

Constitution and Private International Law: Some Contemporary Remarks in Jordanian Law

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The last constitutional reforms passed in 2011 attributed a constitutional value to the question of the constitutionality. The Constitutional Court, established in 2012, was vested with the duty of the constitutional interpretation and the duty to ensure that no legislative action violates the Constitution. Private International law in Jordan is a heterogeneous legal tradition (civil law, and religious law). This article aims to examine some aspects of Jordanian private international law from a perspective of the Constitution and to establish whether Jordan's private international law would pass the test of constitutionality. The focus of this article will be to examine the constitutional status of foreigners, the question of the nationality of a child born to a Jordanian mother, the constitutionality of certain rules on conflict of laws, and the constitutionality of foreign law.

Keywords: *Jordanian constitution, private international law, law on foreigners, international mixed marriage, Jordanian nationality.*

Introduction

Jordan has formed a heterogeneous legal system in which the plurality of legal orders coexists, especially in the matters of personal status which encompasses all legal issues pertaining to the person in society.

According to the provisions of the Constitution, legislative and judicial autonomy is widely recognised to the religious communities. Shari'a Law is applied within the framework of the personal status of the Muslim community and is enforced through the *Shari'a courts*. In contrast, the tribunals of the other religious recognised communities, mainly those of the

Christian councils of Christian communities (majālis al-ṭawāʿif al-masīhiyya), are the competent jurisdiction to decide over all matters of personal status of the Christian communities. Thus, the religious courts deal only with subject-matter relating to personal status such as marriage, divorce, inheritance, child custody etc. This system obviously coexists with the system of the civil courts. The civil courts exercise their jurisdiction in respect to civil and criminal matters in accordance with the law in force and have jurisdiction over all persons in all matters. This includes civil and criminal cases brought against the government.

This legislative and jurisdictional plurality was therefore reflected in terms of laws related to personal status, foreigners, nationality, and the rules on conflict of laws. These main elements present many points of tangency with several particular aspects in the present, and does not fail to influence neither the resolution of the private international disputes nor the domestic one.

Nor do other branches of law, private international law, as a primary branch of domestic law, should not escape from the validity requirements of the constitutional norms, particularly those related to the fundamental rights (Rigaux,1999). Consequently, it would not be without interest, that this article could only claim to explore partially, to examine certain aspects of private international law from a constitutional perspective. In particular, those related to the relationship between the Constitution and private international law in Jordan.

Moreover, this article will merely highlight two main issues that might involve the conventional subjects of private international law. The first concern is that the status of foreigners in the Constitution, including the nationality of a child born to a Jordanian woman married to a non-Jordanian (1). The second concern is the subordination of the rules on conflict of laws to the substantial principles provided in the Constitution, including the status of international treaty law, and the constitutionality of the foreign law before the Jordanian courts (II).

The Status of Foreigners in the Constitution

With the increasing number of incoming foreigners, Jordan places itself in an increasingly assertive migration dynamic. This is because it is a traditional country of transit or settlement of forced and regulated migrant populations, and also a country that receives a large number of *foreign workers*, and students of various nationalities.

There are several aspects to be questioned in this context: Is the foreigner treated as a national? (1). The nationality of the foreign spouse married to a Jordanian woman and their children(II).

The Status of the Foreigners in Jordanian Private International Law

In the *Nottebohm case (Liechtenstein v. Guatemala)*, the International Court of Justice in 1955 defined ‘Nationality’ as :

“[A] legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties”.

Nationality also confers a required legal status entailing the exercise of many civil and political rights. Additionally, nationality is an *extraneous element* widely embraced by the Jordanian rules on conflict of laws, which makes such a justiciable private international dispute subject to private international law mechanisms. This is especially relevant in the area of personal status, which includes in addition to family matters, includes civil status, capacity, the marriage, the *matrimonial* regime, the divorce, the birth, the kinship, the parentage, the custody, the pension, the measures to protect the incapacitated persons, will, and inheritance. The legislator has widely considered all matters of personal status to be linked to the national law of the concerned person.

As a general rule, the relationship between the law of foreigners and the constitutional judge depends on many factors. This includes the existence of legal constitutional provisions pertaining to the foreigners including the constitutional remedies to foreigners as well as to the nationals, and the guarantee that the legal order contains the control of constitutionality over laws and regulations.

Jordan has a written constitution to organise political life and to guarantee the rights and freedoms of the citizens. The legal landscape has been enriched by the creation of the Constitutional Court in 2012. The referral to this court is strictly reserved so that any Jordanian court cannot refer directly the matter of constitutionality to the Constitutional Court.

According to the provisions of the Constitution and the Constitutional Court’s Act of 2012, the court is vested solely the jurisdiction to control the constitutionality of laws and regulations (*le contrôle à posteriori*). This is by the sole direct initiative of certain political authorities (the Senate, the House of Representatives, the Cabinet), or indirectly in the form of a question of unconstitutionality raised in the course of proceedings by one of the disputing parties. If he or she believes that such a law or a regulation intended to be applied in a specific case, violate the Constitution. Thus, the type of control *à posteriori* takes place only when a law or a decree has come into force. Direct recourse for the citizens or the social society has not been established in the Jordanian system, and this type of control considered as a balance between the executive, legislative, and judicial powers. It is therefore a

compliance check between the lower standard (law and decree), and the higher standards, and norms prescribed in the Constitution.

Moreover, the law establishing the Constitutional Court prescribes the modalities for dealing with the issue of unconstitutionality that arises in the course of proceedings. In order to organise the question of constitutionality and avoiding the risks of clogging up the Constitutional Court with pleas that would have no chance of succeeding, a filtering procedure was established by the 2012 Act.

Hence, any court that intends to have a law checked with the norms of the Constitution must refer the matter to the Court of Cassation. Systematically, before referring the issue to the Constitutional Court, all pleas are carried out by the trial court, regardless of the nature of this court whether it was a civil court, a religious, or a special court. If one of these courts found that the question of unconstitutionality is serious, it will be sent to a "Special Tribunal" within the Court of Cassation, composed of three judges who rule on the admissibility of the question before referring it to the Constitutional Court.

Generally, constitutional control is about confronting the situation in question with the constitutional norms, and then the norms, between themselves. It answers the simple question: are the legislative provisions comply with the constitutional? This type of control, according to Jordanian practice and law, is not limited to a specific case, it can have broader implications by affecting other cases. Hence, when the Constitutional Court found such a law or a regulation (decree) violate the Constitution, it empowered the exclusive jurisdiction to declare their nullity.

On the other hand, examining the Jordanian constitution shows that the constitutional sources contain virtually no specific provisions pertaining to the legal status of foreigners. The only provisions that refers to foreigners are contained in Article 103 of the Constitution, which raises the question of the law applicable to the personal status of foreigners, and the provisions prescribed in Article 21 related to the principle of non-extradition for political offences (implicitly the right to asylum). Article 21(1) of the Constitution provides that "[t]he political refugees cannot be extradited because of their political ideas or their defence of freedom". Moreover, it does not appear that Jordan has enacted a special legislation concerning the status of refugees, including for those seeking asylum. In the absence of special legislation, asylum-seekers and refugees in Jordan are subject to the Law on the Residence of Foreigners No 24 of 1973. This law is applied to all foreigners regardless of the distinction between refugees and non-refugees. In addition, Jordan is not a State party to the 1951 Convention relating to the Status of Refugees or its 1967 Protocol, and some legal frame works related to refugees are defined by a memorandum of understanding with UNHCR of 1998 and amended in 2014.

However, Chapter 2 of the Constitution enshrines the nationalist nature of certain rights and duties for Jordanians under the Title (Title 2: Rights and Duties of the Jordanians). It is therefore necessary to question the constitutional basis of the law regarding foreigners in Jordan. The interpretation of the current Chapter leads to conclusion that the provisions pertaining to the fundamental rights for foreigners are prescribed in this chapter despite the nomination of this Chapter (Rights and Duties of the Jordanians). Articles 5-23 of this Chapter do not retain the wording (Jordanian) in all of the texts. As a result, one can distinguish two sort of rights: certain constitutional rights are the exclusive privilege of the Jordanians of nationality (the political rights), and the fundamental rights (rights and freedoms) recognised to any person regardless of his nationality. It is understood that certain specific rights are the privilege of foreigners, first and foremost, the right of asylum.

The absence of specific texts pertaining to foreigners should not, however, hinder a possible creative and constructive attitude that the Constitutional Court could adopt. For the most part, the foreigner can avail themselves of all constitutional rights which they are not excluded by the constitution itself, and on the other, only the legislator can impose any additional restrictions regarding the foreigners (Rigaux, 1999).

The Jordanian constitution does not provide the constitutional court with any technical control. The principle of proportionality is therefore a good method of considering the constitutionality. In addition, the practice in comparative constitutional law sets out many unwritten constitutional and conventional norms that could limit the power of the legislator in enacting laws and regulations. Hence, the French Constitutional Council (*le conseil constitutionnel*) has considered that “[I]t is the responsibility of the legislator to ensure the reconciliation between, on the one hand, the prevention of breaches of public order considered necessary to safeguard the rights and the principles of constitutional value (*principes de valeur constitutionnelle*), as well as the requirements of the good administration of justice and, on the other hand, the exercise of constitutionally guaranteed freedoms”. Any infringement to the exercise of these freedoms must be adapted, necessary, and proportionate to the pursued objectives (Millard, 2012).

On the other hand, it is the view of the researcher that the internationally recognised norms in the international and comparative law are a common source of inspiration. They represent an international constitutional order that it is hoped that the Jordanian Constitutional Court will be empowered to consider the unwritten general principles, notwithstanding any doctrinal reluctance.

From a perspective of the foreigners, a foreigner is interested in bringing to the Constitutional Court certain specific areas concerning their entry and stay in the territory, their deportation,

their family life, whether their spouses and descendants are Jordanian or foreigners, the foreign taxpayer, the foreign proprietor, or the foreign criminal etc. Additionally, in all countries that have instituted a judicial review of the constitutionality of the law such as the United States, France, Belgium (Rigaux 1999), and recently Jordan, the mean of the unconstitutionality is accessible to foreigners as well as to the nationals. Thus, pursuant to Article 60 (2) of the Constitution and to the Act of 2012, the control *à posteriori* may take the form of a question constitutionality raised by any disputing party in the course of proceedings. The court shall, if it finds that the plea of unconstitutionality is serious, refer the issue to the Court of Cassation to determine of its possible referral to the Constitutional Court. The current text does not provide for any distinction between a Jordanian and a foreigner, a natural or a legal person, to access to justice in order to assert their rights as provided in Article 101 of the Constitution.

In this regard, the question is under which conditions the enjoyment of certain constitutional rights by a foreigner is subordinated. Indeed, a foreigner who regularly resides in the country enjoys all the rights of which they are not legally deprived by any legal provisions. Foreigners, in a regular situation, cannot be tortured even if they become criminals. They have the guarantees recognised in international and national law, and they can avail themselves of all constitutional rights. A foreigner is also deprived of the enjoyment of political rights, and access to the civil service and certain professions. Similarly, a foreigner in unregular and asylum seeker situations are entitled to a fair trial since the minimum procedural guarantees (procedural due process) belong to anyone in a State of Law.

Until now, the constitutional jurisprudence had not had the opportunity to decide whether the foreigners are allowed to avail themselves of the principles of equality and non-discrimination that are the right to the Jordanians as stipulated in the Constitution. It is the belief of the researcher that any foreigner enjoys a dual protection. On the one hand: the foreigner has the possibility to avail himself of all constitutional rights which they is not excluded by the constitution itself and, on the other hand, only the legislator has the jurisdiction to impose any additional restrictions regarding them.

In practice, the most notable difference between the national and the foreigner is the fragility of the foreign right of the residence that a State has the power to deport any foreigner from its territory. In the absence of a specific constitutional provisions and practices, it must be noted that the control of the legislative activity in the area of the foreigner's rights, through the multiple principles such as the national safeguard, breaches of public order etc., would prevail. In this regard, monitoring of the compliance with certain principles such as the principle of legality and proportionality, it could escape from the censorship of the constitutional jurisdiction to the benefit of the restrictive interpretation power granted to the

administration under the control of principle of legality recognised to the administrative courts.

The legislature's appreciation power of defining the rules concerning foreigners is based generally on the principle of sovereignty. Many fields such as the acquisition of nationality, their personal status, or their entry and stay on the territory, is not an absolute power of appreciation. This power should meet the constitutional requirements and the respect of the international standards and commitments. Therefore, the legislator must respect the fundamental rights to all those residing in the territory of the country. Similarly, and in order to guarantee a due procedure for detained foreigners subject to deportation orders and measures, any restrictions to the exercise of such a judicial recourse against these measures is unconstitutional. This is because any foreigner should have the right to an effective justice in the right time and the right place.

The Nationality of the Foreign Spouse Married to a Jordanian Woman and their Children

As a general rule, international law grants to any sovereignty the power to determine the modalities of obtaining nationality, either by birth, parentage (*ius soli* and *ius sanguinis*), naturalisation, marriage etc. Nonetheless, the regulations pertaining to the acquisition and withdrawal of the nationality is framed by several principles developed by international law. This includes the obligation to avoid or reduce the statelessness, the prohibition of arbitrary deprivation of nationality, and the general obligation of non-discrimination.

In Jordanian private international law, the inequality of status based on nationality raises many questions. Inequality becomes even more evident when considering granting of the Jordanian nationality to the foreign spouses and their children born to a woman of Jordanian nationality. Discrimination between men and women therefore persists on two fronts: the civil registration and the transmission of nationality to children.

According to Article 5 of the Constitution, the acquisition and loss of the nationality is subject to the special law. The Nationality Act of 1954 generates real discrimination against Jordanian women. Under the provisions of this law, the Jordanian nationality is transmitted only by the father. Jordanian women married to a foreigner does not have the right to grant the nationality to her husband nor to her children. Hence, Article 9 of the Nationality Act provides that the children of a Jordanian citizen (male) are Jordanians regardless of their place of birth.

This problem highlights the controversy between justice and politics. This controversial issue has led to many difficult situations and negative impacts on thousands of married people and

their children who have been deprived of the right to Jordanian nationality. As a result, many families and persons have been deprived of the social and economic benefits such as the right to residence, housing, work, the right to access health and public education, the right to travel (driver's license) etc. Despite the government's recent decisions granting children born to a Jordanian mother all civil rights in the form of a 'privilege card' which is supposed to be used for residence and work permission, driver's licenses, and real estate ownership, this progress remains insufficient in view of true equality between men and women in matters of nationality.

The marginalisation of Jordanian women in relation to question of the nationality is clearly established. The arguments are usually made in favor of this situation are political in nature. These arguments are mainly linked to the Arab-Israeli conflict and the flow of migrants coming from the West Bank and Gaza by encouraging them not to leave their home land by making Jordan as an "alternative homeland", especially as Jordan is the only country in the region to have granted the largest number of the Palestinian refugees the Jordanian nationality. Some views justify this differentiated treatment by the importance of the father's role in the family life and society.

Moreover, the issue of the acquiring of the nationality illustrates the pivotal role of the husband. Hence, when a Jordanian husband wishes that his foreign wife acquire the Jordanian nationality, the legal requirements are easily surmountable. This possibility is provided by the Nationality Act of 1954, so that it is sufficient for the person concerned to submit to the Minister of the Interior an application for acquisition the Jordanian nationality, i.e. after three years of living together, if the wife is one of the Arab countries of nationality, or after five years of living together if his wife was of non-Arab nationality.

The Jordanian Constitution has recognised the principle of equality before the law as well as the principle of non-discrimination in general. The equality before the law leaves the door open to all interpretations in the extent of this principle. Contrary to certain Arabic constitutions, the assertion of the principle of gender equality is not stated in the Jordanian Constitution. The constitutionality of this sort of discrimination against the Jordanian women remains subject to a potential interpretation could be occur by the new Constitutional Court in the light of Article 6 of the Constitution. Article 6 provides that “Jordanians are equal before the law, there must be no discrimination between them, based on race, language or religion with regard to their rights and duties”.

The basis of the equality principle, which is one of those written in the Constitution, requires that it be up to the Constitutional Court to establish the equality between the sexes in the field of nationality, without any discrimination. Moreover, Article 6 does not cite the gender, so it

must be given a common interpretation that the use of the masculine wording in legal texts covers both sexes.

The question remains, in this regard, if this differentiated treatment in the field of nationality and is rooted in Shari'a law. In fact, someone may consider that this discrimination against woman is based on the legacy of tradition and religion. This is "a great mistake" in the view of the researcher. The problem is not Shari'a law itself, but the way it is interpreted. In fact, the place of religion has been affirmed in the Jordanian Constitution. The Constitution considers in Article 2 that "Islam is the religion of the State and Arabic is the official language". Despite this reference to the Islamic religion, Shari'a law is not considered as the principal source of legislations. In addition, the question of nationality is not linked to the Islamic religion. This is because the fundamental principle in Islamic religion is the religious affiliation and beliefs, and not the legal and political concept of the nationality of a State according to the general principles of public international law.

The adoption by the United Nations General Assembly on 18 December 1979 the Convention on the Elimination of All Forms of Discrimination Against Women, and its ratification by Jordan, did not make much progress to resolve this issue. This is because Jordan has expressed some reservations about certain provisions in the Convention, particularly those related to marriage and nationality. In 2009, Jordan lifted its reservations on Article 15, paragraph 4 of CEDAW, which relates to women's freedom of mobility and freedom to choose their own residence. Until today, Jordan still has reservations on Article 9, paragraph 2 that grants women "equal rights with men with respect to the nationality of their children", as well as Article 16, paragraph 1 (c), (d) and (g) that relates to equal rights upon marriage dissolution (Engelcke, 2019).

Moreover, the protection against the issue of statelessness is not resolved yet in Jordanian law, this is due to the fact Jordan has not ratified the 1954 and 1961 United Nations Conventions on this subject. However, the only provisions available under Jordanian private international law are enshrined in the Civil Code, and the Nationality Code. The Civil Code addresses the issue of the stateless persons in indirect way. Under Article 26 which envisages the negative conflict of nationalities, the legislature grants the courts the power to determine the law applicable to stateless persons or persons whose nationality is unknown.

The Constitution and the Rules on Conflict of Laws

Despite the appearance of the first Civil Code in 1976, the rules on conflicts of laws still remain immune from the constitutional revision, and such a question is to be addressed in the future in light of introducing the Constitutional Court in 2012. Moreover, the supremacy of international treaty law over domestic law, as established under the Jordanian legal system,

leads one to inquire about the constitutional court's power to declare unconstitutional a law or regulation that violates the principles of equality. This could bring new consideration to Jordanian private international law.

There are several specific aspects to be questioned: 1) The rules on conflicts of laws and the Constitution; 2) The international treaty law and their constitutionality; 3) The constitutionality of foreign law applied before the Jordanian courts.

The Rules on Conflicts of Laws and the Constitution

The former Fundamental Law of 1928 expressly advocated the application of foreign law by the Jordanian courts. Article 48 states that

The Civil Courts shall exercise their jurisdiction in respect of civil and criminal matters in accordance with the law for the time being in force in the Kingdom, provided that in matters affecting the personal status of foreigners or in matters of a civil or commercial nature which in accordance with international usage are governed by the law of another country, such law shall be applied in the manner designated by the law. (Reference)

It should be noted the same text was repeated by Article 103 of the Constitution of 1946 and repeated in Article 103 of the current Constitution of 1952. According to the text, the foreigner, particularly a non-Muslim, is not subject to the Jordanian law in terms of his personal and family status. However, apart from the Law on Inheritance Issues for Foreigners and Non-Muslims of 1941, no special law on the personal status pertaining foreigners was enacted.

Thus, it should wait until the apparition of the first Civil Code enacted in 1976. Articles 11-29 of the Civil Code, under the title “Conflicts of Laws in Space” regulates the most rules of private international law. The latter provisions designating the applicable law will be applied to a legal relationship entailed with an external element, including the personal status, the contractual and extra-contractual obligations, the forms, the property, and the procedures.

The Jordanian rules on conflicts of laws is characterised by its legislative and non-judicial origin. Nonetheless, such a possibility has been recognised by the courts to fulfil any gaps in the provisions of the legislation. The fact the legislative rules on conflict of laws are not exhaustive, granting an important role for jurisprudence and the doctrine to fill any gaps. Hence, Article 25 of the Civil Code provides that the principles of private international law shall apply in the absence of a relevant provision in the foregoing Articles governing the

conflict of laws. This Article is essential and it represents an important mechanism of openness of the Jordanian jurisprudence on the international and comparative law.

In general, the rules on private international law are an integral part of the legal system of the forum and, therefore they are subject to the hierarchical standards of its sources. This is how the legislator decides whether the content of the rules applied in private international law must be in accordance with the national Constitution with regard to, for example, gender equality or the elimination of all kinds of discrimination based on race, origin, and even, in principle, on the religion. In this regard, the Federal Constitutional Court of Germany issued two decisions on 22 February 1983 and 8 January 1985 in which it considered that: “[T]he application, in the case of the matrimonial and divorce regime between spouses, of the national law of the spouse, must be abandoned since its incompatible with the rules on gender equality stipulated in the German Federal Constitution” (Buruiană, 2006).

In Jordan, in light of the principle of equality between citizens derived from Article 6 of the Constitution, the principle of bilaterally derived from Article 103 of the Constitution, and the so called “principle of safeguarding foreigners” is derived from the same constitutional Article. There is a considerable scope for investigating on several rules on private international law. The examination of certain rules on conflicts of laws provided in Civil Code shows that such a discrimination appears notably regarding to the issues of Jordanian nationality, the personal status and the estates. However, in this field, the Jordanian private international law seems to be moving towards the consecration of the husband's domination over his wife, and more generally a domination of man over the woman. To clarify these aspects, it is necessary to turn to certain rules on conflicts of laws.

A. The Positive Conflict of Nationalities

In the event of a positive conflict of nationalities, i.e. in the case where the individual has several nationalities at the same time, the solution chosen by the Jordanian legislator is to favour the Jordanian nationality. Article 26 of the Civil Code provides that: The law of Jordan must be applied in the case of persons shown to have at the same time the Jordanian nationality and of another State. In contrast, in the presence of a positive conflict that does not involve the Jordanian nationality, it is the duty of the court to determine which nationality to retain in order to determine the applicable law.

The prevailing opinion in the doctrine and jurisprudence preconise to consider the actual “habitual” nationality to which the person appears in fact most attached. This trend was adopted by Article 50 of The Hague Convention of 1930 on issues relating to the conflicts of nationalities, as well as by the practice of the ICJ (*Nottebohm (Liechtenstien vs Guatemala)*)

The solution therefore seems to be imposed under Article 25 as a general principle of private international law (Al Dabbagh, 2006).

This approach demonstrates that these solutions to the question of positive conflict of nationalities are always to favour the national law over the foreign laws, making this connecting factor as a political issue. The likelihood of using the nationality as a connecting factor broadly used in Jordanian private international law in personal status issues, is due to the intentional desire of the legislator for protecting the national interests of the Jordanian citizens. However, this argument is not imbued with a spirit of a uniform protection of international private relationships, and therefore it leads to minimising the possibility of internationalising the Jordanian rules of private international law.

B. Protection of the National in Marriage

The use of the nationality as a connecting factor could be highlighted within the framework of rules on conflict of laws to protect a category of persons identified from the point of view of their nationality entailing the systematic application of the *lex fori*.

In Jordan, Article 15 of the Civil Code provides the application of the Jordanian law in all cases when at least one of the spouses is a Jordanian of nationality. This protection of the national is not based on the criteria of equality and non-discrimination. It demonstrates the protection of the national against any kind of application of a foreign law with regard to the substantive conditions for the validity of a marriage contract, its legal effects including its matrimonial regime, and its dissolution, create uncertainty for foreign parties.

C. The rules on Conflict of Laws Pertaining to International Marriage Contracts

The general rule remains the application of the law of the nationality of the person concerned. Indeed, the dominant attitude of the application of the religious laws of the Jordanians has led to internationalisation of the internal legal conceptions following the application of the substantive national laws, either under the rules on the conflicts of laws, or because of their subsidiary vocation as *lex fori* as long as one of the parties to a transnational or international marriage is a Jordanian.

Under Jordanian law, family law differs according to the religion of the persons concerned. Thus, it is the law of Shari'a that will be applied for Muslims giving the jurisdiction to the Islamic courts (Shari'a court when the two parties are Muslims). In contrast, it is the *ecclesiastical* Law to be applied for Christians, which means the application of law of the confession to which they belong, granting the jurisdiction to the *ecclesiastical courts*. In the event of a dispute between a Muslim husband and his non-Muslim wife, it is the jurisdiction

of the civil courts to decide the case. In other words, the jurisdiction of Islamic courts remains subject to an express declaration of the non-Muslim woman.

This approach adopted by the Jordanian legislator has led to the adoption of the single law principle to extend the application of the religious laws to the areas of the Muslims family relationships. For this reason, the Jordanian legislator adopted a *sur mesure* rules on conflict of laws in order to be in harmony with the general principles of the religious law. The Jordanian Civil Code probably had these considerations into his account. To respond to many concerns regarding the implementation of the religious laws, the legislator in Article 15 of the Civil Code and in Article 189 of the law on Procedures before the Shari'a courts, retains a general exception in order to apply the Jordanian national law in providing that "if one of the spouses is a national at the time the marriage is contracted, the Jordanian law alone shall apply, save in respect of the legal capacity to marry". This approach comports some risks inherent to the foreign spouse resulting in legal uncertainty regarding the law applicable to the substantive terms of the marriage contract, especially in the absence of an appropriate legal consultation.

The discrimination and legal uncertainty are also demonstrated in the law applicable to the rights and obligations arising from the marriage contract, and the law applicable to its dissolution including the divorce. Thus, according to Article 13(2) of the Civil Code provides "The law of the State of which the husband is a national at the time the marriage is contracted shall apply to the effects on personal status, and the effects with regard to property, resulting from the contracting of the marriage". In addition, under Article 14 of the Civil Code

Talaq (unilateral non-judicial declaration of divorce by a husband) shall be governed by the laws of the State of which the husband is a national at the time of the *Talaq*, and *Tatliq* (*talaq* by a court decision) and separation shall be governed by the law of the State of which the husband is a national at the time the proceedings are brought.

Changing the nationality, as a connecting element, would produce therefore many effects on the dissolution of the marriage contract, questioning the possible application the theory of fraud to the law.

It appears that many rules on conflict of laws concerning the international marriage contracts are only an image of domestic law. The solutions adopted by the Civil Code do not seem adequate to resolve all issues pertaining to the marriage contract concluded between two foreigners belonging to a secular State for example, or even to an international religious marriage contracted under a national law. The presumption of a *religious affiliation* uniting the spouses is not always established, especially in the case of different religion affiliations or spiritual orientation between them, or in the case of a marriage contracted between two

atheists. Consequently, if the marriage contract concluded between two foreigners where the foreign law prohibits any discrimination on the basis of religion, for example, the Jordanian international public order may oppose the application of any foreign law.

Applying a single law (that of the husband) for each legal aspect of marriage is a key quality of the Jordanian private international according to which it could be declared unconstitutional before a foreign constitutional forum on the basis of discrimination against women. For example, the German case law provided an interesting example concerning the principle of gender equality. The constitutionality of the rules on conflict of laws was exercised by the Federal Constitutional Court. The FCC ruled that:

[I]t is contrary to the principle of gender equality set out in Article 3 (2) of the GG (Basic Law for the Federal Republic of Germany) the matrimonial regime of a German woman whose husband was Iraqi citizen at the time of the marriage to be determined in accordance with the husband's national law as provided in Article 15 (1) of the EGBGB.

Similarly, it was decided that :

“[I]ts incompatible with the principle of equality that the divorce of a German woman whose spouse was Japanese, be subject to the husband's national law as determined according to Article 17 EGBGB (Rigaux,1999).

A solution could be adapted under Article 103 of the Jordanian Constitution. This text includes two restrictions concerning the jurisdiction and the applicable law. On the one hand, only the civil courts are competent to adjudicate all matters pertaining to personal status of the foreigners regardless their religion. On the other hand, the civil courts will be exempted from applying systemically the national law to all matters concerning personal status of the foreigners unless the mandatory rules or the rules on conflicts of laws provided otherwise.

The Jordanian approach in determining the national law of the husbands in matters of marriage and divorce seems to be unjustified for the foreigners. Under the comparative and international law (Rigaux,1999), the rules on conflict of laws may designate a neutral law such as the place of joint residence of the spouses; or the place of the last joint residence of the spouses; the place where the marriage was concluded; or the country of citizenship of both spouses.

The Constitutionality of the International Rules on Conflict of Laws

The validity of international treaties and conventions is defined in the Constitution of Jordan. Article 33 of the Constitution identifies the competent authorities to conduct negotiations,

ratifying the Treaties and Conventions. Article 33 defines also the modalities of their integration into the hierarchy of norms in the Jordanian law. It provides that 1) The King declares war, concludes peace, and ratifies treaties and agreements. 2) Treaties and Agreements which involve financial commitments to the Treasury or affect the public or private rights of Jordanians shall not be valid unless approved by the National Assembly.

Reading this constitutional text permits any practitioner to observe the different categories of Treaties and Conventions from which it is possible to establish the place of each of them in the hierarchy of the internal order. Article 33 provides that the Executive Power has vested the right to negotiate and ratify Treaties and Conventions, and the legislative power intervenes to authorise their ratification only in exceptional circumstance. This because the King (Chief of Executive Power) is invested with their ratification, and the National Assembly is entitled to approve them only when the Treaties or Conventions involve financial commitments to the Public Treasury, or if they could produce negative affects to the public or private rights of the Jordanians as mentioned in Articles 5-23 of the Constitution. Consequently, according to the modality adopted in Article 33 of the Constitution, the supremacy recognised for the rules of international treaty law is reflected by their respect since they can produce their direct effects over the rules of domestic law.

In this regard, it is important to mention that the Jordanian Constitution does not define the scope of the international norms vis-à-vis the domestic law. In addition, the Constitution contains no provisions regarding the superiority of international treaty law over the domestic laws. However, the supremacy of international treaty law over domestic laws (not over the Constitution) was established by the jurisprudence and the constitutional interpretation. It should also be stressed that the Civil Code of 1976 (Article 24) enshrines the supremacy of the international treaty law.

According to Article 33 of the Constitution, the constitutional court's review of the compliance of the international treaty law with the Constitution remains an open question, especially for categories of international treaty law that do not require an approval from the parliamentary. However, following the silence of the Constitution, it can be noted that the Jordanian Constitutional Court is far from carrying out the ex-post control of the national law for being in harmony with the international treaty law (*contrôle de conventionnalité*) and it was fell to the ordinary courts. Equally, if not more important, the Constitutional Court will refuse to carry out the ex-post control of the compliance of the law with international customs, nor with the general principles of international law. This is because Article 59 of the Constitution confines the control of the constitutionality only to the laws and regulations in force.

The Constitutionality of Foreign Law before the National Courts

Apparently, a doctrinal and judicial overview reveals that the constitutionality of the foreign law has never been discussed in Jordan. The difficulty would therefore appear in the event that the unconstitutionality of a foreign law, designated by the national conflict of laws rule, is raised before the Jordanian judge. In other words, the Jordanian judge will have to consider the constitutionality of the foreign law in light of the foreign constitution, and its ex-post control and harmony in light of the international treaty law binding the foreign State. Equally, the question remains whether the foreign law should be compatible with the provisions of the Jordanian Constitution, or with a fundamental right guaranteed by the Constitution, or with an international treaty law binding Jordan. In this case, it is not a question of making a judgment on the intrinsic value of the foreign law but only of refusing its application by the national court.

The possibility for the national judge to carry out a constitutional review of the foreign laws or their ex-post control considering the supranational standards of *lex causae*, could be articulated on the procedural approach of foreign law treatment in the *lex fori*. It is important to mention that the rules on the conflict of laws will be applied by the Jordanian judge of private international law. Jordanian case law tends to treat foreign law as a matter of law and not as a matter of fact (Aldmour, 2019). Therefore, the application of the foreign law by the Jordanian courts is subject to the control of the Court of Cassation, and the application of the foreign law will not depend on the will of the disputing parties. This treatment of foreign law as a question of law, allows to argue about the constitutionality of the foreign law before the Jordanian courts.

According to the doctrinal consensus (Kinsch, 2017), a simple distinction between several situations was observed. If the legal system in the foreign State does not know the control of the constitutionality of laws and regulations, the judge dealing with the foreign law must refrain from practicing this control. On the other hand, if the question of the constitutionality of the foreign law, raised before the Jordanian judge, has already been resolved abroad, the Jordanian court must follow this jurisprudence when dealing with that foreign law. However, the question arises when the control of constitutionality of the laws is vested to the ordinary courts, in the foreign State, which have the jurisdiction to verify the constitutionality of laws on the basis of case by case approach, precisely in the absence of a competent legal body to exercise this control.

One can argue that the Jordanian judge is entitled to carry out the constitutional review by himself and to refuse to apply the foreign law if it is not compatible with the foreign constitution. Such a possibility is based on Article 27(3) of the Jordanian Code of Civil Procedure which establishes the jurisdiction of the Jordanian courts to decide on any request

raised in the course of proceedings if the rules of the good administration of justice was required. However, the presumption of the compatibility of the foreign laws with the foreign constitution must be observed in principle and must be exercised with vigilance and attention. This is because the possible exercising of such a constitutional control of the foreign law by the Jordanian judge leads to grant him a *quasi-politique* mission. Similarly, if the control of the unconstitutionality is vested to a particular body in the foreign State where the ordinary judge is deprived of this jurisdiction, the Jordanian judge should not be entitled to exercise this control.

An interesting article was published in 1958 by the German Professor K.H. Neumayer, titled "Foreign law and the control of the legitimacy of norms". According to Prof. Neumayer, the possibility for the national judge to refer by himself the question of constitutionality to the foreign constitutional court would be considered a good approach. In practice, as the French professor Kinsch (2017) pointed out, two judgments in German jurisprudence rendered in 1969 had the opportunity to respond to the prejudicial referral to the Italian constitutional court as requested by the litigants. Nonetheless, the Bavarian Supreme Court ruled that:

“[T]he recourse to the international judicial assistance to have the review of the constitutionality of the foreign law would be incompatible with the principle of territoriality of the judicial power and it could not be extended in the absence of an international treaty”.

Apart from exercising the constitutionality review of foreign law before the national courts, the reserve of public order remains as a provisional reference in the hand of the national courts to exclude the application of a foreign law in order to underpin the fundamental rights of constitutional origin and international. Thus, the exception of the public order tends to be established on the basis of the international human rights provisions.

Conclusion

In light of the current status prescribed by certain legal provisions pertaining to the issues of the constitutional status of the foreigners, the Jordanian nationality, the rules on conflict of laws, it seems that the Jordanian private international law is a merely an image of the domestic law. The absence of international human rights conventions, and the fact that the legislator shows no willingness to incorporate certain norms of public international law into the Constitution aggravates the situation. Updating the Jordanian private international law through the jurisprudence is therefore a typical solution supported by legislative provisions as provided in Article 103 of the Constitution and Article 25 of the Civil Code.

Although the case law has not yet addressed several issues, mainly of the constitutional rank, and despite the fact that the Jordanian Constitutional Court created in 2012, they do not have



the jurisdiction to consider the courts decisions and the Parliament's acts if they are not in the form of laws. The new Constitutional Court at the Apex of the country should shape the motion of constitutional interpretation. It should not be considered as a mere law court, but as instrument of developing a genuine creativity culture of constitutional control concerning the private international law.

Remain as an open question, in respecting the national sovereignty and the cultural specificity, and our educational system, what can the international and comparative law provide and inspire our legal order.



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