

Between Reconciliation and Rights: The Judge Role in Child Advocacy in Algeria and Indonesia

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Abstract

This research highlights the significant differences in how Algerian and Indonesian legal system approach reconciliation during the divorce process, particularly concerning the protection of children's rights. Through an analysis of legal documents and relevant literature, this study evaluates the practical application of these legal provisions. The findings indicate that, although reconciliation efforts are required by law, failure to carry out such efforts does not impact the validity of the divorce decision. This underscores the notion that reconciliation should be pursued as a meaningful effort without altering the essence of divorce law. This research also highlights the need for a more integrated approach that combines legal security and child protection in the context of divorce.

Keywords

Reconciliation, Divorce, Children's Rights, Algerian Family Law, Legal Protection.

Introduction

The protection of children has deep historical roots. Traditionally, this was a charitable endeavor led by religious organizations and civil societies.¹ However, in modern times, almost all countries have implemented policies and programs aimed at preventing and responding to child abuse and neglect, as well as minimizing the negative impacts on children. These efforts, embodied in a country's child protection system, play a crucial role in child welfare, particularly when considered in conjunction with broader national policies on child and family matters.²

Divorce presents one of the contexts in which child protection measures are invoked. In Algeria, the Family Code addresses various aspects of personal status, including guardianship, inheritance, and family-related matters. The Code recognizes the family as the cornerstone of society, regulating the rights and obligations of spouses and outlining the rights of children regarding lineage, custody, alimony, and guardianship.

Ideally, families are founded on love and compassion. However, discord, conflict, and incompatibility can disrupt family harmony and threaten its stability. Divorce becomes inevitable when couples cannot reconcile their differences. Although Islamic law discourages divorce, it emphasizes sincere efforts to preserve the family unit and prevent its dissolution.

Alternative dispute resolution methods, such as reconciliation and arbitration, offer pathways to resolve conflicts and restore harmony. In the Algerian legal framework, reconciliation is a mandatory prerequisite to divorce, as stipulated in Article 49 of the Family Code. In practice, however, reconciliation often operates as a procedural formality rather than a substantive attempt to preserve the marital bond. Judges are required to conduct multiple reconciliation attempts within a three-month period, summoning both spouses to hearings to facilitate dialogue

¹ Bruning, Mariëlle R., and E. Doek, Jaap. "Characteristics of an effective child protection system in the European and international contexts." *International journal on child maltreatment: research, policy and practice* 4.3 (2021): 231-256, <https://doi.org/10.1007/s42448-021-00079-5>.

² Ben-Arieh, Asher, et al. *Measuring and monitoring children's well-being*. Vol. 7. Springer Science & Business Media, 2013.

and address their grievances. While judges may suggest temporary separation or counseling if reconciliation seems viable, estranged couples often exhibit a strong inclination toward divorce, undermining the effectiveness of these efforts. Unlike arbitration, which is optional, reconciliation is embedded within the divorce process, but its impact is limited, raising concerns about its substantive utility in protecting children's rights and ensuring family stability.

Several factors explain Algerian courts' limited use of arbitration in divorce proceedings. Courts prioritize mandatory reconciliation over optional arbitration, and many couples remain resolute in their desire to divorce, showing little interest in substantive reconciliation.³ Judges, therefore, face challenges in ensuring that reconciliation fulfills its intended purpose of safeguarding children's rights and maintaining family stability.

Divorce frequently jeopardizes children's rights, highlighting the judge's critical role in protecting these rights during reconciliation attempts. This study examines important issues related to divorce proceedings in Algerian family law, particularly in the context of reconciliation efforts required by law. The Family Code and the Code of Civil and Administrative Procedure in Algeria mandate reconciliation efforts before granting divorce. However, this practice raises important questions regarding its effectiveness and implementation in protecting the rights of children during divorce proceedings. The main question addressed in this study is whether reconciliation efforts in divorce proceedings are mandatory, and what are the consequences of judges failing to carry them out? How does the judge intervene during the reconciliation session to protect the rights of the child?

A critical analysis of these backgrounds and problems reveals that while reconciliation is mandatory, it is often treated as a mere procedural step rather than a substantive mechanism to preserve families. This approach risks neglecting children's rights, which should remain a primary consideration in divorce proceedings. Additionally, neither the Family Code nor the Code of Civil and Administrative Procedure provides clear procedures for instances where one or both parties refuse

³ Ezzerouali, Souad, and Chami, Yassine. "Inclusion of Definitions in Legislative Drafting: A Necessity or a Luxury?." *Mazabib* 22.1 (2023): 37-64.

arbitration, creating ambiguity and inefficiencies in divorce cases that may adversely affect children.

This study highlights the need for the Algerian legal system to reassess and reform the reconciliation and arbitration provisions in divorce law, with an emphasis on improving the protection of children's rights and the effectiveness of reconciliation procedures. This study addresses the gap in existing literature, particularly the limited exploration of reconciliation efforts in divorce cases and their impact on children's rights. Existing literature on alternative dispute resolution predominantly focuses on the reconciliation provisions outlined in articles 970 to 974 of the Code of Civil Procedure, which pertain to civil litigation in various fields. Reconciliation attempts in divorce cases, as stipulated in the Family Code, remain largely unexplored. Furthermore, prior studies examining reconciliation sessions primarily focus on the judge's efforts to persuade the couple to reconcile, neglecting the crucial aspect of protecting children's rights during these proceedings, despite them being the primary victims of divorce.

This research, therefore, addresses the following key question: (1) Are reconciliation attempts in divorce proceedings mandatory, and what are the consequences of the judge's failure to conduct such attempts? (2) How does the judge intervene during reconciliation sessions to protect children's rights?

Method

This study employs a normative legal research methodology, addressing the issues and themes outlined in the research objectives.⁴ Philosophical and analytical approaches are used in this research, focusing on rationality, critical analysis, and philosophical views.⁵ The primary goal of this research is to generate innovative solutions to the identified issues. In addition to its philosophical foundation, the research adopts an analytical descriptive method, outlining applicable laws and regulations relevant to reconciliation efforts and the protection of

⁴ H. Ishaq, *Metode penelitian hukum dan penulisan skripsi* (Bandung: ALFABETA, 2017).

⁵ Marzuki, Peter Mahmud. "Penelitian Hukum (Jakarta: Kencana Prenada Media Group)." (2011).

children's rights. This descriptive analysis is enriched by an examination of positive law enforcement practices, bridging theoretical frameworks with real-world legal applications. Furthermore, the study incorporates an analytical approach, scrutinizing legal provisions concerning reconciliation efforts and children's rights. An inductive approach is also employed, analyzing jurisprudence from the Algerian Supreme Court. This examination provides insights into how legal provisions are practically interpreted and applied, contributing to a deeper understanding of the judicial role in safeguarding children's rights during divorce proceedings.

Results and Discussion

A. The Judge's Obligation to Attempt Reconciliation Between Spouses in Cases of Dissolution of Marriage (Comparative: Indonesia vs. Algeria)

According to Article 49 of the Family Code, "divorce shall not be established except by a judgment after several attempts at reconciliation made by the judge, not exceeding three months from the date of filing the lawsuit." The Algerian legislator mandates that the judge assigned to the family affairs division must attempt reconciliation between spouses before issuing a ruling to dissolve the marital bond. This applies whether the dissolution arises from divorce, repudiation, or annulment. Articles 431 and 439 of the Code of Civil and Administrative Procedure similarly reinforce this requirement.

Interpreting Article 49, legal scholars hold differing perspectives. Professor El Arabi Belhadj considers Article 49 to be procedural, as it pertains to divorce proceedings and obliges the judge to attempt reconciliation before issuing a judgment.⁶⁷ Professor Omar Zouda views reconciliation attempts as an objective necessity for the validity of the

⁶ Belhadj El Arabi, "The Concise Explanation of Algerian Family Law (Marriage and Divorce)" (University Publications Office Algiers, 2002).

⁷ Liefwaard, Ton, and E. Doek, Jaap. "Litigating the Rights of the Child." *The UN Convention on the Rights of the Child in*. 2015, https://doi.org/10.1007/978-94-017-9445-9_10.

legal process.⁸ Professor El Hussein Ben Cheikh Ath Melouya asserts that reconciliation is not a discretionary duty but a mandatory step in ensuring a lawful divorce. The legislator did not grant the judge the discretion to bypass this process, instead stipulating that divorce may only occur following a judgment that includes reconciliation efforts. Therefore, the judge must undertake reconciliation as a substantive and necessary procedure prior to pronouncing a divorce judgment.⁹

This principle, which considers reconciliation a substantial procedure, has been upheld by the Supreme Court under both Ordinance No. 66/154 of July 8, 1966, containing the repealed Code of Civil Procedure¹⁰ and under the current Law No. 08/09, which contains the Code of Civil and Administrative Procedure. It has also been reinforced under the 1984 and 2005 Family Codes. A Supreme Court decision issued on July 3, 1968, stated: “Declaring separation between the parties without the reconciliation attempts prescribed in this regard and without hearing those concerned in this matter is considered a violation of the law.”¹¹ Similarly, a decision issued on June 18, 1991, emphasized: “Ruling on divorce without attempting reconciliation is an error in the application of the law.”¹²

However, the court has clarified that a single attempt at reconciliation is sufficient to fulfill this obligation. Judges are not required to conduct multiple sessions to satisfy the requirements of Article 49. A Supreme Court’s decision, number 620084, dated April 14, 2011, affirmed this approach. It stated: “By reviewing the appealed judgment, it is evident that the judge in charge conducted an attempt at reconciliation between the spouses and held a session for that purpose on November 30, 2008, during which the spouses adhered to their

⁸ Zouda Omar, “The Nature of Judgments Ending the Marital Bond and the Impact of Appealing Them” (Master’s thesis in Law, Algiers, Ben Aknoun, 2000).

⁹ “Handbook on European Law Relating to the Rights of the Child - 2022 Edition,” European Union Agency for Fundamental Rights, 30 Maret 2022, <https://fra.europa.eu/en/publication/2022/handbook-european-law-child-rights>.

¹⁰ Ben Cheikh Ath Melouya El Hussein Dar Houma, “The Purified in Personal Status Cases” (Dar Houma Algiers, 2005).

¹¹ See Article 17 of Ordinance No. 66/154 dated July 8, 1966, containing the amended and repealed Code of Civil Procedure

¹² Supreme Council, Family Chamber, no file number, dated July 3, 1968, Ministry of Justice Judgments Journal, Part One, no publication year, pp. 49-51.

demands.” The judge’s decision was not flawed, as it complied with the procedural requirements of Article 49. The reasoning further indicated that multiple reconciliation attempts are unnecessary when it is evident that further sessions would be futile.¹³

While one jurisprudential view considers reconciliation mandatory, another school of thought disputes its necessity. Professor Lemtaai Nour Eddine argued that “reconciliation attempts are not considered public policy; in fact, in some cases, attempting reconciliation by the family affairs judge is in itself a procedure contrary to public policy, as in the case of someone who pronounces divorce for the third time according to Article 51 of the Family Code, and the judge attempts reconciliation between the parties.”¹⁴ He believed reconciliation attempts are irrelevant to public policy in such cases.¹⁵ Professor Anouar Abdel Rahim stated: “The Supreme Council ruled that the lack of reconciliation attempts is not a matter of public policy and that this attempt can be covered by addressing the subject matter.”

This perspective has been reflected in some Supreme Court decisions, which deem reconciliation attempts non-substantial. For instance, the court ruled: “Reconciliation attempts between the parties in divorce cases are not among substantial procedures, and the pronouncement of divorce and repudiation are always final.”¹⁶ A decision issued on May 3, 1985, explicitly stated that reconciliation attempts are optional.¹⁷ It also confirmed in another decision that “Reconciliation attempts between the parties in divorce cases are not among the substantial procedures.”¹⁸ Even after the 2005 amendments to the Family Code, this view persisted. In a decision issued by the

¹³Supreme Council, Family Chamber, Decision No. 75141 dated June 18, 1991, *Judicial Journal*, p. 65

¹⁴Supreme Court, Family and Inheritance Chamber, Decision No. 620084, dated April 14, 2011, *Judicial Journal*, 2012, No. 01, p. 301.

¹⁵Lemtaai Nour Eddine, “The Waiting Period of Revocable Divorce and its Effects on Judicial Rulings” (Dar Fasila, Algiers, 2009).

¹⁶Anouar Abdel Rahim, “The Divorce System in Algeria” (postgraduate diploma thesis, Algiers, Institute of Law, University of Algiers, 1975).

¹⁷Supreme Council, Family Chamber, Decision No. 36962, dated June 3, 1985, *Judicial Journal*, No. 2, 1990, p. 40.

¹⁸Supreme Council, Family Chamber, Decision No. 36962, dated July 18, 1988, *Judicial Journal*, No. 02, 1990, p. 65.

Supreme Court's Family and Inheritance Chamber on June 13, 2007, it was noted: "However, since Article 49 of the Family Code only applies at the level of courts, and since reconciliation attempts are not considered a serious form of divorce, the reconciliation attempt mentioned in this article is nothing but an exhortation."¹⁹

The issuance of Law No. 08/09 on Civil and Administrative Procedure made reconciliation attempts mandatory under Article 439, which states: "Reconciliation attempts are mandatory." Professor Koudri Khaira emphasized that the use of the term "mandatory" indicates an imperative obligation for judges to attempt reconciliation between litigants. Additionally, Article 442, paragraph 2, of the same law specifies that this process must be completed within a maximum timeframe of three months from the date of filing the lawsuit.

However, despite this legal mandate, the legislator did not prescribe specific penalties for a judge's failure to comply with this procedure. Both Article 49 of the Family Code and Article 439 of the Code of Civil and Administrative Procedure establish reconciliation as a general rule but do not invalidate judgments that fail to comply. This lack of enforcement measures raises questions about the substantive significance of reconciliation within the broader legal framework. Is this a non-substantial procedure for reconciliation?

1. Principles of Islamic Law and Sharia:

- a. Failure to attempt reconciliation should not affect the validity of the divorce as this is contrary to the principles of Islamic Sharia and applicable legal texts.
- b. Divorces declared invalid due to the absence of reconciliation efforts may violate Islamic Sharia, especially when the divorce has occurred three times in a row, legally ending the possibility of further reconciliation.

2. Article 51 of the Family Code:

- a. This article states that a husband cannot take back a wife he has divorced three times, making attempts at reconciliation not only irrelevant but also illegal in this context.

¹⁹Supreme Council, Family Chamber, Decision No. 200198, dated July 21, 1998, Judges' Bulletin, No. 56, 2000, p. 40.

- b. Reconciliation efforts in cases like this can be considered violation of public policy and Islamic Sharia, considering that the decisions of the Koran are definitive.
- 3. Legal Views vs Personal Views:
 - a. The view that reconciliation is a substantive procedure may stem from a lack of understanding of the difference between a divorce pronounced by the husband as part of his legal and Sharia rights, and an irrevocable judicial separation.
 - b. Professor Bouzid Warda believes that there is no reason for judges to ignore reconciliation efforts before deciding a divorce case except because of errors in applying the law.
- 4. Procedure and Substance:
 - a. If reconciliation is considered a substantive procedure, this means that divorce, which is a substantive matter, is conditioned on the fulfillment of the procedure.
 - b. This perspective may unjustly assign blame to one or both parties, despite their lack of responsibility for the procedural lapse.
- 5. Judge's Failure and Implications:
 - a. The judge's failure to carry out reconciliation due to negligence should not be overcome by a greater error, namely by declaring the divorce invalid and canceling the divorce decision.
 - b. While reconciliation is undoubtedly a positive effort, its procedural nature should not overshadow the substantive finality of a divorce judgment.
- 6. Relationship Between Divorce and Reconciliation:
 - a. Reconciliation is an effort that occurs after a divorce occurs and is not directly related to the divorce procedure itself.
 - b. Article 49 of the Family Code does not link reconciliation to divorce procedures which, according to Sharia and law, do not require reconciliation efforts to be carried out.

Therefore, family law in Algeria, particularly through the lens of Article 49 of the Family Code and Article 439 of the Civil and Administrative Procedure Code, mandates the role and significance of reconciliation efforts in the context of divorce. However, it does not include sanctions or specific legal consequences if the judge fails to carry

out the procedure. This lack of sanctions undermines the binding nature of the mandate and raises questions about the substantive position of reconciliation within the broader legal structure.

According to Islamic law and Sharia, failure in reconciliation efforts should not affect the validity of the divorce decision. This is in accordance with the principles underlying Islamic Sharia, which emphasizes the validity of divorce upon the fulfillment of certain conditions without explicitly linking it to the success of reconciliation efforts. Notably, this principle is reinforced in cases where the divorce has occurred three times, rendering reconciliation not only irrelevant but also impermissible. This supports the view that reconciliation, although mandated, does not alter the substantive principles of divorce law.

Understanding the difference between a divorce pronounced by the husband in the exercise of his rights according to law and Sharia and a final judicial separation is a crucial aspect of discussing reconciliation. As Professor Bouzid Warda points out, the judge's failure to attempt reconciliation reflects a misapplication of the law rather than a change in the nature of divorce itself.

The Algerian context contrasts sharply with dispute resolution practices in other jurisdictions, such as Indonesia. For instance, extrajudicial settlement of disputes amongst Muslims in Indonesia dates back to the 13th century AD²⁰, demonstrating a long-standing tradition of resolving conflicts outside formal legal structures.

Peaceful and non-litigation dispute resolution has been deeply ingrained in Indonesian culture, as evidenced by its historical prevalence. Thus far, litigation and non-litigation have been two primary means of conflict resolution in Indonesia. In litigation, the parties to disagreement take their case to a judge, who then makes a final, legally enforceable ruling based on the facts of the case and any other relevant laws. When other methods of conflict resolution have failed or when one side desires

²⁰ Toni, Agus. "Aktualisasi hukum perceraian perspektif pengadilan agama di Indonesia." *MAQASHID* 1.2 (2018): 34-63, <https://doi.org/10.35897/maqashid.v1i2.130>.

a ruling with substantial legal authority that the state can execute, this path is often taken.²¹

Conversely, non-litigation refers to methods of resolving disputes that do not include the use of formal courts. In this approach, the parties to a dispute work together to find a solution without the intervention of formal legal authorities; the emphasis is on peaceful and participative settlement. Alternative conflict resolution methods to litigation include conciliation, mediation, mini-trials, and ombudsman complaints. These methods underscore the adaptability and cultural sensitivity inherent in conflict resolution, providing a participatory framework that aligns with local values and practices.²²

One of the most popular methods of resolving disputes without going to court is mediation. This process may take place either within or outside the judicial system. It involves the assistance of a neutral third party, the mediator, who helps disputing parties reach a mutually acceptable resolution. By fostering better communication, streamlining negotiations, and facilitating the development of consensual solutions, mediation proves to be a highly effective tool in conflict resolution.²³

Christopher Moore defines mediation as “the voluntary participation of one or more neutral third parties in the resolution of a dispute by the disputing parties in the interest of achieving an agreement that is acceptable to all parties involved.”²⁴ In this context, “acceptability” means that all disputing parties must agree to and tolerate the participation of a neutral third party as a mediator in order for the parties to reach a mutually agreeable resolution to the issue.²⁵

²¹ Dewi, Ni Made Trisna. “Penyelesaian Sengketa Non Litigasi Dalam Penyelesaian Sengketa Perdata.” *Jurnal Analisis Hukum* 5.1 (2022): 81-89, <https://doi.org/10.38043/jah.v5i1.3223>.

²² Rosita, Rosita. “Alternatif Dalam Penyelesaian Sengketa (Litigasi dan Non Litigasi).” *Al-Bayyinah* 1.2 (2017): 99-113, <https://doi.org/10.35673/al-bayyinah.v1i2.20>.

²³ Zaini, Ahmad. “Mediasi sebagai Salah Satu Bentuk Alternatif Penyelesaian Sengketa.” *Al Qisthas Jurnal Hukum dan Politik* 9.2 (2018): 53-86.

²⁴ Nugroho Susanti Adi, *Manfaat Mediasi Sebagai Alternatif Penyelesaian Sengketa* (Prenada Media, 2019).

²⁵ Wantu, Fence, et al. “Eksistensi mediasi sebagai salah satu bentuk penyelesaian sengketa lingkungan hidup pasca berlakunya undang-undang cipta kerja.” *Bina Hukum Lingkungan* 7.2 (2023): 267-289.

Further conceptualizations of mediation have been advanced by experts such as Retnowulan, who described the process during a collaborative workshop organized by the Education and Training Centre of the Supreme Court of the Republic of Indonesia and the Centre for Legal Studies. Retnowulan characterized mediation as a method where specialists chosen by the disputing parties guide them toward resolving their conflicts.²⁶ Similarly, Munir Fuady views mediators as impartial facilitators who help opposing parties achieve mutually satisfying agreements, presenting mediation as a time-efficient and cost-effective alternative to litigation. By circumventing formal legal systems, which are often lengthy and expensive, mediation offers an amicable resolution pathway that emphasizes collaboration over contention.²⁷ Rachmadi Usman highlights that mediation is an alternative dispute resolution mechanism centered on facilitated discussions led by a neutral third party. The mediator's primary role is to help the parties arrive at an agreement that benefits all involved.²⁸

This approach is further articulated in Indonesian legal regulations, including Article 1, Paragraph 7, of Supreme Court Regulation (Perma) No. 1 of 2008, which defines mediation as “a process whereby parties to a dispute seek to resolve their differences through negotiation with the assistance of a neutral third party.” This definition is reiterated in Article 1, Paragraph 1, of Perma No. 1 of 2016, emphasizing the mediator's role in guiding voluntary negotiations to achieve a resolution.

In Indonesian courts, mediation is a mandated step in the litigation process. During the trial phase, parties are required to engage in a peace procedure, which persists through the trial until the judgment is

²⁶ Salsabila, Naila, and Saepullah, Usep. “Peran Mediasi Dalam Upaya Rekonsiliasi Rumah Tangga Pada Pengadilan Agama Cianjur.” *El-Usrah: Jurnal Hukum Keluarga* 5.2 (2022): 388-397, <https://doi.org/10.22373/ujhk.v5i2.14069>.

²⁷ Talib, Idris. “Bentuk putusan penyelesaian sengketa berdasarkan mediasi.” *Lex et Societatis* 1.1 (2013), <https://doi.org/10.35796/les.v1i1.1295>.

²⁸ Rachmadi Usman, *Mediasi di pengadilan: dalam teori dan praktik* (Jakarta: Sinar Grafika, 2012).

delivered.²⁹ This framework ensures that litigants have the opportunity to settle their disputes amicably, avoiding the imposition of court-determined outcomes. Judges play an essential role in encouraging parties toward a conciliatory resolution, employing a humanistic and psychological approach to foster cooperation.³⁰

Mediation is deeply rooted in Indonesian culture, reflecting the traditional emphasis on deliberation and consensus. This approach aligns with the national ideology of *Pancasila*, which underscores the values of dialogue, harmony, and consensus. Traditional leaders in Indonesia historically resolved conflicts through mediation, guided by customary law and local wisdom.³¹ Savigny's assertion that law is a reflection of the customs and traditions of the people who create it is particularly relevant here. The traditional methods of conflict resolution through deliberation and consensus paved the way for formal mediation practices in Indonesia.³²

Before the institutionalization of mediation through the Supreme Court's regulations, traditional conflict resolution methods were widely practiced. These practices found formal recognition with the introduction of Supreme Court Regulation No. 2 of 2003, which was later refined by Perma No. 1 of 2008 and Perma No. 1 of 2016.

Mediation has proven to be an effective alternative to litigation in divorce cases, particularly when both parties are informed about the social, religious, and psychological consequences of divorce. The process is most successful when both sides acknowledge the sanctity and significance of marriage as a powerful and sacred bond. By focusing on reconciliation and mutual understanding, mediation fosters solutions

²⁹ Akhyar, Sayed. "Efektivitas Pelaksanaan Asas Peradilan Sederhana, Cepat Dan Biaya Ringan Berkaitan Dengan Yurisdiksi Pengadilan Negeri Sigli." *Syah Kuala Law Journal* 3.3 (2019): 380-394, <https://doi.org/10.24815/sklj.v3i3.12583>.

³⁰ Hartawati, Andi, Sumiati Beddu, and Elvi Susanti. "Model Mediasi Dalam Meningkatkan Keberhasilan Penyelesaian Perkara Perceraian Di Pengadilan Agama." *Indonesian Journal of Criminal Law* 4.1 (2022): 59-73.

³¹ Nugroho, Susanti Adi. *Manfaat Mediasi Sebagai Alternatif Penyelesaian Sengketa*. Prenada Media, 2019.

³² Rado, Rudini Hasyim, et al. "Kebijakan Mediasi Penal Terhadap Penyelesaian Konflik Sara Di Kepulauan Kei Dalam Upaya Pembaharuan Hukum Pidana Nasional." *Law Reform* 12.2 (2016): 266-276, <https://doi.org/10.14710/lr.v12i2.15879>.

that not only resolve the immediate conflict but also uphold the values of family and community.³³

In the Algerian legal system, reconciliation is a mandatory step before a divorce is granted, as stipulated in Article 49 of the Family Code. Alternative dispute resolution methods, including reconciliation and arbitration, offer a path to resolve conflicts and restore harmony. However, in practice, reconciliation often functions as a procedural formality rather than a substantive effort to preserve the marital bond.

Judges in Algeria are required to conduct multiple reconciliation attempts within a three-month period. During this time, they summon both spouses to structured hearings, facilitating dialogue, addressing grievances, and exploring potential resolutions. If reconciliation appears possible, judges may suggest temporary separation or counseling to provide the spouses with time to reflect. However, if either party insists on proceeding with divorce, the judge records the failure of reconciliation and advances the dissolution process. Unlike arbitration, which is optional, reconciliation is embedded in the divorce process. Its impact, however, is often minimal, as estranged couples frequently prioritize divorce over meaningful reconciliation efforts. Therefore, the Algerian legal system faces challenges, ensuring that reconciliation serves a substantive rather than merely a procedural function in protecting the rights of children and ensuring family stability.

The Algerian Family Code governs the protection of children's rights in divorce cases, outlining provisions related to custody, financial support, and parental responsibilities. Judges play a critical role in safeguarding these rights throughout the legal process. During reconciliation hearings, they evaluate the child's best interests, considering parental capabilities, financial stability, and emotional well-being.

If reconciliation fails and divorce proceeds, custody arrangements are determined under Articles 62 to 72 of the Family Code. Custody is generally awarded to the mother for young children, as stipulated in Article 64, unless compelling reasons dictate otherwise. Judges are

³³ Salsabila, Naila, and Usep Saepullah. "Peran Mediasi Dalam Upaya Rekonsiliasi Rumah Tangga Pada Pengadilan Agama Cianjur." *El-Usrah: Jurnal Hukum Keluarga* 5.2 (2022): 388-397.

responsible for verifying the custodial parent's ability to provide adequate care and may reassign custody if the designated parent is deemed unfit, ensuring the child's welfare. Furthermore, judges also enforce child support obligations, requiring the non-custodial parent to provide financial assistance for the child's upbringing, including food, education, healthcare, and housing. Non-compliance can lead to legal penalties. Judicial oversight ensures that decisions regarding custody and alimony align with the principle of prioritizing the child's best interests, mitigating the adverse effects of parental separation.

In cases of consensual divorce, the judge's role in protecting children's rights during reconciliation hearings is particularly crucial. Judges follow stringent procedural guidelines to ensure custody, financial support, and the child's overall welfare are adequately addressed. They also have the authority to amend parental agreements that contravene the child's best interests.

In contrast, the Indonesian legal system incorporates a mediation-based approach to reconciliation. Under Supreme Court Regulation No. 1 of 2016, mediation is mandated before divorce litigation can proceed, with a court-appointed mediator facilitating discussions. Indonesian judges take on a supervisory role, ensuring agreements comply with child protection laws and uphold the child's rights. Judges also have the authority to reject agreements that fail to prioritize the child's welfare and can mandate revisions to ensure sufficient provisions for custody, financial support, and parental responsibilities.

Both legal systems emphasize the child's best interests, but their methods differ significantly. Algerian courts emphasize the judge's direct intervention in modifying agreements, while Indonesian courts rely on mediation as the primary mechanism for conflict resolution. The effectiveness of these approaches depends on judicial oversight and the enforcement of legal measures to protect children's rights in family law cases.

In divorce cases in Indonesia, child custody decisions are based on the best interests of the child. For instance, in the Sarolangun Religious Court decision, *Case Number 274/Pdt.G/2024/PA.Srl*, custody of the child Yesy Alifah binti Joko Susilo, born on January 8, 2015, was granted to the biological mother. The court also ordered the father to provide

child support of IDR 500,000 per month until the child reaches adulthood or becomes financially independent.³⁴

In the Algerian legal system, child custody in divorce cases follows a different approach compared to Indonesia, particularly due to the influence of Islamic law and the French civil law system. One case that illustrates the role of judges in determining the legal status of children is *Case C-129/18, SM v. Entry Clearance Officer, UK Visa Section*, decided by the Court of Justice of the European Union (CJEU) on March 26, 2019. In this case, a minor placed under the *kafala* system in Algeria was submitted for entry clearance to the United Kingdom by a French couple residing there. The *kafala* system in Algerian family law allows an adult to assume responsibility for the care, education, and protection of a child without establishing a legal parent-child relationship, as would be the case in adoption under European legal frameworks. Nevertheless, the court determined that the child was still entitled to legal protection under the principle of the best interests of the child.

The CJEU ruled that a child under *kafala* does not qualify as a “direct descendant” under Article 2(2)(c) of Directive 2004/38/EC because the system does not establish legal parentage. However, the court determined that such children fall under the category of “other family members” as defined in Article 3(2)(a) of the directive. This designation obliges EU member states to facilitate the child’s entry and residence while prioritizing their welfare. The ruling also emphasized the need for a thorough assessment of potential risks such as exploitation, trafficking, or abuse within the *kafala* process. Destination countries, such as the United Kingdom, must evaluate the child’s rights and welfare in line with international legal principles and human rights standards.³⁵

The role of judges in child advocacy and protection is crucial. However, the effectiveness of this role depends on judicial independence.

³⁴ Pengadilan Agama Sarolangun. (2024). *Putusan Nomor 274/Pdt.G/2024/PA.Srl tentang hak asuh anak dalam perceraian*. Mahkamah Agung Republik Indonesia. Retrieved from <https://putusan3.mahkamahagung.go.id/direktori/putusan/zaef9770d37e1a8698d4313731333531.html>

³⁵ Court of Justice of the European Union. (2019). *Case C-129/18, SM v. Entry Clearance Officer, UK Visa Section*. Reports of Cases. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CJ0129>

In Algeria and Indonesia, judicial independence often faces challenges, including political interference, corruption, and external pressures on the judiciary.

In Algeria, executive interference in judicial decisions undermines impartiality and often hampers the effective enforcement of child protection measures. Judges may face pressure that influences their ability to act independently, particularly in sensitive cases involving family law. Similarly, in Indonesia, despite constitutional guarantees of judicial independence, systemic corruption and external influences on the judiciary remain persistent challenges. These issues can compromise the fairness of decisions in cases involving children's rights. Nevertheless, judicial independence is indispensable for ensuring that decisions prioritize justice and the welfare of children. When judges operate free from political and external pressures, they are better positioned to adjudicate cases equitably and uphold the principle of the child's best interests.

The differences between the Algerian and Indonesian legal systems in handling child advocacy are deeply rooted in their historical, cultural, and socio-political contexts. Algeria's legal framework, shaped by Islamic and French civil law traditions, emphasizes the judge's direct role in protecting children's rights, reflecting the integration of Sharia principles with codified laws. Indonesia's pluralistic legal system incorporates *adat* (customary law) and *Pancasila's* principles of deliberation and consensus, promoting mediation and community-based conflict resolution. Judicial training in Algeria focuses on procedural mandates and codified laws, while Indonesian training emphasizes mediation skills and negotiation.

To conclude, while reconciliation efforts are an important aspect of the divorce process to reduce social and emotional harm, their failure should not invalidate the divorce itself. While both legal systems share a commitment to prioritizing the child's welfare, their methodologies and cultural underpinnings highlight significant differences. In Algerian family law, reconciliation serves as a supporting procedure rather than an essential condition for divorce legality. Moreover, Algerian courts rely on judicial intervention to protect children's rights, while Indonesian courts emphasize mediation to foster resolution. The effectiveness of these

approaches ultimately depends on the integrity and independence of their judicial systems

B. Judicial Intervention in Reconciliation between Spouses to Protect Children's Rights

During a reconciliation hearing, the judge's role extends beyond merely encouraging the husband and wife to reconcile and abandon their desire for divorce. This role is especially critical in cases where the husband insists on unilateral divorce or the wife seeks *khul'* (divorce initiated by the wife) under Article 53 of the Family Code, or standard divorce under Article 54. The judge must prioritize the welfare of the children, who are often the most vulnerable parties and the ones most affected by the dissolution of marriage.

Children's rights arising from the termination of their parents' marital bond include custody and alimony. Articles 62–72 of the Family Code define custody as the responsibility for the care, education, and upbringing of the child according to the father's religion while ensuring their protection, health, and moral development.³⁶ Article 75 mandates that the father provide financial support for his children unless the child has independent financial means. This obligation generally extends until the child reaches adulthood, and for daughters, until marriage. In cases where the child is disabled or pursuing education, the obligation continues. Article 78³⁷ further specifies that alimony must cover food, clothing, medical care, and housing. If the father is unable to provide support, another guardian may assume the responsibility.³⁸

Judges play a pivotal role in ensuring that these legal provisions are effectively enforced during reconciliation hearings. In consensual divorces, governed by Article 427 of the Code of Civil and Administrative Procedure, both spouses must submit a joint petition outlining agreed terms, including custody and alimony.³⁹

³⁶ Article 62 of the Family Code.

³⁷ Article 78 of the Family Code.

³⁸ Belhaj Al-Arabi, "Concise Commentary on the Algerian Family Law," Part One (Marriage and Divorce)."

³⁹ Article 428 of the Code of Civil and Administrative Procedure.

One of the most important elements that this petition must include is a summary of all the terms agreed upon by both parties regarding the consequences of the divorce.⁴⁰ For a consensual divorce to be legally valid, the judge must adhere to the specific provisions outlined in Article 341 of the Code of Civil and Administrative Procedure. The Supreme Court emphasized this in one of its rulings: “The judge must respect the specific provisions of a consensual divorce.”⁴¹

However, the judge is obligated to scrutinize this petition to ensure it does not violate the child’s best interests or public order. Article 341 of the Code of Civil and Administrative Procedure grants the judges the authority to annul or amend provisions in consensual divorce agreements that jeopardize the child’s welfare. Based on this principle, the Supreme Court, in its decision, annulled and invalidated the contested judgment issued by the Family Affairs Section of the Mchedallah Branch Court on November 11, 2009, under number 451/09, which granted the dissolution of the marital bond between the parties by mutual consent.

The decision states, “Upon reviewing the contested judgment, it is evident that the court did not verify the procedures stipulated in Article 431 of the Code of Civil and Administrative Procedure. The court stated that it attempted reconciliation between the parties on October 21, 2009, but its efforts were unsuccessful due to the defendant’s insistence on dissolving the marital bond by mutual consent, citing the impossibility of conjugal life and the plaintiff’s absence from the reconciliation hearing. Nevertheless, the Supreme Court upheld the dissolution of the marriage by mutual consent between the parties, which contradicts Article 431 of the Code of Civil and Administrative Procedure. Articles 427–435 of the same Code spell out specific rules governing lawsuits that aim for consensual divorce.

Therefore, it is clear from this decision that there is no room for granting consensual divorce based solely on the joint petition of both parties. Both parties must attend the reconciliation hearing, and the judge

⁴⁰ Article 429 of the aforementioned Code.

⁴¹ Article 72 of the Family Code.

must verify the consent of each. If one party is absent, the judge cannot ascertain their consent and therefore cannot rule for the divorce.⁴²

While national legal frameworks establish the judge's role, international conventions, particularly the United Nations Convention on the Rights of the Child (CRC), ratified by both Algeria and Indonesia, provide additional guidance on child welfare in family disputes. The CRC enshrines key principles, including the best interests of the child, the child's right to be heard, and the state's obligation to protect these rights in all legal proceedings. Algerian and Indonesian courts often reference these conventions to reinforce custody and alimony rulings, aligning domestic decisions with global human rights standards.

The integration of international obligations into domestic family law reflects varying approaches in Algeria and Indonesia. Algerian judges balance statutory provisions, religious principles, and international commitments, while Indonesian courts incorporate customary law and societal consensus. These differences highlight the unique interplay of legal, cultural, and religious norms in safeguarding children's rights.

Judges are particularly critical in cases where agreements may compromise the child's welfare. For instance, if a mother is deemed unfit for custody due to health issues or other factors, the judge has the authority to amend or cancel custody arrangements. Similarly, if parents agree to split custody among siblings, judges may intervene to ensure all children remain under the care of a single guardian, prioritizing emotional stability and overall welfare. Article 64 of the Family Code entrusts mothers with custody of young children due to their nurturing capabilities, while fathers assume guardianship when children reach an age requiring less physical care.⁴³

Custody is a form of guardianship over the child, granted to the custodian for the child's protection, upbringing, care, and the provision of food, clothing, and hygiene in the early stages of life. Article 64 of the Family Code entrusts women with the custody of a young child due to

⁴² Muhtar, Mohamad Hidayat, et al. "Critical Study of Sharia Regional Regulations on Women's Emancipation." *International Journal of Religion* 5.2 (2024): 23-26, <https://doi.org/10.61707/a7s8vg65>.

⁴³ Supreme Court, Chamber of Family and Inheritance Affairs, Decision No. 676898 dated December 8, 2011.

their greater compassion and ability to nurture and care for them. Men, considered more capable of protection, management, and self-sufficiency than women, are granted the right to assume responsibility for the child once they reach an age where direct care is no longer necessary.⁴⁴

Comparative analysis reveals that Algerian and Indonesian judges navigate distinct legal landscapes while upholding similar principles of child protection. Algerian courts, influenced by Islamic law and statutory provisions, prioritize child welfare during reconciliation hearings. Similarly, Indonesian judges, guided by the Marriage Law and Child Protection Act, assess the impact of divorce on children's well-being. Despite procedural differences, both systems underscore the importance of judicial intervention in safeguarding children's rights.

This study highlights the judge's essential role in protecting children during divorce proceedings, particularly in consensual divorces. Judicial intervention ensures that agreements comply with legal and ethical standards, prioritizing the best interests of the child over parental convenience. Judges must remain vigilant against terms that endanger children's welfare, intervening to amend or cancel such provisions when necessary.

Thus, the settlement suggestions resulting from this research emphasize the importance of legal policies that strengthen the protection of children's rights in divorce cases and the proactive role of judges, ensuring that divorce provisions comply with applicable legal and ethical principles. To strengthen child protection, judicial systems should provide clearer guidelines for interpreting the standard of "best interests of the child". Training judges on the psychological and social aspects of children's rights would also enhance their ability to make informed decisions. By prioritizing children's welfare in family law practice, courts can better fulfill their obligation to uphold justice and protect the most vulnerable members of society.

⁴⁴ Belhaj Al-Arabi, "Concise Commentary on the Algerian Family Law," Part One (Marriage and Divorce)" (University Publications Office Algiers, 2002).

Conclusion

This research highlights the significant differences in how Algeria and Indonesia approach reconciliation during the divorce process, particularly concerning the protection of children's rights. In Algeria, while the law mandates reconciliation efforts to safeguard children, the absence of sanctions for failing to adhere to these procedures indicates that reconciliation is not considered a substantive factor affecting the validity of the divorce. In contrast, Indonesia incorporates reconciliation through mediation, reflecting the cultural principle of deliberation to reach consensus. Mediation serves as an integral component of the dispute resolution process, emphasizing its role beyond mere procedural compliance.

To enhance the protection of children's rights and ensure meaningful reconciliation efforts, it is imperative to strengthen the role of judges in overseeing and enforcing these processes. Legal reforms should focus on transforming reconciliation from a procedural formality into a substantial and impactful measure. By embedding reconciliation as a core element of divorce proceedings, both Algeria and Indonesia can promote a more equitable and sustainable legal system that prioritizes the welfare and rights of children.

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