

The Distance Restriction in Granting Custody between the Best Interest of the Child and the Rights of the Parents

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Abstract. The Algerian Family Law stipulates that custody is granted to one of the spouses after the dissolution of the marital bond, while the other party is granted visitation rights. However, the implementation of these rights raises several issues that hinder the child from fully enjoying their rights to care, supervision, and balanced upbringing. Moreover, it often renders visitation rights ineffective and deprives one parent of natural communication with the child. Custody rights, along with the corresponding visitation rights, are subject to several conditions that must be respected to ensure the child's best interest is protected and to maintain a balance between the rights of both parents. For various reasons, these rights may be limited or their implementation obstructed. This has led Islamic jurisprudence and judicial practice to adopt a set of principles and regulations to safeguard these rights, among which is the principle of the "distance restriction." This article aims to shed light on this overlooked aspect in legal rulings and judicial decisions, despite the many problems arising from its neglect and the existence of decisive court rulings on the matter, which ultimately affect both the child and the parents' rights.

1. INTRODUCTION

Custody is one of the most important consequences of the dissolution of the marital bond, as it aims to care for the child and provide a suitable environment for their physical and psychological development. However, the exercise of custody may give rise to several issues, including the custodial parent's change of residence and their relocation far from the parent entitled to visitation rights—an issue commonly referred to as the "distance restriction."

This restriction requires the custodial parent to ensure that the other parent can effectively exercise their visitation rights without undue obstacles. One of the main barriers to this right is geographical distance, which may prevent or hinder the non-custodial parent from exercising their right to visitation or seeing the child.

This restriction raises several questions regarding its legality, the conditions governing it, and its implications—particularly given the absence of an explicit provision in Algerian law defining or regulating its details.

1.1. Section One: The Concept of Distance Restriction and Its Legal Basis

Relocating the child from one city or country to another may result in the non-custodial parent losing the ability to supervise or care for the child through visitation. This is due to several reasons, such as long distances, the hardship of travel, time loss, and travel expenses on one hand, and the potential negative impact on the child's welfare on the otherⁱ. Therefore, the concept of "distance restriction" arises in assigning custody. It is a condition imposed on the custodial parent, relating to the place where custody is exercised and where the child resides. The custodial parent is not allowed to relocate or live with the child in a distant place that would prevent or hinder the other parent—who has visitation rights—from following up with the child and exercising their right to visitation.

The Algerian Supreme Court has ruled that: *"It is well established in jurisprudence and judicial practice that a person's right may only be restricted by what is prescribed by law. The right of parents to visit their child belongs to both of them, and the custodial parent must facilitate the other party's access to this right in the manner they see fit, without restriction, limitation, or surveillance."*

An earlier ruling also stated: *"According to Sharia, the distance between the custodian and the parent with visitation rights is not, in itself, a reason or justification to revoke the mother's custody or to prevent the exercise of visitation rights"*ⁱⁱⁱ.

However, the issue of distance has become increasingly problematic for legal scholars, due to the practical challenges it poses—affecting both the visiting parent and the child, who is the one most in need of protection^{iv}.

1.2. Subsection One: Definition of Distance Restriction

If the visitation location is a place where the child can receive care from the visiting parent—even if only for a few hours—then it should not cause embarrassment or discomfort for the visitor, such as being the home of their ex-spouse, who is now considered a stranger to them^v.

The custodial parent is therefore obliged not to change the residence of the child to a geographically distant location from the parent entitled to visitation, if such a move would hinder or prevent the latter from exercising their rights to visit or supervise the child's upbringing—unless judicial permission is obtained or both parties reach a mutual agreement^{vi}.

The distance restriction in assigning custody is tied to both the place where custody is exercised and the ability to carry out visitation rights. It requires that the custodial parent not relocate the child to a place that would prevent the visiting parent from exercising their right. Moving the child to an unsuitable or distant residence from the non-custodial parent may obstruct the visitation right and hinder the care of the child^{vii}.

The legislator has considered the best interest of the child when determining how custody is to be exercised. For this reason, Algerian Family Law does not impose strict mandatory rules but instead leaves such matters to the agreement of the two parties^{viii}. For instance, the parties can mutually agree on visitation schedules, and the judge respects such agreements. However, when issuing a ruling on visitation, the judge takes into account the child's age, and their physical and psychological condition—especially in the case of infants—or if custody is assigned to someone other than the parents^{ix}.

The legislator has also sought to harmonize the legal provisions related to custody, housing, and visitation rights. After assigning custody, the law addresses the right to housing by giving the obligated party the choice to either provide a residence for the custodial parent and child or to pay a rental allowance. This obligation to provide housing from the outset reflects the intention to preserve a friendly relationship that enables the obligated party to offer a suitable residence nearby, allowing them to visit the child easily and fulfill their responsibilities^x.

Moreover, the judge may rule on visitation rights even if neither party explicitly requests it. The organization of visitation rights is left to the agreement between the custodial parent and the visiting parent, including specifying the time and place of visits. This arrangement ensures that the child, the custodial parent, and the visiting parent are not harmed by the procedure^{xi}.

1.3. Subsection Two: The Legal Basis and Importance of the Distance Restriction

The Algerian legislator takes into account the best interest of the child when assigning custody. All custody-related rulings are governed by this principle—whether in the assignment, extension, or revocation of custody from the person to whom it has been granted. The legislator referenced this principle in five (5) out of eleven (11) articles that address custody provisions (Articles 62 to 72 of the Family Code), under Ordinance No. 05-02, which repealed Article 63 and amended certain other provisions. For this reason, judicial rulings on custody are largely discretionary, wherein the judge evaluates the child's best interest, which the legislator merely referenced without defining its scope or setting specific criteria for its application^{xii}.

Although the Algerian Family Code does not explicitly mention the “distance restriction” in relation to custody assignment, it can be inferred from several provisions—especially Article 64 of the Family Code, which stipulates that the best interest of the child must be taken into account in custody matters^{xiii}. Previously, Article 87 of the Family Code stated that legal guardianship remains with the father, even if the mother holds custody. Thus, the father retained guardianship over his minor children. After his death, the mother would assume that role. However, with the amendment to the Family Code through Ordinance No. 05-02, the revised Article 87 provides that, in the absence of the father or in the event of an impediment, the mother shall assume urgent responsibilities concerning the children. In the case of divorce, the judge grants guardianship to the parent who has been awarded custody of the children.

The primary objective of the legislator in relation to the distance restriction is to uphold the principle of protecting family bonds and the child's right to maintain a balanced relationship with both parents. This principle safeguards a range of the child's interests, which are clearly reflected in the legal definition of custody—particularly in the first paragraph of Article 62. Custody is defined as caring for the child, educating them, raising them in the religion of their father, and ensuring their protection in terms of health and morality. Therefore, after addressing the custody provisions, the law also regulates the right of visitation and access for the non-custodial parent.

The legislator, by imposing the distance restriction, aims to ensure the continuity of the relationship between the child and the non-custodial parent, so that visitation and contact are not severed. This must be achieved without the visiting parent having to endure hardships to carry out this right, and no obstacles should be placed in their path that could discourage them from maintaining their relationship or caring for the child. Custody must not be used as a means of revenge or as a tool to exclude or alienate the other parent from the life of the child. The ultimate goal is for the child to experience emotional and psychological stability, which they should not be deprived of due to the separation of their parents^{xiv}.

1.4. Section Two: The Legitimacy and Limits of the Distance Restriction

This restriction stipulates that custody may only be exercised if the custodial parent resides in the same city—or within a defined geographical proximity—as the legal guardian or the parent who has visitation rights.

This has raised questions regarding its legitimacy under both Islamic law and civil law, especially in the absence of clear and explicit legal provisions regulating it. However, the Algerian legislator has implicitly referenced it within the Family Code and judicial interpretations have supported its application. Nevertheless, this gives rise to practical issues related to whether it truly serves the best interest of the child, and how to balance this with the custodial parent's right to freedom of residence and movement on one hand, and the visitation rights of the other parent on the other.

1.5. Subsection One: The Legitimacy of the Distance Restriction

The legitimacy of this restriction lies primarily in its objective: protecting the best interest of the child. It prevents the use of custody as a tool to distance the child from the other parent who is legally entitled to visitation, or to deny that right altogether. It is the child's right—and in their best interest—to maintain a relationship with both parents and not be deprived of either. Visitation should not become an opportunity for one parent to settle scores with the other, nor should it be manipulated by the custodial parent to deprive the child of this essential right^{xv}.

Although Algerian law does not explicitly mention the distance restriction, Tunisian law—specifically Article 61 of the Personal Status Code—does include it, affirming the child's right to maintain contact with both parents. The article states: *“If the custodial parent travels in a way that involves relocating to a distance that makes it difficult for the guardian to fulfill their duties toward the child, custody is revoked”*^{xvi}.

Therefore, the distance restriction is considered a means of protecting shared and balanced rights—even if some parties to the relationship are unaware of it. It is a right for the custodial parent, as it supports the balanced upbringing of the child who benefits from the care of both parents, even if physically distant from one of them^{xvii}. It is also a right for the child to receive care from both parents, and a right for the non-custodial guardian, as it guarantees their right to see their child and experience the emotional bond of parenthood. Thus, it reinforces the right to visitation and to follow up on the child's upbringing^{xviii}.

1.6. Subsection Two: Limits of Applying the Distance Restriction and the Position of Algerian Courts

The relocation of the custodial parent and child outside national territory may be considered a restriction not merely related to distance, but rather to national borders. Here, relocation or settlement refers to *residency*, not merely temporary travel with the child for purposes such as visiting relatives, leisure, or fulfilling specific needs.

Additionally, if the custodial parent (typically the mother) travels abroad, this does not automatically revoke her custodial rights simply due to travel or repeated visits abroad. The cause for revoking custody is not lawful work, study, or travel itself, but rather any resulting neglect or abandonment caused by such travel. A custodial mother may delegate care to trusted relatives without necessarily being constantly present to manage the child's affairs.

According to Article 69 of the Family Code: if the person entrusted with custody wishes to settle in a foreign country, the judge may either uphold or revoke custody, with due consideration to the best interest of the child. In such cases, custody is not automatically revoked unless the judge determines otherwise and is convinced that the child's best interest lies in staying with the custodial parent, even if residing abroad^{xxix}.

The judge has the authority to decide whether to uphold or revoke the mother's custody based on the best interest of the child, without infringing on the father's rights and interests. Therefore, emigration abroad is not considered a mandatory ground for custody revocation, unlike the cases of marriage to someone who is not a close relative (mahram) or the voluntary renunciation of custody^{xx}. The reasons for emigration, the destination country, and the best interests of the child and both parents—especially concerning visitation rights—must all be taken into account^{xxi}.

The Algerian Supreme Court has held that there should be no distinction between whether the destination country is Muslim or non-Muslim, as long as both parents reside in the same foreign country. This was affirmed in a ruling issued on May 8, 2002, which

stated:

"Custody is not revoked from the mother if both parents reside in the same foreign country, because in such a case, the intended purpose of revocation—namely the father's ability to visit and supervise his children—no longer applies^{xxii}."

This view differs from the opinion held by some scholars—based on other judicial rulings, which carry more weight—who argue for a distinction between Muslim and non-Muslim foreign countries, out of concern for the child's religious upbringing^{xxiii}.

The Algerian Supreme Court, in a decision dated December 25, 1989, ruled:

"In matters of custody, it is judicially established that if both parents reside in a non-Muslim foreign country and they dispute custody in Algeria, the parent residing in Algeria has greater entitlement to custody, even if the mother is non-Muslim^{xxiv}."

However, the Supreme Court also issued a decision on March 12, 2008, based on Article 62 of the Family Code, allowing for the assignment of custody to a mother residing outside Algeria, in consideration of the children's best interest. The ruling stated:

"It is evident from the contested judgment that the appellate judges granted custody to the mother, who resides in France, taking into account the children's best interest and the fact that they are enrolled in school there. This reasoning is sufficient, as the child's best interest takes precedence in custody decisions^{xxv}."

This ruling was made despite the fact that it affected the father's visitation rights—rights that are legally protected.

While the Algerian Family Code does not specify a fixed distance that would constitute a binding restriction when custody is assigned abroad, the situation is different within the national territory. In such cases, judicial interpretations are guided by principles derived from Islamic Sharia law.

While the distance restriction is not applied automatically within national territory, judges in Algeria consider the specific circumstances of each case—such as the actual distance involved, its impact on the child's best interest, the reasons for relocation (e.g., marriage, work), the non-custodial parent's ability to travel (visitation rights), security conditions, and the availability of schools or medical services in the new location.

Judicial practice in Algeria tends to reject the relocation of the child by the custodial parent to a distant place without a strong justification or a judicial authorization. In cases where harm to the father's rights is proven, courts may decide to revoke custody or modify its conditions. However, the courts do not categorically prohibit relocation, as it depends on several conditions, such as:

- Written consent from the other parent,
- Obtaining judicial permission,
- Providing guarantees that the other parent can still exercise visitation rights.

The issue of distance is important because it may prevent the non-custodial parent from exercising visitation rights and monitoring the child's well-being^{xxvi}.

Algerian courts have adopted the same distance threshold as established by Islamic jurists, known as "masāfat al-qaṣr" (the distance that permits shortening prayers while traveling), which is six burūd^{xxvii}—equivalent to 72 miles. This distance is intended to ensure that the custodial parent does not cut off communication between the child and their father or guardians. In modern measurement, this is approximately 122 to 144 kilometers, based on the definition of a mile as 1.8 to 2 kilometers^{xxviii}.

Such a distance can separate two cities within Algeria. Given the vast size of the country, the distance between two Algerian cities may, in some cases, exceed that between Algeria and some neighboring countries.

The Supreme Court has ruled that it is well-established in both jurisprudence and judicial practice that the distance between the custodial parent and the parent with visitation and oversight rights over the children must not exceed six burūd^{xxix}.

Regarding the issue of distance, a decision dated November 21, 1995, stated:

"The mother's residence abroad constitutes grounds for revoking her custody and transferring it to the father, as it becomes impossible for the father to supervise his children living with the custodial mother abroad, and to exercise his visitation rights due to the distance^{xxx}."

The Supreme Court—following the opinion of the majority of Islamic jurists—has generally required the custodial parent not to move the child a long distance that would prevent the father from visiting and caring for his child. This is evident in a Supreme Court ruling which stated:

"It is established in jurisprudence and case law that the distance for the parent with visitation and oversight rights over the children must not exceed six burūd^{xxxi}."

Thus, any judicial ruling that contradicts this principle is considered a misapplication of the law. For example, if the distance between the custodial parent and the child's guardian exceeds 1,000 kilometers, assigning custody to the mother in such a case would be deemed a legal error on the part of the court^{xxxii}.

However, some scholars have argued that the precedent set by the Supreme Court—that the distance between the custodial parent and the parent with visitation rights must not exceed six burūd—has lost its practical relevance. This view is based on the fact that modern technologies have greatly facilitated communication between children and their parents, shortened distances,

and diversified visitation methods^{xxxiii}.

Indeed, understanding visitation in its general sense—where the child is taken for specific hours during the week, on weekends, and during religious and national holidays in alternation—overlooks the importance of ongoing care and oversight. It also ignores the burdens placed on the parent with visitation rights, which may ultimately lead to the breakdown of this relationship.

Restricting the custodial parent from leaving the province or country with the child—without the consent of the parent with visitation rights—is the judicially adopted solution. The custodial parent may travel with the child, as long as it does not harm the other party's rights, such as when both parents agree on the nature and conditions of the move—especially if the child's interest requires it, e.g., travel for medical treatment, education, or security—or in cases where judicial permission for relocation has been granted^{xxxiv}.

In other cases of travel or migration, harm may result for both the child and the non-custodial parent. In such scenarios, the court may revoke or rearrange custody to protect the child's best interest. Therefore, the custodial parent must reside in the same city or at least within a reasonable geographical distance.

From the analysis of Article 69 of the Family Code, the following conclusions can be drawn regarding the legislator's handling of child relocation:

1. All individuals with custodial rights are treated equally with regard to traveling abroad with the child.
2. The authority to approve travel and relocation with the child is left to the judge's discretion.
3. The child's best interest is the key consideration in whether travel is permitted or denied.
4. The article refers to permanent relocation, not temporary travel^{xxxv}.

Restricting the interpretation of the distance condition to international travel—based only on the Supreme Court's treatment of cases involving foreign travel—lacks solid justification. Islamic jurisprudence did not define geographic borders in its rulings, but rather focused on the child's best interest and, by extension, the rights of the non-custodial parent.

2. CONCLUSION

The distance restriction in granting custody serves as a mechanism to protect the relationship between the child and both parents after separation, while prioritizing the child's best interest. Since its application is left to the judge's discretion, codifying it into explicit legal provisions may help reduce family disputes, ease the burden on courts, and offer clearer guarantees for both parties. This is especially important as it requires a delicate balance between the child's needs and parental rights.

Custody arrangements where the child resides in the father's home or with the custodial parent in the former marital home generally do not raise issues related to the distance condition. Problems arise, however, when the custodial parent moves the child far away, making it difficult for the other parent to visit and care for the child. This effectively deprives the child of proper care and balanced parental relationships.

As the Algerian Family Code currently lacks any specific provision on this matter, and Supreme Court rulings remain inconsistent, the following recommendations are proposed:

3. RECOMMENDATIONS

- a. Introduce a clear legal provision in the Algerian Family Code regulating the distance restriction and its conditions.
- b. Strengthen the role of family court judges in monitoring relocation decisions by the custodial parent, especially in urgent cases.
- c. Ensure that amicable divorce agreements include explicit clauses on the child's residence.
- d. Reinforce the importance of visitation rights by detailing them in legislation and favoring their enforcement in court rulings.

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