 2006 edition / Algeria / pp.313-314]. These two texts are vague and ambiguous, as they make kafalah an obligation issued by a man only, as if the child does not need a family or a mother to care for him, but rather a substitute father [Allal Amal / Adoption and sponsorship (a comparative study between Islamic law and positive law) / Previous reference / p.62]. It should be noted that custody [Rushdi Shehata Abu Zeid / Conditions for establishing the right of custody in Islamic jurisprudence and personal status law / Dar Al-Fikr Al-Arabi / first edition / 1999 / Cairo / p.47] is always in the hands of the mother [Hanifi Louisa Dissolution of the conjugal bond while the spouses are alive PhD thesis University of Algiers 2007 p.199/ Yamina Houhou Thesis;LA Kafala In Algerian law and its effects in French law 'prec/163] in the interest of the child, so the legislator should have stipulated that women are more entitled to kafalah than men, and therefore it was the first step for the legislator to stipulate that women have the right to kafalah.

## **2.2.Second requirement: Age of the fosterer**

The Algerian Family Code is ambiguous with regard to the age difference between the fosterer (kafil) and the foster child (makfoul), as it does not specify the age at which kafalah is accepted by the fosterer, which refers to the general provisions of the Civil Code [Al-Ghothi Ben-Malha/Family Law in the Light of Jurisprudence and the Judiciary/Office of University Publications/First Edition/2005/p.169]. We also find no other legal text regulating the situation in the event that the applicant for kafalah is 19 years old for a child who is 17 years old. Although logic does not accept this in the fosterer, because the foster child is in dire need of a father and not a friend, in addition to this, Algerian society with the current economic situation, most of its young people at this age are unemployed and unable to take care of themselves. This makes it necessary to develop a regulatory text that enacts the minimum age of the fosterer, which we believe should not be less than the age of the older brother. Meaning that the age difference between the fosterer and the child should be taken into account, so that the fosterer is at least like an older brother to the

child, while leaving the judge the authority to assess this difference between them. If the child is an infant, it is okay for the fosterer to be a young man, newly married, while in this case it is not conceivable that the fosterer should be a teenager of seventeen years old, for example, but rather a man of thirty-five or forty years old could take over his foster, and so on.

### **3.3.Third requirement: Marriage of the fosterer and the consent of the spouse [le conjoint]**

The Algerian legislator has not established a legal provision that requires the foster parent to be married, knowing that the foster child, regardless of his or her condition, needs a family consisting of a married couple [Belhaj Larbi / Marriage provisions in the light of the new family law, (according to the latest amendments and supported by the latest jurisprudence of the Supreme Court) / Dar al-Kultura, Publishing and Distribution / Edition 2012 / Algeria /p.528; see also Abdelkader Medgan / Brief explanation of the Algerian family system, a summary of Islamic jurisprudence / Arab Press / First edition / Algeria / p.48; Mohamed Abdeljawad Mohamed / Child Protection in Islamic Sharia and Law / Manshaat al-Maarif / Alexandria, Egypt, 1991 edition, pp.67-68], who are like a father and mother for him or her to live a stable and balanced family life [Muhammad Abdul Jawad Muhammad / Protection of Motherhood and Childhood in International Charters / Manshaat Al-Maarifa / 1991 edition / p.65]. No man or woman without a spouse can fully fulfill the duties of foster care, especially if they have never been married and have not experienced the responsibility and burdens of family life.

Although the Algerian Family Code does not stipulate this condition, the Directorate of Social Activity and Solidarity requires kafalah applicants to be married [Leila Jammai / Child protection (a comparative study between Algerian law and Islamic law) / PhD thesis / University of Oran / 2005-2006 / p.138, and see: Allal Amal / Adoption and sponsorship (a comparative study between Islamic and positive law) / op. cit. / p.32].

In addition, the Algerian legislator stipulates that the consent of the parents [Belhadj Larbi / Family Law (with amendments to Ordinance 05/02 and commented on by the principles of the Supreme Court during forty years), University Press Bureau / third edition / 2006 / p.201] of the foster child is required in Article 117 of the Family Code [Al-Aish Fadil / Family Law supported by the jurisprudence of the Supreme Court with the latest amendments of 2005 / Office of University Publications / 2006 edition / Algeria / pp.91-92], which explicitly states: *“Fosterage must be done in front of a court or a notary, and it must be done with the consent of the child who has two parents”*. On the other hand, the consent of the couple requesting foster care is omitted, which is of great importance to the life of the foster child, as one spouse may agree to foster a child, while the other refuses, which puts the

child in a critical situation.

#### **2.4.Fourth requirement: The case of an Algerian requesting to foster a foreign child**

The Algerian legislator stipulates in Article 13 bis1 of the Civil Code [Article 13 bis 1 of the codification of the Civil Code in the light of judicial practice / Berti Publications / 2009-2010 / Algeria / p.5] concerning the rules of attribution, that: *“The validity of the kafalah is governed by the law of the nationality of both the fosterer and the foster child at the time it is made, and its effects are governed by the law of the fosterer's nationality and the same provisions apply to adoption”*.

The Algerian legislator has overlooked the possibility of fostering a foreign child who has been abandoned on the national territory and whose nationality prohibits foster. Can the family judge accept the request of an Algerian fosterer to foster the child? For example, a Chinese child [Adoption Law of the People's Republic of China: <http://www.fmprc.gov.cn/ara/lsw/885/t22497.htm>] has been abandoned and has not been claimed by any of his family or his country, because its internal policy limits each Chinese family to two children [“Only two children per Chinese family” policy. Couples who violate this policy face heavy fines, loss of jobs, forced abortions, and sterilization. See: [https://www.cqv.qc.ca/sous\\_la\\_politique\\_des\\_deux\\_enfants](https://www.cqv.qc.ca/sous_la_politique_des_deux_enfants)]. In fact, the Algerian legislator has not regulated this case, either by accepting or rejecting it. The family judge - whose role is to protect minors - cannot leave this child under the permanent guardianship of the Directorate of Social Activity and Solidarity because there is no fosterer whose nationality is acceptable for adoption, as this would deprive the foreign child of his right to have a family to care for and nurture him.

In practice, if the family court judge, after receiving a favorable opinion from the public prosecutor approves the kafalah request in chambers, the judge has the discretion to take into account the interests of the child in accordance with articles 492 to 495 of the Code of Civil and Administrative Procedure [Farjah Hussein / Basic Principles in the Code of Civil and Administrative Procedure / Bureau of University Publications / 2010 edition / p.182]. As well as article 425 of the same code, which authorizes him, within the framework of his powers related to the protection of minors, to refer to any authority specialized in the subject matter for consultation [Farjah Hussein / Basic Principles in the Code of Civil and Administrative Procedure / op. cit. / p.170]. The opposite is not true in this (exceptional) case; an Algerian minor residing in Algeria cannot be fostered by a foreigner, which is logical since there are many Algerians who meet all the legal conditions to take care of the child.

#### **3.Section II: Consequences related to the status of the fostered child**

The Algerian legislator has addressed child foster care in articles 116 to 125

of the Family Code. However, there are some issues related to the status of the foster child in front of the Algerian administration and judiciary. The issue of awarding custody of the foster child after divorce (first requirement), the right of visitation for the foster child (third requirement), the right of maintenance for the foster child (second requirement) and the status of the foster child by the spouse of the fosterer (fourth requirement).

### **3.1. First requirement: Assignment of custody of the foster child after divorce**

The Algerian judge finds it difficult to resolve the dispute in front of him concerning the allocation of custody of a foster child after the divorce of the foster parents, because the Algerian legislature has not established legal provisions governing this issue. Unlike the case of legitimate spouses, which is provided for in article 62 of the Algerian Family Code, which reads as follows: *“Custody is the care and education of a child, raising the child according to his father's religion, and ensuring his protection and preservation of his health and morals”*.

Moreover, the Algerian legislator was explicit in giving priority to the mother in the custody of her child according to the provisions of Article 64 of the Algerian Family Code: *“The mother has first custody of her child, then the father..”* [Articles 64 and 62 of Ordinance No. 05-02 dated 18 Muharram 1426 (February 27, 2005), amending and supplementing Law No. 84-11 dated 9 Ramadan 1404 (June 9, 1984), containing the Family Code / Algerian Official Gazette / No. 15 / p.22].

Therefore, the issue of assigning custody of the foster child after the divorce of the spouses arises, where the husband is the foster parent and responsible for this child under the foster care contract [Hanifi Louisa, *The Responsibility of Fathers and Mothers for their minor children in the case of divorce; in Revue Algérienne des sciences juridiques économiques et politiques* N°3, 1994, p.61 Yamina Houhou Thesis; *LA Kafala En Droit Algérien et ses effets en Droit Français/prec*, p.160]. In this case, the judge is obliged to assign custody of the foster child to the foster husband [Aziza Hosseini / *Custody in family law, personal status law and Islamic jurisprudence / Master's thesis / University of Algiers / 2001 / p.44*], because the wife has no legal status that binds her to this child other than the emotional relationship. This makes the judge violate the principle of caring for the child's interest, which shows the distinction between legal and foster parents [Yamina Houhou Thesis; *The Kafala in Algerian Law and its effects on French Law/ prec*, p. 161-163-164]. Despite the existence of the same emotional bond, they do not have the same rights without the document that proves this (the kafalah contract), and this makes the kafalah contract similar to a property contract, where the foster child is like a real estate or movable property. An official document must be provided to prove its

ownership or legal status for litigation. This makes us wonder whether the Algerian legislator has placed the foster child in the same legal framework as the object of the contract. For example, recourse to defects of consent, such as a fundamental error in the foster care contract [Dr. Abdul Razzaq Al-Sanhouri / Sources of truth in Islamic jurisprudence, a comparative study with Western jurisprudence / Dar Ihya Al-Heritage Al-Arabi / Part II / First edition / 1997 / Beirut, Lebanon / p.90], such as the foster parent taking a child (female) instead of a child (male), can he return her [Bouacha Akila / Kafalah in family law and Islamic law / Graduate thesis, Higher Institute of the Judiciary / 2001-2004 / p.11] without taking into account her feelings and the psychological disorders that may affect her after abandonment?

Accordingly, it is necessary for the Algerian legislator to establish legal provisions that give the judge hearing the divorce case the legal jurisdiction to consider the request to transfer the child's foster without prejudice to the principle of non-contradiction between judicial rulings. As long as the foster wife has expressly expressed her will to foster the child, which gives her a special legal status that provides her with the legal capacity to submit this request under the consideration of the family affairs judge, within the framework of the interest of the foster child.

### **3.2.Second requirement: The right of visitation for the fostered child**

The right of visitation is one of the basic rights that the judge is obliged to rule for one of the child's parents after their separation and the assignment of custody to one of them, as the Algerian Family Code stipulates in Article 64 as follows: (...When the judge awards custody, he must also award visitation rights). However, the Algerian legislator overlooked this point in the case of divorce between the foster husband and his wife, unlike the legitimate parents [Belhadj Larbi / Al-Wajiz in explaining the Algerian Family Law / Fourth edition / Office of University Publications / Algeria / 2005 / Part I /p.386], as the judge does not grant this right to one of the spouses whose name is not in the foster care contract [Hanifi Louisa, Dissolution of the Marital Relationship during the Spouses' Lifetime, PhD thesis, prec, p.235], as he has no legal capacity towards the fostered child. The Algerian law is clear that only the person with parental authority can obtain the right of visitation [Yamina Houhou Thesis; The Kafala in Algerian Law and its effects on French Law/ prec, p.165], although this affects the psychological balance of the foster child [Mustafa Al-Khashab / Studies in Family Sociology / Dar Al-Nahda Arabia / 1961 edition / Beirut /p.23, see Allal Amal / Adoption and sponsorship (a comparative study between Islamic law and positive law) / Ibid /p.9], leaves him emotionally vacant, and causes him psychological complexes [Romain Liberman; les enfants devant le divorce, edition Presses universitaires de France, 1984, p.46-47].

Thus, the Algerian legislator did not take into account the psychological and social aspect of the foster child, because the right to visit the foster spouse is necessary to protect the foster child and maintain the emotional bond with him.

Therefore, it is appropriate for the legislator to take into account this emotional aspect of the foster child, and to establish a legal provision that authorizes the judge hearing the divorce case to decide on the right of visitation for the foster spouse who has expressly expressed his will to maintain the emotional bond [Yamina Houhou Thesis; LA Kafala in Algerian Law and its effects in French Law/prec/p.166 *“In the best interests of the makfoul child, this issue should not remain a matter of concern and debate, as access is based on socio-affective kinship”*]. That provides him with the legal capacity to request that his name be affixed to the foster care contract along with the foster parent. In the interest of the foster child, the family law judge may grant visitation rights to the foster parent and on the other hand, he may order the foster parent to pay maintenance of all kinds in accordance with Article 78 of the Algerian Family Code, thus respecting the equality between the foster child and the legitimate child [Yamina Houhou Thesis; LA Kafala in Algerian Law and its effects on French Law/prec /p.165. *“Algerian law has not defined the conditions for exercising the right of access. Divorced parents have the option of imposing special terms. Thus they can fix the days, the place, frequency, duration, sharing of holidays, religious and national holidays taking into account the child’s interest that the judge must guarantee. Otherwise, the judge will determine the modalities of the right of access; he has a wide discretion to protect the interests of the minor child. The Supreme Court considers that the father has the right to visit his children at least once a week”*. Supreme Court decision of 16/04/1990 case no. 59784].

### **3.3.Third requirement: The right to maintenance for the fostered child**

The Algerian Family Code establishes the principle of maintenance obligation in accordance with Article 75 of the Family Code [Mohand Djennad, the rights of the child in Algeria. University of Perpignan D.E.S year 2006; www.memoireonline.com]: *“The maintenance of the child shall be paid by the father ... ”* [Mbarka Amamra / Criminal protection of the right of maintenance for the child in Algerian law / Journal of Research and Studies / Year 14 / Issue 24 / Summer 2017 /p.196]. According to this article, maintenance concerns children born in a legitimate marriage, i.e. legitimate children; as for the foster child, the Algerian legislator did not specify whether he has the right to receive maintenance. In the case where the foster care contract is in the name of the foster wife [Yamina Houhou Thesis; LA Kafala in Algerian Law and its effects in French Law/prec/p.167], the judge transfers the child's foster care to her after the divorce is pronounced, but he cannot oblige the husband to pay maintenance and provide housing to exercise custody of the foster child. Under

the provisions of Article 75 of the Algerian Family Code, he has no status as the child's foster caregiver.

In the case where the foster contract is in the name of the fostering spouses, the provisions of Article 125 of the Family Code apply, which states: “*The waiver of foster shall be done in front of the body that approved the fosterage, and shall be with the knowledge of the Public Prosecution...*” [Ladra Kamal / Kafala in Islamic jurisprudence and the Algerian Family Law / Al-Maar Magazine / Volume 16 / Issue 31/ p.611]. Accordingly, the husband can renounce the fostering at his own will and without any legal penalty [Yamina Houhou Thesis; LA Kafala in Algerian Law and its effects in French Law/ prec, p.168]. For example, he renounces his legal status easily in front of the judicial authority that approved the foster, and after prior notification to the Public Prosecution. Thus depriving the fostered child of the right to receive the maintenance due. As stated in the Supreme Court decision issued on December 13, 2006, Case No. 369032 [Yamina Houhou Thesis; LA Kafala In Algerian Law and its effects in French Law/, prec/p.167 the Supreme Court affirmed that: Considering the kafil as the wali of the makfoul child, he must nurture, educate and protect the makfoul child in the same way that the father would do for his son, as long as the kafala has not been abandoned by the kafil], the Algerian legislator considered fostering an obligation on the face of donation [Amara Massouda / Bail provisions in Algerian law in light of the jurisprudence of the Supreme Court / Journal of Legal and Political Research and Studies / Volume 1 / Issue 1 / 2011 /p.68], and the foster is not bound by it as long as he renounces the fostering of the foster child.

It is noteworthy that the Algerian Family Code does not envisage divorce between foster spouses. Therefore, there must be a Supreme Court decision in accordance with the provisions of Article 116 of the Algerian Family Code, which states that “the interest of the foster child shall be taken into account”, in order for the divorce to have the same effects on the foster child as on the legitimate child without discrimination [Yamina Houhou Thesis; LA Kafala in Algerian Law and its effects in French Law/ prec, p.168].

### **3.4.Fourth Requirement: The status of the fostered child by the wife**

When a woman who has been assigned to foster care under a legal contract gets married, the situation raises ambiguity about her husband's status towards the foster child, because it is difficult for this husband to justify his status towards the foster child in front of the administration, schools or the competent authorities. Given the absence of any legal document linking him to the child and authorizing him to have legal guardianship over the child. The contract was in the name of the wife but not the husband, who was unable to justify his status as the father of the foster child in the absence of the foster mother. This complicates the matter administratively for the husband [Yamina Houhou, prec,

p.159], especially in critical cases, such as the need to perform emergency surgery on the foster child as a result of a traffic accident, and the hospital is required to obtain a license for those who have legal guardianship, given that the foster child is a minor.

In order to avoid the above-mentioned problem, the Algerian legislator could make a legal provision requiring that the kafalah contract be in the name of the spouses. The existence of the contract in their names makes them jointly responsible for the child, cooperate in caring for his material and moral interests, and participate in creating a strong bond between all family members, which is the social objective of this obligation.

The solution to this issue is to create a legal text that gives the foster husband a deadline to enter his name in the foster care contract alongside the foster mother. If he refuses, the foster wife must write a special agency for the husband, giving him a special legal status towards the foster child, which he can use in urgent cases or cases that require him to intervene to protect the interests of the foster child, without applying the obligations of the Articles 116 and 122 of the Algerian Family Code. The Directorate of Social Activity and Solidarity must make unannounced visits to monitor the situation of the foster child and the extent to which the necessary measures to protect the child are respected. If it is proven that the interests of the child are being violated or endangered, the foster parent may have the child taken away from him or face a special penalty based on negligence.

#### **4. Conclusion**

The issue of the protection of foster children faces many legal difficulties, resulting from the ambiguity of certain provisions of the Algerian Family Code, as well as the Algerian legislature's omission of certain issues, which put the foster child in a difficult situation before the Algerian judiciary and administration. The foster care contract is considered a final judicial decision, as the judge hearing a divorce or alimony case cannot assign the child's foster care except to the foster parent in whose name the foster care is given. If the judge rules otherwise, this would constitute a contradiction between judicial decisions, which makes it necessary for the legislature to develop legal provisions that give the judge greater authority in order to protect the interest of the foster child.

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