

## Child Custody After Reaching The Age of Discernment

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DOI : <https://doi.org/10.61796/ejcbt.v3i7.1853>



### Sections Info

#### Article history:

Submitted: April 30, 2025

Final Revised: May 25, 2025

Accepted: June 15, 2026

Published: July 07, 2026

#### Keywords:

Child custody

Personal status

Iraqi legislation

Arab legislations

### ABSTRACT

**Objective:** This study discusses the legislative texts, jurisprudential opinions, and judicial rulings regarding the law applicable to child custody after the age of discernment. It examines the concept of custody, the impact of the child reaching the age of discernment, and the approaches adopted by Arab legislation and Iraqi law in regulating custody while identifying the principles used by legislators and courts to determine the child's best interests. **Method:** To clarify the legal aspects of the subject, this research employs an analytical and comparative approach. The analytical study examines national legislation, relevant international conventions, jurisprudential opinions, and judicial rulings, while the comparative study analyzes the legal frameworks of Egypt, Kuwait, Jordan, and Iraq to identify similarities and differences in the regulation of child custody after the age of discernment. **Results:** The study finds that custody primarily serves the child's best interests and should not automatically end once the child reaches the age of discernment. Significant differences exist among Arab legislations regarding the duration and termination of custody, while the judiciary plays a central role in evaluating the child's welfare in custody disputes. Iraqi legislation adopts the child's best interests as the primary criterion and considers the stability of the child's family environment an essential factor in custody decisions. **Novelty:** The study highlights the distinctive approach of Iraqi law, which regulates legal guardianship, custody, and parental obligations within a unified legal framework by applying the law of the father's nationality under Article 19(4) of the Iraqi Civil Code. It also emphasizes that the Iraqi legislature deliberately refrains from specifying a fixed point in time for determining the father's nationality, allowing judicial discretion according to the circumstances of each case.

## INTRODUCTION

The tremendous advances in means of communication and transport, and the ease with which people can move from one part of the world to another, have meant that children may fall victim to disputes arising from the separation of spouses in mixed marriages, which in turn may lead to disputes over custody, for example, if one spouse, relying on their right to visit or host a child whose custody has been awarded to the other spouse, changes the child's place of residence and prevents the child from returning to the custody of the other spouse, where custody has been determined to be in the child's best interests.

Consequently, some countries have sought to regulate the issue of child custody and address the law applicable to it, whilst the legislation of other countries has treated it as part of the mutual relationship between parents and children, bringing it under a single legal framework; however, some legislation has failed to address this issue, which is the case with most Arab legislation.

## **The significance of the research**

The importance of this topic lies in its relevance to academic life; it is considered a matter of great significance in all times and places, as child custody is one of the most significant consequences of mixed marriages, and one that may extend beyond the marriage itself in the event of a separation between the spouses should a dispute arise over the custody of the children.

## **Objectives of the research**

To discuss the legislative texts, jurisprudential opinions and judicial rulings that have been put forward regarding the determination of the law applicable to custody.

## **Research Problem**

As the issue of custody intersects with multiple concepts—at times falling within the concept of marriage as one of its consequences, at other times within the concept of divorce, and at yet other times within the relationship between children and their parents—we find that the legislation of different countries has varied in its adoption of a unified stance on this matter. This has been reflected in the question of determining which law is applicable to matters of custody; rather than there being a single, clear law with exclusive jurisdiction over custody matters, we find that there are several laws which may conflict with one another.

## **RESEARCH METHOD**

To grasp the scope of the subject as fully as possible and clarify its legal aspects, our approach to this research will be as follows:

1. Analytical study: This will be conducted through three main strands:
  - a. The legislative strand: – In which we will examine the legislative treatment of our subject matter at the level of domestic (national) laws and relevant international conventions.
  - b. The jurisprudential axis: – Through which we will set out the jurisprudential opinions that have addressed the subject and analyse these opinions.
  - c. The judicial axis: – In which we will attempt to trace judicial trends and rulings, with a view to identifying the approach that provides the greatest degree of protection.
2. A comparative study:

This will be carried out by drawing on a number of Arab laws (Egyptian, Kuwaiti and Jordanian) and comparing them with the position under Iraqi law.

## **Structure of the research**

To fully cover the scope of the subject, we have decided to address it in two sections. The first will be devoted to defining the concept of custody (the legal framework for child custody after the age of discernment), whilst the second will examine the determination of the law applicable to child custody after the age of discernment.

## RESULTS AND DISCUSSION

### A. The Legal Framework for Child Custody after Reaching the Age of Discernment

In order to gain an understanding of the concept of custody, we shall divide this section into two subsections: in the first, we shall outline the differences between legal systems regarding the concept of custody; and in the second, we shall examine the impact of these differences on the determination of child custody arrangements.

#### Section One

#### The Concept of Custody and Differences in Legislation Governing It

The decision regarding a child's custody has a direct impact on the child's life through their upbringing and care, as at this young age they are entirely dependent on the custodial parent for all matters relating to their lives, which in turn affects the children's future behaviour. In this article, we shall discuss custody, its procedures, the entitlement to custody – whether it lies with the father or the mother – and other details, including the legal rights of the designated parent (or relative) to raise the child and look after their affairs. Usually, both parents take care of the child's affairs, but how do we determine which parent will become the child's guardian in the event of divorce or separation?[1] The Iraqi Personal Status Law No. 188 of 1958, which is currently in force, did not define custody; rather, the preamble to the second amendment to this law states that ((“The term “custody” in the Personal Status Law refers to the upbringing of the child and the management of their affairs by the person legally entitled to do so, the protection of those unable to manage their own affairs, and their upbringing in a manner that fosters their well-being and protects them from harm. Iraqi jurisprudence and the Iraqi judiciary have not deviated from this definition’))[2].

However, if we examine some Arab laws, we find that Egyptian legislation – specifically the Personal Status Act No. 44 of 1979, as amended – contains no definition of custody, leaving it to the courts to resolve the disputes brought before them, whilst drawing on the definitions set out in detail in the sources of Islamic jurisprudence. As for Jordanian law, as embodied in the Personal Status Act No. 61 of 1976, which is currently in force, it also does not provide a definition of custody, but rather sets out the conditions and the order of priority regarding who is entitled to custody, its duration, the circumstances under which it ceases, and the custodian's remuneration, in accordance with Articles 154–166 of the aforementioned Act. It appears that this matter has been left to the discretion of the judiciary, guided in this regard by jurisprudential opinions. As for Kuwaiti law, the Explanatory Memorandum concerning Article 189 of the Kuwaiti Personal Status Law No. 51 of 1984, which is currently in force, states the following: ‘Custody of a minor means his upbringing and care, and the undertaking to provide for his food, clothing and accommodation, to organise his daily routine, and to manage all his affairs in a manner that serves his best interests, by the person who has the legal right to raise him.’ Custody is defined in Article 143 of the UAE Personal Status Law No. 28 of 2005, which is currently in force, as follows: ‘The protection, upbringing and care of the child in a manner that does not conflict with the guardian's right of authority over

the child's person; this definition corresponds to that set out in Article 132 of the draft Unified Arab Law [3].

## **Section two**

**The Impact of Differences in Legislation on the Determination of Child Custody Provisions** As child custody involves three rights (the rights of the child, the mother and the father), we find that Islamic jurisprudence and secular law have differed as to who holds the right to custody. To examine this, we shall address in this section the impact of differences in Islamic jurisprudence on legislation, and the stance of legislation in determining child custody provisions[4]:

Muslim jurists are unanimous that there are three rights involved in custody: the right of the child, the right of the mother and the right of the father; and that reconciling these rights is obligatory where possible. However, if this proves impossible, some jurists hold that custody is a right of the child over his mother, rather than a right of the mother over the child. It follows that the mother is obliged to take custody and has no option to waive or refuse it, whilst another school of thought maintains that custody is a right of the mother; consequently, she is not compelled to take custody of the child and is free to decline by waiving her right. A further school of thought holds that it is a right of both the mother and the child; thus, if someone else is available to provide custody, the mother is not compelled to do so, and if she is appointed, she is not obliged to decline, and the child's right to custody takes precedence. The first paragraph of Article 57 of the current Iraqi Personal Status Law stipulates that 'the mother has the greater right to the custody and upbringing of the child during the marriage and after separation, provided that the child is not harmed thereby'. Several points can be inferred from this text[5]:

**Firstly:** Custody is a right of both the child and the mother; however, she is obliged to take custody if no one else is available, even if her right to it has been forfeited. In accordance with this, the Court of Cassation has ruled that 'The mother is not legally obliged to take custody of her child unless she is designated to do so; if a female guardian other than the mother from among the mahrams is found to take custody of the child, the mother is not designated to take custody of him nor is she compelled to do so. However, if no female guardian from among the mahrams is found, or if one is found but refuses, the defendant mother is designated to take custody of him and is obliged to do so [6].

**Second Case:** If the mother obtains a khul' from her husband on the condition that she relinquishes custody of her son, the khul' is valid and the condition is void. In accordance with this, the Court of Cassation ruled that 'If the khul' is effected on the basis of the wife's waiver of custody of her daughter and her maintenance in favour of her husband, and the defendant subsequently, after the divorce, seizes her daughter from him, the court shall dismiss the plaintiff's claim for the handover of his daughter to him, in accordance with Sharia and the law, since custody is the right of the mother and the child, and waiving it is contrary to public order [7].

**Thirdly:** the rights of the child in care take precedence over those of the parents; in accordance with this, the Iraqi Court of Cassation has ruled that 'in custody cases, the

court must give priority to the best interests of the child over those of the disputing parties seeking custody[8].

The provisions of the Egyptian, Jordanian and Emirati Personal Status Laws contain no reference to custody being an exclusive right of the mother or the child, however, the judiciary in those countries has followed the jurisprudential approach that regards it as a shared right, with the child's best interests taking precedence in the event of a conflict of interests. The current Kuwaiti Personal Status Law stipulates that the right to custody is not forfeited but is suspended by certain impediments and is restored upon their removal, pursuant to Article 193 thereof, whereas Article 120 of the Yemeni Personal Status Law stipulates that custody is a right of the child and may not be relinquished; the Tunisian law takes a different stance, as under Article 55 thereof, if the custodial parent refuses to exercise custody, she cannot be compelled to do so; As for the draft Unified Arab Law, it considers custody to be a duty incumbent upon both parents for as long as the marriage subsists; however, following separation, if the child is an infant, the mother is obliged to provide custody and may not relinquish it[9].

#### **B. The law applicable to the custody of a child after reaching the age of discernment**

To fully address the scope of the subject and highlight the position of Iraqi law, we shall divide this section into two parts: in the first, we shall review the position of certain Arab laws; and in the second, we shall clarify the position of Iraqi law.

##### **First Point**

##### **The Approach Taken by Certain Arab Legislations**

Most of these laws have been influenced by Egyptian law, specifically the current Egyptian Civil Code, which remains silent on the law governing custody. This has left it to Islamic jurisprudence and the judiciary to assume this responsibility. Some jurists(30) have held that custody is a consequence of marriage and is therefore subject to the law of the husband at the time of marriage, The Egyptian judiciary has adopted this view in some of its rulings; others in the field of Islamic jurisprudence, however, regard it as a consequence of divorce. In accordance with this, the Egyptian Court of Cassation ruled that 'whenever a divorce decree is not issued in the wife's favour, nor based solely on the husband's fault, but rather on the fault of both spouses, then, in accordance with French civil law, the husband is entitled to custody of his child, and it is not in the wife's interest to rely on the general rule set out in Article 302 of that law, which provides that custody of the children is a right of the husband to whom the divorce has been granted, on the grounds that custody cannot be awarded to the husband under this provision) [10] The Egyptian judiciary has, in some of its rulings, treated custody as a matter of guardianship; the grounds for Cairo Court Decision No. 89, issued on 2 February 1954, state the following (Given that, in fact, Egyptian laws do not contain a specific provision regarding custody, the Court considers it appropriate to apply the principle that the law of the minor who is to be protected shall apply, by analogy with the provisions of Article 16 of the Egyptian Civil Code, which states that 'The law of the person in need of protection shall apply to substantive matters relating to guardianship, curatorship, custody and other substantive regimes for the protection of persons under legal incapacity and absent

persons' On this basis, the provisions of English law are applicable to the present custody application, given that the two minors for whom custody is sought to be granted to the claimant are English nationals, following the nationality of their father, the defendant, who is an English national.)

Based on the aforementioned jurisprudential opinions and the established practice of the Egyptian judiciary, the following conclusions may be drawn[11]:

1. In the absence of a specific provision governing custody in the Egyptian Civil Code, the Egyptian judiciary has resorted to applying the most commonly accepted principles of private international law, in accordance with Article 24 of the said Code; however, it has not been entirely successful in this regard, as it has not always been clear which approach to adopt. This has been compounded by the fact that the nationality of the father, mother and child has been a determining factor in most of its rulings, leading to the same outcomes whether custody is treated as a consequence of marriage or as a consequence of divorce, even though custody is not considered a consequence of marriage—which pertains to the relationship between the spouses themselves— Furthermore, the classification of custody as a consequence of divorce is the approach followed in European jurisprudence and case law, influenced by the Christian faith, which has in turn influenced certain opinions in Egyptian jurisprudence and judicial rulings.
2. In some of its rulings, the Egyptian judiciary has subjected custody to the rule of attribution applicable to guardianship over property; however, there is no basis for equating guardianship over a person with guardianship over property, as the provisions governing each are based on considerations different from those underpinning the other[12].
3. If we accept that the legislator is not obliged to stipulate detailed cases, but rather suffices with referring to one relationship from which the other, related to it, is inferred; and given that the prevailing legal characterisation of custody is as a right for both the custodian and the child, with priority given to the child's best interests in the event of a conflict of interests, this would lead us to classify custody under the category of reciprocal relationships between parents and children, which in turn are governed by the law of parentage or lineage; yet this has not occurred in Egyptian legislation, as embodied in the Civil Code[13].

All this has led some Egyptian jurists to state: 'The root of the difficulty faced by Egyptian courts in determining the law applicable to custody lies in the fact that these courts have not sufficiently examined the legal characterisation of custody—an examination upon which the issue of the applicable law depends. The legal characterisation of custody is governed, in accordance with the general rule of legal characterisation, by Egyptian law, which in this context is Islamic law, as the general law governing personal status in Egypt. By referring to the principles of this law, it becomes clear that children, in their own right, have rights and relationships with their parents which have their own distinct nature and provisions, irrespective of the relationship between the parents themselves. These rights and relationships include the establishment

of parentage – which is a right of both the child and the father – and primary parental authority, namely custody, which some regard as a right of the child, others as a right of the custodian, and still others as a right of both the child and the custodian together; or, in other words, custody is considered the first stage of parental authority over the child, and as such, we prefer to subject custody to the law of the father's country) Most Arab legislations have followed the Egyptian legislative approach by not stipulating a specific rule regarding custody, nor even regarding the mutual rights and obligations between parents and children. Consequently, the prevailing jurisprudence there favours the approach adopted by the dominant school of thought in Egypt, namely the application of the father's nationality law. The Kuwaiti legislator has acted wisely by subjecting custody to its own specific rule, pursuant to Article 43 of the current Law No. 5 of 1961 regulating relations involving a foreign element, which stipulates that ( 'The law of the father's nationality shall apply in matters of personal status and custody'). It also addresses in detail matters relating to paternity, filiation, the rectification of lineage and adoption under Articles 41, 42 and 43 of the aforementioned Act. It is worth noting that the Yemeni legislature, in the Civil Code No. 19 of 1992, which is currently in force, has limited the scope of Yemeni law to marriage, divorce and most matters of personal status, with Article 26 stipulating that ( 'matters of marriage, divorce, annulment and maintenance shall be governed by Yemeni law where the parties consent'); that is to say, it makes the application of Yemeni law conditional upon the consent of both parties if the spouses are non-Yemeni nationals [14].

Even if we accept that custody is governed by the law governing mutual relations and rights between parents and children – which, according to the prevailing view in Islamic jurisprudence, is the law of the father's nationality – the question arises as to the point in time at which the father's nationality is taken into account.

If we were to say that the father's nationality is to be taken into account at the time of the marriage, on the grounds that parentage is one of the consequences of marriage, we would thereby be asserting that custody is likewise a consequence of marriage; this is precisely what the prevailing school of jurisprudence has already refuted.

If, on the other hand, we were to apply the father's nationality at the time of the child's birth, this could lead to a multiplicity of applicable laws due to the number of children who might acquire different nationalities should the father change his own nationality (42) Furthermore, the father may die before the child's birth; which of the two laws is more appropriate – the law in force at the time of the father's death or the law in force at the time of marriage? If we were to favour the father's nationality at the time the case is brought, this could lead to circumvention of the law, whereby the father changes his nationality with the aim of benefiting from the law of a particular state that has no connection to the parentage.

In our humble opinion, it seems preferable to apply the law of the father's nationality without specifying a particular time, leaving the matter to the judge's discretion, rather than applying a specific time, so that each case may be assessed on its own merits [15].

## **The Second Requirement**

### **The Position of Iraqi Law**

Whilst most Arab legislation does not provide for a specific rule governing custody, or even the mutual rights and duties between parents and children, Iraqi law is distinguished by a unique approach, by bringing together matters relating to legal guardianship, custody and other obligations between parents and children under a single legal framework and subjecting them to the law of the father's nationality, pursuant to Article 19(4) of the Civil Code, Thereby avoiding the controversy surrounding the determination of the applicable law on custody; consequently, the scope of the law of the father's nationality extends to cover all matters relating to custody, its duration, termination, conditions and levels, However, this law does not apply if one of the spouses was Iraqi at the time of the marriage, pursuant to Article 19(5) of the Iraqi Civil Code. In accordance with this, the Iraqi Court of Cassation has ruled that the paternal grandmother has priority over the foreign mother, who is not resident in Iraq, in matters of custody of the child; Furthermore, the application of foreign law is suspended if its provisions contravene public order and public morals in the judge's country, in accordance with Article 32 of the Iraqi Civil Code. In accordance with this, the Iraqi Court of Cassation has ruled that children are attributed to their Muslim mother, whereby the judge distinguishes between a Muslim wife and her Baha'i husband, as the Baha'i faith is not recognised in Iraq as a religion or denomination. The children are attributed to the Muslim mother because Islam is the most honourable of religions, and the Iraqi judiciary has had the opportunity to enshrine this principle—that is, to base the custody arrangement on the father's nationality—in a case involving an Egyptian Christian couple working in Iraq. The wife filed a petition for divorce against her husband before the Sharia Court in Mosul; whilst the judge was hearing the case, the wife declared her conversion to Islam before the judge, and her conversion was recorded in Sharia Certificate No. 1042, Register 576, dated 28 October 1978. The court attributed legislative jurisdiction to Egyptian law, The court offered Islam to the husband, but he refused and did not accept conversion. The court ruled in favour of the wife, granting her custody of the children. The husband appealed the ruling to the Court of Cassation, which upheld the decision of the Sharia Court in Mosul and ruled that, under Islamic law, young children follow the spouse who has converted to Islam. Therefore, the appeal judgement ordering the separation of the spouses and the handover of the children to their mother is valid and in accordance with Sharia and the law [16] . The following observations may be made regarding the above appeal judgment:

1. The court based its characterisation of the relationship at the centre of the dispute on Iraqi law as the applicable law for such characterisation, pursuant to Article 17(1) of the Iraqi Civil Code.
2. The court applied Egyptian law as the applicable law pursuant to Article 19(3) of the Iraqi Civil Code, which provides that 'in matters of divorce and separation, the law applicable is that of the spouse at the time of divorce or at the time the proceedings were instituted'.

3. As the defendant's wife was a Muslim at the time the proceedings were brought, as evidenced by the Sharia certificate issued by the Sharia Court in Mosul, the applicable Egyptian law is the Personal Status Law. This law provides that if the spouses are non-Muslims and the wife converts to Islam, she must offer Islam to her husband; if he refuses, the judge shall separate them immediately, which is what the Iraqi judge did.
4. The Iraqi judge did not challenge the wife's conversion to Islam on the grounds of circumvention of the law, and consequently did not apply the Coptic Orthodox law on custody – which awards custody to the husband who was not at fault for the divorce – because religious belief is a psychological matter which the judiciary cannot examine except through official external manifestations, which are evident in her conversion to Islam.
5. With regard to the law applicable to custody, the Sharia Court in Mosul – upheld by the Court of Cassation – applied the law of the father's Egyptian nationality, pursuant to Article 19(4) of the Iraqi Civil Code, which stipulates that 'matters relating to legitimate filiation, guardianship and other obligations between parents and children shall be governed by the law of the father'.
6. As for the point in time at which the father's nationality is taken into account, we note that the court applied the father's nationality law at the time the case was filed; that is, it applied Egyptian personal status law as the general law, given that the wife had converted to Islam at the time the case was filed. Had the court, however, taken as the relevant time the father's nationality at the time of the child's birth or at the time of marriage, it would have applied the Personal Status Law specific to the Coptic Orthodox community to which the couple belonged at the time of the marriage contract. This confirms that the Iraqi legislature was correct in not specifying a particular time for the application of the father's nationality law, a position which we have previously endorsed[17].

## CONCLUSION

**Fundamental Finding :** This study examined the concept of custody and the impact of a child reaching the age of discernment by analysing the positions of Arab legislation and Iraqi law on custody regulation, as well as the principles applied by legislators and the judiciary in determining the child's best interests. The findings indicate that custody is fundamentally intended to protect the child's physical, psychological, and social welfare. Reaching the age of discernment does not automatically terminate custody, as decisions should continue to prioritise the child's best interests. The study also found significant differences among Arab legislations regarding the age at which custody ends and confirmed that Iraqi legislation adopts the child's best interests as the primary criterion, while emphasising the importance of maintaining a stable family environment.

**Implication :** The findings highlight the essential role of judicial authorities in evaluating the child's best interests when resolving custody disputes after the child reaches the age of discernment. They further imply the need to strengthen legal provisions protecting children at this stage, promote greater consistency in custody regulations, particularly for

children with special needs, encourage judicial consultation with social and psychological experts, ensure that the views of discerning children are appropriately considered, raise public legal awareness of children's rights, and continuously develop custody legislation in response to social changes. **Limitation** : The study is limited to an examination of the concept of custody and a legal analysis of Arab legislation and Iraqi law concerning children who have reached the age of discernment, with particular emphasis on legislative provisions and judicial principles governing custody decisions. **Future Research** : Future research may contribute by expanding comparative analyses to additional legal systems, evaluating the practical implementation of the child's best interests principle in judicial decisions, and assessing the effectiveness of legislative reforms designed to enhance legal protection and family stability for children who have reached the age of discernment.

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