

1. INTRODUCTION

Divorce is a tool to end the marital relationship, either by the individual will of the husband or the wife, or by a common consensus. In this line, the responsibility of the parents towards their children does not end with divorce; therefore, the legislator took into consideration their interests after divorce as the parents cannot be in one place to take care of the child. Because of the egoism of each of the parents and their will to keep the children and deprive the other part of them, the Algerian legislator prioritized the interest of children in the laws that regulate the custody issues to avoid the repercussions of such conflicts.

The legislator linked most of the provisions, if not all, to the interest of the child without determining their content in the family law. Thus, we can say that the judge has the main role in the custody issues thanks to the complementarily between the laws of the family law, his discretion, and the prosecutor who is a main part in the familial disputes, including the custody issues.

Based on this, the problematic of the study can be raised saying, “to what extent does the Algerian legislator guarantee the right of the children through balancing the parents positions in the right to custody? How does the family issues judge protect the interests of the child? What are the criteria he relies on in his discretion? What are the enforcement obstacles that face the judicial officer during the enforcement of the

The practical problems facing the family issues judge in the custody cases

provisions related to the submission of the child, his visit, and his housing?

To answer these questions, we use the analytical descriptive method and divide the paper into two chapters. The first tackles the judge's discretion in estimating the right to custody, visit, and housing, while the second tackles the problematic related to the custody in the mixed marriage and in the enforcement of the provisions.

2. the judge's discretion in estimating the right to custody, visit, and housing of the child

Resort to the justice is one of the prominent guarantees to protect the individuals' rights and liberties. Therefore, the dispute may be related to objective rights of people and to their personal liberties. Besides, disputes over the right to custody, visit, and housing may be raised to courts. In this regard, the family issues judge faces issues triggered by the custody per se in his quest to preserve the children interests that are a flexible criterion.

2.1 the nature and provisions of the custody:

Divorce raises a set of effects, including the custody that is based on raising and taking care of the child. In this line, the Algerian legislator attempted to cover the custody and its related issues in the family law. Nevertheless, he deviated from what the Islamic Sharia provided for. Thus, we must know the nature of the custody that raises continuous issues to the justice.

2.1.1 definition of the custody:

Islamic jurists set various definitions to the custody. The Hannafids see that it is raising the child and

Elias Messaouda Naima

taking care of all his issues by the parent in charge of custody until a specific age¹. Moreover, the Malikites see that it is taking care of the child housing, food, clothes, and cleanliness².

In addition, the Shafiites believe it is protecting the dependent person and raising him in a good way that keeps him away of what harms him³. Finally, the Hanbalis see that it is keeping away the child and the mentally troubled person of what may harm them, and caring for their interests⁴.

From these definitions, we see that they differ in the formulation and agree in meaning as they all provide that the child under custody is the one who cannot be autonomous⁵. Legally speaking, Article 62 of the family law defines the custody as caring of, educating, raising, and protecting the child and his health and ethics. In this line, the legislator focused on the causes and goals of the custody, and identified its limits and basic functions. Hence, the court must take into consideration all these sides when ruling the divorce⁶.

2.1.2 order and requirements of people entitled to custody:

The mother has the right to custody starting from the birth of the child. The legal rule provides for this since the mother is axiomatically able to deal with the child. Nevertheless, some jurisprudents see that the custody is the right of the woman who takes care of the child, and that the mother is not obliged of custody⁷.

In this regard, Article 64 of the Algerian family law provided for the order of those who have the right to

The practical problems facing the family issues judge in the custody cases

custody as follows, the mother, the father, the motherly grandmother, the fatherly grandmother, the motherly aunt, the fatherly aunt, and the other relatives taking into consideration the interest of the child. Moreover, the judge must rule the right to the visit when granting the right to custody.

Based on what was said, we see that the legislator enacted a new order in Ordinance 05-02 that differs from the old one, as he placed the father before the grandmother and the motherly aunt, and added the fatherly aunt to the list and considered the interest of the child a basic criterion.

Besides, the legislator pointed in paragraph 02 of Article 62 that the custody must be attributed to a qualified person without identifying the qualifications. Paragraph one of Article 62 shows the requirements of custody that include a good mental health and adulthood because the mentally troubled cannot be responsible for himself, much less a child. In addition, the custodial parent must be fair and just person, as agreed upon by all the jurisprudents⁸. Furthermore, he must be able to raise the child, as the latter is known for his movements and needs that may cause harm⁹ if the custodial parent does not pay attention to; thus, the custodial parent cannot be an aged or sick person. In addition, he must be honest and preserve his religion and ethics.

In this line, the perverts such as alcoholics, adulterers, and people of bad reputation cannot have the right to custody so as not to raise the child on pervert principles¹⁰.

Elias Messaouda Naima

Moreover, the he must be Muslim as provided for by Article 62. In this line, since the custody shall not be granted to a pervert, it cannot be granted to a disbeliever. Here, the judge takes into consideration the interest of the child. In this line, we wonder what the criterion of this interest is.

2.2 the interest of the child:

The Algerian legislator pointed to the interest of the child in most of the laws that deal with custody, either regarding the order of people who deserve the right, or in deciding the age, end, and forfeiture of the custody. Thus, what is the criterion used by the judge in the cases of custody and its related issues?

2.2.1 the difficulty of regulating the interest of the child:

In handling the issue of the custody, the Algerian legislator relied on the interest of the child without identifying any regulations to this criterion or giving a definition to the expression “interest of the child”. Nevertheless, it is legally agreed upon that this criterion is marked with flexibility that makes the judge look for regulations that govern the interest of the child. These regulations change according to the age and environment and oblige the judge to take all the measures and tools that may help him take decisions because estimating the interest and applying the laws are subject to the judge’s thought since the interests are determined according to the circumstances and people’s situations¹¹.

We must point that justice in Algeria lacks the judges’ jurisdiction in such cases. Therefore, the judge

The practical problems facing the family issues judge in the custody cases

must pay more attention. In this regard, the psychological studies proved the development of bad behavioral habits for the children, such as psychological struggles and continuous fear¹² due to being exploited in mutual retaliation between the parents. This pushes the familial issues judge to seek specialized sociological help in many custody cases to make detailed reports that show the environment of the child and the apparent behavior of the custodial parent before making the verdicts.

2.2.2 the regulations that govern the interest of the child:

The Algerian legislator provides that the interest of the child is the legal frame to estimate the custody and its related rights. It is an objective issue left by the law to the judge's discretion. Thus, he makes research to achieve this interest because not taking the child interest when issuing the ruling of custody makes the rule appealable for insufficient reasons¹³. In addition, the judge relies on moral and material criteria in estimating the interest of the child.

2.2.2.1 The material criterion:

The childcare requires providing his necessary needs to achieve his interest. Therefore, the legislator obliged the father to spend on his child and detailed this in Article 78 of the family law because the estimation of the alimony is subject to the judge's discretion as it is one of his objective topics¹⁴.

Hence, the judge's intervention in estimating the alimony is based on the interest of the child. Though the jurisprudents do not agree upon who should bear the

Elias Messaouda Naima

alimony in case the father is poor, they insist on providing it to the child regardless its source, as his interest is above all¹⁵. Because of the importance of the material side of the child that guarantees his stability and well-being, the legislator suggested the establishment of a fund that provides for the basic needs of the child when the parents get divorced. Thus, the moral and psychological care for him is not enough if not accompanied by the material care that guarantees his basic needs and materials stability¹⁶.

2.2.2.2 The moral criterion:

Due to the importance of the moral element of the child, mainly after the negative effects of the divorce and his acceptance of this fact, we find that Islam grants custody in the child's first years to women, as they are the source of affection and spiritual care that men lack¹⁷. To achieve the interest of the child, Article 425 of the administrative and civil procedures law empowers the judge with appointing a social assistant, a doctor, an expert, or any competent part for consultation. This is also provided for by the supreme court in its verdict of 18/05/2005 that rules that the principle that provides for the in achievement of the child interest shall be established with the help of a social assistant¹⁸. Moreover,

when determining the order of those who have the right to custody and the age of the end of custody, he sought the interest of the child. In addition, this is seen in the verdict of the supreme court of 04/06/2006 that rules that it is judicially agreed upon that the mother has the right

The practical problems facing the family issues judge in the custody cases

to custody, unless there is an obstacle, as she is patient, devoted, and affectionate, unlike the other relatives. It adds that the judges who establish their rulings on this principle rely on legal basis, and their rulings are not appealable¹⁹. Therefore, when granting or forfeiting the custody, the judge takes into consideration the child's emotional needs so that he grows up with a complete character in a secure moral atmosphere where the duties that aim at protecting him are performed²⁰.

3. the problematics related to the custody in the mixed marriage and in enforcing the provisions:

The issue of granting custody of children who come from mixed marriages is one of the complex questions for the judges of the family issues. The judge faces difficulty of what law to apply in the custody cases of such marriages due to the absence of a legal text. This paves the way for the jurisprudence to determine the applicable law when considering such cases, including the right to the visit and the provisions of custody in the enforcement state. The dominant view in the comparative law is that the custody is the effect of divorce. Some jurisprudents see that it is part of the legitimate mentorship of children. In this line, mentoring and preserving a child is one of the prominent related rights. Granting custody must be subject to the personal law of the child²¹.

In addition, the question of enforcing the rulings of the family issues judge regarding the submission of, visiting, and providing housing for the child raises many issues when enforcing the decision due to the specificity

of the child. Hence, we shall detail these problematic in the two following sections. The 1st shall be devoted to the problematic related to the custody in the mixed marriage while the 2nd shall deal with the problematic of enforcing the provisions related to the custody and its related rights.

3.1 problematic related to the custody in the mixed marriage:

The Algerian legislator committed himself to setting a criterion that guarantees the interest of the child. Hence, the judge must consider it when granting the right to custody, extending it, or forfeiting it. Most of the legislations, including the Algerian, work to set solutions to some problems that face the judge when resolving disputes over custody in the mixed marriages. The problematic raised here do not stop at the law to be applied, because despite adopting the criterion of the nationality to choose the applicable law, we still face other problematic. Therefore, some states, including Algeria, made international treaties to provide the necessary protection for the child. However, still the divorce may be between two nationals of two different states that are not members of any related international treaties. In this case, the judge refers to the civil law.

Based on this, one may ask, “to what extent did the Algerian legislator manage to guarantee the interest of the child through balancing the two positions of the parents regarding the custody in a mixed marriage?”

3.1.1 the problematic of attributing the custody in the mixed marriage in case of the existence of a treaty in Algeria:

The practical problems facing the family issues judge in the custody cases

Most of the Algerian immigrants chose France due to historical reasons. This resulted in mixed marriages between the Algerians and the French. However, due to divorce, many issues emerged regarding the fate of the children. Moreover, due to the increasing statistics, and so that the two states maintain the interests of the children, a treaty had been established on 21/06/1988 about the situation of the children of the mixed Algerian-French marriages in case of divorce²², in order to achieve a better protection and facilitate the movement between the two states, taking into consideration the interests of the children.

Moreover, the treaty obliged the judge to grant the other parent the right to visit his child when issuing a ruling that grants custody to the other. This was adopted by the Algerian legislator in Article 64 of the Algerian family law that provides that the custody shall be granted to the mother, the father, the motherly grandmother, the fatherly grandmother, the motherly aunt, the fatherly aunt, and then the relatives, respectively; taking into consideration the interest of the child above all. Besides, the judge must rule the right to the visit when he rules the right to custody²³.

Nevertheless, most of the judicial provisions from the Algerian or French courts may trigger issues in the enforcement due to the difference in the public policies of the two states. One of the issues we may face is granting custody to the mother by the French judge, knowing that the mother may not meet the requirements provided for in Article 62 of the Algerian family issues

Elias Messaouda Naima

law that provides for raising the child on the religion of his father, mainly if the mother is not Muslim and residing in a foreign state far from the father²⁴.

Article 07 of the treaty shows that despite it covers the issue of the visit, there are other related issues such as when the other parent refuses to submit back the child to the custodial parent after the visit. Besides, despite the solutions mentioned in Article 11, we still face problems even if the custodial parent resorts to courts regarding this issue. Legally speaking, the court rules the use of the public force to take back the child; however, the ruling cannot be enforced on a foreign state under the public policy. Therefore, the interest of the child becomes in danger²⁵.

From another side, the treaty did not handle the issue of reviewing the custody regarding the period of claiming custody in case a motive emerges to review the ruling, even if it has pointed to some cases that affect the interest of the child in Article 05 that provides that if there are exceptional circumstances that directly endanger the moral or physical health of the child, the judge must adapt the conditions of exercising this right according to the interest of the child.

In this vein, we may ask, “can the parent ask for reviewing the verdict of a French judge who ruled the custody to the mother so that he raises his children on his religion? In this context, the parent relies on the international conventions such as Article 26 of the Human Rights Declaration of 1948, which states that the parents are the 1st to have the right to choose the

The practical problems facing the family issues judge in the custody cases

education of their children, and Article 62 of the family law that provides that the custody is taking care of, educating, and raising the child on the religion of his father, in addition to protecting his health and ethics. This problematic shows that raising the child on the religion of his Muslim father contradicts with the custody of a non-Muslim woman.

Hence, the disputes over the custody in the mixed marriage are subject to the Algerian family law and the considerations of the Algerian public policy. In addition, in front of the judge, the case is ruled by Article 62 of the Algerian family law and paragraph 03 of Article 26 of the Human Rights Declaration. Consequently, the custody is granted to the parent who meets the considerations.

On the other hand, the opposite takes place when the cases are raised to a French court. In this context, we find ourselves in front of two contradictory rules. Therefore, in case the provisions of the bilateral treaty are not applied, a resort is made to the provisions of the private international law that regulate the attribution rules in the civil law²⁶.

3.1.2 the issue of granting custody in case of the absence of an international treaty:

In case of the absence of a treaty between the states of the parents who come from two different states regarding the question of custody, what law should be applicable? Is it the local or the foreign? The Convention of La Hague of 05/10/1961 on the protection of the minors calls for subjecting the issues of custody to the

Elias Messaouda Naima

law of the child's residing state because it is where his life and relations are built. The philosophy of this Convention takes care of the character of the child more than that of the custodial parent. In this line, the English law was influenced by this trend and subjected the custody to the law of the child's residing state to solve the issue²⁷.

As for the Algerian legislator, he set in Articles 9-12-13-21- and 24 of the civil law provisions that cover the disputes over custody in front of the court, and provided for the law to be applied in paragraph 02 of Article 12 and Article 13 of the same law²⁸.

On the other hand, the ruling of the supreme court on 02/06/1992 provided that it is legally established that the local jurisdiction in the cases of divorce, custody, and visit is that of the address of the family residence. Moreover, the applicable law in case of divorce is that of the state of the husband²⁹.

As for the issues of the age of the child subject to custody and the duration and time of the visit, the legislator did not set any explicit rule. Nevertheless, such cases can be subject to the law of the judge's state in accordance with Article 09 of the civil law that states that the Algerian law should be the reference in adapting the relations whose type must be identified when the laws contradict, in order to know the law to be enforced.

In this regard, we must point that the custody can be forfeited when the child moves to a foreign state, according to Article 69 of the family law, and taking into consideration the interest of the child. Hence, the

The practical problems facing the family issues judge in the custody cases

custodial mother must stay with the child in the state of the father to protect his interests. Any violation of the commitment leads to the forfeiture of the right to custody as provided for by the ruling of the supreme court on 21/11/1995. The latter states that the custody shall be forfeited and granted to the father in accordance with the provisions of Islamic Sharia and the family law when the mother resides in France and the father in Algeria. In this case, the father cannot supervise and mentor his children, raise them on Islam, and exercise his right to the visit due to the far distance. Consequently, the father is granted custody to raise children on his religion³⁰.

In such cases, the justice sought the interest of the child though the mother is the first to have the right to custody; however, she still has the right to visit so that the child grows up on the religion of his father. In the same vein, the ruling of the supreme court on 12/10/2005 provided that it is legally and religiously established that the custody is granted based on the interest of the child. It adds that granting it to the mother who resides in a foreign state far from the father who has the right of kinship, to visit, and to raise his children on his religion contradicts with the principle recognized by Article 62 of the Algerian family law.

Besides, the judges, with their ruling they issued, have wronged in applying the applicable law; leading to the partial abolition of the appealed decision regarding the custody³¹.

Hence, the judge must take into consideration all the data and issues that are part of the custody and its related

issues, and the interest of the child when issuing his ruling.

3.2 the problematic that arise when enforcing the provision of custody and its related rights:

When the family issues judge faces disputes over the custody and makes decisions, the decisions give rise to rights to the child and the parents. These rights are material such as the alimony and the housing to exercise custody, and moral such as the mentorship and the visit. These provisions draw their force from the fact that they are final decisions from judicial bodies with an executive force.

Nevertheless, they face problematic when being enforced mainly due to the specificity of the child. Consequently, the decision cannot be enforced with public force or coercively, making the problems of enforcing the final decisions regarding the submission, visit, mentorship, and housing of the child among the most raised issues to the family issues; knowing that the Algerian legislator did not set solutions to such cases even though he enshrined the penal protection with a penal liability against any violation of such decisions.

Nevertheless, this is still insufficient and requires the efforts of the judge so that problems do not emerge when enforcing the verdict.

3.2.1 problematic of enforcing the judicial decisions about submitting and visiting the child:

If the child subject to custody is not under the supervision of the custodial parent when the divorce case is raised, and if the issue is not referred to the family

The practical problems facing the family issues judge in the custody cases

court judge urgently according to Article 57 Bis of the family law, the child must be submitted to the custodial father after the issuance of the final decision by the judge.

However, the problematic here that faces the judicial officer is the refusal of the child to go with the custodial father. Hence, the judicial officer cannot enforce the ruling with public force; rather, he writes up a statement that describes the case to the president of the court to consider the enforcement issues according to article 631 of the administrative and civil procedures law. The latter states that in case there is a problem in enforcing one of the executive documents provided for in this law, the judicial officer issues a statement and calls the opponents to refer the issue to the president of the court who urgently starts the enforcement.

The president of the court is the one who rules in the urgent cases related to issues facing execution because the legislator did not handle this case in the family law when handling the issues of custody. This refers us to the law of the administrative and civil procedures whose articles handle the issues of enforcing the custody provisions and submitting the child subject to custody to the custodial parent, in accordance to execution.

In this case, the judge either proves the issue in the enforcement and asks the suspension of the enforcement for a period of no more than 06 months, or rules that there is no issue and that the enforcement must be carried on. The issue may not be settled because one of the

Elias Messaouda Naima

parents may incite the child not to go with the custodial parent. Therefore, the penal legislator charged the parent who does not submit the child to the custodial parent, in accordance with the judicial rulings, with the penal liability.

As for the visit, it is among the legal rights of the child and the other parent, in accordance with Article 64 of the family law that provides that the place and time of the visit must be determined in the same ruling³².

The visit is the time taken by the non-custodial parent to meet the child. It is not identified in the family law. Nevertheless, the Algerian law recognizes the right to the visit in the weekends and religious and national days; and in case of dispute, the judge determines the place and time of the visit. In this line, the judge's discretion must take into consideration the age of the children. Thus, the judge rules whether the non-custodial parent must take and then submit back the child to the custodial parent, or whether he can pass the night with the child in the custody house providing that he does not embarrass the custodial parent, mainly if it is a woman.

3.2.2 the problematic that arise when enforcing the ruling related to the house of the custody:

The ruling that grants custody covers its issues and takes into consideration the child's interest. Therefore, it obliges the father to provide a house for the custodial mother according to Ordinance 05-02 that amends and supplements Article 72 of the family law that provides that in case of divorce, the father must provide a suitable

The practical problems facing the family issues judge in the custody cases

house for the custodial mother, or pay the rent if he cannot.

In addition, the custodial mother stays in the house of the husband until he enforces the judicial provision related to the house. The house of custody is one of the points of divorce between the couple who has children. It is meant for the children where their mother can practice her right to their custody, in accordance with their interest. This saves them from destitution and from being a burden on the society³³. The issue has details and causes; however, what is important is the issues that arise when enforcing the ruling that includes the provision of a house for custody.

Article 72 of the family law shows that the father has to provide a house for the custodial mother to practice her right. The house must be appropriate and include the necessary accommodations for a decent life³⁴.

The Algerian justice enshrined this issue even before the amendment of the family law because the supreme court ruled in its decision of 15/06/1999 that “the custodial mother stays in the husband’s house because he has another house. Because the custodial mother exercises her right to custody in the house under dispute since 11 years, i.e., since the issuance of the divorce ruling, and because the statement of facts confirms that the father has another house, the judges refuse the appeal for it is unfounded and for the right of the mother to stay in the husband’s house to protect the interests of the 04 children subject to custody. Therefore, the appeal is refused”³⁵.

Elias Messaouda Naima

The legislative development of the family law made the commitment to provide a house for the custodial mother part of the ruling with the right to custody in accordance with a legal text, unlike the past when it was part of the judge's discretion. Some judicial rulings linked this right to having more than 03 children. However, after the amendment of the family law by Ordinance 05-02, the right to housing is the right of the child. However, the most important issue that faces the judicial officer in the enforcement of this ruling is the commitment to the criteria that must be found in the house because the judge just uses the expression "a decent house for the custody". In the absence of a legal text that identifies the criteria that must be found in the house, the question raises two problems during the enforcement. The 1st is when the house is not suitable for the custody and the 2nd is when the house is far from the family of the custodial mother.

Generally, after the divorce, the father provides a house at a low price where there are the necessary accommodations for the child and the custodial mother. In the absence of a clear text and the blurriness of the judicial ruling, the judicial officer refers to the norms and habits which consider the house with electricity, gas, water, doors, walls, and windows as suitable. However, the custodial mother may refuse it such as when the house is with not furniture, narrow, or is in a high building. In case of refusal, the judicial officer cannot carry on the enforcement of the ruling and writes a statement about the house provided by the father, and

The practical problems facing the family issues judge in the custody cases

may add photographs to the statement that show the interior and exterior of the house and the reservations by the custodial mother. Then, the issue is raised to the judge urgently. The supreme court enshrined the right of the custodial mother to the rent amount if the house provided by the father is inappropriate, as provided for in its decision of 14/03/2013.

In this context, the judicial officer must consider the fact that the father provides an inappropriate house as a refusal of the enforcement of the decision and, thus, writes a report and moves to the second commitment that is the amount of the rent. Despite this, there is still a problematic regarding the period of the start of paying the rent amount to the custodial mother. The question is whether it starts from the date of refusing to provide a suitable house for custody or from the date of the ruling with the right to custody. Thus, we say that the judge must be exact in his decision through identifying the minimal criteria of the custody house, or suggesting to the father paying the amount of the rent to the custodial mother. Besides, he must determine the date of the start of payment to consider the interest of the child.

The second issue that faces the enforcement of the ruling with providing a house for custody is that the father may use tricks to blackmail the mother to waive the custody house and the rent amount. Most of the tricks used by the fathers is providing a house that is far from her family; thus, she refuses and loses her right to the custody house. Nevertheless, the jurisprudence of the supreme court provided in its ruling of 12/10/2007 that

Elias Messaouda Naima

the house of custody must be in the zone of the husband's house or the house of the mother's family. In addition, when providing the house for custody, the father must take into consideration the interest of the child as provided for by the ruling of the supreme court of 14/01/2009. The ruling says, "when the judges of the Court of Blida saw that the children subject to custody live in Kolea, since they were born, raised, and still study there, and that their movement from this city would affect their stability because the previous data achieve their interests, the judges refused the house of Larbaa in BeniMoussa and ruled with the amount of the rent. The ruling adds that this in accordance with Articles 72 and 78 of the family law. The amount of the rent is 6000 DA and suits the rent standards in the region. Therefore, the appeal is not grounded and, thus, is refused".

We must remind that the interest of the child is the supreme goal of the Algerian legislator, as it is mentioned in many texts of the family law. Thus, the judge must enshrine it in the judicial provisions he issues in the disputes over custody, mainly regarding the house of custody. In this line, he must identify the minimal criteria of the house and rule that it must be located where the custodial mother or her family reside in order to end such issues when enforcing the decisions.

4. CONCLUSION

Upon this study, we see that the custody is a sensitive topic as it is related to the child. Therefore, the Algerian legislator obliged the judge to consider the interest of the child above all. Despite this care, the

The practical problems facing the family issues judge in the custody cases

legislator did not set the criteria that achieve the interest of the child. Rather, he left them to the judge's discretion because what serves the child's interest today may not after a while. Besides, what suits a certain child may not suit another. Moreover, the rulings about the divorce and custody do not have the force of *res judicata* even if they were final and have the legal force. In this regard, they can be appealed at any time. This raises issues when enforcing the provisions of custody whose enforcement issues differ than the other provisions.

If the judicial official has procedural measures when enforcing the judicial provisions, either through the coercive enforcement with public force or the seizure, it is different when enforcing the custody provisions that do not accept the coercion. In this context, most of the rules in solving the issues of custody depend on the jurisprudence of the supreme court. Due to the gaps in the Algerian legislation in regulating the custody issues, the legislator must set some criteria that govern the principle of the interest of the child to be used by the judge in the disputes over custody and its rights and commitments because the interest of the child changes with time and space. Furthermore, the legislator must integrate laws that regulate the applicable law in the custody issues in mixed marriages and not limit the judge to the rules of the civil law due to the specificity of the custody issues and the character of the child.

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Elias Messaouda Naima

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The practical problems facing the family issues judge in the custody cases

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