



## Problems Related to the Exercise of Custody Rights in Algeria: Between Legal Texts and Judicial Practice

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### ABSTRACT

*This research addresses the problems related to exercising custody rights in Algerian legislation. As one of the critical legal consequences of marital dissolution, custody is crucial for ensuring the child's welfare. Islamic law approves custody, and statutory laws have followed suit, prompting an investigation into the legal issues arising from its judicial application. This study is structured into two main axes: the first examines issues related to alimony and house rent allowance, and the second addresses the challenges of visiting and transporting the child in custody. Using a descriptive-analytical approach, we analyzed rulings and decisions issued by the Algerian judiciary. The study found that while Algerian family law stipulates provisions for custody, many loopholes revealed through judicial practice make these provisions incompatible with Algerian society's social and economic conditions. Our findings highlight the need for legislative amendments to address these discrepancies.*

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## 1. Introduction

Marriage is a divine law for His servants, as stated by God Almighty Qs. Ar Ruum: 21 “and among His signs is that He created for you from yourselves mates that you may find tranquility in them, and He has placed between you affection and mercy”. Indeed, those are signs for people who give thought. Marriage is one of God's signs, as He understands the instincts and nature of His creation, knowing that humans require both

physical and emotional intimacy<sup>1</sup>. Therefore, marriage was legalized<sup>2</sup> to achieve essential goals for humans: to satisfy innate instincts, to continue the lineage with children in a legitimate manner, and to gain companionship, comfort, and cooperation in facing life's challenges.<sup>3</sup> God Almighty knows the human soul is changeable and may encounter unexpected situations. If there is estrangement between a husband and wife, the relationship should be treated with kindness. Thus, God has guided people toward reconciliation and established means for it. Divorce becomes the final solution if these means fail to resolve the dispute.<sup>4</sup> When separation occurs in a manner recognized by Sharia and law, it results in material and moral consequences. Perhaps the most critical and complex issue brought before a judge is the joint children from the marital relationship and the financial consequences that result from it.<sup>5,6</sup>

Therefore, responding to it or rejecting it is based on the evidence, which complicates the judge's task of deciding on the fate of the children and finding the most appropriate solution that serves their interests, starting with determining who will take care of them and handle their affairs and, until they reach a certain age.<sup>7,8</sup>

The custody stage is important because the child in this period is weak and unable to carry out his affairs, moreover, according to psychologists, the occurrence of any changes

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<sup>1</sup> Bani Syarif Maula and Ilyya Muhsin, "Interfaith Marriage and the Religion-State Relationship: Debates between Human Rights Basis and Religious Precepts," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 2 (2024): 791–820, <https://doi.org/10.22373/sjkh.v8i2.19479>.

<sup>2</sup> Muljan et al., "Preventing Child Marriage in Bone District, South Sulawesi: Perspective of Islamic Family Law," *El-Usrah* 7, no. 1 (2024): 110–27, <https://doi.org/10.22373/ujhk.v7i1.22482>.

<sup>3</sup> Muh. Sholihuddin, Saiful Jazil, and Syamsun Ni'am, "Remarriage in the 'Iddah Perspective of Maqāshid Al-Usrah: Study in Wedoro Waru, Sidoarjo, Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 2 (2024): 263–68, <https://doi.org/10.22373/sjkh.v8i2.15061>.

<sup>4</sup> Durotun Nafisah et al., "Comparative Analysis of Islamic Family Law and Normative Law: Examining the Causes of Divorce in Purwokerto, Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 2 (2024): 846–71, <https://doi.org/10.22373/sjkh.v8i2.16825>.

<sup>5</sup> Abdullah et al., "Fulfillment of The Living Rights of Children the Victims of Divorce in the Muslim Community of Lombok, Indonesia," *El-Usrah* 7, no. 1 (2024): 253–71, <https://doi.org/10.22373/ujhk.v7i1.22281>.

<sup>6</sup> Syifa Fachrunisa, Rezki Suci Qamaria, and Nurul Hanani, "Judges' Perspectives on the Determination of the Amount of Mut'ah, Childbirth Costs, and Child Sustenance in Divorce Cases (The Study on the Court's Decision Number 808/Pdt.G/2021/Pa. Kab. Kdr)," *El-Usrah: Jurnal Hukum Keluarga* 6, no. 1 (2023): 54–70.

<sup>7</sup> Mursyid Djawas et al., "The Alimony Obligation of a Civil Servant and Non-Civil Servant Father towards Children Post-Divorce (The Study on Aceh Syar'iyah Court Decision Study of 2019)," *El-Usrah: Jurnal Hukum Keluarga* 6, no. 1 (2023): 91–114.

<sup>8</sup> Meli Dwi Yuniar, "The Realization of the Fulfilment of the Children's Sustenance Post-Divorce In Purworejo Religious Court in 2020-2021," *El-Usrah: Jurnal Hukum Keluarga* 6, no. 1 (2023): 131–48.

in the immediate environment surrounding the child in the first years of his life may disrupt many of his psychological and mental functions and abilities.<sup>9,10</sup>

Hence the great importance of the right to custody, as the first features of the child's personality are formed during this period, and the foundations of preparation for social, professional and family life in the future are established during the custody stage. Hence, the importance of custody increases and its value increases, which is why Islam gave it great importance, and approved a number of legal provisions to preserve children's rights and ensure their care from birth until adulthood, and after that most of the legislation took them as a basis.<sup>11,12</sup>

The Algerian legislator has regulated the custody provisions in Chapter 02 of Part 02 of Volume 01 of the Family Law of 1984, amended and supplemented by Order No. 05\_02, in Articles 62 to 72 thereof<sup>13</sup>To ensure the achievement of the purpose of these provisions, the legislator appointed a family affairs judge as a monitor and trustworthy guardian in charge of custody, and it gave him broad powers to apply it in the same law, in addition to other powers that came later in the Civil and Administrative Procedures Code.<sup>14</sup>

Issues related to the exercise of child custody are among the most critical topics in legal studies related to personal status, as the stability of the child in custody requires care and attention to their interests to ensure they can continue their everyday life in a calm and comfortable atmosphere. The importance of research on child custody in international studies can be demonstrated through various studies, such as Aayesha Rafiq (2014)<sup>15</sup> *Child*

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<sup>9</sup> Paul R. Amato and Juliana M. Sobolewski, "The Effects of Divorce and Marital Discord on Adult Children's Psychological Well-Being," *American Sociological Review* 66, no. 6 (2001): 900–921, <https://doi.org/10.2307/3088878>.

<sup>10</sup> Cornelius J. Botha and Lauren G. Wild, "Evaluation of a School-Based Intervention Programme for South African Children of Divorce," *Journal of Child and Adolescent Mental Health* 25, no. 1 (2013): 81–91, <https://doi.org/10.2989/17280583.2013.768528>.

<sup>11</sup> Muhammad Irvan Hidayana, Iman Jauhari, and Azhari Yahya, "Juridical Analysis of Children Protection Post Divorce Parent," *Jurnal IUS Kajian Hukum Dan Keadilan* 8, no. 2 (2020): 302–11, <https://doi.org/10.29303/ius.v8i2.704>.

<sup>12</sup> Imen Gallala-Arndt, "The Impact of Religion in Interreligious Custody Disputes: Middle Eastern and Southeast Asian Approaches," *American Journal of Comparative Law* 63, no. 4 (2015): 829–58, <https://doi.org/10.5131/ajcl.2015.0025>.

<sup>13</sup> "Law No. 84-11 of June 9, 1984, Including the Family Code, Official Journal No. 24 of June 12, 1984." (1984).

<sup>14</sup> Fatma Aissaoui, "PROTECTION OF THE CHILD OF UNKNOWN LINEAGE: THE CONVENTION ON THE RIGHTS OF THE CHILD AND ALGERIAN LEGISLATION," *Russian Law Journal* XII, no. 2 (2024): 124–35.

<sup>15</sup> Aayesha Rafiq, "Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)," *International Journal of Humanities and Social Science* 4, no. 5 (2014): 267–77.

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*Custody in Classical Islamic Law and Laws of Contemporary Muslim World*, and Mohamed Adil (2017)<sup>16</sup> *Religion as a Determinant of Child Welfare in Custody Cases in Malaysia and Classical Islamic Law: A Comparative Overview*.

The issue of custody rights is receiving increasing attention at the global, regional, and national levels, especially when the child in custody is the result of a mixed marriage. For example, studies conducted by Hala Ahmed Nour El-din, *Indeterminacy of the Best Interest of the Child and Shari'a Rules in Custody Adjudications: Egypt Case*,<sup>17</sup> I Nyoman Sujana, *Legal Consequences of Divorce in Mixed Marriage*;<sup>18</sup> John M. Nunley and Richard Alan Seals, *Child-Custody Reform, Marital Investment in Children, and the Labor Supply of Married Mothers*;<sup>19</sup> Kathi L.H. Harp and Carrie B. Oser, *Factors Associated with Two Types of Child Custody Loss among a Sample of African American Mothers: A Novel Approach*;<sup>20</sup> and Asuncion Fresnoza-Flot, *The Best Interests of the Child in 'Mixed' Couples' Divorce in Belgium and the Netherlands: Filipino Mothers' Socio-Legal Encounters about Their Children*.<sup>21</sup>

Although various previous studies have addressed issues related to child custody, our research offers a different and more comprehensive approach. This study combines theoretical (legal) aspects with practical procedural (judicial) aspects to achieve concrete results and generate recommendations to suggest amendments to Algerian family law to improve its quality and achieve judicial security. Based on what has been outlined from the beginning, this research focuses on the following important question: What are the legal problems arising from the judicial application of the right to custody? To answer this

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<sup>16</sup> Mohamed Azam Mohamed Adil and Rafeah Saidon, "Religion as a Determinant of Child Welfare in Custody Cases in Malaysia and Classical Islamic Law: A Comparative Overview," *Islam and Civilisational Renewal* 8, no. 1 (2017): 35–46, <https://doi.org/10.12816/0043454>.

<sup>17</sup> Hala Ahmed Nour El-din, "Indeterminacy of the Best Interest of the Child and Shari'a Rules in Custody Adjudications: Egypt Case," *AUC Knowledge Fountain*, 2021, 1–55.

<sup>18</sup> I Nyoman Sujana, "Legal Consequences of Divorce in Mixed Marriage," *Journal of Law, Policy and Globalization* 60, no. 1 (2017): 53–58, <https://www.iiste.org/Journals/index.php/JLPG/article/view/36642>.

<sup>19</sup> John M. Nunley and Richard Alan Seals, "Child-Custody Reform, Marital Investment in Children, and the Labor Supply of Married Mothers," *Labour Economics* 18, no. 1 (2011): 14–24, <https://doi.org/10.1016/j.labeco.2010.08.002>.

<sup>20</sup> Kathi L.H. Harp and Carrie B. Oser, "Factors Associated with Two Types of Child Custody Loss among a Sample of African American Mothers: A Novel Approach," *Social Science Research* 60 (2016): 283–96, <https://doi.org/10.1016/j.ssresearch.2016.06.007>.

<sup>21</sup> Asuncion Fresnoza-Flot, "The Best Interests of the Child in 'Mixed' Couples' Divorce in Belgium and the Netherlands: Filipino Mothers' Socio-Legal Encounters about Their Children," *Onati Socio-Legal Series* 11, no. 4 (2021): 990–1011, <https://doi.org/10.35295/OSLS.IISL/0000-0000-0000-1180>.

question, the research is structured around two main axes: *First: Problems Related to Alimony and Rent Allowance.* In this axis, we discuss various legal issues arising from the need to provide alimony and rent allowance for the child in custody. The dissolution of the marital bond often leads to the assignment of custody to one of the spouses or another party deemed more deserving according to jurisprudence and law. This produces specific effects and rights required in the exercise of custody to ensure the child's best interests. *Second: Problems of Visitation and Transportation of the Child in Custody.* In the second axis, we examine issues related to the visitation and transportation of the child in custody. Another area of concern is ensuring that visitation rights are respected and that the child can be safely transported between custody arrangements. This includes logistical, legal, and emotional challenges that courts and families must navigate to uphold the child's best interests. By addressing these two main axes, our study aims to highlight the most significant legal problems in this context, focusing on examples of judicial applications observed in councils and courts and the jurisprudence of the Supreme Court.<sup>22</sup>

## 2. Legal material and Methods

This research employs a normative legal research design with a descriptive-analytical approach. The study focuses on the legal issues related to child custody rights in Algeria by analyzing judicial rulings and legal decisions. Primary data is sourced from court decisions and legal rulings, while secondary data is gathered from relevant legal literature, including books, journal articles, and Algerian family law documents. Data collection involves library research and documentation of court archives. The data is analyzed using descriptive-analytical techniques, wherein the collected data is described in detail to understand the context and content of the judicial rulings, followed by a critical evaluation to identify the strengths and weaknesses of the existing legal provisions and their practical application.

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<sup>22</sup> Article 78 of Order No. 05-02, dated 18 Muharram 1426 AH, corresponding to: 27 February 2005, amending and supplementing Law No. 84-11, dated 9 Ramadan 1404 AH, corresponding to: 9 June 1984, containing the Algerian Family Code, issued in Official Journal No. 15, dated 27 February 2005.

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### 3. Result and Discussion

#### 3.1. Who is obliged to pay alimony for the child in custody

The father must ensure alimony for his children,<sup>23</sup> according to what God says in the Qur'an: {Mothers may nurse [i.e., breastfeed] their children two complete years for whoever wishes to complete the nursing [period]. Upon the father is their [i.e., the mothers'] provision and their clothing according to what is acceptable }, which is what the Algerian legislator went for under Article 75 of the Algerian Family Code. Therefore, a distinction must be made between the following cases: For males, the father is obligated to provide alimony until the child reaches the age of majority, which is 19 complete years. Even after reaching this age, the father remains obligated to provide alimony if the child is unable to earn due to a mental or physical illness, or is still studying. For females, the father's obligation to provide alimony extends until the daughter's marriage and consummation, even if she is not yet of legal age, such as if she marries at the age of sixteen after receiving permission from a judge. If the father is incapacitated and the mother is also incapable, the obligation of alimony is transferred to the relatives of the children.

In principle, the father spends on his child in custody without the need for a judicial ruling, but when the father refrains from spending, the person who has custody of the child has the right to demand alimony for the child in custody, because this right is linked to custody.<sup>24</sup> The custodian cannot exercise custody over the child except by providing support for him, as the judge in charge of personal status, in determining the amount of alimony, takes into account the condition of the spouses and their living conditions, and he can review the amount of alimony a year after the ruling is issued<sup>25</sup>, which is what the Supreme Court established in its decision, which stated: "Judges of the matter are obligated to discuss the father's financial condition when determining the nutritional alimony of the

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<sup>23</sup> Syaifuddin Zuhdi et al., "The Confiscation of Husbands' Wealth as A Collateral for Post-Divorce Child Support: Perspective," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 2 (2024): 912–33, <https://doi.org/10.22373/sjkh.v8i2.17326>.

<sup>24</sup> Douglas W. Allen and Margaret Brinig, "Child Support Guidelines and Divorce Incentives," *International Review of Law and Economics* 32, no. 3 (2012): 309–16, <https://doi.org/10.1016/j.irle.2012.04.001>.

<sup>25</sup> Article 79 of the Family Code, op. cit.

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child in custody, especially since the nutritional alimony for the child in custody continues for a long time, and does not disappear with the legal lapse of custody<sup>26</sup>”.

It is worth noting that the Algerian jurisprudence established the principle: an unmarried girl who does not work must support her father. The judges of the matter must investigate whether or not she spends, because her residence with her father is not evidence of his support.<sup>27</sup>

With regard to criminal prosecution, the court competent for alimony matters is the court of the domicile or residence of the person scheduled to receive alimony, and the crime of not paying alimony is a continuing crime until the amounts assigned to the accused are paid. Also, withdrawing or waiving the complaint does not lead to the end of the public lawsuit, given that A complaint is not a necessary condition for proceeding.<sup>28</sup>

As for the penalty prescribed for the crime of non-payment of alimony, Article 331 of the Algerian Penal Code stipulates: “The punishment shall be imprisonment from six months to three years, and a fine from 50,000 DZD to 300,000 DZD, Every person who intentionally abstains - for a period exceeding two months - from providing the amounts legally determined to support his family, and from paying the full amount of alimony assigned to him to his wife, his ascendants, or his descendants, despite the issuance of a ruling against him to pay alimony to them”<sup>29</sup>.

The custodian can resort to the alimony fund stipulated by the legislator in Law 15-01, which includes the establishment of the alimony fund, in the event that it is not possible to fully or partially implement the order or judicial ruling specifying the amount of alimony, due to the debtor’s refusal to pay or his inability, and this procedure drops the criminal prosecution case against the debtor for alimony for the crime of not paying alimony in accordance with Article 331 of the Penal Code.

The Algerian legislator has established that alimony for children is obligatory for the father<sup>30</sup>, for child until he reaches the age of majority (The age of majority in law is 19 complete years, and even when he reaches that age, the father remains obligated to provide

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<sup>26</sup> Supreme Court Decision No. 343907 dated 06/14/2006.

<sup>27</sup> Judicial Journal, Issue 2, 2021, p. 81.

<sup>28</sup> Buchra Abd Errahman and Radia Aimour, “The Judge’s Authority to Estimate the Right to Custody and Visitation, and Implementation Problems in Algerian Legislation,” *Journal of Legal and Social Sciences* 10, no. 2 (2021): 2021.

<sup>29</sup> Article 331 of the Penal Code, as amended by Law No. 06-23 of December 20, 2006.

<sup>30</sup> Article 75 of the Family Code, op. cit.

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alimony if the child is unable to earn due to a mental or physical illness, or is studying). And as for girl, the father's obligated alimony extends until the daughter's marriage and consummation, even if she is not yet of the legal age of majority, such as if she marries at the age of sixteen after being given permission by a judge to marry.

In the event of the father's incapacity, the mother must guarantee the alimony of the children if she is able<sup>31</sup>.

The first problem that is raised is, if it is proven that the father is unable to pay, and the mother is not working, who will bear the expenses of the child in custody?

Here in this case, the duty of alimony is transferred to the ascendants and to the relatives of the other children, but what is the solution in the event that they are unable?

By referring to the Family Law, we found that the Algerian legislator did not address this issue, but it did create a social solution represented by creating a fund to guarantee alimony, through Law 24-01, which includes measures for obtaining alimony<sup>32</sup>, thus, the Algerian legislator guaranteed that the child in custody and the divorced woman would receive the alimony determined by the judicial authorities, in the event of the husband's inability or failure to pay alimony.

The second problem is procedural, and has emerged through judicial practice, as according to Article 65 of the Amended and Supplemented Family Law, custody expires for males when they reach the age of 16 years, and for females when they reach the age of marriage, However, despite the expiration of custody, their alimony remains obligatory on the father, and the problem arises for 16-year-old males who do not have the capacity to claim their rights before the judiciary: In the event that the father fails to pay their alimony, who will file their lawsuit?

Here, by referring to judicial applications, we found that these lawsuits are filed in the name of the minor, and by the mother as a guardian in his right, in her capacity as his guardian, since he lives with her, and she is the one who takes care of his affairs and not in her capacity as a custodian, because custody has already lapsed.

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<sup>31</sup> Article 76, *ibid*.

<sup>32</sup> The provisions of Law No. 24-01, dated Shaaban 1, 1445 AH, corresponding to February 11, 2024, which includes special measures for obtaining alimony, issued in Official Journal No. 10 of 2024, issued on: 02-11-2024.

Second: Custody residence: Housing is considered one of the components of alimony, and the Algerian legislator, through Article 72 of the Family Code<sup>33</sup>, has clearly and explicitly obligated the father to provide housing in which to exercise custody, and even if this is not possible, he is obligated to pay rent, which was confirmed by the Supreme Court in a decision that stated: “ The father is not exempted from providing housing or paying rent, as they are included in alimony, even if the custodian has housing<sup>34</sup>, provided that the custodian remains in the marital home until the father implements the judicial ruling related to housing.

Accordingly, the custodian has the right to demand a residence to exercise custody, and the father is obligated to it regardless of his financial and social circumstances, because these circumstances do not deprive the custodian of her right to demand it<sup>35</sup>.

It is also settled in the judiciary that the request for foster housing, or the payment of rent allowance, must be submitted during the divorce case and the assignment of custody<sup>36</sup>, which is what the M’sila Judicial Council took in the appeals before it, aiming to request housing or rent allowance for the first time<sup>37</sup>. And when he says “adequate housing,” the legislator means housing that provides the necessary means of living, such as a kitchen, bedding, electricity, gas, water, etc.

Article 72/1 of the Family Code, after its amendment in 2005, stipulates: “In the event of divorce, the father must provide, for exercise custody, suitable housing for the custodian, and if this is not possible, he must pay rent”.

By referring to the decisions of the Supreme Court, we can extract a number of judicial rulings that were relied upon, through the content of the text of the aforementioned article, as it was stated in the decision of the Supreme Court issued on April 14, 2011<sup>38</sup>: “The divorced woman with custody shall remain in the marital home until the judgment declaring her right to housing is implemented”, which means that the ruling that the custodian remain in the marital residence depends on the condition that the father does not implement the judicial ruling related to housing, whether its content is providing suitable housing or paying housing rent.

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<sup>33</sup> Article 72 of Law No. 84-11, including the Family Code, op. cit.

<sup>34</sup> Supreme Court Decision No. 288072 dated 07/31/2002, Judicial Journal, 2004, No. 1, p. 285.

<sup>35</sup> Msila Judicial Council Decision No. 163/08, issued on 05/05/2008.

<sup>36</sup> Supreme Court Decision No. 24184, dated 12/02/1980, 1981, p. 90.

<sup>37</sup> Msila Judicial Council Decision No. 158, dated 03/30/2009.

<sup>38</sup> A decision issued by the Supreme Court on April 14, 2011 under No. 684955, Judicial Journal for the year 2011, No. 02, p. 176.

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It was also stated in the Supreme Court's decision issued on March 13, 2013<sup>39</sup>: "The custodian has the right to a rental allowance if the housing provided by the father is not suitable for practicing custody." It is also possible to claim the rent allowance, which is considered part of the maintenance due to the child in custody, at any time, and the validity of the *res judicata* cannot be relied upon in its regard, as stipulated in the decision of the Supreme Court issued on January 14, 2009<sup>40</sup>.

The Supreme Court also affirmed in its decision issued on April 14, 2011<sup>41</sup>, that the child in custody has the right to prepare a home for custody or to receive rental allowance, and this remains an existing and independent right, even if the mother waives all of her rights established in the divorce ruling.

The place of providing housing is linked to the place of exercising custody, which is determined either by the location of the marital home or by the location of the custodian's family, as determined by the custodian to exercise custody affairs, and this is what was approved by the ruling issued by the Supreme Court's decision, dated November 11, 2010<sup>42</sup>.

It is worth noting that the ruling on a housing rental allowance for exercising custody is restricted in its practice in Algeria, because the custodian's residence outside the national territory does not obligate the father to provide housing or rent allowance for the child in custody, which was approved by the Supreme Court in its decision issued on May 12, 2011<sup>43</sup>.

Although the custodian's right to housing is considered established in jurisprudence and law, this right should not be abused, as it must be exploited, because when it was proven in one of the appeals filed with the M'sila Judicial Council that the custodian does not exploit the housing that the father rented, this was considered arbitrary. In exercising

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<sup>39</sup> Decision issued by the Supreme Court dated March 14, 2013 under No. 0729230, Judicial Journal for the year 2013, No. 02, p. 276.

<sup>40</sup> A decision issued by the Supreme Court dated January 14, 2009 under No. 481857, Judicial Journal of 2009, No. 02, p. 292.

<sup>41</sup> Decision issued by the Supreme Court dated April 11, 2007, No. 384529, Judicial Journal for the year 2008, No. 02, p. 291.

<sup>42</sup> Decision issued by the Supreme Court dated November 11, 2010, No. 581700, Judicial Journal for the year 2011, No. 02, p. 252.

<sup>43</sup> Decision issued by the Supreme Court dated May 12, 2011, No. 622754, Judicial Journal for the year 2012, No. 01, p. 304.

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her right to housing, the judge ruled to cancel her right to housing and rent allowance because she did not need them<sup>44</sup>.

In some cases, the father rents housing in an isolated rural area at a low price, and the custodian waives her right to housing.

Referring to the text of Article 52 of the Family Law, which was abolished pursuant to the 2005 amendment, it required multiple children to be subject to custody in order for the arbitrarily divorced custodian to remain in the marital home. However, the Supreme Court's decision issued on 03/13/2002 stated the principle: "Housing is a right for the child in custody, even if he is alone, because it is one of the elements of maintenance"<sup>45</sup>.

It is worth noting that Algerian jurisprudence established the principle: The assessment of the suitability of the housing allocated for the exercise of custody is subject to the discretionary authority of the judges of the matter. <sup>46</sup>

### **3.2. Problems related to visiting and transporting the child in custody.**

#### **a. The right to visit the child in custody:**

One of the most important rights related to custody is the right to visit or see the child, as the parents have the right to follow up on their child and visit him if the child is in the custody of one of them, which achieves for the child in custody protection and care, meeting his requirements, observing him and asking about his behavior<sup>47</sup>. This visit is for the father to his child while he is in the mother's custody, or for the mother to visit her child if he is with his father or someone else.

The ruling on this issue is that if the child is in the mother's custody and his father wants to see him, she is not obliged to send him, but she is obligated not to prevent him from visiting him, and the same ruling applies to the father if he is in custody<sup>48</sup>, through specific periodic appointments, because the visit is for the child in custody, even if It is a

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<sup>44</sup> Msila Judicial Council Decision No. 185 dated 05/11/2009.

<sup>45</sup> Decision issued by the Supreme Court dated 03/13/2002, No. 276760, Judicial Journal for the year 2004, No. 1, p. 274.

<sup>46</sup> Judicial Journal, Issue 1, 2022, p. 57.

<sup>47</sup> Al-Mawardi Ali bin Mohamed bin Habib, Al-Hawi Al-Kabir, edited by: Ali Mohamed Moawad and others, Dar Al-Kutub Al-Ilmiyyah, Beirut, 1419 AH, Part 11, pp. 507-509.

<sup>48</sup> Imam Abu Zahra, Personal Status, Dar Al-Fikr Al-Arabi, Cairo, Egypt, p. 411.

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right guaranteed to both parents, it is also a legal, moral and educational duty that falls on the responsibility of each of them, for the benefit of the child.<sup>49</sup>

Visiting is left to custom and tradition, meaning that it is not daily, but is considered according to the circumstances of the custodian, the interests of the child in custody, and the person who has the right to visit. It is programmed once or twice every week, but there is no harm in the mother visiting her son or daughter daily if her home is nearby, while if she the mother is with the child at her husband's house, and the husband must give permission for the visit, because this is his right, and if he does not give him permission, the mother must bring the child out to see him and check on his condition.

The Algerian legislator did not specify a specific time for the visit, whether the period was an hour, a day, or a month, and left that to the satisfaction of both parties, because it is a matter of consent between the parties, and the judge has discretionary authority to take into account custom and tradition, as it is customary for the judge to rule on the right to visitation on weekends, national and school holidays equally between the two parties, provided that the purpose of the visit is to maintain the link between the child in custody and his father or mother, and to preserve him and take care of his affairs<sup>50</sup>.

The Algerian legislator did not specify the right to visitation in an independent legal article, but rather referred to it in the last paragraph of Article 64 of the Family Code by saying: "...and when the judge rules to grant custody, he must rule with a right to visitation", which means that the personal status judge is obligated to issue a ruling on the right to visitation on his own initiative when assigning custody to one of the parents or to others. The Algerian legislator here has taken the judge out of the circle of the legal rule that stipulates that the judge may not rule what the opponents have not requested. In this regard, we distinguish between two cases:

**The first case:** If both of them demand custody and both of them insist on custody, then the judge must assign custody to one of them, and in return give the other party the right to visitation. **The second case:** If neither of them demands custody, and the case is entered into consideration, then there is no objection to the judge returning the case for

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<sup>49</sup> Ben Daoud Hanan, "Custody in Algerian Family Law, Al-Ustaz Al-Bahith Journal for Legal and Political Studies, Volume 4, Issue 2, Algeria 2019, p. 243.," *Al-Ustaz Al-Bahith Journal for Legal and Political Studies* 4, no. 2 (2019): 243.

<sup>50</sup> Saad Abd Elaaziz, *Procedures for Practicing Family Affairs Cases Before the Courts of First Instance Divisions, Houma House, Algeria* 2013, p. 182.

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scheduling, re-summoning the parties and deciding on the custody of the children, and consequently the right to visitation.

Given the extreme importance of assigning custody and, consequently, the right to visitation, the law has protected it and imposed criminal penalties for anyone who violates this right and tampers with it. Article 328 of the Penal Code B stipulates: “He shall be punished by imprisonment from one month to one year, and a fine from 20,000 DZD to 100,000 DZD”, the father, mother, or any other person who does not hand over a minor whose custody has been decided by an urgent or final ruling to the person who has the right to claim, as well as anyone who kidnapped him from the person to whom his custody was entrusted or from the places where he placed him, or keep him away from him or from those places, or force others to kidnap him or deport him, even if this happened without deceit or fear”, and the refusal to surrender was proven by a judicial officer after following implementation procedures.

The Supreme Court confirmed in one of its decisions that the father’s visitation is a right for his son once custody is assigned to someone else, and it is his right as well, and it is not restricted or linked to a specific age or a specific period. Accordingly, the Supreme Court overturned the decision that determined that the right to visitation began to take effect when the child in custody reached the age of 4 years<sup>51</sup>.

It also confirmed in another decision that the Family Law did not differentiate between those who deserve custody and those who have the right to visitation. Rather, it required the judge, when ruling on custody, to rule on the right of visitation without distinction between the aunt, mother, or others if they adhere to it<sup>52</sup>.

With regard to the place of exercising the right to visitation, it is established in jurisprudence and law that visitation is a right that is restricted only by what is restricted by law, and the custodian of the child must facilitate the use of his right to visitation by the other party without restriction, restriction or monitoring, and ruling otherwise is considered an overstep by the judge in his jurisdiction, a restriction of people’s freedom, and a violation of the law and Sharia, which was confirmed by the Supreme Court by overturning the decision issued by the Council, which ruled that the mother should visit her two daughters on the condition that the visit is not outside the husband’s residence. In

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<sup>51</sup> Supreme Court Decision No. 350942 dated 01/04/2006, Judicial Journal, First Issue 2006, p. 455.

<sup>52</sup> Supreme Court Decision No. 258479 dated 01/23/2001, Judicial Journal, Second Issue 2001, p. 302.

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another decision, it said: “It is legally established that it is not valid to limit the exercise of the husband’s visitation right in the divorced wife’s home, since she has become a foreigner to him”<sup>53</sup>.

From all of the above, it is worth noting the new amendment that came under Order 05-02 in Article 57 bis, that the judge may decide urgently - by order on a petition - on all temporary measures, especially those related to alimony, custody, visitation, and housing. Following the new amendment to the Civil and Administrative Procedures Law, the competent judge in this article is the family affairs judge and not the president of the court, in accordance with Article 40 and Article 323 thereof, and the decision is made pursuant to an order subject to expedited enforcement and implemented despite opposition and appeal.

**b. Problems related to the right to visit:**

Since the issue of the right to visitation was not fulfilled from a regulatory perspective, this opened the way for many problems, especially since only one article regulated this right in parallel with the right to custody, and among the most important of these problems related to the right to visitation are the following:

The Algerian legislator obliged the judge, at the end of Article 64, when ruling on granting custody, to rule on the right to visitation, but he did not explain to us how to exercise this right or its controls, because he did not specify for us the place of exercising custody, whether in the house where the child resides with his custodian, or in elsewhere, and also he did not specify the time the visit would take (one hour or several hours, or the number of days).

Referring to Islamic legal rulings, the jurists did not establish a specific method for regulating the right to visit, and therefore the judge must (in order to avoid harm) take into account people’s customs and traditions in using this right, and look at the interest of the holder of the right to visit, so that he can reassure his son, satisfying his emotional instincts and enjoying seeing him, he must also look to the interests of the child, which must prevail in all cases.

However, in practice, exercising the right to visit generates several legal problems: *The first problem* is related to visitation dates for school children: Usually the judge grants

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<sup>53</sup> Supreme Court Decision No. 79891 dated 04/30/1990, Judicial Journal for the year 1994, No. 1, p. 55.

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them the right to visitation on Friday or Thursday, but upon implementation a problem may occur such as refusing to extradite him, when the person entitled to visitation resorts to the judicial officer for forced implementation, and the latter refuses to go out with him outside his work hours, although Article 629 of the Code of Civil and Administrative Procedure in this case states that it is sufficient only to obtain permission from the president of the court for execution, we noticed through our investigation that the judicial officers did not seek this.

*The second problem:* “Usually the judge rules the right to visitation on weekends, as well as religious and national holidays, equally between them.” Accordingly, several problems arise in the implementation of the operative ruling, and what raises confusion is the term “equity between them,” regarding whoever takes it first, the father or the mom, and sometimes, ambiguity and inaccuracy in the ruling may result in criminal lawsuits being filed on the basis of a misdemeanor of not extraditing a child, in accordance with Article 328 of the Penal Code. As an attempt to find a solution to this problem, and through our investigation at the M’sila court level, we found that family affairs judges add the phrase “...granting the father the right to visitation on national and religious holidays equally between them, with the taking and returning starting with the custodian”<sup>54</sup>.

**c. The right of transportation the child in custody:**

The Algerian legislator has tried, through the Algerian Family Law, to address the issue of the custodian’s travel and transfer with the child, and its impact on the right to visitation, which has not received a great deal of attention in Algerian legislation, due to the lack of sufficient legal texts to resolve all the practical problems that arise regarding it. These problems can be limited to the issue of the ruling on transferring foster children inside and outside the national territory, for the purpose of permanent residence or out of necessity or need for that.

The issue of the custodian’s transfer of the child within the national territory for permanent residence is one of the issues that the Algerian legislator did not address with an explicit legal text, despite the issue’s great importance deserving of legal treatment, which opened the door for different legal scholars to return the issue for adjudication through the judiciary, as there are those who said that the silence of the legislator on this issue is an

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<sup>54</sup> M’sila Court Ruling No. 622/09, dated 12/20/2009.

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expression of leaving the custodian freedom to move as long as it is within the borders of the national territory.<sup>55</sup>

In light of this legal silence, the Supreme Court tried to address this issue despite the clear conflict in its jurisprudence, between allowing the custodian freedom to move, and restricting it to a specific distance to guarantee the visitor's right to visit the child.

Among the decisions in which the court did not restrict the transfer of the custodian to the child, and did not take into account the distance between the custodian and the holder of the right to visitation, we mention among them the following: "It is legally established that the distance between the custodian and the holder of the right of visitation and supervision is not considered a justification for the mother to lose the right of custody, and it does not prevent the use of the right to visit"<sup>56</sup>.

In the same context, the court affirmed the same approach in another decision that stated the following: "The distance between the custodial and the holder of the right of visitation and supervision, the six baruds (120 km) distance prescribed by the ancient jurists, does not prevent the use of that right in view of the development of modern means of transportation and transportation"<sup>57</sup>.

With regard to the concept of violation, there are decisions of the Supreme Court according to which the custodian's transfer of the child to the child was restricted by respecting the distance specified in the books of Maliki jurists, which is estimated at six curtains. Among these decisions, we mention what was stated in it: "It is established in Sharia and judiciary that the distance between the custodian and the holder of the right to visit the children in custody should not be more than six baruds (120 km), and therefore a ruling in violation of this principle is considered a mistake in applying the law. Whereas It is established - in the current case - that the distance between the custodian and the guardian of the children exceeds a thousand kilometers, so the Council's judges, by

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<sup>55</sup> Idris Al-Fakhouri, "Traveling with a Foster Child: A Study in Light of the Family Laws of the Maghreb Countries," *Journal of Legal, Administrative and Political Sciences*, no. 12 (2011): 2011. p. 182.

<sup>56</sup> The Supreme Council, Private Law Chamber, without file number 10/09/1968, Judges Bulletin, No. 2, 1969, p. 38.

<sup>57</sup> The Supreme Council, Private Law Chamber, without file number, 11/18/1970, Judges' Bulletin, No. 1, 1972, p. 67.

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assigning custody of the two children to their mother, have made a mistake in applying the law, and if that is the case, it is necessary to overturn the contested decision”<sup>58</sup>.

This confusion in the positions of the Supreme Court in this regard is due to the legislative shortcomings that affected the position of the Algerian legislator on many legal issues, which should have been decided by explicit legal text.

As for the issue of the necessity or need for the custodian to move with the child within the national territory, the Algerian legislator did not address this issue, and remained silent about it since this matter did not raise major problems compared to other issues in the same field. Therefore, there is nothing wrong with the custodian’s freedom of movement with the child in custody within the national territory as long as there is a necessity and need for that, and this movement is temporary and in the interest of the child in child custody<sup>59</sup>.

As for the issue of the custodial transfer of the child outside the national territory for the purpose of permanent residence and settlement, the Algerian legislator addressed this issue with the text of Article 69 of the Family Code, which stated: “If the person entrusted with the right of custody wants to settle in a foreign country, the decision is up to the judge in proving his custody or dropping it, taking into account the interests of the child in custody”.

It is noticeable from the text of this article that the Algerian legislator mentioned one issue in it, which is the custodian’s travel of the child outside the national territory for the purpose of permanent residence and settlement; This travel is restricted by the permission of the judge, who was granted wide discretion to allow this, to keep his custody in place or prevent him by dropping it, taking into account the interest of the child in custody on the one hand, and the right of equality between the custodian and the holder of the right to visit in terms of following up and supervising him financially and morally on the other hand.<sup>60</sup>

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<sup>58</sup> The Supreme Council, Personal Status Chamber, File No. 43594, 09/22/1986, Judicial Journal of 1992, Issue 4, p. 41.

<sup>59</sup> Saad Abd Elaaziz, Family Law in its New Clothes, Provisions on Marriage and Divorce after the Amendment, 4th Edition, Houma House, Algeria 2013, p. 142.

<sup>60</sup> Aissa Taiba, “The Right to Visit the Child in Custody and the Guarantees for Its Approval and Implementation in Light of Family Law and Judicial Jurisprudence,” *Journal of Law and Human Sciences* 11, no. 1 (2018): 276.

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Thus, it is necessary for the judge to grant this authority to protect the rights of the child and preserve his interest, or in other words, he will grant his license, taking into account the interest of the child in custody, as can be seen from the text of the article that it equates between men and women in custody, as both are subject to the judge's supervision, because it relates to the religious upbringing of the child for fear of being influenced by the foreign country's religion, customs and traditions, and so that the child remains subject to parental supervision.<sup>61</sup>

The Supreme Court also ruled in its decision issued on November 21, 1995, that the mother's residence abroad is one of the reasons for losing her custody and assigning it to the father, because it is impossible for this father to supervise his children residing with the custodian abroad, and it also deprives him of the right to visitation due to the distance<sup>62</sup>.

It should be noted that although the legislator explicitly stipulated that the right of guardianship of the child be assigned to the custodian in accordance with Article 87 of the Family Code, amended and supplemented by Order 05-02, which exempts the custodian from the obligation to obtain a license to carry out the administrative affairs of the child in custody, we have observed in practice that the custodian is not allowed to travel with the child in custody outside the national territory, except by possessing a license issued by the president of the court, even though it is mentioned in the ruling custody, and it exempts her from obtaining any such license.

Regarding the issue of the custodian's transfer of the child outside the national territory due to the necessity or need for it, the Algerian legislator was silent in text and jurisprudence about addressing this issue despite its great importance related to the rights of overlapping parties and varying according to multiple cases. The matter here was not left to the authority of the judge or to the approval of the person entitled to visitation. Rather, the custodian was given full freedom to travel with the child as soon as the custodian presented the divorce ruling that included the right of guardianship over the child, and a document proving the relationship of kinship, in addition to an individual passport for the minor.

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<sup>61</sup> Hamidou Zakia, "The Child's Interest in Maghreb Family Laws, "A Comparative Study" (University of Tlemce, 2005).

<sup>62</sup> Supreme Court Decision No. 408248,1995, Personal Status Chamber, first issue 2011, p. 244.

This is what was confirmed by the new amendment to the Family Law of 2005, in accordance with Article 87, paragraph 3, whereby the custodian - who is often represented by the mother - is now recognized as legal guardianship over the child under divorce only, even if the father is alive and enjoys full capacity, in addition to the presence of Some regulations that dropped the requirement of a judicial license for a sponsor wishing to travel with his sponsored person, and it only allowed him to present the sponsorship contract, while his husband who wanted to accompany the sponsored person was left with just his permission, if it was not mentioned in the sponsorship contract, because if he mentioned it, he does not need the sponsoring husband's license or the judge's license.

The issue of giving the custodian a kind of absolute freedom to travel with the child outside the national territory, whether there is a necessity or need for that or not, has become a dilemma that threatens the child in custody and the holder of the right to visit, especially since that travel involved bad intentions to find and be alone with him there without return. Therefore, it was necessary for the legislator to restrict the custodian's travel to the child due to necessity or need outside the country with the explicit and official approval of those who have the right to visit, while if the latter arbitrarily grants it despite the presence of a state of necessity or urgency that prompts the custodian to travel, the matter is referred to the judiciary to investigate and decide on the matter, and giving all the guarantees that make the return of the child in custody to the homeland certain.

The event of a divorce by mutual consent and the wife relinquishes custody to the husband, she has the right to withdraw her relinquishment later. Algerian jurisprudence has established the principle: The mother has the right to demand custody again after she relinquished it during the divorce by mutual consent, as long as she justified her request and had actual custody<sup>63</sup>. Another principle was also established, which states: The mother's right to custody is not forfeited simply by traveling and frequenting abroad, because the reason for the forfeit of custody is not work, study, or repeated legitimate travel, but rather the loss and chores resulting from that travail.

The custodial mother can involve relatives she trusts to care for the child in custody without blaming him for managing his affairs<sup>64</sup>.

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<sup>63</sup> Judicial Journal, Issue 1, 2021, p. 80.

<sup>64</sup> Judicial Journal, Issue 2, 2018, p. 85.

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Through what was mentioned above, we stand on the necessity of amending the Algerian Family Law and enriching it by allocating a significant number of articles to regulate how the right to custody is exercised and specifying its provisions in detail to facilitate the matter for personal status judges, as well as to reduce the disputes that occur between spouses regarding: alimony, rent allowance. The right to visitation and transfer of the child in custody.

#### **4. Conclusion:**

The conclusion of this study indicates that the Algerian Family Law includes several provisions to regulate custody, but many gaps have emerged through judicial application over more than forty years, rendering these provisions inconsistent with the new social and economic conditions of Algerian society. Family affairs judges, empowered by the issuance of the Civil and Administrative Procedures Law, have broad authority to quickly resolve cases related to alimony, temporary custody, housing, and visitation through orders on petitions subject to expedited enforcement. The absence of explicit legal texts addressing the issue of the custodian's movement with the child within the country has led to conflicting Supreme Court decisions, which alternately allow custodians freedom of movement and impose distance restrictions. The Algerian legislature has not regulated the child's movement within the country due to necessity, either in terms of text or jurisprudence. It has remained silent on this matter as it has not posed significant issues compared to other related matters. While the legislature addresses the custodian's relocation of the child outside the national territory for permanent residence under Article 69 of the Family Code, requiring judicial permission, it remains silent on the necessity or need for international relocation, granting custodians complete freedom to travel with the child abroad upon presenting a divorce ruling including custody rights, kinship documentation, and an individual passport for the minor.

The recommendations of this study emphasize the urgent need for the legislative authority to amend Algerian Family Law No. 84-11, which has been in effect for 40 years, by enriching all its sections, particularly those related to monitoring the child post-custody assignment, organizing visitation rights, and regulating transportation issues in custody. Additionally, Article 64 of the Family Code should be amended to specify conditions for visitation, including cases of cancellation, eligible petitioners, dates and locations, duration

of visitation periods, and methods of visitation when there is a significant distance between the custodian and the visitation rights holder, as well as penalties for violating visitation provisions. Effective mechanisms must be developed to protect the child in custody from abuse, such as adopting civil penalties similar to other Arab legislations that temporarily revoke custody from custodians who repeatedly refuse visitation or fail to visit for over three months without acceptable reasons. Implementing monitoring mechanisms to ensure custodians adhere to the custody agreement, such as appointing social assistants to supervise the custodian's role, is essential. Moreover, legislators should restrict the custodian's travel with the child abroad for urgent needs or necessities by requiring explicit and official consent from the visitation rights holder. If consent is arbitrarily withheld despite urgent circumstances, the issue should be referred to the judiciary with guarantees for the child's return to the home country. This conclusion highlights the pressing need to update and improve custody regulations in Algeria to align with current social and economic conditions and to provide better protection for children in custody.

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