

## **Applicable Law on Personal Status in Private International Law: An Analytical Study in Iraqi Law**

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### **Abstract**

Personal status issues occupy great importance and wide scope in the conflict of laws, as evident in matters such as marriage, divorce, inheritance, and wills, among others. The conflict of laws in personal status issues raises multiple problematic aspects in determining the applicable law. Our Iraqi legislator has relied on nationality as a connecting factor in personal status issues, as it provides the greatest protection for the Iraqi individual and the public order in Iraq, according to our Iraqi legislator's viewpoint supported by jurisprudence. However, the application of nationality law in the conflict of laws in the field of personal status has created several problematic issues that affect individuals' acquired rights and pose difficulties in safeguarding these rights.

**Keywords:** Personal status, the applicable law, foreign law, Private international law, Challenges in the application of nationality law

### **Introduction**

Personal status issues occupy great importance and wide scope in the conflict of laws, as evident in matters such as marriage, divorce, inheritance, and wills, among others. The conflict of laws in personal status issues raises multiple problematic aspects in determining the applicable law. Our Iraqi legislator has relied on nationality as a connecting factor in personal status issues, as it provides the greatest protection for the Iraqi individual and the public order in Iraq, according to our Iraqi legislator's viewpoint supported by jurisprudence. However, the application of nationality law in the conflict of laws in the field of personal status has created several problematic issues that affect individuals' acquired rights and pose difficulties in safeguarding these rights (Al-Karaawi, 2024, p. 4.).

The significance of the research lies in the fact that studying the rules of connecting factors related to personal status acquires the utmost importance. This is because personal status is a fertile ground for conflicts of laws, given the significant differences in laws in this field. To meet international needs, countries have become interconnected, leading to increased conflicts between laws in this field. This requires the judge to search for the most appropriate and just law to govern these relationships between individuals. Practical necessities have

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compelled the judge to allow the application of foreign laws in personal status matters, instead of the national law (Al-Sabaawi, 2012, p. 30).

### **Research Questions**

Below are the research questions.

- Has the Iraqi legislator provided a comprehensive and inclusive definition for the term "personal status"?
- Did the Iraqi legislator rely on a specific connecting factor to determine the applicable rule in personal status disputes?
- What are the problematic aspects faced by Iraqi judges when applying the nationality connecting factor in personal status matters?
- Is the Iraqi judge obligated to apply foreign law, which the national connecting factor refers to in their law, as the specialized law in personal status matters in all cases?

### **Research Methodology**

In this study, an analytical approach by analyzing the legal texts found in Iraqi laws that address the important rules governing and regulating personal status issues. I focused on determining the applicable rule in personal status matters when there is a conflict between laws.

### **Research Structure**

Our research is divided into two sections. In the first section, we addressed the general criteria for determining the applicable law in personal status matters. It is divided into two subsections. The first subsection focuses on defining the concept of personal law in personal status matters, while the second subsection discusses the criteria for assignment in personal status matters.

The second section addresses the problematic aspects of applying conflict of laws rules in personal status matters. It is also divided into two subsections. The first subsection discusses the issues related to the application of nationality law in personal status matters, while the second subsection addresses the issues of applying foreign law.

### **General criteria for determining the applicable law in personal status matters**

Applying the rules of assignment in personal status matters requires separating initial issues to determine the applicable law and how to apply it. This is merely an adaptation of the legal relationship, which is a preliminary and fundamental issue preceding the determination of the applicable law. It aims to find the desired solution to the issue presented before the judge. By performing

this task (the legal description of the disputed relationship), the judge can identify the appropriate assignment rule to govern this relationship. Alternatively, the judge may resort to the issue of reference, which is one of the important topics in private international law. It is the solution to the conflict between the judge's law and the foreign law to which it refers when there is a difference in the assignment criteria. This is done by applying the rules of assignment in personal status matters (Muslim, 1956, p. 188).

#### **Defining the concept of personal law in personal status matters.**

Personal status refers to the legal status of an individual in their private capacity and their relationship with their family, as governed by the law of the country to which the person is connected by nationality or domicile (Al-Daoudi, and Al-Hadawi, 2011, p. 82). The term "personal status" was first used in Italian law in the 12th and 13th centuries when conflicts arose between the general law of the Italian state and the local laws of each city in Italy. This required the division of matters into two categories: personal status matters and property matters. The definition of what falls under personal status varies from one country to another. In some countries, it is limited to matters of status and capacity, while in other countries, it also includes matters such as guardianship, inheritance, lineage, and maintenance. For example, in Egypt, the Egyptian Court of Cassation defined personal status when it issued its ruling in 1934, attempting to define what is included in personal status and what is not. It stated: "It is a collection of characteristics that distinguish a person from others, whether natural or familial, to which the law assigns legal effects on their social life. These characteristics include being male or female, married, widowed, divorced, a legitimate child, having full legal capacity, lacking legal capacity due to age, disability, insanity, being deprived of legal capacity, or having it restricted for legal reasons (Al-Hadawi, 2005, p. 87).

#### **Criteria for determining applicable law in personal status matters.**

The Iraqi legislator's position regarding the definition of the concept of personal status was not known in Iraq until recently because it was not recognized in Islamic law. The Iraqi legislator adopted it from other legislations, and therefore, some laws, such as the repealed Basic Law and the Personal Status Law for Foreigners No. 78 of 1931, mentioned this term without defining it. The Iraqi Civil Law also did not refer to this term in the provisions related to conflict of laws, but rather provided examples of personal status matters and specified the applicable law for each issue. Despite the absence of a comprehensive definition in Iraqi laws for personal status matters, this does not prevent understanding the

issues covered by this term by referring to the relevant legal texts, including the Iraqi Personal Status Law No. 188 of 1959 and the Civil Law, which define the subjects considered personal status matters, such as marriage, divorce, birth, lineage, custody, maintenance, wills, inheritance, and capacity (Al-Khatib and Al-Kubaisi, and Al-Samarrai, 1980, p. 7).

All the subjects of personal status are considered matters of public order because they serve the public interest. Individuals are not allowed to contract out of them, except for matters related to financial issues. Therefore, they are sensitive topics due to their connection to an individual's status and their relationship with their family (Hisham and Okasha, 2008, p. 252). This was emphasized by the Iraqi legislator in Article 130/2, which mentioned some of these matters, including personal status matters, and granted them specificity. The provisions related to personal status matters are considered part of the public order, and it is not permissible to agree to contravene them (Article (130/2)).

#### **Guidelines for Determining the Applicable Law in Personal Status Matters**

The determination of the applicable law in personal status matters is related to the elements of the relationship or connection that gives rise to the dispute. These elements include the parties involved, the place, and the cause or event that gives rise to the obligation. Regarding the element of the parties, we note that the most important elements related to individuals or what is known as "personal status relationships" are nationality, marriage, lineage, and maintenance. It is reasonable for the rule of determination to include an assignment guideline, which is the criterion chosen by the national legislator to guide the application of the law in personal status matters. This criterion links the assigned concept to the applicable law, such as the assignment guideline related to the nationality of the parties or their common domicile (Khalil, 2015, p. 76-77).

Due to the specificity of personal status matters, which are connected to an individual's situation and their relationship with their family on one hand, and their connection to the public order on the other hand, the opinions of jurists and the stance of local legislations in each country have differed in determining the assignment guideline and subsequently the applicable law in personal status matters. Most Latin American countries, including Iraq, adopt the nationality criterion, while Anglo-Saxon countries adopt the domicile criterion, including England (Al-Daoudi, 1996, p. 131). The stance regarding the assignment guideline in personal status matters can be divided into two groups: the first group advocates assigning personal status matters to the nationality law, while the second group advocates assigning them to the domicile law. Each group has its justifications and arguments.

## **Results and Discussion**

### **a. Challenges in the Application of Conflict of Laws in Personal Status Matters**

Iraqi legislation assigns the applicable law for personal status matters to the criterion of nationality, considering that it provides the maximum protection for the Iraqi individual and the general system, under the requirements of the state. However, applying the law of nationality to personal status matters, despite its advantages, especially in Iraq, may face challenges that affect the individual involved in the dispute, making it difficult to determine the applicable law among conflicting laws. This requires the search for a rule that establishes the appropriate solution. Additionally, there is the issue of the national judge applying objective rules in their law in this case, noting that the application of these rules is exceptional and requires excluding foreign law in cases where it contradicts the public policy of the judge's country.

### **b. Challenges in the Application of Nationality Law in Personal Status Matters**

Firstly, the issue of multiple nationalities arises when the judge is faced with a dispute involving parties who hold legal status in two or more nationalities. In other words, the parties involved in the relationship have multiple nationalities, and the determining factor for the applicable law is the nationality of the parties (Okasha, 1999, p. 170). This raises several questions: What is the solution if the nationality of the judge hearing the dispute is among the conflicting nationalities? On the other hand, what is the solution if the nationality of the judge is not among the conflicting nationalities? If the nationality of the judge is among the conflicting nationalities, the judge does not face any difficulty in this case. The judge should prioritize their own nationality and apply the law of their own country, as nationality is a matter related to sovereignty, and the judge is not permitted to apply foreign law instead of their own law (Fouad, 1993, p. 5).

The Article 33/2 does not intend to favor Iraqi nationality over foreign nationality, as reaching such a result would occur even in the absence of such a provision, based on general principles that do not allow foreign public law to compete with and displace national public law. The importance of this article lies in its role as a rule that determines a circumstance of attribution, not a rule for resolving conflicts between nationality laws (Al-Daoudi. Al-Hadawi, p. 85).

The answer to the other question is as follows: If the conflicting nationalities do not include the nationality of the judge presiding over the dispute, the solution to this problem lies in determining the actual and real nationality that the judge identifies based on the circumstances and facts. The person's stronger

connection to this nationality, i.e., the actual nationality, should be considered. This is the nationality with which the person has the strongest ties, and which is linked to all aspects of their life, giving it priority over other nationalities. Examples of these circumstances and facts that indicate the person's connection to a particular state could include their habitual residence in that state, the language they speak, the place where they carry out their economic activities and their specific job, holding a political position in that disputed nationality, having served in the military in that country, paying taxes, exercising political rights such as the right to vote and run for office, or owning properties in that country. All these circumstances and facts indicate that the person is connected to that state through their actual and real nationality, which the judge should give preference to over other nationalities (Article (5) of the Hague Convention of 1930).

Most domestic legislations, including Iraq, have adopted this solution because having multiple nationalities is a reality, not a legal issue. This is reflected in Article 33/1 of the Iraqi Civil Code, which grants the Iraqi judge the right to determine the law to be applied in cases where individuals have multiple nationalities at the same time, and Iraqi nationality is not among them. It states that the court should determine the applicable law in cases where individuals do not have a known nationality or when they have multiple nationalities at different times (Article 33/1).

At the international level, the concept of actual and real nationality is also recognized as the solution to the issue of multiple nationalities when the nationality of the judge's country is not among the conflicting nationalities. International courts have adopted the consideration of actual nationality by examining the circumstances and realities of the case, such as habitual residence, place of residence, military service, etc. For example, the Permanent Court of Arbitration in The Hague applied this approach in the 1912 *Canivaro* case. The International Court of Justice also applied a similar solution in the *Nottebohm* case between Liechtenstein and Guatemala in its judgment issued in 1955 (Al-Aboudi, 2012, p. 157).

Secondly, the state of statelessness poses a problem for judges when determining the applicable legal framework for personal status issues related to one of the disputing parties. It requires finding an alternative connecting factor that guides the judge to the applicable legal framework for personal status conflicts. The question here is what solution the judge resorts to when the person's task is to determine their nationality, but they are stateless or what is known as "statelessness," meaning the person does not possess any nationality and is

therefore without a homeland. Their legal system is unknown, and some compare this person to a ship sailing in the sea without knowledge (al-Asadi, p. 260).

However, jurisprudence, judiciary, and legislation address these issues by relying on a fallback connecting factor in the absence of the original connecting factor, which is nationality. This fallback factor is domicile, an alternative, and reserve connecting factor to nationality. Judges resort to this solution only in cases where the connecting factor of nationality is absent for personal status matters. If the person does not have a domicile, then the law of the place of residence is applied (Jaber, 1959, p. 263).

The Iraqi legislator affirmed this solution in Article 33/1 of the Iraqi Civil Code, which grants the court the authority to determine the applicable law for individuals who do not possess a known nationality.

Based on this provision, the Iraqi legislator has given the judge the power to determine the applicable law for individuals who do not possess the nationality of a specific country, which can be applied to their personal status matters. The matter is left to the judge's discretion, and this authority is exercised gradually. First, the law of the domicile is applied, and if there is no domicile, the law of the place of residence is applied.

However, the problem of determining the applicable law, resolved by the law of domicile or the law of the place of residence, does not end there. The judge may also face the problem of stateless individuals for whom it is difficult to determine their domicile or place of residence. What is the solution in this case? International custom dictates that the judge applies their law (the law of the judge presiding over the dispute) in such cases involving stateless individuals when their domicile or place of residence cannot be determined, as this law has the fallback jurisdiction in cases where the law is absent (Article (33/1)).

Based on the aforementioned, the judge is presented with three laws to consider: the law of domicile, the law of the place of residence, and the law of the judge. One of these laws can be applied in the case of statelessness regarding personal status matters. The entire matter is left to the judge, who possesses discretionary authority to determine the applicable law and find the suitable solution for the stateless individual, considering that the original connecting factor (nationality) is absent (Hisham, 1974, p. 752).

Thirdly, changing nationality is also one of the issues or complications in the application of nationality law in personal status matters. If there is a change in the nationality of one of the disputing parties, it is necessary to determine the law governing their nationality. In this case, the judge faces a new nationality law and

an old nationality law. What is the judge's position in this case? Will they exercise their discretionary power or compare between the two laws?

Given that nationality is subject to change, it raises the issue of a moving or changing conflict (Ahmed, 1956, p .214). Two conditions are required for this type of conflict: a time gap between the emergence of the legal status that includes a foreign element and the dispute brought before the court, and the ability to change nationality naturally, allowing for the succession of the old nationality law and the new nationality law. This leads to conflicting acquired rights under the laws of both countries and raises the issue of a moving conflict, which is of greater interest in personal status matters compared to other topics, considering the various relevant factors and the need to preserve certain interests according to different requirements.

Therefore, when a person changes their nationality between the time of the establishment of the legal relationship and the time the dispute is brought before the court, should the old or new nationality law be considered? Most legal legislations, including Iraq, tend to respect the acquired rights of individuals. The new law is applied immediately to the future effects of legal relationships, while the legal acts, their validity, and the effects are subject to the old law (Izz al-Din, p. 67).

From the above, we can observe that our Iraqi legislator did not explicitly provide a solution to the moving and changing conflict. However, it included certain solutions in some provisions that indicate the time that should be considered to determine the applicable law (Article (19/2/3). (23/1) of the Iraqi Civil Code).

**c. Challenges in the application of foreign law to personal status matters.**

The Iraqi judge may face challenges when applying foreign law referred to by the conflict of laws rule in personal status matters, despite its competence to adjudicate matters related to personal status. This may require the judge to exclude the application of foreign law, especially in cases where the foreign law contradicts the public policy of the judge's country. This compels the Iraqi judge to exclude it based on the wide discretionary power granted to them in determining whether the foreign law violates the law of their country, as affirmed by Article 32 of the Iraqi Civil Code, which prohibits the application of the competent foreign law if its provisions conflict with the idea of public policy (Article (32)).

For example, in inheritance, which is considered a personal status matter, the concept of public policy comes into play as an obstacle to the application of



the competent foreign law imposed by the heir to the adoptee, which may not be accepted in countries where adoption is rejected by their laws, and inheritance is not entailed as in Iraq.

The Iraqi legislator confirms this by protecting personal status matters by subjecting them to different considerations, especially those of a religious nature. The foreign law that should be applied may allow marriage between individuals of different religions, such as allowing a Christian to marry a Muslim. However, such a marriage is prohibited in the state of the judge handling the dispute, which is the stance of most countries that adhere to the principles of Islamic law concerning marriage, including Iraq. Therefore, this protection is manifested by considering such a marriage as contrary to public policy in Iraq, leading to the exclusion of competent foreign law.

If the choice-of-law rule indicates the application of foreign law to personal status matters involving a foreign element, it does not mean that the Iraqi judge, for example, is obliged to apply that law. The judge should ensure that the foreign law, which is competent in governing personal status matters, does not conflict with the fundamental principles and essential foundations upon which the judge's society is based. If there is a conflict with prevailing ideas in their society and it violates the public policy of the judge's country, the judge should exclude that law, even if it is the law that should be applied according to the choice-of-law rule in the judge's country. This exclusion is a discretionary measure that the judge resorts to as an exception and a remedial action in the face of foreign law (Muhammad, 2021, p. 36).

The Iraqi Civil Code addresses this exception in Article 32, where the Iraqi legislator explicitly allows the exclusion of foreign law if it conflicts with public policy in Iraq. It grants the judge the authority to determine whether this law violates public policy or not (Artic 32).

However, the question here is: What is the solution if the Iraqi judge excludes the application of the competent foreign law, as indicated by the choice-of-law rule, due to its violation of public policy in Iraq regarding personal status matters? Will the judge leave the legal relationship subject to the dispute without a governing law, or will they search for another suitable law to replace the excluded law in ruling on personal status matters, or will they modify the foreign law to align it with the principles and foundations of their society?

To answer all these questions, we turn to the position of jurisprudence, which is divided into two parts. The first opinion states that excluding the foreign law that violates public policy is not sufficient without replacing it with an alternative law. Their evidence for this is the case where foreign law allows the establishment of a relationship that is not permitted by the judge's law. In this

case, the foreign law should be excluded without the need to replace it with another law (Abda Jamil, 2008, p. 217).

### **Conclusion**

In conclusion, it is evident from the above that personal status matters are important and sensitive due to their connection to the legal status of individuals and their family relationships, which may involve a foreign element and be subject to conflicts between laws. Therefore, certain conclusions have been reached through our study, including, Different positions of countries regarding the issues falling within personal status matters. Some countries limit this term to status and capacity, while others have a broader scope, including wills, inheritance, lineage, and alimony. Our Iraqi legislator has adopted the latter position. The reason for conflicts between laws in personal status matters is the allowance of the Iraqi legislator to apply foreign laws alongside Iraqi law in personal status matters due to practical necessities imposed by the need to meet the requirements of international transactions and the differences between legal systems of different countries. Some matters are considered part of personal status matters in one country but not in another, which may pose difficulties for judges. In such cases, judges resort to finding a suitable referral rule to govern personal status matters, which is the most appropriate solution for the parties involved in the dispute. The differences in legislation regarding the adoption of the referral rule in conflicts of laws in personal status matters vary based on the considerations adopted by different countries, considering their own interests as a state and the interests of individuals. Some countries adopt the domicile rule, while others adopt the nationality rule. In Iraq, our legislator has adopted the nationality rule as it ensures stability and consistency in individuals' transactions in personal status matters. Applying the nationality rule, which has been adopted by our Iraqi legislator, poses many problems and difficulties for the judge. This necessitates the search for appropriate solutions because these problems may lead to the loss of rights for individuals who are citizens of other countries, as their acquired rights under their nationality law may not be recognized. All of this stems from the differences in legislation between countries concerning the resolution of conflicts of laws in personal status matters. In such cases, the Iraqi judge has no choice but to exclude the application of the competent foreign law that contradicts the general system in Iraq and replace it with another law to resolve the dispute. The judge must determine the appropriate rule for the disputed personal status matters to fill the legislative vacuum that affects the legal relationship. The recommendations of this

paper consist of the Work towards establishing international agreements for international judicial cooperation in the field of conflicts of laws in personal status matters. These agreements should facilitate the resolution of conflicts of laws in personal status matters through specific referral rules that provide suitable solutions for such disputes. Adopt unified referral rules, especially in countries that apply the principles of Islamic law in personal status matters. This would make it easier for the judge to resolve personal status disputes by providing clear and efficient solutions, leading to the parties involved in the dispute having confidence in knowing the applicable referral rule for their personal status matters. It would also achieve compatibility between conflict of law rules and the principles of private international law. Include an explicit provision in the Iraqi Civil Code or the Iraqi Personal Status Law that clarifies a specific concept or provides an explicit definition of the idea of personal status, rather than merely specifying the topics that fall under personal status matters. Introduce an explicit provision in the Iraqi Civil Code that determines the applicable referral rule for personal status matters in cases of nationality change, which is one of the challenges faced by judges regarding nationality rules or what is known as movable or changing conflicts of laws.

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