



Problematic Issues in the Interpretation of Article 72 of the Algerian Family Code: between Legislation and Judicial Practice

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Abstract:

The interpretation of legislative texts plays a pivotal role in social life: it dispels ambiguity, obscurity and deficiencies that may affect a legal rule in its substance, scope or particular aspects. This interpretative function is principally discharged by doctrinal scholarship and the judiciary, which in turn has a beneficial effect on the practical and applicative dimension of the legal text. Provisions of the Family Code are closely connected to many aspects of people's lives; accordingly, the legislator has endeavoured to draft those provisions so as to achieve their intended purpose. Nevertheless, the practical application of those provisions gives rise to numerous problems, particularly concerning the legal consequences of the dissolution of the marital bond, and it is against this background that the present study seeks to examine one of the problems raised by the provisions of that Code.

Keywords:Family Code; Interpretation; Consequences of dissolution of the marital bond; Textual ambiguity; Legislative intent.

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Introduction

The interpretation of a legal rule may be defined as: “the determination of the meaning of the ruling contained in that rule, such that the factual situation which the rule was enacted to regulate is clarified either through its wording or its substance.”¹

From this definition, it is clear that interpretation has a broad scope: it extends to all legal rules, whatever their source, whenever uncertainty arises as to their intended meaning. What concerns us here, however, is primarily the interpretation of legislative texts. Such interpretation is ordinarily undertaken by legal scholars, through the efforts of jurists and commentators in explaining, analysing and criticising statutory rules. In doing so, they rely upon the principles of sound reasoning and logic, without necessarily considering the practical consequences that the application of the statute may produce in concrete cases. Scholarly interpretation thus tends to be an end in itself rather than a means, characterised by its theoretical orientation. Nevertheless, modern legal scholarship increasingly endeavours to formulate interpretations that remain connected, as far as possible, to social reality -whether as directly observed by scholars or as reflected in judicial decisions² - having come to recognise the practical utility of interpretation both for legislative drafting and for judicial decision-making.

Legislative interpretation is also performed by judges in the exercise of their judicial function. When adjudicating disputes, they are obliged to apply the law and to render judgment, for they may not refuse justice. Judicial interpretation of statutory provisions thus occurs in the context of actual litigation, and its function is to ascertain the applicable rule of law in the case before the court. In contrast to scholarly interpretation, judicial interpretation is therefore essentially practical, being influenced by the factual circumstances of the dispute. Judges may even depart from strict logical reasoning if adherence thereto would lead to outcomes that conflict with justice or with their judicial conscience. Scholarly interpretation, by contrast, proceeds from hypothetical considerations, without reliance on sufficient factual context.³

This does not mean, however, that scholarly and judicial interpretations are wholly opposed. On the contrary, they are intimately connected. Scholarly interpretation illuminates the path for judges, while judicial interpretation provides scholars with concrete insights that may prompt them to revise or refine their theoretical analyses.⁴

Interpretation, in this sense, extends to all legal provisions of whatever kind. Of particular importance are those rules that directly affect social life, such as the provisions of the Family Code. This study will focus on Article 72 of that Code, contained in the chapter on the consequences of divorce. At first sight, the provision appears straightforward and unambiguous. Yet careful analysis of Article 72- especially when comparing its first and second paragraphs - reveals that the legislator’s intention with regard to the father’s obligation to provide housing or pay rent is not entirely clear. The provision’s practical application also gives rise to numerous questions: What is the precise object of the obligation to be performed? To what extent does the debtor (the father) enjoy freedom of choice in discharging that obligation?

¹Djafour, M. S. (2018). *Introduction to legal sciences* (Vol. 1, 21st ed.). Algiers: Houma Publishing, p. 290.

²Abdelatif, M. F. (2018). *The interpretation of legal texts in the jurisprudence of the Supreme Constitutional Court: Between theory and practice (A comparative study)*. Cairo: Arab Studies Centre for Publishing and Distribution, p. 74.

³Smith, J. (2015). *Law and Society*. Oxford University Press, p. 45.

⁴Abdelatif, M. F. *Ibid.*, p. 50.



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This prompts us to ask: what exactly was the legislator's intent regarding the object of the obligation imposed upon the father under Article 72 of the Family Code? Is the father entitled to choose how he performs the obligation? And if so, does that freedom of choice extend to all stages of enforcement?

In order to address these issues, this paper proposes to examine them as follows:

- **First Topic:** The ambiguity and deficiency of Article 72 of the Family Code.
- **Second Topic:** The relationship between Article 72 and matters of enforcement.

The FIRST TOPIC: THE AMBIGUITY AND DEFICIENCY OF ARTICLE 72 OF THE FAMILY CODE

Article 72 of Law No. 84-11 of 9 June 1984 on the Algerian Family Code,⁵ as amended and supplemented⁶, provides:

"In the case of divorce, the father must provide suitable housing for the custodial mother. If he is unable to do so, he must pay rent. The custodial mother shall remain in the marital home until the father executes the court judgment concerning housing."

At first glance, this wording appears to be sound and free of interpretive difficulties. Upon divorce, the father must provide housing for the custodial mother where there are children from the marriage, since the provision refers specifically to "the father," which presupposes the existence of children between the separated spouses. This means that housing is ordered only when there are children, as the purpose of housing is to facilitate their custody—a matter that is both logical and self-evident. Furthermore, the first paragraph of Article 72 specifies: *"If he is unable to do so, he must pay rent."* In practice, the court, when issuing a divorce judgment, determines the monthly rent allowance, payable from the date the judgment becomes final.

Yet a closer reading of both paragraphs of Article 72 reveals ambiguity. The legislator did not clearly identify the principal object of the obligation to be performed by the father. Is it housing, with rent as a substitute, or are both obligations available to him as alternatives? The first paragraph, by using the phrase *"if he is unable to do so,"* implies that housing is the original obligation. However, the second paragraph employs the phrase *"the court judgment concerning housing"* in more general terms, suggesting a possible choice between housing and rent, since the father is the one who executes the obligation.

This raises the problem: does Article 72 establish a single obligation, with rent as a substitute in case of impossibility (*optional obligation*), or does it create two obligations, with the father free to choose between them (*alternative obligation*)?

FIRST REQUIREMENT: DETERMINING THE LEGISLATOR'S INTENTION

Faced with the ambiguity and deficiency in Article 72, one must seek to identify the legislator's intention, whether actual or presumed. The intention is actual if the text is clear and unambiguous, such that the legislator's purpose⁷ can be easily discerned from the wording, syntax, and logical structure.

The first paragraph, as noted, appears precise: it requires the father to provide housing, then adds the phrase *"if he is unable,"* thereby indicating that rent is secondary. The difficulty

⁵Law No. 84-11 dated 9 June 1984, containing the Algerian Family Code, Official Gazette, No. 24, dated 12 June 1984.

⁶Ordinance No. 05-02 dated 27 February 2005, containing the amendment of the Family Code, Official Gazette, No. 15, dated 27 February 2005

⁷Abdelatif, M. F. Ibid., p. 77.



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lies not in the wording but in its implications. For example: who must prove the impossibility of providing housing? Must the father himself demonstrate his inability, thereby effectively adducing evidence against his own interest, or must the mother prove that housing is available, and thus that there is no need for rent?

Another difficulty arises from the expression “*in the case of divorce*.” Does this mean Article 72 applies only to divorce (*ṭalāq*) and not to *taṭlīq* (judicial dissolution) or *khulʿ* (dissolution at the wife’s request)? Custody (*ḥadāna*) may be granted in all these cases, not only upon divorce.

The second paragraph, meanwhile, is both ambiguous and deficient in clarity. It undermines the apparent precision of the first paragraph by effectively granting the debtor (the father) discretion, since he is the one who executes the obligation. By referring to “*the court judgment concerning housing*” without mentioning rent explicitly, the provision leaves open the possibility that the father may choose either housing or rent. This raises questions: does the debtor always retain the freedom of choice, since he is the one to perform? Does the phrase “*court judgment concerning housing*” mean housing only (by literal interpretation), or does it also encompass rent (since rent is also related to housing)?

If the legislator intended to allow both, why did he not say “*the court judgment concerning housing or rent*”? This inconsistency suggests that the legislator’s intention was neither expressed clearly nor can it be presumed. A commentator or interpreter may not ascribe to the legislator an intention he did not actually hold. If the legislator had wanted the provision⁸ to reflect new social circumstances, he should have amended the statute. Legislative amendment is the prerogative of the legislator, not the interpreter⁹.

SECOND REQUIREMENT: THE PROBLEM POSED BY ARTICLE 72

The central question raised by Article 72 concerns the nature of the obligation imposed on the father. Is it a single obligation, with rent as a substitute, or is it a multiple obligation allowing the debtor to choose?

If it is an **optional (substitute) obligation** (*iltizāmbadlī*), the father’s primary duty is to provide housing. His liability may nonetheless be extinguished if he performs the substitute—namely, payment of rent—set by the court. In this case, the essence of the obligation is defined by the principal duty (housing), not by the substitute. Thus, if the primary duty becomes impossible due to reasons beyond the debtor’s control (for example, the house is demolished due to administrative demolition orders, or expropriated for public use), the obligation is extinguished and the father owes nothing further¹⁰.

By contrast, if the substitute (rent) becomes impossible (for example, if the father is insolvent or unemployed), the obligation does not lapse: the debtor remains bound to provide housing. Because the substitute here involves money, the obligation always remains legally possible, even if not immediately, then later.

If, however, the obligation is **alternative (facultative)** (*iltizāmtakhīrī*), then the father has two equivalent obligations: housing or rent. The obligation is discharged by performing either. If

⁸Djafour, M. S. Ibid, p. 293.

⁹Abdel Latif M.F, Ibid, p. 79.

¹⁰Saadi M.S., Al-Wadih in the Explanation of the Civil Code: The General Theory of Obligations – Rules of Obligation, A Comparative Study in Arab Laws, Dar al-Huda, Algeria, 2010, p. 223.



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one option becomes impossible, the debtor must perform the other. The nature of the obligation is not defined until the debtor makes his choice¹¹.

Applied to Article 72: the first paragraph suggests an optional obligation (housing as the original, rent as a substitute), while the second paragraph suggests an alternative obligation (discretion for the debtor). The legislator's failure to reconcile these two formulations creates the central interpretive difficulty.

THE SECOND TOPIC: THE RELATIONSHIP BETWEEN ARTICLE 72 OF THE FAMILY CODE AND ENFORCEMENT ISSUES

As the title of this section indicates, Article 72 of the Family Code is directly related to the father's obligation, as defined therein, which arises under the heading of the consequences of divorce. The discussion that follows will examine, first, the practical problems posed by enforcement of judgments under Article 72, and second, the manner in which the Algerian judiciary has addressed such problems.

FIRST REQUIREMENT: PRACTICAL PROBLEMS IN THE ENFORCEMENT OF JUDGMENTS UNDER ARTICLE 72

For any judgment or judicial decision to be enforceable, it must first be final, i.e. no longer subject to ordinary remedies such as opposition or appeal. With respect to judgments dissolving the marital bond, the Algerian legislator has provided that such judgments are both preliminary and final in respect of divorce itself. By contrast, in matters relating to custody, maintenance (*nafaqa*), and their related components, judgments become final only after the exhaustion of ordinary remedies.

According to Law No. 08-09 on the Code of Civil and Administrative Procedure,¹² specifically Article 600 and following concerning compulsory enforcement of enforceable instruments, the bailiff (*al-muḥḍar al-qaḍā'ī*) serves the enforceable title upon the debtor and grants him fifteen (15) days for voluntary compliance, pursuant to Article 612. Thus, when the custodial mother obtains the enforceable title and serves it upon the father, he has fifteen days from the date of service to comply voluntarily, failing which the judgment will be enforced against him compulsorily.

The difficulty, however, lies in the scope of the debtor's freedom of choice in performance. When served with the enforceable title, the father may initially choose to perform the obligation by paying rent (the secondary option).

The question then arises: may he, at a later stage of enforcement, retract that choice and instead provide housing (the primary option)? In other words, is the debtor's discretion confined to the initial fifteen-day period prescribed in Article 612, or does it extend to all subsequent stages of enforcement, such that he may alter his chosen mode of performance at any time?

If Article 612 is applied strictly, the debtor's discretion expires after fifteen days from service of the enforceable title. His choice becomes final,¹³ and only the selected form of performance (e.g. rent) remains enforceable thereafter. Otherwise, allowing continuous shifts

¹¹SaadiM.S., *ibid*, p. 223.

¹²SaadiM. S., *ibid*, p. 224.

¹³Law No. 08-09 dated 25 February 2008, containing the Code of Civil and Administrative Procedure, Official Gazette, No. 21, dated 23 April 2008.



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between options would create instability and uncertainty in enforcement, undermining legal certainty and the rights of the custodial mother.

Further, if the debtor fails to exercise his option within the fifteen-day period, the object of the obligation to be enforced is determined by law itself. Article 72 of the Family Code indicates that in such a case, the obligation defaults to the payment of rent, as the court has already ruled upon it. It is therefore not for the judge to decide anew after expiry of the option period, since the matter is governed by statutory provisions and not by contract.

Some might argue that judgments in maintenance matters lack *res judicata* in the strict sense, as they remain subject to review (e.g. regarding the amount of rent or maintenance, or its continuation or cessation). While this is true, it does not follow that the court may re-define the object of the obligation (housing versus rent) after the debtor has exercised his choice. To allow otherwise would contradict both enforcement rules and the principle of legal certainty.

SECOND REQUIREMENT: JUDICIAL TREATMENT OF THE ENFORCEMENT PROBLEMS UNDER ARTICLE 72

The interpretive difficulties arising from Article 72 are of considerable practical importance, as they directly concern enforcement of obligations and are likely to have generated numerous disputes. Nevertheless, upon reviewing decisions of the Algerian Supreme Court in family law matters up to the publication of the *Supreme Court Judicial Review* (Vol. 1, 2021), no ruling was found that directly addresses this precise issue. It is possible that lower courts have rendered judgments on the matter, but none appear to have reached the Supreme Court of cassation.

That said, a number of Supreme Court rulings concerning housing and rent can provide indirect insights:

- **Decision of 15 April 2010, File No. 554808:** The Court held that housing or rent constitutes a component of maintenance (*nafaqa*), and that judgments thereon carry only temporary authority¹⁴. Maintenance and its components, under Article 57 of the Family Code, are provisional measures that may be claimed at any time and at any stage of litigation. Accordingly, judgments concerning them do not have absolute *res judicata* effect; they are subject to change and review.
- **Decision of 14 January 2009, File No. 474255:** The Court annulled an appellate judgment that had ordered both housing and rent, despite the husband having already provided independent housing meeting all conditions of adequacy¹⁵. The Court held that allowing both constituted a misapplication of the law, particularly Article 16 of Ordinance No. 05-02 of 27 February 2005, which amended Article 72 of the Family Code.¹⁶ The Supreme Court reasoned that the provision requires the husband to provide either housing or rent, not both. In this decision, the Court explicitly used the language of choice, describing the obligation as **alternative** and employing the conjunction “*or*” in reference to housing or rent.

¹⁴Ordinance No. 75-58 dated 26 September 1975, containing the Algerian Civil Code, as amended and supplemented, Official Gazette, No. 78, dated 30 September 1975.

¹⁵Supreme Court decision, Family and Inheritance Chamber, dated 15 April 2010, Case No. 554808, Judicial Review of the Supreme Court, Documentation Department, Issue No. 1, 2010, p. 241.

¹⁶Supreme Court decision, Family and Inheritance Chamber, dated 14 January 2009, Case No. 474255, Judicial Review of the Supreme Court, Documentation Department, Issue No. 2, 2009, p. 267.



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This latter decision is especially significant. It indicates that once the husband has chosen one option (e.g. providing housing), he may not subsequently be compelled to provide the other (e.g. rent), since he has already discharged his obligation by his choice. By implication, if he initially chose rent, he may not later revert to housing. Thus, the Supreme Court appears to interpret Article 72 as establishing an **alternative obligation**, with the debtor's choice binding once exercised.

Conclusion

Legislative texts are enacted to regulate individual conduct and to govern relations between persons. It is therefore incumbent upon the legislator, when drafting such texts, to ensure precision and clarity, so that they may fulfil their intended role and achieve their purpose. Yet achieving perfect correspondence between legislative wording and intended meaning is not always easy, particularly given the volume and variety of legislation. Consequently, some provisions inevitably emerge as ambiguous or deficient in meaning, rendering the legislator's actual position uncertain. In such cases, interpretation by both doctrine and the judiciary become essential, especially in the context of practical application, where such problems manifest most clearly.

Article 72 of the Algerian Family Code, as amended, exemplifies this phenomenon. Its wording oscillates between ambiguity and deficiency. From the analysis conducted in this study, the following conclusions emerge:

1. The Algerian legislator placed Article 72 under the section concerning the consequences of divorce, even though such consequences also arise in cases of judicial dissolution and *khul'*.
2. While Article 72 appears, at first glance, to be clearly drafted—particularly in its first paragraph, which requires the husband to provide housing and, if unable, to pay rent—the second paragraph introduces a formulation that obscures the legislator's intent, referring to “the court judgment concerning housing” without explicitly mentioning rent.
3. Article 72 raises the issue of the nature of the obligation imposed upon the father: is it an optional (substitute) obligation or an alternative obligation?
4. The provision also raises problems at the enforcement stage, particularly concerning whether the debtor may alter his choice of performance in subsequent phases of execution.
5. The position of the Algerian judiciary, as reflected in the jurisprudence of the Supreme Court, is not unequivocally clear. While no decision has been found that directly addresses the problem, certain rulings suggest an interpretation that treats the obligation as alternative, with the debtor's freedom of choice limited to a single, binding exercise.

In light of these findings, the following recommendations are offered:

1. The classification of Article 72 under the heading “consequences of divorce” should be reconsidered. It should instead fall under “consequences of dissolution of the marital bond,” as it applies equally to divorce, judicial dissolution, and *khul'*.
2. The legislator should amend Article 72 to clarify the nature of the obligation—whether it is optional or alternative. In practice, the alternative interpretation is preferable, as it aligns more closely with social reality.
3. The legislator should expressly provide that, in alternative obligations, once the debtor exercises his option during the period of service of the enforceable title, his freedom of choice lapses. He may not retract his choice except with the consent of the creditor.



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4. Article 214 of the Civil Code should be amended so that, in cases of alternative obligations, if the debtor fails to choose within the prescribed time limit, the right of choice passes to the creditor, not to the judge, as is currently provided.

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