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Applicable Law on Child Custody Eligibility -A comparative study in the light of Arab legislation

القانون الواجب التطبيق بشأن أهلية الحضانة

- دراسة مقارنة في ضوء التشريعات العربية

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Abstract:

Following a separation, mixed marriages encounter numerous issues that have a direct impact on their children. These issues are primarily concern determining the applicable law and assigning custody to one of the parents

Before awarding custody, the process requires prior fulfillment of conditions whether they are related to the guardian or the beneficiary of custody, in particular with regard to their legal capacity, and that they vary across countries due to unresolved conflicts of law rules in different legal systems.

Through the study, we found that the comparative Arab legislations differ in stipulating the eligibility or not to the holder of custody right and in stipulating the conditions that must be met to fulfill this capacity. Re-examining these laws is necessary because some also define the length of custody, others let the judge make the final decision. The child that is being detained in custody gains no benefit

Keywords: Mixed marriage; Custody; Capacity; Rule of attribution; Conflict of laws.

الملخص :

يعتري الزواج المختلط بعد الطلاق العديد من المشـاكل التي تؤثر مباشـرة على الاطفال، وبالخصـوص ما تعلق بإسـناد حضانتهم واختيار القانون الواجب التطبيق، اذ من الضروري التأكد من توافر شروط معينة سواء ما تعلق منها بالحاضن أو المحضون لاسيما أهليتهم القانونية التي تختلف من قانون دولة إلى أخرى وتتأثر بضوابط الإسناد.

بينت الدراسـة اختلاف التشـريعات العربية المقارنة في اشـتراط الأهلية للحاضـن من عدمه وفي النص على الشـروط الواجب توافرها لاكتمال هذه الأهلية، كما هناك منها من حددت مدة الحضانة وأخرى تركتها لسلطة القاضي، وذلك ليس في مصلحة المحضون ما يستدعي ضرورة إعادة النظر في هذه التشريعات.

الكلمات المفتاحية : الزواج المختلط؛ الحضانة؛ الأهلية؛ قاعدة إسناد؛ تنازع القوانين.

Introduction

One of the family's noble goals is to raise the child, so all systems were keen to regulate everything related to their conditions, especially those related to custody, which the Algerian legislator considered through the text of Art162 [(1)]to take care of the child, teach him and rear him in accordance with his father's faith, and to make sure that his health and morality are protected. As for Art 54 of the Tunisian Personal Status Code, custody was considered as keeping the child overnight and raising him, while Art 163 of the Moroccan Family Code defined it as "preserving the child, which may harm him and doing his upbringing and interests. The holder of custody right must, as much as possible, take the necessary measures to protect the child in a safe environment...".

Custody is therefore a right for both spouses for the duration of the marriage bond, and for one of them or for others, depending on the circumstances, following a separation. It has been limited by necessary conditions, the first of which is eligibility, as a prerequisite for any legal action, especially with regard to the upbringing and development of children. It is mostly associated with creating a positive

atmosphere for the child and fostering his interest in all aspects of his life. This is because it plays a significant role in building the child's personality.

Eligibility has been defined as the competence of a person for a subject or his ability in relation to a right or duty (2). It has also been defined as :"The competence of a person to be a positive or negative party to rights, and the expression of his will is an expression on which the law has arranged effects"(3). It is of two types ; the capacity of obligation, whether it is incomplete or complete, and it is proven by the life, and eligibility of performance that a person enjoys after reaching the age of majority, as well as being of the gender required by law with integrity of mind, so he has the capacity to act and manage together.

The fact that custody is one of the most significant outcomes of mixed marriages emphasises the significance of learning about the topic, which extend beyond marriage in the case of separation, and most Arab legislation did not include the applicable law, as is the case in Algerian law, neither on custody nor on eligibility for custody.

Problem: When countries differed in regulating the provisions of eligibility for custody and its conditions, it was important to look out the legislation that determines the eligibility of the kid and the custodian in foreign relations, especially in Arab legislation.

In order to answer the problem, we relied in our study on the descriptive analytical approach to the legal texts that dealt with the subject, in addition to the comparative approach in which we explained the various legislative texts and jurisprudential opinions. This is accomplished through the first axis, which is the legal qualification of custody, followed by the second axis, which is the applicable law to assess eligibility for custody and the challenges in applying it.

I. Legal qualification of custody

The technical process of qualification aims to ascertain the legal character of the issue produced by the international dispute facts in order to classify it under a particular linking sect and the issues for which the legislator has established the rule of conflict(4). The qualification plays a crucial and essential function in adding the proper legal description so that the judge can determine the applicable law because the majority of Arab legislation does not contain a conflict of custody regulation. Disparities in legal qualifications are the main source of controversy over the applicable legislation. These differences are disputed in two main ways: first, by examining the nature of the right to custody based on the child's interests, and second, by attempting to determine the source of custody.

1. The nature of the right to custody based on the interest of the child

It was clear from the above that custody is a very broad concept that encompasses psychological, material, and educational care in all of its forms and meanings in order to prepare the child to become a useful and good member of his family, society, and homeland. Because of the close relationship between parents and their children, there is no question about whether custody is a matter of personal status (1.1). Despite the disparity between legislation and jurisprudence about its nature (1.2).

1.1 Custody is a matter of personal status:

Whether a person's nationality or place of residence, their personal status is a collection of factors pertaining to their legal standing and their relationship with their family that are governed by state law. Determining what is included in personal status varies from one country to another(5), and whatever it is, personal status issues apply to personal law, which regulation varies from one country to another, and the judge must expand its meaning to include all ideas adopted by other legal systems except what is contrary to public order and public morals.

Since the Algerian legislator addressed custody in the third chapter on the effects of divorce (Art 62-72 A.F.C.) without defining a special conflict rule, it was agreed that custody is a matter of personal status regardless of what is considered personal status without it. According to the text of Art 9 of A.C.C., its qualification is subject to the law of the judge, which is the same as what most Arab legislation, including the Egyptian one, adopted.

The Kuwaiti and Tunisian legislators have specifically targeted the custody issue for an explicit conflict rule in Art 43 of the Law on Relations with a Foreign Element, where the law on the father's nationality applies. This is similar to the Tunisian legislator, who established three conflict rules and left it up to the judge's discretion to choose the best and fittest for the child (Chapter 50 of the Tunisian Journal of International Law).

1.2 Jurisprudential and legislative difference on the qualification of custody

Jurisprudence differed in the qualification of custody. There are those who considered it as right, may drop it, waive it or transfer it to another person, and there are those who considered it a mandate binding and therefore cannot be dropped or transferred, and others considered it a "right and a mandate" at the same time (1.2.1). What is the position of Arab legislation on that (1.2.2).

1.2.1 Jurisprudential position

The nature of the right to custody was named four jurisprudential opinions, some of which considered it a common right between two parties, namely the custodian and the child, and some of which singled out one party for the right to it without the other, while others considered it a right with three parties.

- Custody is a common right between the custodian and the child: Most modern jurisprudence concurs that custody is "a right and duty" since it is connected to the custodian's and the child's shared existence. The child who requires the caretaker and is in charge of his affairs has the right to custody, according to Islamic jurisprudence, and the custodian has the obligation to keep the people under his care.

- Custody is a right of the child: Proponents of this view believe that custody is a right of the child because it is initiated for his benefit. It is a natural duty of the mother towards her child and she is not entitled to refrain from doing so, otherwise she is forced (6), this view is supported by many arguments; including that maternity is a duty. The child remains with his mother as long as he needs her, and therefore she cannot waive custody.

This approach has been adopted by numerous laws, the Syrian judiciary, and

some Algerian jurisprudence. Some contend that the court can decide that, in such a circumstance, the mother can be forced to have custody, even if it is a shared right, but the child's interest comes first, thanks to the principle of taking the child's interest into consideration.

- Custody is a right of the custodian: Proponents of this view believe that custody of children is a right of the custodian who is not forced upon him if there is no other; or if the child does not accept another custodian and has no money to hire him [7]. This tendency is criticised since it goes against the intent of the initiation of custody [8].

- Custody is the right of the custodian, the child and the father: According to the Egyptian judiciary, the custodian has three rights: the rights of the kid, the father, and the custodian. Reconciling them wherever possible is required. Both the custodian and the child, who has the right to use his father to influence his custodian's actions, greatly benefit from this point of view. The goal of custody is the child's interest. In addition to having the option to waive custody at any time, the custodian also has the right of priority while exercising custody.

1.2.2 The legislative position

Some Arab laws, like those in Syria and Egypt, have not made clear where they stand on the hybrid nature of custody, although many of their texts make this clear. Similar to Moroccan and Tunisian laws, which have repeatedly stated that custody is the custodian's right—particularly in Art 55 and 57, which use the word "rights"—and Art 64, which authorised the concept of custody waiver, other chapters demonstrate that custody is the child's right.

The Algerian lawmaker did this by extrapolating the Family Code's provisions, particularly art 66, which contained the following statements: "The custodian's right shall be forfeited" and "Waiver unless it harms the child's interest." While Article 68 rendered custody subject to the holder's decision, Art 60, 62, and 67 underlined the child's rights and asked the legislator to give him precedence over all other rights. Nonetheless, we discover that Algerian lawmakers consider custody to be a shared right between the two parties [9].

2.The nature of the right to custody through its source

In order to comprehend the legal definition of custody, one must first distinguish between the right holder and the obligation to it (2.1), and then one must look for the source of this distinction (2.2).

2.1. Distinguishing between the obligation of custody and the holder of the right to custody

It is said that "for every right there is a duty". This contrast is justified by making a single notion of right and duty. However, even if the object is the same, this is not the case. One issue is the connection between two things; another is the unification of their thoughts. The meaning of the requirement is transfer, and the meaning of the right is competence.

Consequently, the obligation itself needs to be separated from the owner of the right and the attribution. Whereas the right has the sense of jurisdiction, the obligation has the meaning of assignment.

Custody is an obligation; in this case, the custodian is the committed party, and the

kid is the committed party to him or the right holder. As the child's carer and guardian, the custodian must always act in the child's best interests, without laxity or negligence [10].

This distinction is important in mixed relationships because the rule of attribution under the judge's law determines the authority given to the custodian, even while the judge's law rules the basic topic of defining the form of custody [11]

2.2.The source of the commitment to custody :

Numerous patterns evolved as a result of the judiciary and jurisprudence's disagreement over the origin of the commitment to custody:

- Custody is one of effects of the marriage contract : Most Arab legislation has been affected by the Egyptian civil law, which has been silent about the rule of attribution of custody, so some jurisprudence has gone on to say that custody is related to paternity, Since the latter is a direct consequence of the husband and wife's marriage relationship, the marriage contract serves as the source of commitment to it. As a result, it is governed by the law that applied at the time of marriage, which is the law of the husband [12].

However, this trend is slowed down in two ways: first, by tying custody to a contract that has expired because of the breakdown of the marital tie; and second, by requiring custody to be given to people other than the spouses in the event that the parents are absent or incapable.

- Custody is one of the effects of the dissolution of the marital bond: The proprietors of this tendency think that the only time a custody disagreement arises is when the marital bond is dissolved to determine who will be given custody. These conditions and the family's current status are strongly tied to how the final processes for custody are organised, and custody is one of the consequences of the marriage bond's breakup. The practical benefit this tendency provides—allowing the entire outcome of the breakdown of the marital connection to be governed by a single piece of legislation—supports it [13].

Some jurisprudence criticizes this on the basis that the lapse of a marriage contract includes only the effects of lapse with respect to marital relations, without affecting rights.

- Custody is the one of the effects of paternity: Those who establish the child's paternity and demonstrate the child's entitlement to guardianship of education and protection are obligated to provide custody, which starts when the guardianship of custody ends. The concept of custody in Islam, which is seen as one of the consequences of fatherhood, has been inferred by Egyptian jurisprudence. However, this view was rejected due to the potential for granting custody to people who demonstrate their affiliation with the kid due to ineligibility or dishonesty.

- Custody is a legitimate and legal obligation: Some jurisprudence have considered custody a legitimate and legal obligation due to the fact that the sources of commitment cannot deviate from the five sources known in the law (contract or unilateral will, illegal action, and enrichment without a reason and the law).

If the first four sources are inconceivable to justify the obligation of

custody, they prevail over the law that establishes it with a special text that determines its scope and arranges for its judgment regardless of any other behavior, and their argument in this regard is that "where there is an obligation that is not based on the will, there is no justification for its existence except the law"[14].

II. The applicable law determine eligibility for custody and difficulties of its application

Eligibility is important because it is the basis on rights that a person can enjoy and duties he can undertake are assessed. Its provisions relate to public order, so a person cannot acquire it unless the law grants it to him, nor can he waive an existing eligibility. Additionally, as implied by Article 45 of the Code of Civil Law, Article 48 of the Libyan Civil Code, the Tunisian Code of Obligations and Contracts, and the Moroccan Code of Obligations and Contracts, he is not permitted to increase or decrease the scope of his eligibility.

As eligibility is a requirement for both the custodian and the kid, the relevant law must be sought in order to ascertain eligibility for custody (1) and the potential challenges associated with its implementation (2).

1. Applicable law to determine eligibility for custody

Since custody is one of the legitimate states provide for those who have the authority to bear what is necessary for the upbringing and educating children, is proven for men as well as women, even if the custody of women is prevail for the custody of men[15], we have to search for the necessary eligibility for both the custodian (1.1) and the child(1.2).

1.1. For the custodian

To ascertain the appropriate statute (1.1.1), it is required to examine the type of eligibility that the custodian is expected to possess (1.1.2).

1.1.1. The type and nature of the eligibility of the custodian

As stated by Algerian law, where article 62/2 of the Family Code affirms the requirement that the "custodian be qualified for this" without defining the kind or nature of this eligibility, determining the custodian's eligibility is a matter of qualification for which reference is made to the judge's law. The Tunisian legislator used the term "in charge," ەn contrast, the Moroccan lawmaker employed the phrase "most qualified" in relation to the provisions of Article 171 of the Family Code. Therefore, in the absence of a specific language on the subject, the Civil Code's common rules must be consulted in addition to the Islamic juridential regulations (Art 222 F.C).

Then, the question arises about the type of this eligibility, whether it is general (ordinary) or specific (marriage), as it is necessary to make distinction between two cases:

- There is no difficulty in the matter, and there is no dispute among jurists that this capacity falls within the purview of the Nationality Law, Art 10 of the Civil Code, if the eligibility required for the custodian is the ordinary general eligibility, which is based on discernment and is determined by taking into account the elements of the case [16].

According to Art 24 A.C.C., Algerian law outlines the age of majority, eligibility requirements, and the decision on the actions

of the lacking discernment. It does not, however, apply foreign law for violations of public order or morals, such as the naturalization of a person with the nationality of a country in order to dissolve a marriage if the law of his nationality does not permit it or the taking of a referral.

If the eligibility required for the custodian is the specific one [17], it is subject to the common law, that is the law of both spouses, this was adopted by the Egyptian legislator, he distinguished between the general eligibility completed by 21 full years, and the eligibility of marriage by requiring the age of 16 for the girl and 18 for the boy. According to Egyptian jurisprudence, the custodian's eligibility is probably determined by their ability to marry as a family duty on the one hand, and the legislator's approval of the Coptic Orthodox Regulation's Article 139, which states that the custodian must be at least 16 years old and 18 years old on the other [18].

1.1.2. Applicable law to the eligibility of the custodian

As previously mentioned, the legal conditions pertaining to the custodian's eligibility differed depending on Arab legislation. It is necessary to distinguish between the two earlier circumstances in order to determine the applicable law.

As for the legislation that approved the general eligibility of the custodian, we find that it applies the law of nationality, considering the rules of eligibility among the mandatory rules that cannot be violated, as it is the case in the Algerian Civil Code, which regulated eligibility in several articles, as article 40 determined the full eligibility to perform by reaching the age of (19) years, provided that the person enjoys his mental capacities and is not interdicted, which is confirmed by Articles 7and 86 of the International Covenant on Civil and Political Rights.

Algerian jurisprudence differed in its interpretations, some of them interpreted it as the custodian reaching the age of majority only, and others as majority and adulthood together, because majority is considered a prerequisite for adulthood, there is no adulthood before majority, but majority and adulthood can be at the same time. Therefore differ according to the natural composition of the person and his experience in the affairs of money and the environment in where he lives [19].

This is all if the custodian is one of the parents, what is the matter with regard to other people, especially the aunt, sister, and close relatives, because raising the problem of young age in relation to grandmothers cannot be imagined from a practical point of view [20].

The Moroccan legislator has explicitly out the requirement of legal majority for the custodian other than the parents, by Art 171 of the Family Code, which stipulates that " First the mother, then the father, and finally the mother's mother, are granted custody. If this is not possible, the court may decide to award custody to one of the most qualified family members in light of the child's favorable evidence." Moroccan jurisprudence believes that this is consistent with the requirements of the Family Code, in particular Art 20 and 21, which allow the marriage of minors[21], it is identical to what the Algerian law maker permitted, whereby the underage husband gains the ability to file a lawsuit over the rights and obligations that

come with marriage, but this does not render him completely competent and, thus, eligible to claim custody.

As for the legislation that takes into account the particular eligibility (marriage), such as the Egyptian legislation. It is subject to what is called the global law. According to Art 12 of the Egyptian Civil Code, which reads: " Each spouse's legislation will determine the requirements for the marriage's legitimacy," this is the law of both spouses. This is because a new legal bond is formed between the spouses, and it goes without saying that the moment the marriage is consummated is what counts.

However, if the husband's nationality is different from the wife's, the question that emerges in this regard is how to apply each spouse's legislation to the objective situations. Two branches of jurisprudence are used to address this query [(22)]:

. Adopting the concept of the inclusive application of the two laws, which entails combining their provisions, results in the creation of stricter regulations. For example, if the husband's law permits marriage at age 21 and the wife's law permits marriage at age 18, the validity of the marriage must reach both parties' ages of 21.

The distributed application of the two laws refers to applying each party's law exclusively to itself and not to the other. This is acceptable when it comes to the study's focus on eligibility and age, but it becomes more problematic when considering the marriage system as a whole, as it includes barriers to marriage and other issues. Therefore, it is necessary to apply the law of husband and wife together, so it is sufficient for one of the two laws to include an impediment so that this marriage is not considered.

As for the Algerian legislator, has adopted the distributed application through art 11 A.C.C, and art 97 of the Civil Status Law regarding the basic conditions for marriage, and plural application with regard to the impediments to marriage, except from what the Algerian husband was permitted to do by Art 13 of the A.C.C. at the time the marriage was consummated [(23)].

As a result, we discovered that the Algerian and Tunisian legislators disregarded the provisions pertaining to the custodian's eligibility, whereas only a few of them stipulated both Moroccan and Libyan law. Additionally, the Egyptian legislator was the only one to adopt a special capacity for custody, which is the eligibility to marry, within each spouse's law, due to its association with family life.

1.2 For the child

The definition of custody and the definition of the kid are fairly similar. According to Mr. Ahmed Mohamed Ahmed, it is :"The child is the person who is not independent in his affairs of what is in his interest, and does not avoid what is harmful to him in reality or in presumption...."[(24)], as others defined it as "the one who does not independence in his own affairs from what harms him because he cannot make distinction, as a fool or imbecile big child, so custody is only established on the imbecile child"[(25)].

1.2.1. The type and nature of the eligibility of the child

Custody is a legal regime aimed at preserving and caring for the child, thus it is

a right for him. The demonstration of custody requires that the child deserves it, and he is eligible to be under this regime, as he must meet certain conditions in order to remain in the custody of another person, like he may reach a certain age that neglects the care of his custodian. These conditions varies according to the sex of the child, his mental abilities and his maturity(26).

Certainly, the eligibility required in the custody is not the general eligibility or the marriage eligibility, therefore it is the eligibility of the obligation, that proves for every human being. Nonetheless, the majority of Arab laws, like the Algerian one, provide a custody period that begins at birth and lasts for ten years for men and until they reach marriage age for women (27).If the custodian is the child's mother and has not remarried for the second time, the judge may extend custody for males up to 16 years old, considering the child's best interests. however, he failed to provide for the continuation of custody beyond this age if the child's mental state is compromised by insanity.

Also, Algerian legislator set that the period of custody expires when the m reaches 10 years, girl reaches 19 years. The male custody can be extended to 16 years by the judge, while the Jordanian legislator distinguished between the custody of the mother, which lasts to 15 years according to the text of Article 173/a, and for non-mother 10 years with an extension if the child is sick because of which it is indispensable to take care of women unless his interest requires otherwise(28).

In turn, the Moroccan legislator established that custody would continue until both males and females reached the age of legal majority (Art 166 of the Family Code), with the right of choice upon reaching the age of fifteen (15). If they are not available, he selects one of his most qualified relatives, as long as it does not conflict with his interests and has the approval of his legal guardian; if not, the matter is brought before the judge.(29).

1.2.2. Applicable law to the eligibility of the child

The legislation governs the child's legal age and the length of custody. The custodian's right to guardianship over the kid is usually determined by the age of discernment. This presents a challenge for legal systems that follow the best law for the child rule, which has been upheld by some jurisprudence, particularly Islamic jurisprudence, which bases its custody principles on the idea that the child's interests should be taken into consideration without regard to a specific age (30).

Due to the lack of specific and unambiguous requirements in the majority of Arab laws regarding a child's eligibility, jurisprudence diverged in identifying the relevant legislation, and numerous jurisprudential interpretations arose. These can be categorized into two primary opinions:

- Submitting the child's eligibility to the judge's law **:** Some jurisprudence holds that the question of whether a foreign person has a right is one that is not covered by any foreign laws and is instead governed by the laws of the country in which the right is to be exercised (31).

- Submitting the child's eligibility to the law of the judge and the law regulating the conditions of custody together: some jurisprudence say that the child's eligibility, in addition to being subject to the law of the

country in which the right is to be enjoyed, must be subject to the law governing the emergence of the right itself.

- Submitting the child's eligibility to the law of his nationality: According to a third view, the child's eligibility is governed by his country's laws without exception.

- Submitting the child's eligibility to the law governing the substantive conditions of custody: It does not raise any problem, considering that all Arab and even non-Arab legislation recognize the child's right to custody.

2. Difficulties in the application of the nationality law regarding eligibility for custody

As was already noted, eligibility is the ability to execute any of the rights, whether they are the child's or the caregiver's, after meeting a set of standards. Nationality laws frequently determine it, although they can be difficult to apply in many cases, especially when the nationalities of the spouses and children differ (.21), when there is no reliable nationality (.22), or when there are several nationalities (.23).

2.1 Difference in the nationality of the parents from the national nationality of the child

Many comparative laws lacked a special provision for situations where the nationalities of the parents and the child in custody are different. However, the Islamic Sharia, being the general Sharia, lacks special provisions that cover a variety of hypotheses, such as:

The eligibility of a non-Muslim custodian and a non-Muslim father: Islamic jurisprudence considers that a non-Muslim in Dar al-Islam is treated the same as a Muslim and therefore the eligibility of the foreign custodial mother on her child in general.

The eligibility of a non-Muslim custodian married to a national Muslim: Since the majority of jurisprudence holds that the parents' different nationalities affect the non-Muslim custodian's eligibility, it is illegal for a non-Muslim foreigner to have custody of a Muslim child because Muslims' differing religious beliefs (al-Dar) impede their right to custody(32).

2.2. Statelessness

A person who is not regarded as a citizen by any nation's laws is known as a stateless person(33). As a result, there was initially no legal conflict. Arab laws lacked a unique attribution system, leaving it up to the judge's judgement to determine which laws were closest to him. This is the law of domicile or residence, which was adopted by Egyptian law (Art 25 C.E.C).

In the event of statelessness, the judge must apply the law of domicile or residency as the place where the child's existence and relationships with others are concentrated, according to Algerian law (Art 22 C.C.). Both the 1951 Geneva Convention on Refugees and the 1954 New York Convention on the Status of Stateless Persons are in compliance with this.

The applicable law will change by altering the domicile or place of residence of the individual whose eligibility is to be decided due to their statelessness, whether they are the kid or the custodian. (34).

2.3. Multiple nationalities

For multiple nationalities, a distinction must be made between two cases:

Multiple nationalities with no nationality of the state of the judge: Some Arab laws resolved the matter and adopted real nationality, such as Algerian law through Article 22 C.C. and Tunisian law through Chapter 29 of the Code of Private International Law. Other Arab laws left the decision up to the judge, including Jordanian law, Syrian law, and Egyptian law through Article 25/1 BC.

Conflict between two nationalities, including the nationality of the state of the judge: Despite numerous critiques that delayed this criterion, the majority of Arab laws supported the implementation of their national law, which was the judge's nationality.

The issue of conflict of nationalities should not be viewed as an independent matter; rather, the judge should be free from prejudices and not always favor national law, but rather take into consideration the child's interest as a child who is suited to one procedure and not another. This is what the jurisprudence called the functional solution to the conflict, and regardless of the applicable law, it is a solution that lacks legal security and exposes the child's interests to danger and instability (35).

Conclusion

The study demonstrated the significance of the custody eligibility issue as a necessary precondition since it is connected to one of the child's unalienable rights and the consequent sponsors and protection because of his vulnerability.

A set of results have been come up:

- Confirmation of the Arab legislation on the condition of eligibility in custody without specifying what is meant by it.
- The difference in Arab legislation in establishing a rule of attribution for the eligibility required for custody.
- The judge has a key role in assigning custody to the legally qualified person, taking into account the complementarity between national and international legal texts and his discretion in ensuring the interest of the child.

Considering everything that has been said, several suggestions can be made, the most significant of which are as follows:

- In order to establish a precise and explicit attribution criterion for the matter of custody eligibility, the Algerian family law and numerous Arab legislation are being reviewed.

- The norms of conflict, which are regarded as preconceived positions that are extremely disconnected from reality, require that the child's best interests be prioritised over the national interest.

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[13] Youbi Souad, op.cit, p 105.

[14] Salah al-Din Jamal al-Din, op.cit, p. 298. ; Youbi Souad ,op.cit, P. 107

[15] Maki Salouh, Shahrazad Abdullah, op.cit. p. 170.

[16] Art 10/1 A.C.C. as following: "The civil status and eligibility of persons shall be governed by the law of the state to which they belong with their nationalities ...", op.cit.

[17] Specific eligibility relates to certain persons who are prohibited by law from engaging in some legal acts, although they are adults and without symptoms of eligibility. See : Amhadi Abuzina Amna, op.cit.,p. 247.

[18]Salah al-Din Jamal al-Din, op. Cit., P. 308.

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