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# An Applicable Law on Custody: A Comparative Study

**Nadia Qozmar**

*School of Law, Jerash University, Jerash, Jordan.*

ORCID iD: <https://orcid.org/0009-0006-9464-0456>

Email: [prof.dr.nadiaqozmar@gmail.com](mailto:prof.dr.nadiaqozmar@gmail.com)

**Najlaa Flayyih**

*School of Law, Ajman University, Ajman, United Arab Emirates.*

ORCID iD: <https://orcid.org/0000-0002-2807-9350>

Email: [N.flayyih@ajman.ac.ae](mailto:N.flayyih@ajman.ac.ae)

**Omar Al-Makhzoumi**

*School of Law, Zarqa University, Jordan.*

ORCID iD: <https://orcid.org/0000-0001-5249-424X>

Email: [omakhzoumi@zu.edu.jo](mailto:omakhzoumi@zu.edu.jo)

**Ali M Abughazleh**

*School of Law, Amman Arab University, Amman, Jordan.*

ORCID iD: <https://orcid.org/0009-0000-7156-8590>

Email: [a.abughazleh@aau.edu.jo](mailto:a.abughazleh@aau.edu.jo)

**Mahmoud Odeh**

*Cybersecurity Department, School of Information Technology,  
Zarqa University, Jordan.*

Email: [Modeh@zu.edu.jo](mailto:Modeh@zu.edu.jo)

**Ahmad Abdulkadir**

*Jeddah College of Law, University of Business & Technology – Saudi Arabia.*

ORCID iD: <https://orcid.org/0000-0003-4159-2041>

Email: [a.abdulkadir@ubt.edu.sa](mailto:a.abdulkadir@ubt.edu.sa)

## **Abstract**

### **Keywords:**

*Custody, Private International Law, Judicial Hesitancy, Childhood, Personal State*

*The intricate nature of the rights and responsibilities that emerge in international private relations regarding personal status, along with the variations in these rights and concepts across different countries, have had a significant influence on the laws governing custody. This study has centred on important and essential issues that formed the basis of the research and a brief discussion that presented a fresh examination of the needs and regulations of custody in private international law. It takes into account recent advancements in international private relations, recognising that custody is primarily a social concept rather than a purely legal one. For this study, a secondary qualitative study was conducted, incorporating a legal approach. The data was gathered from various primary and secondary sources, and a descriptive analysis was performed. The findings of this study indicate that the primary focus of all legal research has been on matters related to personal status, such as custody. These issues are crucial for the functioning of societies and the well-being of individuals. Comparative legislation, including the legislatures of Jordan and Egypt, has shown interest in the topic of custody. However, these legislations did not establish a clear framework for determining the applicable law. As a result, the issue was left to be addressed by legal scholars and the judiciary, leading to disagreements among scholars and hesitation among judges when making rulings. The doctrinal conflict and judicial hesitancy in custody determinations arose from contrasting perspectives on adaptation, which is a fundamental aspect of custody law. Based on the analysis of legal precedents and court decisions, it has been determined that custody is equivalent to soul guardianship. As the head of the family, the father's nationality law applies, granting him the authority to regulate all family activities. Because parent-child dynamics differ from parent-parent dynamics. The current study has also highlighted significant implications, emphasising the need for strict laws and policies to safeguard the custody rights and requirements of children.*

## **Introduction**

Childcare is a crucial aspect of global private relationships, with the individual being viewed as the cornerstone of the family. This is because the experiences a child goes through during this period play a crucial role in shaping their core personality traits. These traits can be difficult to alter later on, regardless of whether they are in a shared or separate environment (Al-Lamsawy & Al-Lamsawy, 2002b).

Childhood is a powerful reminder of the immense responsibility we have to guide and shape the next generation. It is a time when we must provide guidance, instruction, and moral support to ensure that they carry the message of tomorrow. The parents' dedication to maintaining family unity is believed to greatly influence their children's behaviour, sense of togetherness, and overall mental health. Challenges in life and building a family can sometimes cause strain on a couple's relationship, which can hinder the intended goals of marriage (Nasser, 2002b).

Considering that divorce is a commonly chosen method to terminate a marriage, a crucial aspect that arises from divorce is the custody of children born out of the marriage. This raises concerns about the well-being of the children and the responsibility of their guardians to provide for them. Additionally, there are unique challenges in safeguarding children in marriages that involve a foreign partner ([Apostolou, Constantinou, & Anagnostopoulos, 2019](#)). This emphasises the importance of laws related to custodians.

Regarding this matter, the primary method of obtaining custody of children is through the "applicable law on custody." In a custody proceeding, three parties are considered crucial: the minor, non-custodial, and custodial parent. There have been numerous provisions established by national legislation concerning the well-being and safeguarding of children, which have subsequently developed into international conventions ([Gallala-Arndt, 2015](#)).

Given the lack of established rules regarding the provision of kindergarten, this study will concentrate on the rule of attribution that governs custody matters. The aim is to assist national judges in determining the applicable laws for custody cases.

Religious scholars have collaborated with them to develop legal documents that establish their lineage, facilitate breastfeeding, nursing, and child expenses, and manage their finances until they reach adulthood. The Islamic Sharia is widely regarded as the definitive guide for matters concerning personal status ([Gallala-Arndt, 2015](#)).

Given the lack of established rules regarding the provision of kindergarten, the researcher aims to identify a governing rule for custody issues. This will enable national judges to determine the applicable laws for custody matters.

This study primarily centres around establishing the definition of nursery and its upkeep, along with the necessary requirements for custody and the specific legal scope related to this matter.

Thus, the present study has made a valuable contribution to the existing literature on custody law. This study has provided crucial custody requirements. Simultaneously, the ongoing study has also emphasised significant implications necessary for safeguarding the rights of children during custody battles. In addition, the current study has significant practical implications as it can contribute to the development of a strong legal framework for safeguarding children's custody rights. Regarding this matter, a well-crafted legal framework can also be developed.

## **Literature Review**

### **Custody Definition**

Nursery language (1): This source of action involves wrapping one's arms around another person, creating a sense of warmth and comfort. It can be

done in various ways, such as placing the arms around the chest or shoulders. The purpose is to express affection and care, often seen in nurturing environments like a nursery or when comforting a child.

Nursery is the terminology (2) which means: raising a minor or raising a child.

Nursery Fariha (3): Legal guardianship of a minor or an individual who is unable to care for themselves due to mental incapacity; Recognition of his achievements; Avoiding anything that could cause harm is crucial. and the intellectual, emotional, and cognitive development to face the challenges of life and take on its obligations.

Nursery (4): The upbringing, care, and preservation of minors, supervision, and the management of all their affairs at a certain age, ensuring their well-being and protection. It revolves around the challenge that young individuals face in their formative years - the struggle to be self-reliant, make independent decisions, and differentiate between what is advantageous and what is detrimental.

### **The Reason for Child Custody**

A nursery serves a crucial role in supporting young children who are still developing self-awareness and the ability to communicate their needs effectively. It provides a nurturing environment where they can learn about the things that are beneficial for their growth and development while also being protected from potential harm. Therefore, the nursery prioritized nurturing and tending to the well-being of a young individual and their surroundings (Al-Jund, 1993).

A young person requires a unique service that aligns with the early stages of their life. He requires empathy, along with recognising his perspective as a child and communicating with him using the language of empathy and understanding. A young person also needs someone to connect with them on a personal level, someone who can understand and empathize with their inner thoughts and emotions. The mother is typically more skilled in these areas and has a natural right to custody of the young child (5).

### **Custody Requirements**

A minor's education requires an incubator who possesses the necessary competence and capability to fulfil this responsibility. Capacity and competence are guaranteed by the presence of specific conditions. If any of these conditions is not met, the incubator will fail:

1- The mind (6): The incubator must possess the intellect and therefore cannot be responsible for the care of individuals who are mentally unstable or insane. Such individuals are unable to take care of themselves and are not allowed to seek assistance from others, as the person who loses something cannot give it away.

2- Puberty: The incubator is a male or female puberty, since a young person needs to be taken care of by a person who incubates him, even if he is special ([Nasser, 2002b](#)).

- Trustworthiness and morals: A custodian is expected to demonstrate fidelity and morality, ensuring the well-being and development of a young person, without compromising their health, behaviour, religion, or psyche. The custody rights of an individual lacking trustworthiness are not determined based on the upbringing and morality of the young person ([Alruwaili, 2021](#)). For instance, if someone displays immoral behaviour, they are not considered suitable for caring for a young person and are not granted custody. However, a person who demonstrates responsible behaviour and prioritises the well-being of the young person is granted custody until the age of seven. This is done to ensure the proper care and protection of the child, and it aligns with the practices in Sharia Courts.

- The ability to raise a child: The conditions of a nursery typically involve providing care and meeting the needs of children or young individuals, rather than focusing on specific abilities or limitations. Therefore, the presence of an incubator does not necessarily imply that the nursery is intended for disabled or incapable individuals ([Al-Jund, 1993](#)). Severe illness, poor health, or work may be the cause. Thus, neither the presence of blindness or visual impairment nor an illness that hinders their ability to perform daily tasks allows for independent functioning. Simultaneously, it is essential for effective childcare that an elderly individual requiring additional assistance does not neglect their household responsibilities. This is to prevent potential harm or neglect to the child. Additionally, individuals living with contagious diseases or harbouring animosity towards young children should not be entrusted with childcare, even if they lack access to alternative care options.

It is important to acknowledge that there are specific criteria for an individual to be eligible as an incubator, whether they are a woman or a man ([Al-Lamsawy & Al-Lamsawy, 2002a](#)).

### **Legal Nature of Custody**

To comprehend the legal aspect of custody, it is necessary to establish a precise and coherent framework due to the extensive and dynamic nature of international private relations. This nature is boundless in comparison to the rules governing the resolution of conflicts ([Alruwaili, 2021](#)).

This obliges legislators and judges to place these complex realities under the sects and divisions that have a statutory governing text, so how can we reconcile the renewed and non-exhaustive international private relations, including the issue of custody, with the limited rules of conflict over which to settle conflicts of laws.

Hence the urgent need for the issue of adaptation in international private relations to reach the attribution rule as a first step in order to resolve the

dispute or the determination of the particular relationship ([Ibrahim, 1992](#)). The question of adaptation appears in international law on the presence of a foreign element in the custody dispute as the difference of nationality or the domicile of the parents.

In the realm of adaptation, the judge's authority is not without limits. The Court of Cassation oversees the proper selection and application of legal rules in this area. This is particularly important in custody cases, where adaptation plays a crucial role in establishing relationships and determining the applicable laws ([Salama, 1996b](#)).

Many find the task of determining the applicable law for a dispute to be intricate and challenging to resolve. This is because the issue at hand may vary from one state to another, resulting in different classifications for the dispute. Consequently, the conflict rule will differ, leading to variations in the applicable law for custody and ultimately resulting in different solutions. This phenomenon is commonly referred to as the conflict of adaptations.

The issue of adaptation was resolved by the Jordanian legislature through Article 11 of the Jordanian Civil Code, which stipulates that “Jordanian law is the reference in the adaptation of relations when it is requested” ([Hayajneh, 2012](#)).

When it comes to deciding which law applies in a conflict-of-laws case, the Jordanian legislature follows a theory that gives authority to the judge to adapt the law. As a result, the Jordanian judge is obligated to refer to Jordanian law ([Nasser, 2002a](#)).

When a dispute regarding a legal relationship with an international aspect is presented to the party involved, they have the authority to determine the nature of the relationship or legal position. In Jordanian law, these are the rules that are currently in effect in the Hashemite Kingdom of Jordan. They encompass various sources of legislation, custom, justice, and jurisprudence.

Therefore, the issue of adaptation seems to play a crucial role in determining the rule of attribution and ultimately deciding the law that has the authority to objectively govern the dispute. In Jordanian law, the primary adaptation is used to determine the nature of the relationship in dispute and include it in a legal system. Its role is limited to determining the applicable law ([Al-Masryi, 2009](#)).

Any changes made afterwards fall under the authority of Jordanian law and are regulated by the relevant legal framework determined by the rule of attribution. The legal system in Jordan encompasses all the rules and sources of law within the country. When dealing with a relationship that involves a foreign element, it is important for a Jordanian judge to consider international perspectives and concepts. Instead of strictly adhering to their own laws, they should broaden their horizons and take into account various legal relations that may arise with the foreign element within their legal system. It must be noted that the Jordanian legislature intended to

subject adaptation to Jordanian law only in the event that the dispute was brought Article 25 of the Jordanian Civil Code (Act No. 43 of 1976) and its amendments stipulate that: "The principles of private international law shall be followed in the absence of any conflict of laws stipulated in previous articles." Article 24 of the Jordanian Civil Code No. 43 of 1976 and its amendments stipulate that "the provisions of the previous article shall not apply if there is a provision in a special law or in an international treaty in force in the Hashemite Kingdom of Jordan that contradicts them". Section 19 of the Jordanian Civil Code No. 43 of 1976, which has been modified to include provisions for real estate and movable property, also includes two exceptions to Jordanian law as outlined in section 11. or the legal system in Jordan ([Mirbaz, Sohail, & Jawad, 2022](#)).

The Egyptian legislature has proactively worked towards updating the judge's law in accordance with Article 10 of the Egyptian Civil Code No. 131 of 1948 and its subsequent amendments, which stipulated that "Egyptian law is the reference in the adaptation of relations when it is requested to determine the type of relations in a conflict of laws case in order to determine the applicable law among them" ([Al-Dawudi, 2011](#)).

Many people discuss the challenges of navigating personal status issues, which can vary greatly depending on the laws of different regions or communities within a country ([Al-Hedawi, 2011](#); [Paul, Kiesewetter, & Khalaf-Newsome, 2023](#)).

There are multiple solutions available for addressing this matter. One option is to have the adaptation be subject to the judge's interpretation of the law. Another approach is to determine the applicable internal law based on the rules of attribution in a multi-religious and multi-confessional State.

Article 27 of the Jordanian Civil Code No. 43 of 1976 and its amendments stipulate that "if it appears from the provisions of the foregoing articles that the applicable law is the law of a particular State in which there are several laws, the internal law of that State shall determine which of them should be applied" ([Al-Hedawi, 2011](#)).

An approach similar to this has been adopted by the Egyptian legislator through article 26 of the Egyptian Civil Code No. 131 of 1948 and its subsequent amendments (where it appears that the applicable law is the law of a particular State in which there are several laws, the internal law of that State shall determine which of these laws shall be applied).

According to [Salama \(1959\)](#), it is clear that custody falls under the category of personal status. Therefore, when a judge examines legal relationships involving a foreign element, they must adapt their understanding to align with international principles of cooperation and coexistence among different legal systems. This allows the judge to effectively handle cases involving foreign elements. For this to be achievable, it is crucial that the national judge approach foreign legal systems with an informed perspective and an expansive mindset ([Lequette, 1976](#)).

It is worth mentioning that there has been a range of opinions and uncertainties among legal experts and judges when it comes to defining the legal status of custody (including custody adaptation). Some argue that it carries more weight in terms of its impact on marriage, while others emphasise its significance in relation to divorce, separation, personal jurisdiction, or financial guardianship ([Riad & Rashed, 1976](#)).

There is a belief that it is important to shield children from marital conflicts due to the negative impact these disputes can have on them.

Some scholars argue that custody is a right of both parents involved in the child's upbringing. Ultimately, there is a perspective that argues for the child's well-being and the involvement of both parents in their upbringing. This includes the father's responsibility to provide for the child's needs and the opportunity for him to take care of the child during custody. The goal is to find a balance that respects all of these rights and responsibilities. When there is a conflict between these rights, the child's right is prioritised over the rights of the father and mother. This is because the well-being of the child is considered more important and is always given precedence.

## **Method**

### **Research Approach**

This study primarily centres around the topic of "applicable law on custody," specifically examining the various requirements for custody and the application of specific laws. Therefore, to address these objectives, an interpretivism philosophy is incorporated, which primarily focuses on subjectivism. This approach has been proven to be effective in supporting inductive reasoning, which is essential for justifying the exploratory nature of the study. For this study, a rigorous qualitative methodology was applied.

In order to achieve this goal, a thorough analysis was carried out, focusing on the countries of Egypt and Jordan.

### **Data Collection Sources**

Various data sources were considered for this study. Primary sources were carefully examined to ensure compliance with relevant laws and legislations pertaining to custody requirements. However, when considering secondary sources, various journal articles, books, and literature were taken into account.

### **Data Analysis**

Once all the necessary data was gathered, we proceeded to analyse it descriptively to examine how a particular law could be applied in the context of custody.

## Results and Discussion

### Specify Applicable Law

It has been noted that the national legislators of Jordan and Egypt did not establish a specific rule of attribution for the issue of custody. As a result, jurisprudence had to develop a rule of attribution for the applicable law. Therefore, the study has examined the trends in jurisprudence that aim to establish a rule of attribution for the applicable law by linking the issue of the rule of attribution to the issue of adaptation. Furthermore, there has been a significant emphasis on the legal aspects surrounding custody, including the scope of applicable laws, the factors of age and duration, the costs involved, housing arrangements, visitation rights, and the possibility of waiving custody. As a result, the concept of public order has emerged as a potential obstacle to the application of foreign laws in custody matters, leading to the following demands:

The first requirement: The law applicable to custody

Second requirement: The scope of the law applicable to custody

Third requirement: Public order and exclusion of foreign law from the application of custody.

### Section I: The Law Applicable to Custody

The issue of custody is viewed as a matter of personal status, which greatly impacts the bond between parents and their children. Therefore, the matter of adaptation has been thoroughly examined, leading to the emergence of various jurisprudential trends aimed at establishing a rule of attribution for determining the applicable law. I shall therefore review these jurisprudential trends as follows:

**The First Opinion:** The argument suggests that the prevailing views on custody are influenced by the laws governing descent. According to this perspective, custody is seen as a consequence of descent, meaning that the law of the father's state is applied when the child is born. This viewpoint considers custody as the initial step towards self-jurisdiction, and distinguishes it from financial guardianship, which is governed by the law of the father's state. Several comparative laws have been considered in this regard, such as the Kuwaiti law in Article 43 of 1961, as well as laws from Iraq, Germany, Italy, Switzerland, Turkey, and Japan ([Sassòli, 2005](#)).

**Second opinion:** Another approach is to consider custody within the legal framework that governs marriage's consequences. This is because the child is a product of the marital relationship, and therefore the laws of the husband's state at the time of marriage are considered relevant. This viewpoint has received support from certain court decisions.

**Third opinion:** In recent times, there has been a growing trend to address custody matters in accordance with the laws that govern the effects of divorce. This is because the issue of custody only arises after the marriage contract has been dissolved. Therefore, custody is considered as one of the consequences of divorce, separation, or dissolution of the marriage. By applying the Egyptian conflict rule, as stated in Article (13/2), the law of the husband's (father's) country at the time of divorce, separation, or filing for divorce is taken into consideration. This law governs the effects that pertain to the relationship between the parents and their children. Consequently, this law has the authority to make decisions regarding custody, its conditions, and other related matters ([Berger, 2002](#)).

**Fourth opinion:** According to this legal principle, the relevant law is restricted to two specific laws. The first one pertains to the consequences of divorce, specifically the law of the father at the time of divorce or the time of the lawsuit, as per Egyptian law. The second pertains to the personal law of the child, specifically the law of the State to which the child belongs in terms of their nationality ([Ayoub, 2022](#)). This trend supports the first law regarding custody, which only comes into play when a disagreement arises and a marriage is dissolved, based on practical and legal considerations. The proponents of this trend argue for the importance of prioritising the well-being of the child in the aftermath of a divorce. They delve into various aspects, such as the child's best interests, their age, their relationship with their peers, and the individuals involved in the dispute. This trend also indicates that it is important for the most appropriate law to be applied to various aspects of custody, such as its initiation, transition, termination, the obligations of the custodian, visitation rights, and other related matters. This is discussed within the context of the legal framework surrounding custody laws.

**Fifth opinion:** Certain aspects of contemporary jurisprudence and international conventions lean towards favouring the laws of the young person's home country as the sole governing authority when it comes to matters of custody or protection.

**Sixth opinion:** This trend is the latest one, which is regarded as the judicial one since it is founded on judicial rulings. We did not find any legal basis in jurisprudence for treating the issue of custody in the same way as the guardianship of a young person's property. Specifically, there is no provision in the Egyptian Civil Code No. 131 of 1948 that subjects custody to the law of the young person's nationality, as stated in Article 16 ([Eldin, 2000](#)). There have been concerns about the judiciary's approach to determining the law applicable to custody issues. Some argue that it has treated custody as a matter related to jurisdiction over money, which is protected under Egyptian civil law. However, the judiciary has declined to apply the rule of attribution of jurisdiction over money in this case.

In relation to the provision mentioned in margin No. 31 regarding the subordination of custody to the law applicable to the guardianship of a young person, there are differing opinions. Some argue that custody should not be subject to the rule of attribution for guardianship over money. They

believe this because the application of article 16 directly to the Egyptian civil law pertains to jurisdiction over money, and there is no room for self-jurisdiction over money. These judgements are based on various factors.

It has been suggested that the challenges faced by the judiciary in establishing rules for custody attribution stem from a lack of simplified research on custody adaptation. This research is crucial for resolving the issue of applicable law.

The researcher advocates for the view that the judiciary has been hesitant to establish a clear rule for determining the applicable law in cases of attribution. It would have been more prudent for the judiciary to consider how custody arrangements can be adapted to the applicable law.

After carefully examining the relevant legal cases, the varying opinions of judges, and the different aspects of the law regarding custody, it is evident that the main cause for the divergence in legal opinions and the uncertainty in judicial rulings is the lack of thorough analysis of the issue of custody and its proper placement within the legal framework. It would have been more appropriate for the legal experts and judges to give this matter the attention it deserves, especially considering that Islamic Sharia is the overarching law governing personal status in Jordan and Egypt.

Similarly, children have rights and their relationships with their parents are separate entities with their own rules. These relationships exist regardless of the marital status of the parents, whether they are married or divorced. The rights of the children and their relationships with their parents are not dependent on marriage or divorce.

It is clear that custody is not solely determined by marriage or divorce, nor is it merely a form of financial guardianship. Instead, it represents the initial step towards self-guardianship. Therefore, custody is not affected by the rules regarding the consequences of marriage, divorce, separation, or the management of finances. The determination of the rule of attribution of the law applicable to custody is based on the concept of custody as a guardianship. As such, it is subject to the law of nationality of the father, who is considered the head of the family and responsible for the affairs of the family. The primary concern is to ensure the well-being and welfare of the young individuals involved.

After thoroughly studying the legal aspects of custody, it is evident that the law of the paternal country should be the primary consideration. Now, let's delve into the extent to which this law applies to custody matters.

## **Section II: Scope of the Law Applicable to Custody**

After determining that the rule of attribution in custody cases falls under self-jurisdiction, it is important to note that the father's law applies to all matters related to custody. Therefore, let's briefly examine the conditions, provisions, and duration of custody:

The standard practice is that the age at which custody ends is determined by the level of independence a young person has attained, regardless of their gender. In an academic context, it is observed that when the incubator is of the male gender, it is typically under the care of women until he reaches a certain stage where he no longer requires their assistance and then integrates into a community of men.

Subsequently, Act No. 100 of 1985 was promulgated. Article 20 of the Act states that: "The right to custody of women shall end when the child reaches the age of 10 and the child reaches the age of 12. After that age, the judge may keep the child until the age of 15, and the young woman until she marries in the custody of the child without the charge of custody if it is determined that her interest so requires" ([Ahmed Nour El-Din, 2021](#)).

The law that governs the maintenance of the legal profession also applies to the financial support of the child. Legal experts calculate the cost of the child's maintenance based on the father's income. The mother, however, is not entitled to this support if she is a wife or an aggressor, as she is already provided for through spousal support or other expenses. However, once the specified period has ended, she may be entitled to receive payment for the child's expenses.

Non-mother nurseries are eligible for the incubation fee from the moment they start caring for the young ones, like the hired molecules responsible for feeding and nurturing them.

The right to vision is regulated by the relevant laws, with Islamic jurists overseeing this right before the involvement of Jordanian and Egyptian legislators. A father has the right to visit his young child whenever he wants, and no one can stop him, as the child greatly benefits from his care. It would be unjust to deny the father the opportunity to see his son. The right to see has been regulated by the legislature and comparative judiciary, specifically in chapter III of the Personal Status Law No. 15 of 2019 through various articles (181-183) ([Solima, 2021](#)).

*((The mother, the father, and the paternal grandfather in the absence of a father have the right to see the fostered child, visit him, accompany him once a week, and contact him through the available modern means of communication when he is in the hands of one of them or others who have the right of custody.....))*

The Egyptian legislator has addressed this matter in Article (20) of Decree-Law No. (25) of 1929, which was later amended by Law No. (100) of 1985. According to this law, both parents have the right to visit their child, and in the absence of the parents, the grandparents are granted the same right.

If consensus cannot be reached to arrange the vision, the judge will step in to organise it, ensuring that it is held in a location that does not cause any psychological harm to the individual. The vision judgement is not legally binding, however, if the individual responsible for the minor fails to carry out the judgement without a valid reason, the judge will issue a warning.

This law, known as the father Law, pertains to the matter of custody relinquishment. It addresses the rights of both the minor and the custodian. If the wife is the custodian, she cannot terminate custody. Instead, she may seek a divorce under the condition that the young person remains in her custody, even if she remarries. The Jordanian Personal Status Law No. 15 of 2019, Article 186, mandates that if the mother receives an appointment for custody, she must fulfil this responsibility. However, the most competent judge who has the right of custody must intervene if the mother declines the appointment and refuses custody of her children ([Alawaisheh & Alrefai, 2021](#)). The same law stipulates in Article 172 that certain circumstances can result in the loss of custody. The right to custody will terminate in these cases:

- A) If one of the conditions required to be met in the custody receivable is in breach
- b) The new incubator resides with the person whose incubator has fallen due to his or her behavior, apostasy, or serious infectious disease).

The transfer of custody from one place to another is governed by the Father's Law. According to Article 175 of the Jordanian Personal Status Law (177) of 2019, the father is required to obtain the mother's consent before transferring the guardianship of a child from a nursery to a location within the Kingdom. This applies to kindergarten-aged children, regardless of the new location's proximity. The Jordanian legislator addresses the matter of travel and movement in articles 175–177 of the Jordanian Personal Status Law No. 15 of 2019. According to Article 175, the bailiff's custody will not be affected by the guardian's or nursery's right to a place within the Kingdom, unless the bailiff's interests are impacted by this travel.

Travel and temporary incubation will be passed on to the next individuals with custody rights. In this section, I will discuss the general regulations and the exclusion of foreign law when it comes to custody matters. Previously, we explored the extent to which the applicable law applies to custody issues and its underlying aspects. Now, let's delve into the broader framework and the limitations on the use of foreign law in custody cases.

### **Section III: The General System for the Exclusion of Foreign Law from Application to Custody**

Public order is often described by jurists as a legal mechanism used in litigation to exclude the application of foreign law when its provisions clash with the fundamental principles of the judge's country's societal system.

Others define it as "a defense whereby the application of a legal rule in foreign law is prohibited applicable under the national conflict rule if its judgment is contrary to the higher social, economic, political and religious principles and values upon which the society of the judge State is based".

Many scholars argue that the concept of public order is complex and ever-changing, making it challenging to define precisely due to its fluid nature across different times and locations.

Similarly, the concept of public order and the judge's discretionary power does not imply that the judge can rely solely on personal beliefs and opinions. Instead, the judge should be guided by the fundamental principles that govern their state, avoiding personal biases and broadening their perspectives, especially when dealing with private matters. As a result, the issue focused on placing the judge's discretionary power under the supervision of the Court of Cassation.

Regarding custody and the application of public order and the exclusion of foreign law, it is worth noting that the rule of attribution may involve the use of foreign law to govern custody. However, the judge has the discretion to exclude foreign law if it conflicts with the public order of their own country ([Salama, 1996a](#)).

Given that Islamic law has jurisdiction over personal matters, it is possible for violations of custody regulations to arise in various situations. These violations may stem from foreign laws that significantly disadvantage the child's best interests or that grant custody rights based on discriminatory factors. The judge in the state considers it against public order when parents agree to waive custody in a way that harms the best interests of the child. This confirms that custody is the responsibility of the custodian and the incubator ([Yusuf et al., 2022](#)).

The concept of public order has two consequences. One is negative, which involves the exclusion of foreign law, either entirely or partially. The other is positive, as it grants jurisdiction to the judge to address any legislative gaps that may arise from the exclusion of foreign law.

In certain cases, the consideration of mitigating the effects of public order can have implications for custody issues when legal rights or agreements are formed outside the jurisdiction of the judge, in accordance with a foreign law that contradicts the requirements of the national public order. For example, in some states where divorce is prohibited or the idea of polygamy is not accepted, the impact of public order may be limited. In such situations, the judge may not declare a divorce or second marriage as invalid but may acknowledge some of its effects. This is known as the attenuated effect of public order.

As previously mentioned, public order can have a significant impact on custody proceedings. It can influence the procedures and temporary measures, such as temporary maintenance or custody, which fall under the jurisdiction of the Magistrate's Law. Article (34) of the Egyptian Civil and Commercial Procedure Law No. (13) for the year 1968 states this "the courts of the Republic are competent to order provisional and precautionary measures that are implemented in the Republic, even if they are not competent in the original case".

Likewise, Article (921) of the Egyptian Procedure Law No. (77) for the year 1949 stipulates that "the person entitled to alimony may obtain an order from the court before which the case is being heard to estimate temporary alimony

for him” (Moustafa, 2003). Article (896) of the same law stipulates that in a request for separation or divorce, the president of the court shall hear “the statements of each of the spouses and order the precautionary or temporary measures that he deems necessary to preserve the interests of both spouses and children and in the particular estimation of temporary expense.

## Conclusion

The primary focus of all legislation has been on matters pertaining to personal status, particularly custody. This is due to the significant impact that personal status issues have on the development of both societies and individuals.

Comparative legislation has shown a significant interest in the topic of custody, particularly in the Jordanian and Egyptian legislatures. However, they have not established a clear framework for determining the applicable law. As a result, the issue of custody has been left to the interpretation of legal scholars and the judiciary, leading to a heated doctrinal debate and uncertainty in judicial rulings. The reason behind this doctrinal dispute and the uncertainty in judicial rulings regarding custody stemmed from differing perspectives on how to approach the issue. This, in turn, reflects the effort to determine the appropriate legal framework for custody cases.

The findings indicate that custody is viewed as a responsibility for protecting one's well-being. Furthermore, it has been noted that the implementation of the law regarding the nationality of the father stems from his role as the head of the family, granting him authority over all family matters. This distinction is made due to the unique nature of the parent-child relationship in comparison to the relationship between the parents themselves.

It has been determined that the law of the father is the governing law for custody matters, encompassing all substantive issues. However, the judge's authority extends to procedural, temporary, and provisional matters, which may be decided based on different criteria. Nevertheless, legislators at the national level, including those from Jordan and Egypt, have established provisions for determining a foundation of support for custody. Furthermore, it is recommended that the Jordanian legislature consider utilising the law of the father's nationality as a potential solution to the custody issue. This approach could serve as a fair and appropriate basis for making rulings that prioritise the best interests of the child.

## Recommendations

- We can develop strict regulations regarding the enforcement of specific custody laws. In order to achieve this objective, it is crucial to make significant revisions to the current legislation.
- It is critical to establish enforcement agencies that can effectively enforce custody laws, thereby safeguarding children's rights.
- Developing crucial policies to safeguard children's custody rights is of utmost importance.

- International human rights agencies can establish collaborations to advocate for children's custody rights.

## Implications

Research on custody law has uncovered the intricate and multifaceted nature of the legal issues involved. The study highlights the complexity of rights and obligations within international private relations concerning personal status. It also emphasises the variations in these rights and concepts across different states, particularly when conditions of attribution change. Furthermore, the research sheds light on the ambiguity surrounding this theory and its lack of a well-defined framework for concept development and solutions. In this study, we will be addressing significant issues that are central to the research. We will also be engaging in a thoughtful discussion that presents a fresh perspective on the requirements and provisions of custody in the realm of private international law. Considering recent developments in international private relations, it is important to recognise that the concept of custody holds social significance alongside its legal implications.

Moreover, the current study has also been important in bringing attention to various limitations within the context of custody law in Jordan and Egypt. This approach has the potential to be highly effective in motivating governments to establish and enforce strict laws and regulations concerning the care and custody of children, regardless of whether they have disabilities or not. This study may also serve as a catalyst for policymakers to develop crucial policies regarding the protection of custody laws, with the aim of achieving favourable outcomes.

## Limitations and Future Research

There are a few limitations to consider in the current study. For example, this study solely concentrated on gathering secondary qualitative data because of the exploratory nature of its objectives. The study's scope was restricted in real-time. For this study, the legal systems of Jordan and Egypt were considered to determine the applicability of specific laws regarding custody. This can be attributed to a lack of extensive research conducted. Meanwhile, little attention has been paid to crucial policymaking aimed at enhancing the practicality of custody laws. This can be attributed to the research bias.

Thus, future research may prioritise the collection of primary qualitative or quantitative data to gain a deeper understanding of how specific custody laws are applied in real-life scenarios. Additionally, it is worth considering the custody laws in other countries such as the UK and USA to gain a broader understanding of the topic. In addition, further research could also prioritise the development of significant policies in this area.

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