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Reforming the Custody System: Loss of Custody and Relinquishment of Custody as Examples

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Abstract- This study examines the legal and judicial framework governing the loss and relinquishment of child custody under Moroccan family law. It highlights the legislative philosophy underlying custody as a mechanism to protect the best interests of the child while ensuring parental responsibility. Based on a detailed analysis of judicial decisions of the Moroccan Court of Cassation, the paper identifies the main causes of custody termination, including circumvention of visitation rights, remarriage of the custodial mother to a foreigner, and voluntary or implicit relinquishment. It also analyses inconsistencies and ambiguities within Articles 173–176 of the Family Code and evaluates their practical application in light of Maliki jurisprudence. The research concludes that the current framework requires reform to ensure gender equality, protect the psychological well-being of the child, and prevent misuse of custody and visitation provisions. Recommendations include legal recognition of joint custody, clarification of waiver conditions, and stronger judicial oversight to safeguard the child's best interests.

Keywords: Child custody; Moroccan Family Code; Court of Cassation; Judicial interpretation; Custodial rights; Relinquishment of custody; Visitation rights; Parental equality; Best interests of the child; Family law reform.

Introduction

Custody ⁽¹⁾is considered one of the fundamental rights of the ward, which has been established for the purpose of caring for and raising him, acting in his best interests, and preserving his health and morals. The custodian must do everything possible to achieve these interests. The guardian generally bears great responsibilities towards the ward, as he must take all necessary measures to protect the ward and ensure his physical and mental safety. He must also take care of the ward's affairs in terms of discipline and academic guidance, and he must notify the public prosecutor of any harm suffered by the ward so that the public prosecutor can fulfil his duty to protect the ward's rights.

¹ Moroccan lawmakers define custody in Article 163 of the Code as: "Custody is the protection of the child from harm and the fulfilment of his or her upbringing and interests."

Given the importance of custody and its impact on the upbringing and care of the child, the legislator has surrounded it with a set of guarantees to protect the best interests of the child in custody. This is evident in the fact that custody of children is assigned to both parents as long as the marital relationship exists. In the event of its dissolution, custody is assigned to the mother, then to the father, then to the mother's mother. If this is not possible, the judge may decide to grant it to one of the most eligible relatives, in accordance with the conditions set out in Article 173 of the Code.

Furthermore, the right to custody is not absolute and permanent, as circumstances may arise that prevent or revoke it, such as the failure to meet one of the conditions for eligibility, such as lack of integrity and honesty, inability to raise the child, marriage of the custodial mother or non-mother custodian, depending on the circumstances, silence on the part of the person entitled to custody, or difficulty or impossibility of the custodian monitoring the child's circumstances, as well as due to circumvention in the implementation of the visitation decision and failure to enable the person entitled to visit the child, or due to the waiver of custody by the person entitled to it in other cases.

In this context, the legislator has given the judiciary the right to monitor and supervise the proper application of the provisions contained in the section on custody and has allowed it to take all necessary measures to ensure the growth of the child under the custody of those who provide him or her with the necessary protection and care.

However, despite the importance of the legal protection established by the legislator to protect the child in custody, it remains insufficient, as judicial practice in this regard has revealed a number of practical problems, either due to the ambiguity of certain legal provisions, such as those relating to the silence of the person entitled to custody or the problem of travelling with the child outside the country... or because of the legislator's silence on the regulation of certain issues related to the interests of the child in custody, such as the relinquishment of custody, the issue of the law applicable to custody in mixed marriages, and the issue of the custodian's presence with the child abroad and the return of the legal representative to the country.

We will therefore discuss some of the issues related to the loss and relinquishment of custody, focusing on the most important judicial rulings issued by the Court of Cassation on the subject, as follows:

- The issue of circumvention in the implementation of visitation rights;

- The issue of the loss of custody due to the mother's marriage to a foreigner;
- Optional (explicit) waiver of custody;
- Implied waiver of custody (silence on the part of the person entitled to custody).

To answer these questions, it would be useful to divide the topic into two main areas:

First axis: The judiciary's handling of custody revocation rulings

First: The judiciary's handling of the issue of circumvention in the implementation of the decision Visitation rights

Second: The issue of revocation of custody due to the mother's marriage to a foreigner other than the custodian

Second axis: The judiciary's handling of the issue of relinquishing custody

First: Optional (explicit) relinquishment of custody

Second: Implied waiver of custody (silence of the person entitled to custody)

First axis: The judiciary's handling of the provisions on the loss of custody

The legal provisions governing the termination of custody raise a number of issues when applied in family courts, the most important of which are the problem of circumvention in the implementation of visitation rights (first) and the problem of termination of custody due to the marriage of the custodial mother (second).

First: The problem of circumvention in the implementation of visitation rights

Article 184 of the Family Code stipulates that "the court shall take such measures as it deems appropriate, including modifying the visitation arrangements and revoking custody rights in cases of breach or circumvention of the agreement or decision governing visitation."

A breach of the visitation order is established when the custodian expressly refuses to allow the person entitled to visit the child to exercise that right in accordance with the terms specified in the agreement or court order. As for circumvention of the decision, this occurs when there is no

explicit refusal on the part of the custodian, but instead the custodian resorts to fraudulent means with the intention of depriving the person entitled to visit the child of this visit.

Thus, in order to ensure the implementation of the agreement or ruling governing visitation rights, the Family Code grants the court full authority to take appropriate measures, such as modifying the visitation schedule and revoking custody rights from anyone who violates or circumvents the agreement. ⁽²⁾

Whether it is a matter of fraud or breach of the agreement or decision governing the visit, the court hearing the case retains the power to rule to terminate custody of the person proven to have committed fraud or breached the decision. In this regard, the Court of Cassation ruled in a decision issued on 17 October 2017 that breach of the decision governing the visit requires a ruling to revoke custody due to breach of the right of visitation, stating: "However, since the subject of the request is the revocation of custody due to breach of the right of visitation, and since the court has ruled accordingly, it has reached the conclusion that the dispute should be settled, as long as it has been proven from the facts that she has violated the visitation order. Based on this reasoning derived from the facts of the case presented to the judges, the court compensates for the criticism and therefore the request must be rejected." ⁽³⁾

If the visit of the child to the non-custodial parent is genuine, it largely involves the duty of supervision that the father bears as the legal guardian of the child. Therefore, the courts did not hesitate to rule to revoke custody whenever it was proven that this supervision was impeded, by circumventing the implementation of the visitation order through evading to enable one parent to visit the child and maintain family ties with him or her, sometimes by devious and deceitful means, and sometimes by the use of force. This was confirmed by a decision of the Court of Cassation issued on 30/01/2018, in which it considered that the appellant's refusal to allow the respondent to exercise his right to visit his daughter after she was insulted, attacked and abused by her father invalidates her custody. The decision states "The appellant refused to allow the respondent to exercise his right to visit his daughter,

insulted and attacked him, and her father assaulted and expelled him, which indicates her violation of the visitation order. This was confirmed when the court gave her three months to comply with the above-mentioned decision, to no avail, and ruled to revoke her right to custody. The court applied Article 184 of the Code and justified its decision correctly. The appeal was unfounded." ⁽⁴⁾

It is also possible to prove a breach of the visitation order by the presence of the child with his mother in a place far from the father's supervision, as confirmed by another decision of the same court issued on 16 February 2016, which considered that the change of residence of the custodian and her move to another city without the required notification constituted a violation of the right of visitation that warranted the revocation of custody. The decision stated: "The appellant's change of residence and her move from the city of Agadir to the city of Dakhla without the required notification so that he could follow his daughter, and his inability to maintain contact with his daughter on two occasions and his request for an urgent order to enable him to implement the visitation arrangements specified in the divorce ruling, and his inability to do so according to the bare inspection report, constitutes a violation of visitation rights, requiring the termination of custody for violation of the visitation regime, which has no effect on the age of the child." ⁽⁵⁾

In this context, the young age of the child does not constitute grounds for denying the custodian's violation of the visitation order, as Article 184 does not specify a specific age for the child in this regard. This was confirmed by a decision of the Court of Cassation issued on 4 December 2018, which stated "When the court rejected the request to revoke the custody of the child in question, despite the proven breach of the visitation order, it justified its decision on the grounds that the child was less than four years old and that separating him from his mother would cause him great harm, even though Article 184 does not specify a specific age for the child to apply its provisions regarding visitation, and even though depriving the son of his relationship with his father causes him great harm,

²Salah al-Din al-Taous: "*Visiting the Custodial Child: A Comparative Study*," thesis for completion of a postgraduate diploma in advanced studies at the Family and Migration Legislation Training and Research Unit, Mohammed I University, Faculty of Legal, Economic and Social Sciences, Oujda, academic year 2007/2008, p. 58.

³Decision of the Court of Cassation No. 523 dated 17 October 2017 in Sharia case No. 900/2/1/2016, published in the 2017 annual report of the Court of Cassation, Amnia Press, Rabat, p. 42.

⁴Court of Cassation Decision No. 74 dated 30/01/2018 in Sharia case No. 649/2/1/2016 (unpublished).

⁵Court of Cassation Decision No. 168 dated 16/02/2016 in Sharia case No. 717/2/1/2015, published in the Court of Cassation Decisions Bulletin, Issue 22, Year 2015, p. 67.

See also Court of Cassation Decision No. 418 dated 16 August 2011 in Sharia Case No. 305/2/1/2010, cited by Ibrahim Bahmani, *Judicial Action in Family Cases*, Dar Al-Salam Press, first edition, 2018, p. 290.

it misapplied the article invoked and rendered its decision subject to cassation." ⁽⁶⁾

In the same context, the Court of Cassation did not consider the custodial parent's compliance with the visitation order for intermittent periods as justification for denying her violation of the visitation order. This was clarified in a decision issued by the Court of Cassation on 7 April 2015, which stated "The custodian's breach of the visitation order justifies the court's decision to terminate her custody and hand the child over to his father for custody, as he is next in line after the mother in terms of custody entitlement. provided that there is nothing in the file that would disqualify him. Article 184 of the Civil Code has been applied, and the best interests of the child, which lie in his father's supervision and care, have been assessed. The court did not consider the applicant's compliance with the visitation order for intermittent periods to be a justification for denying her breach." ⁽⁷⁾

It should be noted that the Moroccan legislator, through the provisions of the Family Code, did not stipulate punitive measures when regulating custody provisions, which criminalise the custodian's refusal to hand over the child to the person who has the right to visitation. However, we find that the Penal Code stipulates the offence of failing to hand over the child to the person who has the right to claim him or her in Article 476, which states that "anyone who is entrusted with the care of a child and refuses to hand him or her over to the person who has the right to claim him or her shall be punished with imprisonment for a period of one month to one year."

This was confirmed by a decision of the Court of Cassation issued on 5 November 2019, which ruled that the conviction of a custodian for refusing to hand over a child to the person who has the right to claim him or her requires the termination of custody and the handover of the child to his or her father. The decision stated "The conviction of the custodian for refusing to hand over a child to the person who has the right to claim him, as this deprives the claimant of visiting and supervising his child, , the court considered it a violation of the visitation order and ruled to terminate her custody of her son and hand him over to his father, who is next in line in the order of custody, as long as the file contains no evidence to

disqualify him. It therefore applied Article 184 of the Civil Code correctly." ⁽⁸⁾

In this context, the role of the Public Prosecution in protecting the child criminally in the event that a final or provisionally enforceable judgment or decision is issued awarding custody to one of the parents or to others, and the person who has custody of the child refuses to hand him or her over to the person who has the right to custody, by initiating proceedings against the person who refuses to hand over the child in custody, in accordance with Article 477 of the Code of Criminal Procedure, which states that "if a court ruling on custody is issued and is final or provisionally enforceable, the father, mother or any person who refuses to hand over the minor to the person entitled to claim custody, as well as anyone who abducts or entices the minor, even without deception or violence or coercing another person to entice or abduct the minor from the person entrusted with his or her custody or from the place where he or she was placed, shall be punished by imprisonment for a term of one month to one year and a fine of two hundred to one thousand dirhams. If the perpetrator of the crime has been deprived of parental authority over the minor, the imprisonment may be up to three years.

It is clear that the above chapter applies to any person who has custody of the child, such as the mother, father, maternal grandmother, and other relatives to whom custody of the child has been entrusted, or any foreign person who has taken custody of the child and has not handed him over to the person who has legal custody of him after the issuance of the judgment or decision. The criminal legislator has also increased the penalty if the perpetrator of the crime has been deprived of parental authority over the minor, and the crime of failure to hand over the child requires an explicit demand for the child and a complete refusal to hand him or her over. ⁽⁹⁾

We conclude from the above that the issue of visiting the child is fraught with a number of practical difficulties. After the dissolution of the marital relationship between the spouses and the awarding of custody to one of the parents, there is often a lack of goodwill and respect between the parties. The non-custodial parent may attempt to exercise their right to visit the child, but may encounter obstruction from the custodial

⁶ Court of Cassation Decision No. 652 dated 04/12/2018 in Sharia File No. 70/2/1/2018 (unpublished).

⁷ Court of Cassation Decision No. 165/1 dated 07/04/2015 in Sharia case No. 312/2/1/2014, published in the Court of Cassation Decisions Bulletin, Issue 22, 2015, p. 51.

⁸ Court of Cassation Decision No. 704 dated 05/11/2019 in Sharia Case No. 719/2/1/2018 (unpublished).

⁹ Adolphe Rioulet: *"Criminal Law in Explanations"* (no edition mentioned), 1990, Publications of the Association for the Development of Judicial Research and Studies, Rabat, Morocco, p. 600.

parent, by refusing to comply with the visitation order, changing their place of residence without notifying the other party, or refusing to hand over the child to the person who has the right to visit them.

When these acts are proven, custody is revoked from the custodian who has violated his obligation to implement the visitation order, and compliance with the visitation order for intermittent periods does not help him to negate this violation. The judiciary often addresses this circumvention and takes a strict approach in dealing with those who refuse to implement the visitation order in order to protect the child and the non-custodial parent.

By granting the judiciary the right to monitor and supervise the proper application of the provisions contained in the section on custody and allowing it to take all necessary measures to ensure the growth of the child in the custody of those who provide him or her with the necessary protection and care, the legislator has succeeded in ensuring the effectiveness and efficiency of the preservation and protection of the rights of the child in custody.

We believe that failure to comply with the visitation schedule should not directly result in the loss of custody, as this would be contrary to the philosophy of the legislator, which places the interests of the child above all other considerations. Instead, a graduated scale of penalties could be introduced, such as imposing a financial penalty on the offender, with the loss of custody only being considered in cases of continued non-compliance.

Second: The issue of (loss of custody due to marriage) (the custodian's marriage to a foreigner)

(The issue of forfeiture of custody due to marriage to a foreigner unrelated to the child)

The marriage of the custodian to someone who is not a relative of the child (a stranger to the child) is one of the reasons that lead to the loss of custody. This means that any wife who has been divorced from her husband by a court ruling and has been granted custody of her children from him loses her right to custody as soon as she marries someone who is not related to the child. This is a general rule derived from the noble hadith, in which the Prophet (peace be upon him) said, "You are more entitled to him as long as you are not married."¹⁰

However, this condition is absolute, as it excludes married foster mothers, whether the husband is a foreigner or a close relative of the child. ⁽¹¹⁾Some Maliki and Hanafi jurists have permitted custody to be granted to women married to husbands who are related to the children, which has been adopted by the Family Code, as it has not taken this rule to its absolute conclusion, but has included some exceptions where custody is not forfeited despite the marriage of the custodian. A distinction is made between the marriage of a custodian who is not the mother (Article 174 of the Code) in the following two cases: 1- If her husband is a close relative or legal representative of the child; 2- If she is the legal representative of the child. With regard to the marriage of the custodian who is the mother (Article 175 of the Code) in the following cases:

- If the child is under seven years of age, or if separation from her would cause him harm;
- If the child has an illness or disability that makes it impossible for anyone other than the mother to care for him;
- If her husband is a close relative or the legal guardian of the child;
- If she is the legal representative of the child.

It is thus clear that it has become difficult to terminate the mother's custody despite her remarriage in light of these conditions, because the best interests of the child require in most cases that he remain with his mother. This was confirmed by the Court of Cassation in a ruling issued on 22 March 2011, which ruled that the child's anaemia () meant that he needed one of his parents, and that the most suitable parent was the mother, who was the subject of the request. The ruling stated that her custody should not be revoked, and stated: "However, when the court found during the hearing of , which was conducted in the presence of both parties and the child, that the requested custody of should be revoked, and that the child clung to the latter when he began to cry for fear of being separated from his mother, and that he was suffering from anaemia, which makes him in need of one of his parents, and that the former is his mother, the defendant. Based on this, the court awarded custody to the defendant, thereby applying Article 175 of the Family Code and not violating the provisions of the articles cited. The court's

¹⁰ Jamal al-Din ibn Yusuf al-Zayla'i: "Raising the Banner in the Exegesis of the Hadiths of Guidance," Part III, first edition, Dar al-Hadith Press, (no publisher mentioned), 1995, p. 546.

¹¹ Abdelaziz Haddoui: "Divorce and Practical Observations in Light of the Family Code and Islamic Law," first edition , (no publisher mentioned), 2014, p. 106.

decision was sufficiently reasoned and not based on unfounded grounds.¹²

In order to give priority to the best interests of the child in the custody of the foster mother, the Court of First Instance in Midelt issued a preliminary ruling⁽¹³⁾ rejecting the request to terminate the mother's custody due to her marriage. The ruling was notable for its reliance on unprecedented grounds, considering that the potential psychological harm to the eight-year-old child in the event of a change in her custody environment required that her best interests be given priority over those of the father and that custody be retained by the mother despite her marriage to a man who was not related to the child.

The details of this case go back to when the plaintiff father submitted an editorial claiming that the defendant (the custodial mother), who is divorced from him and with whom he has a daughter born in 2014, married another man who is not her mahram. for which he sought a ruling accepting the request in form and, in substance, ruling to remove custody of the child from her mother and assign it to him.

This judicial ruling drew its reference from a previous decision by the Court of Cassation issued on 20 May 2014, in which it ruled that: "... The two children live with their paternal grandfather, the appellant, and are under his actual custody because their mother has relinquished her actual custody in his favour. They enjoy psychological stability with him and have achieved good academic results. It is in their best interests to remain with their grandfather, the appellant, as long as they have not reached the age of discretion..."⁽¹⁴⁾

Thus, judgments issued to revoke custody due to marriage to a non-relative are temporary in nature⁽¹⁵⁾ and remain in effect as long as the reasons for them remain valid. If it becomes clear that the new situation resulting from the custodian's marriage is clearly detrimental to the child, the provisions allowing the court to reconsider custody may be adopted in accordance with the last paragraph of Article 173, which states: "If a change occurs that is detrimental to the child, the court may reconsider custody." Provisions allowing the court to review custody may be adopted in accordance with the last paragraph of Article 173, which states: "If a change in the custodian's

situation is likely to harm the child, custody shall be revoked and transferred to the next person in line."

It is worth noting that marriage between a custodian and a foreigner is restricted to women, not men, according to the provisions of Articles 174 and 175 of the Code, which raises the issue of discrimination and inequality between a divorced man and his ex-wife, as there is no justification for restricting the rights of women, especially mothers, to custody on the grounds that they are married to foreigners. The fact is that the father may also be married to a foreigner.

Therefore, Moroccan lawmakers are required to review Articles 174 and 175 of the Code in a manner that allows men and women to benefit from their provisions on an equal footing, especially since reality has proven that stepmothers often neglect, mistreat, and harm their stepchildren more than foreign spouses. It is therefore inappropriate to apply these two articles in the context of a code that affirms the principle of equality in its preamble.

The second axis: the judiciary's handling of the issue of relinquishing custody

The relinquishment of custody is a voluntary act whereby the person who has custody relinquishes it, with or without cause, to the next custodian. An example of this is when a mother relinquishes custody of her children to their father, which can be referred to as voluntary (explicit) relinquishment⁽¹⁶⁾ of custody (first). The waiver may be implicit, by not claiming custody rights for a full year after the cause of forfeiture or death of the custodian (second).

First: Optional (explicit) waiver of custody

The issue of relinquishing custody is linked to an equally important question: whether custody is truly for the benefit of the child, obliging the custodian to fulfil their duty, or whether it is a right of the custodian that cannot be enforced and can be relinquished like any other right.

Does this really lead to a ruling that custody is permanently forfeited by those who are entitled to it? Or can it be returned

¹²Court of Cassation Decision No. 112, dated 22/03/2011, Sharia File No. 675/2/1/2008 (unpublished).

¹³Judgment of the Court of First Instance in Midelt in case no. 63, issued on 29/09/2022 (unpublished).

¹⁴ Court of Cassation Decision No. 388 dated 20/05/2014, Sharia case No. 401/2/1/2013, (unpublished).

¹⁵ Sameh Sayed Mohamed: "Practical Problems in Personal Status Laws in Egypt and Arab Countries," Dar Al-Ma'arif, Egypt 2010, p. 126.

¹⁶ Muhammad al-Kashbour: "Custody Rulings: A Study in Maliki Jurisprudence and the Family Code," Al-Najah al-Jadida Press, Al-Bayda, first edition, 2004, p. 89.

to the person who waived it in order to protect the rights of the child and look after his or her interests?

To answer these questions, we will first discuss some of the different jurisprudential opinions on the adaptation of the right to custody, as the jurisprudential disagreement in this context has been divided into several trends, the most prominent of which are:

- The first jurisprudential trend: considers that "custody is an exclusive right of God Almighty, and therefore cannot be waived or relinquished by the custodian."
- The second school of thought considers custody to be the right of the custodian, as it is established for her as soon as her child is born and, according to the legal principle that a mother cannot harm her child because he is part of her, she is more entitled than anyone else to his custody.⁽¹⁷⁾
- The third view is that custody is the exclusive right of the child and an obligation on the custodian, who is compelled to fulfil it, because from the moment of birth, the child is entitled to several rights, such as the right to life and upbringing and the right to be cared for by his mother.
- The fourth view considers it a right of both the custodian and the child, and that whenever it is possible to reconcile these rights, reconciliation must be sought, but if they conflict, the right of the child takes precedence as it is the stronger of the two rights.⁽¹⁸⁾

Given the differences among jurists regarding the classification of custody, Moroccan lawmakers settled the matter and considered it a right of the custodian. It suffices to refer to the repealed Personal Status Code to see from its texts that lawmakers chose to adopt the well-known Maliki school of thought when they stipulated in

Article 106 of the repealed Personal Status Code⁽¹⁹⁾ that "the silence of the person who has the right of custody for a period of one year after learning of the entry shall result in the loss of his custody" and allowed the wife to seek *khul'* (divorce) for something related to the rights of the children, unless she was insolvent.⁽²⁰⁾ All of this confirms that the code considered custody to be an exclusive right of the custodian.⁽²¹⁾

It is clear that the Moroccan legislator's view of custody rights has changed significantly,⁽²²⁾ It has become a right of the child alone and a duty incumbent upon the custodian, through the emphasis on the need to preserve the rights of the child by incorporating the provisions of international conventions ratified by Morocco and ensuring the best interests of the child within the legal provisions of the Family Code. This is implicitly derived from the provisions of the first paragraph of Article 163 of the current Family Code,⁽²³⁾ and explicitly from the provisions of Article 54 of the same Code, which states that: "... Children have the following rights over their parents ... 3-Descend, custody and maintenance in accordance with the provisions of Book III of this Code" And from the provisions of Article 164 of the same Code, which stipulates the following: "Custody is one of the duties of the parents as long as the marital relationship exists."

Therefore, it is most likely that custody is a right of the child, because the legislator's intention was based on achieving the child's best interests, which are realised by ensuring his or her proper care and upbringing. Consequently, the person most capable of doing so is the most entitled to it, because the intention is to achieve the best interests of the child and not the best interests of the person entitled to custody.⁽²⁴⁾

While jurisprudence has addressed the issue of relinquishing custody, Moroccan lawmakers have remained silent on regulating it, both in the repealed Personal Status Code and in the current Family Code. This has prompted the Moroccan judiciary, particularly the Court of Cassation, to

¹⁷ Mamdouh Azmi: "Custody Rulings between Jurisprudence and Judiciary," *Dar al-Fikr al-Jami'i*, Alexandria, 1997, p. 9.

¹⁸ Ibn Abidin quotes here a fatwa by Abu al-Sa'ud ruling that if a wife waives her right to custody, she cannot waive the right of the child—the ward—because the strongest of the two rights is custody of the child.

- Ibn Abidin: "Rad al-Mukhtar 'ala al-Durr al-Mukhtar," *Dar al-Fikr*, Beirut, second edition, 1996, vol. 3, p. 559.

¹⁹ Dahir Sharif 1-93-347, issued on 22 Rabi' al- , 1414 AH (10 September 1993), published in the Official Gazette No. 4222 on 29 September 1993, p. 1833.

²⁰ See Chapter 65 of the repealed Personal Status Code.

²¹ Wafa Al-Loda, "Judicial Protection of the Child in the Family Code," thesis for a postgraduate diploma, Abdelmalek

Essaadi University, Faculty of Legal, Economic and Social Sciences, Tangier, 2005/2006, p. 125.

²² Mohammed Al-Kashbour: "Custody Rulings," a study in Maliki jurisprudence and the Family Code, Al-Najah Al-Jadida Press, Casablanca, first edition, 2004, p. 90.

²³ Article 163 of the Family Code states that: "Custody means protecting the child from harm and providing for his or her upbringing and interests."

²⁴ Kenza Harchi: "Women's Rights between Sharia and Moroccan Law," doctoral thesis in Sharia, Faculty of Sharia, Al-Qarawiyyin University, Fez, academic year 2000-2001, p. 97.

issue rulings on this matter based on the reference to Maliki jurisprudence stipulated in Article 400 of the Code. which in some cases allows for the relinquishment of custody rights by referring to the most probable or well-known opinion and what has been practised in Maliki jurisprudence, subject to two basic conditions:

- The first condition: the person relinquishing custody must have proven their right to custody, and the relinquishment must be made to the next person in line under the supervision of the competent court. The prevailing opinion in jurisprudence is that custody is a right of the custodian, who may relinquish it if they have proven this right, because relinquishing custody before it exists has no effect. Thus, the custodian, whether the mother, father or other person, may relinquish custody either during the marriage or after divorce if it has been assigned to them, and they may only relinquish it to the next person in line if the conditions are met, as confirmed by the Court of Cassation in a ruling which stated: "However, it is sufficient for the court's ruling obliging the appellant to hand over her daughter to her father in fulfilment of her obligation, as justified in its decision, that the custodian's waiver of custody of her daughter dated 27/04/2004 is binding on her and obliges her, and that her unilateral decision to revoke it has no effect in accordance with Article 230 of the Civil Code. Similarly, it is well-established in Maliki jurisprudence that the guardian's relinquishment of her right to custody without excuse after it has become obligatory, whether during the marriage or after divorce, is binding on her, as stated in Al-Zarqani's commentary on Mukhtasar Sidi Khalil, part II, page 372, and that these reasons are sufficient and the court's ruling is valid on this basis alone, without the need for further reasons...".⁽²⁵⁾

In another ruling issued on 5 April 2016, the same court deviated from its previous position, ruling that custody rights cannot be waived while the marriage is still in force, and that custody is shared between the spouses at that time, because custody rights are only granted to the wife alone after the marriage has been dissolved. The ruling stated: "However, since the attested waiver was issued on 31/10/2013 during the marriage, custody at that time is shared between the spouses, and the wife is not granted sole

custody until after the marriage has ended. Since it is established in jurisprudence that the waiver of a right before it is acquired is not binding, and since the divorce did not take place until 17/02/2014, the waiver is not binding on her. This reason, derived from the facts of the case as established before the court, replaces the reason criticised, and the complaint remains without basis."⁽²⁶⁾

In a recent decision issued by the Court of Cassation on 18 April 2021, it reversed its previous position, ruling that it is permissible for one or both parents to waive their right to custody even before divorce, as this right exists during the marriage, pursuant to Article 164 of the Family Code, which states: "Whereas what is stated in the appeal is correct, in that, pursuant to Article 164 of the Family Code, custody is one of the duties of the parents as long as the marital relationship exists, and pursuant to Chapter 18 of the Law of Obligations and Contracts, obligations issued by one party are binding on the party from whom they originate as soon as they come to the knowledge of the party to whom they are owed. It is clear from the custody waiver form included under number 44 dated 25/07/2013 that the respondent in the appeal waived custody of their daughter to her paternal grandmother, the second respondent, and that the latter accepted this and undertook to take custody of the daughter in question. When the court justified its conclusion that the right to custody and its relinquishment can only occur at the time of the divorce ruling and not before, otherwise it would be considered a premature relinquishment without cause for rescinding, invalidating or nullifying the commitment, it thereby violated the provisions of Article 18 above and rendered its decision subject to cassation."⁽²⁷⁾

Another ruling by the same court stated that: "The waiver of custody rights is binding. If the mother waives her custody rights, they are transferred to the next person in line."⁽²⁸⁾

The Court of First Instance (Family Division) in Taourirt also ruled in one of its judgments that: "The mother's waiver of her right to custody before the court requires that it be revoked and granted to the father."⁽²⁹⁾

²⁵ Court of Cassation Decision No. 562 dated 04/10/2006, Sharia File No. 143/2/1/2006, published in the Journal of Important Decisions Issued by the Supreme Council, p. 240 ff.

²⁶ Court of Cassation Decision No. 316, dated 05/04/2016, Legal File No. 258/2/1/2015 (unpublished).

²⁷ Decision of the Court of Cassation No. 249, dated 18/04/2021, Sharia file No. 4/2/1/2020, website of the

Supreme Council of the Judiciary (www.cspj.ma), date of visit to the website 20/02/2024.

²⁸⁰ Decision of the Supreme Council (currently the Court of Cassation) No. 562, issued on 04/10/2006, in legal file No. 143/2/1/2006.

²⁹⁰ Judgment issued by the Court of First Instance (Family Division) in Taourirt, (without mentioning the number of the

We note that the transfer of custody rights to the next person in line for custody must be made of one's own free will, without coercion or deception, and that such transfer must be accompanied by the actual handover and exercise of custody by the transferor to the transferee, as confirmed by a decision of the Court of Cassation issued on 15 May 2018, which states: "The appellant's criticism of the decision is valid, in that although the custodian's waiver of custody in favour of the father of the child, made of her own free will, deprives her of her right to custody, this is conditional on the waiver being accompanied by the actual transfer and exercise of custody by the person to whom custody is waived. The appellant maintained throughout the proceedings that the child, Rehab, remained in her care and under her financial support since she relinquished her custody rights in the divorce proceedings in favour of the father, who is the subject of the appeal. The court that issued the contested decision was insufficient in its reasoning when it stated that the waiver was binding on the person waiving custody without verifying whether the respondent had sought to take the child into his care in accordance with the terms of the waiver and had complied with the requirements of the law. The court's reasoning was therefore incomplete, tantamount to a lack of reasoning, and subject to cassation. ⁽³⁰⁾

- The second condition: The court shall not authorise the relinquishment of custody unless it is satisfied that such relinquishment is in the best interests of the child. ⁽³¹⁾ This is in line with the new approach of the Family Code, as set out in Article 186, which was confirmed by the Court of Cassation in one of its decisions, which states that: The mother's relinquishment of her right to custody does not result in the loss of that right if the child is under the age of 7. ⁽³²⁾

It should be noted that custody may be regained after it has been lost or relinquished in accordance with the provisions of Article 170 of the Family Code, which states that "custody shall revert to the person entitled to it if the reason preventing him from exercising it no

longer applies, and the court may restore custody if this is in the best interests of the child."

This means that once the impediment preventing custody has been removed, the court may grant the right to reconsider custody, taking into account the interests of the child. , it may refuse to do so after providing an acceptable explanation, in order to protect the child, because the best interests of the child take precedence over the interests of the other parties, as confirmed by a decision of the Court of Cassation issued on 1 March 2016, which stated: "The applicant's objection to the contested decision is valid, as, pursuant to Article 170 of the Family Code, custody reverts to the person entitled to it if the excuse that prevented him from exercising it no longer applies. The applicant maintained throughout the proceedings that the reason that led him to relinquish custody of his son and prevented him from exercising it was his heavy workload outside the home at that time, and that this reason no longer applies as he has become a 50% partner in the shop, as evidenced by the shop's supply invoices bearing his name. He now employs two people to manage the shop, and they share the management of the shop between them. The court's decision to reject the plaintiff's request to regain custody of his son Musab without taking into account the above was incomplete and tantamount to a lack of reasoning, making it subject to appeal. ⁽³³⁾

Second: Implied waiver of custody (silence of the person entitled to custody)

It has already been mentioned that the waiver of the right to custody can be either explicit or implied, understood from the actions of the custodian. Explicit waiver is when custody is assigned to a person who is entitled to it and who waives it in favour of another. Implicit waiver occurs when the person entitled to custody remains silent about claiming it for a full year without excuse, knowing that he is entitled to it.

judgment), dated 25/02/2011, in case No. 2010/636, (unpublished).

³⁰⁰ Decision of the Court of Cassation No. 290, dated 15 May 2018, Sharia case No. 275/2/1/2017 (unpublished).

³¹⁰ In this context, we note that the Algerian legislator stipulated in Article 66 of the Family Code that custody may be relinquished, stating that "the custodian's right shall be relinquished upon marriage to a non-relative, and upon relinquishment, provided that this does not harm the interests of the child." The Algerian legislature has recognised in the text of this article that the custodian has the right to relinquish

custody, but this right is subject to the fundamental condition that such relinquishment does not harm the interests of the child. If the relinquishment is not in the best interests of the child, the judge will reject the request, provided that the legal and legitimate conditions for custody are met and the interests of the child are at stake.

³²⁰ Court of Cassation Decision No. 392, dated 23/07/2008, Sharia File No. 605/2/1/2007 (unpublished).

³³⁰ Court of Cassation Decision No. 207, dated 1 March 2016, Sharia file No. 642/2/1/2013 (unpublished).

The legislator stipulated in Article 176 of the Code that "the silence of the person entitled to custody for a period of one year after becoming aware of the construction shall result in the forfeiture of custody, except for compelling reasons."

It is clear from the above article that the legislator has specified the period for forfeiting the right to claim custody if this right is not exercised within one year from the date of knowledge of the new marriage. The period of one year is considered sufficient to indicate that the person entitled to custody is unwilling to exercise his right to care for the child, unless there are compelling reasons that prevent him from exercising his right.⁽³⁴⁾

It is worth noting that the repealed Personal Status Code had previously stipulated this requirement in Article 106, which states that "the silence of the person entitled to custody for a period of one year after learning of the entry shall result in the forfeiture of his custody," a condition that finds its basis in Maliki jurisprudence⁽³⁵⁾, although the jurists of this school of thought differed on how to apply it.⁽³⁶⁾

In this regard, the following question arises: Is the one-year period of silence linked only to the issue of marriage as stipulated in Articles 174 and 175 of the Code, or does it extend to other reasons⁽³⁷⁾ that result in the loss of custody for breach of its general conditions? Is this silence linked to both women and men, or is it specific to men only?

Most Maliki scholars have ruled that the one-year period of silence is only applicable in the case of the guardian's

marriage, which is the approach adopted by Professor Ghamija⁽³⁸⁾ (may Allah have mercy on him), who considered that the period of forfeiture of custody is limited to the case of the custodian's marriage and does not include other cases in which custody is forfeited. However, he mentioned exceptional cases to this condition and summarised them as follows:

- The right holder's silence regarding the claim for custody from someone who is lower in rank than him, such as the mother's silence regarding the claim for custody of the child who is in the father's custody after the marital relationship has ended.
- The case of the custodian moving from the country of the guardian of the child, as the basis for this case is the difficulty of supervision when it occurs.
- Other cases in which custody may be revoked due to a breach of the general conditions of custody relating to the ability and suitability to provide custody.

The Court of Cassation also followed this jurisprudential approach, which considers that the one-year period of silence is linked only to the case of the custodian's marriage and not to other cases in which custody is forfeited. In a decision issued on 19 November 2008, the Court of Cassation ruled that the provisions of Article 176 of the Code relate to the silence of the person entitled to custody who did not claim it for a period of one year after learning of the marriage, and do not relate to the mother's relinquishment of custody.⁽³⁹⁾

³⁴⁰ Ministry of Justice: "Practical Guide to the Family Code," M. S., p. 109.

³⁵⁰ Sheikh Khalil said, "Unless he knows and keeps quiet about it," Al-Mawak said: Ibn Arafah said, "If the son knew about her marriage and did not take the child until the period was prolonged, then she became divorced from her husband, he has no right to take the child from her because he has abandoned his right by doing so ()."

The explanation of Al-Saghir states the following: "The conditions of custody (...) are that she has no husband who has entered into it to work for her husband, except that he informs those who follow her of her entry and remains silent for the duration of his knowledge without excuse (...)." For further information, see:

- Abu Abdullah Muhammad bin Ahmad bin Muhammad al-Maliki: "Sharh Mayara al-Fasi 'ala Tuhfat al-Hakam fi Nukat al-Aqd wa al-Ahkam ma'a Hashiyat al-Ma'dani 1-2," Part 1, First Edition 2000, Dar al-Kutub al-Ilmiyyah, Beirut, Lebanon, p. 440.

- Ahmad bin Muhammad al-Durair: "A Brief Explanation of the Closest Approaches to the Doctrine of Imam Malik," Part 1, n.p., 1972, Dar al-Ma'arif, Alexandria, Egypt, p. 454.

³⁶⁰ For more details on the various jurisprudential opinions on this subject, see:

==Ahmad al-Khamlishi: "Commentary on Personal Status Law: Effects of Birth, Legal Capacity and Legal Representation," Part 2, First Edition 1994, Al-Ma'arif Al-Jadida Press, Rabat, Morocco, p. 177 ff.

³⁷⁰ See Articles 173 to 179 of the M.A.

³⁸⁰ Abdelmajid Ghamija: "The Supreme Council's Position on the Duality of Law and Jurisprudence," Publications of the Association for the Dissemination of Legal and Judicial Information; Studies and Research Series, Issue 1, March 2007, p. 300.

³⁹⁰ Court of Cassation Decision No. 536 dated 19/11/2008 in Sharia Case No. 21/2/1/2008, cited by Ibrahim Bahmani:

On the other hand, there is a school of jurisprudence ⁽⁴⁰⁾that considers that silence for a period of one year nullifies the right of custody, regardless of the reason for the transfer of the right of custody, i.e. whether it is due to the marriage or death of the custodian, or her failure to meet one of the general conditions, or other reasons for nullification, after the silent party has become aware of his right to custody.

In this context, another issue arises concerning the conflict between the expiry of the period of custody resulting from the silence of the person entitled to custody after learning of the custodian's marriage and the exception referred to in the first paragraph of Article 175 of the Code, relating to the age of the child, which shall not exceed seven years.

The Court of Cassation has previously addressed this issue in its decision dated 16 January 2018 (), 2018, in which it ruled that the exercise of custody by the person entitled to it before the expiry of one year from the date of his knowledge of the custodian's marriage is contrary to the reason required by law, which relates to the age of the child, who is not more than 7 years old, making his right to terminate the custodian's custody unacceptable. ⁽⁴¹⁾

We note that knowledge of the marriage and cohabitation referred to in Article 176 of the Code is subject to all means of proof, as confirmed by a decision of the Court of Cassation dated 1 March 2016, which considered that the court of first instance's reliance in its decision on the date of conclusion of the marriage contract and the date of submission of the application for termination of custody did not imply the appellant's knowledge of the construction, but must be inferred by any acceptable means of proof, stating that "The court, in its decision, relied solely on the date of conclusion of the marriage contract and the date of submission of the application for termination of custody, and concluded that the appellant was aware of the respondent's pregnancy without indicating in its decision how it had deduced his awareness by any acceptable means of proof, thereby violating the provisions of Article 176, especially since the appellant stated that he was an immigrant in Italy and was undergoing treatment there, which meant that the decision violated Article

176 of the Code of Civil Procedure and was deficient in reasoning, which is tantamount to its absence and subject to cassation. ⁽⁴²⁾

In confirmation of the above decision, the Court of Cassation ruled that failure to prove who has the right to custody of the child does not give the right to demand that custody be revoked from the custodian. In its decision issued on 21 September 2005, it considered that the appellant's knowledge of the respondent's four-year marriage to a person unknown to him remained a mere allegation without proof, which did not give him the right to demand the removal of custody from the custodian. The decision stated "However, in response to the sole ground cited for cassation, the court that issued the contested decision explained in its reasoning, and correctly so, that pursuant to Article 176 of the Code, the silence of the person entitled to custody for one year after learning of the marriage terminates his custody. and that the appellant stated in his opening statement that the respondent had been married for four years to a person unknown to him, and therefore the appellant's criticism of the contested judgment is unjustified and his statements remain mere allegations without proof. Thus, the court responded to the appellant's arguments and did not violate the law but applied it correctly. It did not need to conduct further research as it had sufficient evidence to decide on the case, and its decision was sufficiently reasoned and based on valid grounds. ⁽⁴³⁾

We conclude from reading the above judicial decisions on the subject of the loss of custody by the person entitled to it for a period of one year after becoming aware of the construction that it is often difficult for the latter to prove knowledge of the construction in the new marriage, which prompts the judiciary to maintain custody for the person to whom it was entrusted, taking into account the interests of the child above all other considerations. Given the ambiguity and lack of clarity of the provisions of Article 176 of the Code with regard to the date of commencement of the one-year period after knowledge of the construction, it is natural to refer to Maliki jurisprudence ⁽⁴⁴⁾in accordance with the reference provided for in Article 400 of the Code in the absence of a text.

"*Judicial Action in Family Cases*," first edition 2018, Dar Al-Salam, Rabat, Morocco, p. 223.

⁴⁰⁰ Ahmad bin Muhammad bin Yusuf al-Rahuni: "Imam al-Rahuni's commentary on al-Zarqani's explanation of Mukhtasar Khalil," Part 4, first edition 1306 AH, Al-Amiriyah Press, Bulaq, Egypt, p. 262.

⁴¹⁰ Court of Cassation Decision No. 425, dated 16/01/2018, Sharia File No. 731/2/1/2016, (unpublished).

⁴²⁰ Court of Cassation Decision No. 204 dated 01/03/2016 in Sharia File No. 590/2/1/2015 (unpublished).

⁴³⁰ Court of Cassation Decision No. 425 dated 21/09/2005 in Sharia Case No. 63/2/1/2005, Ministry of Justice: *Selected Judgments in the Application of the Family Code*, M. S., p. 311.

⁴⁴⁰ Al-Saghir explains that if the person entitled to custody remains silent about his request, his right shall lapse under the following conditions:

Conclusion

Finally, in order to address the issues related to the loss and relinquishment of custody, we propose reorganising the requirements for custody and basing them on the principle of gender equality and the best interests of the child, in order to overcome the imbalances revealed by the practical application of the Code, through:

- Establishing joint custody between men and women after the dissolution of the marriage contract in a manner that allows the parents of the child to jointly supervise and care for the child, thereby contributing to the protection of the child's best interests.
- The need to stipulate legal provisions in the code relating to the relinquishment of custody rights and linking them to the condition of transferring custody to the next person in line, taking into account the best interests of the child.
- Recognition of equality between men and women with regard to the loss of custody due to marriage, in the sense that the marriage of the custodial father or mother does not result in the loss of custody except in cases of extreme necessity, depending on the circumstances, and the judiciary must take all precautions in the best interests of the child.
- The need to scrutinise the legal requirements relating to visitation rights for non-custodial mothers and fathers, in order to prevent any circumvention of the law, under penalty of revoking custody rights and imposing severe penalties on those who circumvent the visitation rules.

And Allah is the source of success.

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Court of Cassation (Morocco), Decision No. 170, 1 March 2016.

Court of Cassation (Morocco), Decision No. 511, 19 November 2008.

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- 1- **He must be aware of his right to custody:** if he is not aware of his right and remains silent about requesting custody, his right is not forfeited, regardless of how long he remains silent.
 - 2- **He should know that his silence forfeits his right to custody:** if he is unaware of this, his silence does not invalidate his right, because this is a secondary matter for which people are excused if they are unaware of it.
 - 3- A year must pass from the date he learned of his right to custody: if less than a year has passed since he learned of it and he remained silent, then he requested it before the year passed, he will be granted custody.

If the custodian marries a foreigner and he consummates the marriage, and the person to whom custody was transferred is not aware of the marriage until her husband divorces her or dies, she retains custody. Similarly, if he is aware of her marriage and remains silent for a year, until her husband divorces her, he cannot take the child away from her, and the child remains with her, because his silence for a year means that he forfeits his right to request custody. For more details, see:

Sheikh Ahmad al-Sawi: *"In the Language of the Seeker of the Closest Paths to the Small Explanation of Qutb Sidi Ahmad al-Dardir,"* Part 2, (no mention of edition or date), Dar al-Kutub al-Ilmiyyah Library, Beirut, Lebanon, p. 497 ff.

Court of Cassation (Morocco), Decision No. 214, 16 January 2018.

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