

The Right to Custody: A Study In Light of the Conflict in Comparative Arab Legislation

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Abstract

The issue of custody is one of the most important effects of mixed marriage between two people of different nationalities, which is represented in its first form, which is divorce, and from here the young is a subject of dispute before the judiciary, and if most comparative personal status legislation has addressed the right to custody and who are the stakeholders in that, Except this issue has raised broad problems in the field of conflict of laws, especially since most comparative legislation has been silent on defining a base of support in view of custody disputes with a foreign component, which has sparked widespread debate in jurisprudence and the judiciary about the appointment of the applicable law, and on the other hand, some legislations, including Iraq, singled out the nursery with a support rule that requires the application of the husband's nationality law, and despite that, there remain problems related to the application of the foreign law concerned, including the timing of his choice and the accompanying cases of multiple nationality and lack thereof, not to mention the possibility of excluding him for violating the provisions of the judge's law.

Key words: *Right to custody ,applicable law,multiple nationalities,statelessness, public order, dynamic conflict*

I. Introduction

First: the definition of research

Child custody is the smallest and most important issue of personal issues, the most important of which is the violation of family rights and duties in relation to the rights of the child and the child and his parents together. The Iraqi legislator and the rest were keen on organizing legislation in clear legal texts, guaranteed by the Iraqi Personal Status Law. They belong to their nationalities and reside in the same state and have jurisdiction, but the problem is ticked in the event that the nationality of one of the parties is different, especially in mixed marriage. Most of the legislation, including Iraqi legislation, has devoted attention to trying

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to find solutions to some of the problems that plague this type of marriage, especially after separation and its implications, which is reflected in the nursery cycle.

The issue of custody being intertwined with certain ideas, on the one hand, can be considered the effects of marriage on the one hand, on the other hand the effect of the effects of divorce, and on the third hand a cross within the relationship. Of the sons, we find that most of the state's legislations have differed among themselves, and so regarding the adoption of the unified position. The intensity of this disagreement has increased, which is the absence of attribution rules in most countries related to this subject, which in turn reflected this on the jurisprudence of jurisprudence and the judiciary to search for a better law to rule the dispute over the law of the specialist in the matter of custody, which has raised many problems, which we will try to highlight within. The matter did not stop there, even in the few countries that have developed a rule for explicit allocation with regard to custody issues, including Iraq, and we find that these rules are described as general because they lack detail and accuracy sometimes more than many problems in front of the corridors cancel them if the person concerned with the application of his law enjoys more than the nationality and not from the addition of the Iraqi nationality or changed during two simultaneous or even non-existent processes, and that the idea of public order and a broad effect on marriage mixes, especially between the spouses of different religions, and is reflected in the legitimacy of any from them in custody and the possibility of exempting the law from applying the ruling of attribution.

The topic of the research has many problems embodied in the following questions:

To what extent has the comparative legislations, including the Iraqi legislation, which singled out custody according to an attribution rule, through the balance between the status of the parents in the disputed right to custody in the context of mixed marriage? And if a separation occurs between two persons of foreign nationality, what is the relevant law, and what are the problems that it raises and its impact on the interest of the child in light of the different adaptations that describe custody as one of the fruits of mixed marriage?

Research importance:

The issue of nursery is one of the practical topics in view of the openness that the world is witnessing at the present time due to the demise of geographical barriers as a result of the spread of social media, which led to the ease of communication and movement of peoples, and the increase in the migration of Iraqi youth to the countries of immigration due to the security events that surrounded our country or because of the completion of their studies The Supreme Council outside Iraq has led to an increase in social interaction and the growth of the phenomenon of mixed marriage, which is likely to turn into a negative phenomenon, the beginning of which is separation and the center of its gravity is the conflict over child custody, as more than one law is called entitled to apply to this conflict, hence the urgent need to delve into this The subject is in a serious attempt to find a solution to this problem.

Reasons for choosing the search

Despite allocating the text of 19/4 of the Iraqi Civil Code to deal with the law that is applicable in matters related to duties between parents and children, which can be adapted for custody as one of them, but that treatment was not explicit and the legislator did not specify a time for the application of this law, was he successful with this treatment?

Objective of the research: The study is searching for the law applicable to the right to custody, as it is one of the most important rights related to the child born to parents who have a nationality different from the state of the judge or some of them. The study also aims to identify the difficulties raised by the application of the custody rule of attribution.

Research methodology: To find out the problems that have been raised and to understand the issue of nursery in all its aspects, we adopted the following approaches:

1- The descriptive and analytical approach, which focused on describing the legal texts and jurisprudence related to the issue of custody, extrapolating and analyzing it to reveal the circumstances related to it on the theoretical and practical levels.

2- The comparative approach by comparing the position of some Arab and foreign laws that singled out the issue of custody with a rule of conflict and between those that did not concern it with such a rule, in an attempt to find common points and stand on the latest legislative developments in order to support the legislator and the Iraqi judiciary with it.

Research plan: To understand the dimensions of the subject in order to reach the desired results, we divided the research into two requirements. In the first we dealt with the definition of the issue of nursery. It came in two branches. In the first we dealt with the definition of nursery in legislation and comparative jurisprudence, while the second section bore the title of legal adaptation of the nursery, and regarding the second requirement it came under the title Defining The law applicable to custody was mentioned in two sections, the first bearing the title of the position of comparative legislation from the text on an attribution rule related to custody, while the second section was titled Difficulties in applying the law applicable to custody and finally a conclusion that included the most important findings and recommendations.

II. Introducing the issue of custody

The custody of important rights is to place confidence in legislation and remove great importance, as it was a fertile ground for scholars' opinions, which leads us to address the statement of what is intended, according to my Lord for some legislations. And legal jurisprudence, and in order to understand the issue of custody, one must also find out more preliminary concepts than the important issues in this topic, including those with the right of custody as an important criterion in assigning custody to the right person according to the Iraqi Personal Status Law.

The first branch: what is meant by nursery is a belief

Article 57 of the Iraqi Personal Conditions Law did not include a definition for a specific term of custody, but rather the introduction of the Second Amendment to the Personal Issues Law in Iraq by addressing it by saying (meaning prolonged custody in law cases, the personal upbringing of the child and managing his

affairs before him has the right to do so by law, and preserving those who do not He is able to manage his affairs by himself and educate him as he takes care of him and preserves what harms him) (1). We believe that the legislator referred it to the judiciary of Iraq to address it as a safe haven to settle disputes for them more than using the jurisprudential opinions that are more in line with the spirit of the times and the principles of Islamic law as the reference basis in the conditional facts related to the issue of custody as one of the effects of the task that involves the separation of the spouses.

With regard to personal status laws, the Arabic personal language was with the exception of some definition of the term custody, such as the Egyptian Personal Status Law (2), the Jordanian and Kuwaiti laws, while some other definitions simplified Houdan, including the issues of the UAE Personal Law No. 28 issued in 2005 In Article 143, which is known as custody b (Preservation, upbringing and care of the child in a manner that does not conflict with the guardian's right to self) (3).

Legislative definitions are understood earlier, as they are consistent with the concept of custody and are consistent with the wisdom that began with it, which is to preserve guardianship from loss and destruction, and differed in terminology, but taking it on some of them like Iraqi legislation took only the social dimension, without referring to the religious dimension as the Algerian legislator did. He focused on the reasons and objectives of foster care in this definition, which is raising the child and managing his affairs. As for the Emirati legislator, it was balanced between the bilateral relationship that binds the child (the child) and the person in need of care and the second party as a guardian without prejudice to the right of the last state, and in contact with the legislator Qatar received a deferred interest from a small nursery building, so it was considered the centerpiece of the nursery idea, and this is taken on the rest of the definitions that we mentioned.

The second section: holders of custody rights

If the custody is according to the definitions of the previous means, there is a relationship between two persons, the custodian guardian and the child, the jurisprudential fatwas tend to say that custody is a fostered right and that it is considered a right of custody or the guardian and from holding the stick in the middle that makes the pods really common and the child calls for addressing knowledge of the directions of jurisprudence and as follows:

The first trend: the right of custody of young A to cuddling

He went along with the supporters of Islamic jurisprudence (4) in this direction by saying that custody is the right of the little one over his mother, and the mother is not really, if miscarried, she falls (5). She follows this saying that the last custody is forced and she does not have an R in the privilege, but the possibility Power in the absence of another incubator or in the event of the presence of others and they did not accept her a little with a reservation, as was his life later, care and care for his mother in the first place (6). He arranges this opinion as follows (7):

1- It is not permissible for a female incubator to give up or reconcile with the brooder, paid or without compensation, and if it is not suitable for the assignment or reconciliation, it is not worthy of the other side, if any, then he is acting where the opportunity for the right of the young who is owned and can be dropped from each other who is not originally owned is lost.

2- If the aunt takes care of her husband in exchange for giving up custody of her child, even for a specific reason, then the divorce is valid and the waiver condition is invalid because they have missed the right of custody and are not owned.

Second: The mother's right to custody

Supporters of this view argue that custody is a right of the mother that gives her the ability not to force her into a small custody other than her abstaining from sex or waiving this right (8), but if there is no other person or she is responsible for the expenses of her foster child due to the father's lack of money and the spending of the other (9). And, according to this opinion, the following (10):

1- If the babysitter gives up her custody with an excuse, she is not entitled to take it back.

2- If the nursery completes the conditions of custody, then no one has the right to extract from it, because that would result in losing her right to custody.

3- The young brood is not transferred outside the place where the juvenile resides, because this is a waste of the right to custody, and in the event that the mother is not fit to breastfeed her child, her father has brought the disease pe in the place where the incubator is established so that she does not lose the right of custody.

Third: The joint custody right between the custodian and the child

And whoever expresses this opinion believes (11) that custody of the right to custody and the smallness of the child are together and that the mother is not compelled in the event that there is an alternative to her (12) and the interest of the adopted child is stronger than the interest of the foster mother, and it is imperative to work with what is best and most beneficial for him The right of a child is stronger than others (13), so custody here is a sufficient obligation. If it is assigned to the right, it must be abstained from it, and in the case of revelation in contradiction with the husband, khula 'is a valid condition because it is forfeited from the right only. As for the right of the child, the rest is stronger than him.

The position of Arab legislation

Most of the Arab legislations have gone on considering the right to custody as a common right between a babysitter and a young woman, taking into account the interests of the child being the strongest. Therefore, if the mother waives the right to custody, her right to the child remains, whether it is an explicit provision as in the legal and personal precedents No. 188 of 1959 amended (14) Qatari Family Law No. 22 of 2006 (15), or a man explicitly stated, such as the UAE Personal Status Law (16), the Egyptian Personal Status Law, Bahraini Family Law No. 19 of 2017, Kuwait No. 51 of 1984, and the Algerian Family Law.

And it has what the Iraqi and Algerian legislators went to, as the Iraqi Court of Cassation ruled in 2012 that (the mother who deserves custody of the children will irrigate their house if they get married after a thousand papers unless the child is harmed) (17), and also approved by the Supreme Court in Algeria in one of

its decisions in 2002 By saying (Likewise, custody is not the right of Hadent Yen only, but rather a right of small custody) (18).

The second condition

Should the law apply to custody and the difficulties encountered in this application

In view of the difference in jurisprudence and the judiciary regarding the adaptation of custody, it has been reflected in the determination of the law applicable to them, and if its ruling was not to assume an important role in directing us to that law, but the comparison of legislation was divided over it, then this required dividing this requirement into two branches, and this is as follows:

The first section: the position of comparative legislation on the basis of attribution of custody

To stop the fact that a comparison of legislation in this regard must be made to indicate the position of each of the statements of legislation that did not provide a basis for the designation of special legislation, which provides for this, and so on as follows.

First: The position of the coupler pain legislation, which ceased to define the basis for attribution of private custody:

Most of the Arab legislation has been affected by the position of the Egyptian legislator, or is it the Algerian, Emirati and Bahraini legislation, which does not specify the law pertaining to disputes and custody, and it does not differ in the French and English legislation. All controversial jurisprudential and juridical lovers have resulted in many different directions, centering on those trends:

The first trend: You lead this prevailing trend in French jurisprudence (19) and it is supported by an aspect of Egyptian jurisprudence (20) which mentioned custody of many of the effects of marriage measured on filiation as the last Muslim from the effects of marriage, and therefore the marriage contract is a source Commitment as the child is the fruit of this contract and therefore it is the direct influence on the marital (21).

This hadith reaches the conclusion that the law must apply to custody in mixed marriages, which is the law of the husband's nationality as it is the law that governs the effects of marriage and specifically the law of the father at the time the marriage contract is concluded (22).Some of the provisions of the French judiciary were affected in its early stages, the first of this opinion in a ruling issued by the Paris Court of Appeal, which was the custody during its consideration of the issue of proving that his natural father is illegitimate, as it is applied to the court mentioned in the French law regarding the state of any law which governs the effects of marriage, which is the joint nationality law for parties (23) and the Egyptian judiciary has also adopted in some of its provisions (24).

The truth is that the problem of custody does not arise during the continuation of the marital union until it is considered one of its effects, rather it arises after the divorce and separation, that is, after the end of the marital bond, meaning that the marriage contract ended upon pronouncing the divorce or divorce, and that communicating this opinion means not adhering to custody in the event of a child From the fruit of a legal relationship, that is, the absence of a marital relationship in the first place.

The second trend: Supporters of this trend went to adapt custody to its impact on the effects of the annulment of the marriage contract, whether it was divorce, divorce or physical separation, and they considered that the ruling that separates the dispute between divorce in a mixed marriage is the same that separates the issue of attribution of custody, and therefore it must be The law applied to the idea of custody is the same law that reproached the idea of the effects of the dissolution of marriage on the way that justifies their submission to one law, which is the law of the husband's nationality at the time of filing the case, on the basis of the link between the two ideas (25).

The Egyptian and Algerian judiciary rulings (26) that settled on later referred to this trend. The Egyptian Court of Cassation included the custody relationship between children and their guardians in one of its rulings when it said (and they planned accordingly and eliminating the law that applies to the effects of marriage and the reasons for divorce) whether between the spouses or in the relationship between them and the children) (27).

The third direction: a third direction went, led by a side of Egyptian jurisprudence (28), which Kiev incubated on him from the effects of lineage, where he presented his opinion by saying that the effects of lineage extend to rights and duties. Mutual between children and parents, including the state over oneself, and it is custody for its first stages regardless of the relationship between parents (29), as it is an obligation that falls under the child's lineage to him, and the father's law applicable in custody disputes, whether the nationality law is as it is Adopted in Arab countries or the father's house law, as it is applied by the Anglo-American state (30).

The fourth trend: going to some of the jurisprudential threshold by saying that the type of custody of the types of rent resulting from a contract separate from the marriage contract is a lease contract contracted by the father for the benefit of the child, and it seems that this has based his opinion on some of the provisions of the Egyptian judiciary in which it came (the custody contract between the father and mother The incubator is like other lease contracts, and it is also permissible to make a netting for him by contracting for their choice ... Do not accept the fuel that wants to terminate the contract.

This view can be criticized by saying that custody may be attributed in some cases to a person who is not a parent of the child, but to a person whom the court finally deems to be, especially in the case of no civil custody or no custody. Truthfulness and this is what is stipulated in the Iraqi Personal Status Law Article (31).

We have seen the topic

Through the previous presentation, it seems clear about the disagreement over the applicable law as a result of the various amendments that have been launched in the nursery, and if it is possible to accept that the nursery is close to the state of the self within the education, caring for the child, including not harming him and not contradicting the right of the guardian in the state of the self The latter is more general and comprehensive than custody, and the guardian's conditions differ from the guardian's conditions and powers. Custody is based on a court ruling or the agreement of the parties who have custody. As for the mandate, it is confirmed by the texts of Sharia and law, according to the arrangement

Accordingly, saying that the legal condition for custody is a kind of self-guardianship is a false statement, because admitting this means that custody is the right of the father before the mother, and this

contradicts the provisions of guardianship in most Arab legislations. Iraqi laws, whether Article (102) of the Iraqi Civil Code or Article (102) 27 of the Iraqi Law for the Care of Minors, which gave the right of guardianship over the father. As for custody, it is the mother's right in most Arab personal status laws, including Article 57 of the Iraqi Personal Status Law.

As for adapting the custody to its financial condition, and therefore the application of the child's nationality law to say contrary to what has been implemented in the courts of the right to custody depends mainly on the basis for moving the dispute before the courts. Either the right to custody is in a second stage after the dispute is settled, and it may be adjudicated. Whoever is not a student from the mother or the father according to the conditions and controls of custody in a way that serves the interests of the child, the type is the basis, and this is confirmed by the Iraqi Personal Status Law ([32]), that custody is the right of custody and the child, with the interest of the young child being referred back in a case that rejects them.

Based on the foregoing, custody can be considered as one of the issues of duties between parents and children. The source of the obligation to custody is the same law that defines its scope and limits its extent and has implications for the family and children.

Second: Legislation that was taken as a basis for granting private custody

At a time when it played most of the legislation comparison to devote the basis for the appointment of private custody, it settled some other positions of the law, which it should have in custody disputes when singling out the contradictions of explicit rules in this regard, such as the legislation of Qatar, Kuwait and Tunisia.

With regard to the Qatari Civil Law No. 22 of 2004, Article 20 stipulates that (the father's nationality law shall be applied in substantive matters of the state to self and custody, and this roughly corresponds to the text of Article 43 of the Civil Status Law No. 76 of 1980 (33)).

The Tunisian Journal of Special International Law has devoted the text of a file that is somewhat mixed from its predecessors, and Article 50 of them stipulates the following (subject to the law of custody in which the dissolution association signed. Marriage or the law the personal file of the child or on the basis of the law).

It is understood from the foregoing that the Tunisian legislator has put in place a unique law of conflict, as it gives the judge the right to choose one of the best three laws, which is the law by which the marital bond was dissolved, the personal status law of the child, or the law of his home, provided that this choice takes into account the interest of the child The best.

In the same context, the position of the Iraqi legislator came about the law that should be applied to custody and you are not explicit. Paragraph 4 of Article 19 stipulated Iraqi civilians on it (issues of filiation, the state and other duties among which parents and children must apply the father's nationality law). Thus, the Iraqi legislator was brought together for issues of filiation, the state and other duties between children and fathers, and the inclusion of custody as one of the duties of the first law, which is the law on the nationality of the father, thus expanding the scope of this law. To include the guardianship conditions for the duration and fall of wages and salaries.

An echo of this article was found in one of the rulings of the Iraqi Court of Cassation, where it ruled that (the children of young children in Islamic law follow the Islam of the spouses, and this is correct, the distinguished ruling, which provides for the distinction between spouses and the handover of children to their mother, is correct and they agree to the law beginning) (34).

In fact, the application of the nationality determination control according to the text of Article 19, which requires the application of the father's nationality law, given that the issue of custody in Iraq is a personal status issue derived from Islamic law, a good choice. Therefore, adopting this officer allows the application of Islamic law to Muslims residing abroad, while adopting other controls, such as the homeland, as in the Anglo-American systems, allow the application of non-Islamic laws to the Iraqi communities residing there. Despite this, we do not agree with what the Iraqi legislator said about limiting the selection to one officer while leaving the judge to choose the exact time in the event of multiple jinn Saih the father. This may lead to the control of the judiciary and instability of judgments in similar cases, so that it is not possible to deviate from a general principle that can be relied upon, which thus reduces the chances of achieving justice, and embodies, for example, in the hypothesis that applies to the judge, the law of the father's nationality was marriage, which means recognition that Custody is one of the effects of marriage, and this is what we were criticizing previously. As for imposing the application of the father's nationality law at the time of divorce, it means acknowledging that custody is one of the effects of divorce, and this is imprecise. Custody issues may arise during and after the marital relationship, and divorce proceedings can be filed separately from the custody case. As for the application of the husband's law at the time of the child's birth, it leads to the multiplicity of laws in force in the event of multiple children and the possibility of each of them obtaining a different nationality, especially in the case of changing the father's nationality before birth and acquiring a new nationality, not to mention the possibility of the father's death before the birth of the child.

To avoid the above, look at the controls, Option A allows the judge, including choosing the most appropriate law according to the best interests of the child, the nationality law of the husband at the time the lawsuit is filed or the nationality of the child law, in js law first applied within this deadline is most appropriate because the time The specifics raised by the dispute. The effects of the husband's law at that time are an attempt to unify the husband's law in matters of personal status, especially since the legislator adopted this solution contained in paragraph 3 of the same article in matters of divorce, separation and physical separation, and to reduce the problems encountered in this application, especially If it is proved that it is necessary to circumvent the law by acquiring the new nationality of the spouses at this time with descent in order to benefit from the law of a particular state so that the application of the nationality law for the child as a very important link that revolves around the custody dispute and the judge in that discretion in Choosing to achieve those interests is what is hoped for, and this choice is conditional on not disturbing the public order in Iraq.

The second section: Challenges of the work of the father's law in matters of custody (the problem of applying Article 19 and the bullet presented by the Iraqi judge).

While the Iraqi legislator singled out the guardianship rule in Article 19/4, it is necessary to apply the bottom n. The father, but things do not go so easily, as they cause the choice of the law on the nationality of

the husband. According to Article 19, a legal problem in certain hypotheses, from here it is necessary to shed light on them and develop solutions with the help of jurisprudence and jurisprudence in this regard, as follows.

First: the legal loopholes that exposed the actions of Article 19 of the Iraqi Civil Code

You may imagine some Iraqi lawmaker may be biased in the exception article contained on 5/19 to apply Iraq's law to custody disputes if one of the parties to the Iraqi relationship at the time of marriage is trying to achieve equality and protect the man and woman in Iraq and is married to a foreigner, but that exception mediator finds a legal problem that may arise On certain occasions of exposure to the Iraqi judge, the individual regarding, for example, a Syrian marriage to a Jordanian and a forger in Iraq, and the division between them obtained the wife at the beginning of her pregnancy from this marriage, and then naturalized the Iraqi nationality during pregnancy based on a previous transaction that demanded the acquisition of nationality. An Iraqi woman grants her the right to the Iraqi nationality law and after birth there was a dispute over custody of the child, and in this assumption the Iraqi law will not apply because the Iraqi wife was not from her marriage and this is recognized as an exception above the possibility of applying the Iraqi law and suddenly changing his status and harm their interests, and overcoming This assumption was the first application of the Iraqi law if the spouses were Iraqis without specifying a specific time (35) similar to Article 25 of the Egyptian Civil Law.

Second: Multiple nationalities

Mai Assaf is an Iraqi judge in mixed custody disputes, provided that the husband has more than one nationality at one time, and here it is in front of two cases. The first is that one of the multiple nationalities of the husband is with the nationality of the judge's state of any Iraqi nationality, and in this case there is no problem with the judge, the Iraqi law is applied based on the text Article 33/1 stipulates (for those who prove them at one time, regarding the Iraqi nationality for Iraq and for the foreign country or several countries of foreign nationality, the law of the State of Iraq must be applied).

The issue is the second basic method in the event that a father possesses more than one nationality and does not include the Iraqi nationality in custody disputes, and at this stage Z, the mother does not have the nationality of an Iraqi, and the Iraqi legislator has not stood silent. As for this hypothesis, Article 33/1 of the Civil Status Law CAPS (specifies which court to apply or whoever proves multiple nationalities at that time. One) (36).

It is clear from this text that the legislator called on the Iraqi court to choose the relevant law in custody disputes, as the effects of dissolution of marriage are mixed as it deems appropriate, but he did not set the standard. Determinants can be on the basis of attributing conflict custody to the relevant law.

With reference to the views of the jurisprudence of private international law, it becomes clear to us that several criteria have been adopted, among them the principle of equal opportunities among sovereigns, which means that the judge before custody considers all nationalities on an equal footing, and therefore a multinational person has the obligation to adhere to one and is dealt with on this basis (37).

The other criteria are the standard weighting of nationality before the other in relation to the rights acquired at the beginning of the criterion that favors the nationality of the state, which is a law closer to the law

of the judge, and the standard house (38) and the actual or real sexual standard is most in line with the most common principles of private international law.

The actual nationality criterion means the nationality of the country in which the person is closer to other nationalities, and the judge helps him to uncover them all by searching for the circumstances and reality of each case, several elements of the goal such as a place of actual residence, an actual marriage, a place of correspondence or other indicators, such as the extent of his ability to communicate in the language of the country whose nationality is to be proven, or where to perform military service ... etc.) (39), and it seems that the true sexual criterion is the most honest and most likely criterion because it is the nationality of the country that is associated with them, uses the rights and fulfills its obligations.

Third: statelessness

A stateless citizenship is a person who relinquishes all state laws from the mind of N of their citizens since birth or later on this Christmas falls into an asexual status (40).

Regardless of the details of the many opinions that were said about the applicable law that does not allow its status (41), the opinion has gone that the law of a person's home or place of residence may be applied in custody disputes in mixed marriage as it is one of the most common principles in private international law, This was endorsed by both the Geneva Convention relating to the Status of Refugees in 1951 and the New York Convention. Badimi nationality 1954, most European courts and some Arab legislation (42).

As for the Iraqi legislation, it did not explicitly take this solution, but rather left the matter to the discretion of the judge, as Article 33/1 of the Iraqi Civil Code stipulated that (The court determines the law to be applied ... in the case of persons who do not know the nationality (43).

With reference to the Iraqi Penal Code No. 111 of 1969 in the Mediterranean, we find that Article 19/1 can be considered a person who is not of his nationality and residing in Iraq, an Iraqi citizen. The application of this law and thus the reference to the application of the Iraqi law to the judge of the house of the person who was found, or the law of the place of residence in the first degree in custody disputes in the absence of the nationality of the person who wants to apply the law.

Fourth: Changing the father's nationality (changing the attribution officer to the person's nationality).

Changing the attribution officer on nationality or the so-called transition conflict raises many difficulties, especially when applying the nationality law, as it is the law applicable to personal disputes, including custody as one of the duties between parents and children according to the interpretation of the text of Article 19/4 of the Iraqi Civil Law.

This embodies the loophole of a legal change that governs the attribution of the father's nationality in the period between marriage and the filing of the lawsuit, or what is the latest situation and the issuance of the judgment, in the assumption that a Jordanian man marries Syria and resides in Iraq. Then the two spouses have a child, and then the mother obtains Iraqi nationality and the conflict revolves around after the divorce, and here the Iraqi judge will find before the officers the assignment of two mangles and not Asafana in the application of Iraqi law, whether on the basis of the text of Article 19/4 of it or resorting to the exception mentioned in

Paragraph 5 of the same Article, which requires the application of Iraq law if one of the Iraqi spouses was at the time of marriage. The father does not have Iraqi nationality in the first place until we apply the text of the article previously, as it cannot be applied with the exception because the mother acquired Iraqi nationality after the conclusion of the marriage and the change of the husband in the past by imposing his nationality after establishing the right, and I mean concluding the marriage and acquiring Iraqi nationality after the divorce and filing the case. It leads to the application of a law that the wife did not expect upon the conclusion of the marriage, or the imposition of the application of Iraqi law in the event that one of the spouses holds Iraqi nationality at the time of marriage, despite his relinquishing it later. So the doubles became an alienated later.

On our part, to avoid these problems in the event of a change of nationality from time to time, two attribution officers can be approved and they are the application of the husband's law at the time of filing the case, and in the event that occurs. The personal status law of the child was not applied because it is the best law for him, as Iraqi law applies without specifying any time in case one of the spouses is an Iraqi citizen.

III. Conclusion

At the end of this research, we reached a set of results through which some recommendations can be made as follows:

Results:

1- The Iraqi legislator regulates the issue of nursery according to a special base of attribution, although it is not explicit like the rest of the legislations, such as the Kuwaiti, Qatari and Tunisian legislation, but that does not mean that the organization was complete and incomplete, so the Iraqi legislator did not explicitly specify the term the law applicable to custody nor did the time specify What is taken, is it the law of the father's nationality, the conclusion of marriage, the time of dissolution of the marital bond, or the time of filing the lawsuit, which raised many questions about that.

2- Establishing a custody attribution rule based on the nationality regulator may collide with many legal problems, including the multiplicity of nationalities and their absence, as well as the moving conflict

3- If the legislator has singled out custody disputes of an international character for a custodian officer related to nationality, but he did not refer within the rules of attribution to the forms that are represented by changing the religious beliefs of the two children, which in turn reflects on the right to custody, and it seems that the legislator left that to matters of public order and status law the Iraqi character.

Recommendations

1- We urge the ethnic legislator to amend the custody attribution rule Article 4/19 Research The new paragraph includes an explicit text regarding custody disputes that includes among its options optional attribution controls that leave the freedom for the judge to choose the law applicable to custody represented by the father's law at the time of filing the case first and in case it is not possible Its application leads to the application of the personal law of the child as he is the main person in the disputed relationship. As for adhering

to one authority for attribution, which is the law of the father's nationality without specifying a specific time, it sometimes leads to the rule of the judiciary and its instability on a discriminatory principle in the similar case, which may surprise the opponents in a law that was not taken into account, especially in the event that the husband or wife acquires Iraqi nationality after divorce, to circumvent the law in an attempt to apply the Iraqi law to the case. As for the multiplicity of custody attribution controls and leaving the judge's freedom to choose in a way that achieves the interest of the child, it is a limitation of the above.

2- We call upon the Iraqi legislator to amend the fifth paragraph of Article 19 of the Iraqi Civil Code so that the amended paragraph requires the application of Iraqi law in the event that one of the spouses is an Iraqi in custody disputes and without specifying a specific time for this application.

References

- 1- Lisan Al-Arab by IbnManzur, Volume 13, Ahmed Ibrahim Ahmed, Private International Law (Conflict of Laws), Dar Al-Nahda Al-Arabiya, 2002. IbnAbdeen, Muhammad Amin bin Omar bin Abdul Aziz Al-Dimashqi. Hanafi, c3, Al-Mukhtar's Response to the Chosen Role, Dar Al-Fikr, Beirut, 1421.
- 2- Ahmed Muslim, Brief on Private International Law in Egypt and Lebanon, Dar Al-Nahda Al-Arabiya, Cairo, 1966.
- 3- Salah El-Din Gamal El-Din, Custody Problems in Mixed Marriage (a comparative study), Dar Al-Fikr University, Alexandria, 2004.
- 4- Ghaleb Ali Al-Daoudi, Hussein Al-Haddawi, Private International Law (Nationality - Nationality - Foreigners Center) Part One, Al-Ateeq Book, Cairo, without a year of publication.
- 5- Okasha Muhammad Abdel-Al, Conflict of Laws (A Comparative Study), University Press, 2002.
- 6- Muhammad Kamal Fahmy, The Principles of Private International Law (Nationality, Citizenship, the subject of conflict), University Culture Foundation, Alexandria, 1997.
- 7- Hafiza El-Sayed Al-Haddad, Summary in Private International Law (Nationality - Foreigners Center), Book Two, Al-Halabi Publications for Human Rights, Lebanon, 2002.
- 8- Ezz El-Din Abdullah, Private International Law (Conflict of Laws and Conflict of International Jurisdiction), Egyptian General Book Authority, Ninth Edition, Cairo, 1986.
- 9- Mahmoud Bouzinah in Safety, Conflicting Laws on Custody of Children in Mixed Marriage (Comparative Study), Journal of Jurisprudence, Volume 12, Issue 2, October, 2019.
- 10- Problems of conflict of laws in matters of custody (a comparative study in light of Arab legislation and judicial jurisprudence in Algeria), Algerian Journal of Law and Political Science, Volume Three, Issue Five, June 2018.
- 11- Hussein Rajab Muhammad Mikhliif, Custody in the Iraqi Personal Status Law (a comparative study), Al-Taqi Magazine, Volume 24, Issue 10, 2011.
- 12- Rasha Ali Al-Din Ahmed, Child Rights (a comparative study in light of the contradictions in Arab laws (parenthood, alimony), Journal of Legal and Economic Research, Issue 66, August 2018.
- 13- SuadYobi, The Problem of Custody Ratios in Mixed Marriage, Baseera Center for Research, Consulting and Educational Services, Issue 24, February, 2017.

- 14- Difficulties in the law applicable to private international relations (nursery as a model), Journal of Law and Political Science, Issue 4, June, Algeria, 2016.
- 15- Izzat Muhammad Ali Al-Buhairi, Law applicable to nursery (a comparative study in Islamic jurisprudence), Journal of the College of Sharia and Islamic Studies, Qatar University, Issue 25, 2007.
- 16- GhaliKahleh, Legal Problems Preventing Custody in Mixed Marriage (Comparative Study), Law Journal, Issue 9, December 2017.
- 17- Farsi Yesh, Nursery and Applicable Law, published by the Faculty of Legal, Economic and Social Sciences in Marrakech, Volume 2, 2017.
- 18- Firas Karim She'an, Hussein NehmeNghemish, Conflict of Laws in the Nursery (a legal, jurisprudential and judicial comparative study), Journal of the Scientific Investigator in Legal and Political Sciences, First Issue, Fifth Year, 2013.
- 19- NashwanZaki Salman, Custody and conditions for its practice (a comparative study), Al-Rafidain Journal of Rights, Volume 16, Issue 59, Year 18, 2014.
- 20- The Judicial Journal, Iraqi Bar Association, Issue 3-4, Thirty-second year, 1977.
- 21- HodaEsmat Amin, nursery school in Personal Status Law and International Agreements, MA, Salahaddin University, 2005
- 22- SouadYoubi, nursery school in private international law, PhD thesis, AbiBakrBelkaidTesselman University, Faculty of Law and Political Science, Algeria, 2018.
- 23- Blaslow and Dr. Fawry, Joint Custody in Litiginal Courts, Discussion Papers Series, No. 7472, June 2013.
- 24- NLOW E, National Report: England and Wales.
- 25- Pativol, TraitéElémentaire De Droit International Privé 3^{ém}Editione, 1959, p. 520; JPNiboyet, Cour De International PriveFrancais, Paris2^{ém} Edition, 1949.
- 26- Joseph, Child Status and Law Struggle, University of Chicago Law Review.