



The Balance between Objective Justice and Disputed Justice within the Framework of the Attributive Approach: A Comparative Study

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Abstract: The study aims to explain a new type of justice in the framework of the attributional approach, which combines the logic of the attribution and the logic of the material preference of the legislator while making a balance between this type and the traditional type — disputed justice that is achieved when applying the national attributive rule of a mechanical nature with rigid and neutral application. Until the use of the concept of objective justice as a corrective means of Iraqi national dispute rules by considering it as an attributive goal, the basis of attributive justice aims not only to reach out to a framework of engaging the legal relationship with a legal system, but also to search for the best result that can be applied to resolve the dispute. Accordingly, this study aims to establish the necessary reform rules from which the legislator will start in the field of Iraqi attributive rules. Therefore, we recommend the Iraqi legislator include the rule of the harmful act as evaluation means, which is one of the most trusted laws, by making several amendments including Art. 19, 22, and 27 of the Civil Code to avoid any legal issues during the trials in the Iraqi courts.

Keywords: attributive Rules; Civil Code; disputed justice; Iraqi legislator; legal system; objective justice

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I. Introduction

It is well-known that the rule of attribution is called general and neutral in the attribution, and that the goal of these rules is to achieve disputed justice that is achieved by engaging the legal relationship to a legal system of a country regardless of its content of the objective or the result of resolving the dispute. There is no doubt that this type of justice has its nature of the syndrome with the rule of the attributive rule since its establishment. Yet, with time, jurisprudential endeavors and judicial attitudes have appeared with legislative progress to develop the concept of traditional justice, which is directed towards the mechanism of developing the attributive rule by searching for a job or the purpose of the bases of the attribution in order to conclude the dilemma of “the mechanism of focus,” which could lead to a blind choice without taking into account the considerations that must be based on the choice.

Just thinking about refraining from the traditional mechanism adopted in the attributive rule is considered in itself a major challenge facing the legal system of any country, whether by the national legislator, who seeks to reach objective justice as the optimal purpose of private international law by amending the existing rules of traditional attribution or by the national judiciary by forming advanced judicial jurisprudence that seeks to adapt the rules of attribution to reach the modern concept of justice represented by “objective justice.” Therefore,

the issue of balance between the two types of justice is an important issue, which is about achieving “the fairest law” or “the most just law.”

This paper focuses on making an in-depth and detailed discussion to clarify the criteria for balancing disputed and objective justice. Given the status of private international law, the procedure of this balancing may result in adding a new aspect of private international law by considering this balance as the core of the attributional approach of this law. By the same token, this balance may result in clarifying the problem of this approach – i.e., fluctuation and fuzziness in dealing with the rule of dispute.

The research aims to pave the way for a step in the process of the Iraqi dispute rules by reading these in various models of laws and reading the methods adopted in resolving the disputes by the court either by amending the existing ones or enacting new rules to keep pace with the comparative attributive development. This also applies to the Iraqi judiciary. In the present article, we are trying to display its foundations and means through which it can develop the attributive process in the absence of the necessary legislative treatment.

To reach the goal of the study, it is required to use several methods in an integral manner, which is represented by the inferential and comparative analytical approaches for the purpose of inferring the jurisprudential, legal, and judicial data to reach the application of objective justice as an objective purpose of Iraqi dispute rules.

To understand the topic of research in all aspects, we divided this paper into two main parts as follows: The first one focuses on the definition of disputed justice and objective justice within the framework of the attributional approach. The second part is about the mechanism of balance between disputed justice and objective justice.

II. Definition of Disputed Justice and Objective Justice within the Framework of the Attributional Approach

In general, justice in the philosophy of domestic law and international law is one and constant concept that does not change even if the methods of expressing it change. The attributive justice can appear

in two forms, but each one has a specific function and characteristics, which requires us to define them here. Therefore, we will explain the content of disputed justice and the content of objective justice.

II.1. The Content of Disputed Justice

To determine the concept of disputed justice, the concept must be rooted in philosophical terms because each scholar sees justice from a certain angle. For example, there are philosophers who differentiate between the concept of justice and justice itself, as this distinction goes back to the ancient Greek philosophers, especially Aristotle. This differentiation was established later at the attempt of modern legal jurisprudence by distinguishing between the legal form of justice and justice fundamental justice, fairness. The idea of justice is related to a legal rule, while the idea of justice is related to legal standards, and this is what we will explain later. Justice is based on the idea of equality, which is accustomed to the predominant situation, while justice is based on real equality, which is accustomed to special circumstances and even realistic particles. Therefore, justice is generally characterized by kindness, humanity, and mercy from the rigidity of the laws in some cases. It is also the gateway of the law to the requirements of mercy and humanity, even if it sacrifices the requirements of justice (Ashoosh, 1992).

Justice then is characterized by an emotional personal nature, and it has been represented in humanity in the laws. That is, it seeks to reduce the rigidity and stress of the legal rule. Therefore, there is a flexible personal factor that shows its impact on the conscience of individuals, which may call for thinking about the risk of control by the judiciary. That can be explained by saying that the characteristics of the public legal rule, whose impact is also reflected in justice, do not extend its effects to justice. The public means that the rule in its application applies to everyone and does not issue a specific consequence in particular or for people defined by themselves. Yet, it is comprehensive in that all those who meet their conditions. As for abstraction, it means that the rule is established at the time of being enacted in situations that do not look at people and facts themselves. When justice comes to

fill a vacuum present in the legislation or to reduce the strength and solidity of the law, it does not defend a specific issue in itself, rather it means defending a right or the individuals (Fattah, 2016, p. 64). Justice does not interfere with its intervention to the extent of simple details. Therefore, justice prefers if you will, and this increase and kindness are dictated by good will under the impact of the power of emotion, mercy, and compassion. Thus, it is one of the requirements of legislation and it can come with a new rule or an unprecedented principle, and justice is incapable of doing that (Tallies, 1924).

Accordingly, when applying the philosophical concept of justice to the attributional approach, it is clear to us that the purpose of the basis of attribution is closer to achieving justice that does not care about the realistic circumstances separately, but it is an application of the law. Therefore, disputed justice finds its existence with the presence of rules called “the rules of dispute” and their purpose is to contribute to providing a solution that can be expected, fair, and independent from the court that hears the dispute (Audit, 2003, p. 289). The same result can be reached on the characteristics of the bases of attributional rules and their generalization and abstraction. Besides the characteristics of the bases of attribution, in particular from neutral and patriotism and being double-sided and indirect rules, they do not give a solution to the dispute. Rather, they are guidelines that indicate the law must be applied to the case. Then, its mission ends with that. Also, its philosophy is based on defining the closest law related to the legal status and from the point of view of the national legislator regardless of the content of this law or the effects of its application. It is on what is described by a part of jurisprudence rules that are satisfied with assigning the relationship in an automatic way to the most related laws according to the legislative policy of the State of the judge regardless of the material outcomes resulting from this application. It can also lead to the application of the national law on international private relations by ignoring the basic feature that distinguishes this international relationship (Haddad, 2005, p. 91).

Therefore, we can define disputed justice as the kind of “justice that appears when achieving the best equality between the rules of attribution types from the perspective of the legislator and the judge,

which requires ensuring the continuity of individual legal statuses in the international private relations and respecting the legitimate expectations of the parties without sacrificing the interests of others, the interests of the State, or social and basic moral values in the judge's State."

II.2. The Content of Objective Justice

It has become clear that the existence of disputed justice is engaged to the existence of the rule of dispute in terms of establishment, so we can say that this type of justice is the traditional type, which was necessary for interventional reform of the rules of dispute to make it "teleological" targets more than being mechanical rules with an automated application. Therefore, jurisprudence tried to create an advanced type of attributional justice called objective justice, but this type is not an independent concept of disputed justice. Rather, it is derived from it. Thus, it is considered a new concept or perception of the concept of justice in general within the scope of international private relations. We can define objective justice in its legal framework as a set of legal principles that the human mind extracts from the reality of the life of humanity and the nature of social relations that suggests realistic rational solutions reflecting good materialistic results and fair to the legal provisions based on texts at times and the mind at other times.

When the concept of objective justice falls within its legal framework on the attributional approach, it is clear to us that this type of justice is directed toward achieving certain results. Therefore, the English jurisprudence calls these rules (Oriented Rules — Result) the rules that are directed towards the results, so we expect the emergence of objective justice in a dispute through two following aspects. The first aspect (theoretical aspect) argues that objective justice can be achieved when the legal relationship is applied to a specific objective and objective judgment that the parties to the relationship may want to reach. Also, the task of deeply thinking of the best or most appropriate material result is sponsored by the judge or the parties themselves. When competition is absent, the means of attribution can reveal the material outcomes. That is, the attribution will be from the law that includes the favorite

objective result. The second side (practical aspect) is achieved by the rule of attribution, which reflects the legislator's desire for a specific material result. When the attribution stops, objective justice is achieved.

Here we can say that objective justice in private international law is a type of corrective justice,¹ because it aims to correct the course of the legal relationship or the legal rule in the field of protecting individual freedom for the purpose of protecting the weak party or equality in personal status issues, for example. Therefore, we can say that objective justice is a legislative or judicial tool that aims to reform social relations and to serve specific purposes. When the judge applies the rules of attribution, the law is driven by objective motives, not by a personality decided by the legislator.

Therefore, objective justice can be defined within the framework of the attributional approach as follows, "justice that is achieved through the attributive method to reach the best result in the relevant law, either through the direct application of the most relevant law, or the use of specialized rules that suit the ideas assigned to ensure the achievement of the interests that these ideas seek to."

III. The Concept of Balance between Disputed and Objective Justice

The research in the mechanism of balance requires us to explain the concept of this balance and its purpose and to explain the difference between the two types of attributional justice that have a role in clarifying the reasons that called on the jurists in the transformation of the application from the framework of disputed justice to the scope of objective justice. This is what we will explain in this topic through three main points.

We can say that the balance between the two types of justice is the conduct of a kind of suitability between the legal life of development and change, on the one hand, and continuing to work in the traditional approach, on the other hand, through the usual technical means that the

¹ Corrective justice is a form of justice that aims to restore the right of the abused people, and it is a response to a specific damage or injury committed by the abuser. Its primary goal is to correct things by giving the affected party what it deserves, and it is necessary to preserve a fair society.

legislator resorts to for resolving the dispute between laws. This can be one of the purposes of private international law. Therefore, discussing this issue raises an important question: given the fact that the legal relationship includes a foreign component that gives it a technical characteristic that requires the stability of legal relations for individuals as well as achieving the principle of coexistence between countries and facilitating the need for international commercial transactions, which kind of attributional justice can achieve these considerations?

In fact, the conduct of this balance normally leads to a special identity of private international law by considering the budget process as the “DNA” of the attributional approach in private international law. In addition, providing such a balance leads to an important problem that the attributional approach suffers from, which is fluctuation and blurriness in dealing with the rule of dispute.

The first jurisprudential attempt to distinguish between the two types of justice by the German Professor Gerhard Kegel in the mid-20th century appeared in the Hague Academy. The purpose of this distinction was to confront the crisis of private international law within the framework of the attributional approach, which was dominated by the traditional concept giving priority to a mechanism of bilateral and neutral attribution as the attempt to use new attributive methods that produce access to another type of justice called objective justice. That happens by making the concept of interest part of the legislative drafting of the dispute rule (Kegel, 1964). This attempt was influential in the judicial positions as the French Court of Cassation issued the first judicial decision that translates the considerations of the interest by refraining from the traditional attributive determinants that seek to achieve justice in the traditional concept by the use of determinants of objective content to reach objective justice.

The proliferation of the attributive rule with a materialistic form increased frequently in France and other European countries in the early 1950s with the use of a means of multiple attributive rules. Thus, the officer’s application of these rules will lead to the desired result. Then, we find that the application of the enforced law has not been a goal similar to attributive rules. Yet, its material content has become the goal that moves and directs the attribution.

IV. The Difference Between the Two Types of Humiliating Justice

Before starting to clarify the differences between these types of justice, we need to make it clear that there is a driving force that was behind the emergence of both types — i.e., the flexibility of the national legislator and the lack of exclusivity of international private disputes by allowing the implementation of foreign law. The most important goal that the rules of the dispute of the private international law seek is to achieve justice. Behind the philosophy of the rules of dispute, there is a fundamental issue, which is the national legislator gives up part of the sovereignty in favor of a foreign law to be applied in a relationship with a foreign component. This tolerance of the national legislator aims to reach attributive justice.²

We find the basis of this requirement in taking a more tolerant system towards foreign laws and abandoning the idea of nationalism that looks at the legal scope as the private property that is confined only to members of a specific group or country, which in turn constitutes an obstacle to the growing international relations (de Boer, 1996). However, this situation may require the implementation of foreign law since it is the most appropriate and fair foreign legal system to the rule of legal relations that are attached to a foreign component (Bogdan, 2011). Indeed, denying the need to implement a foreign law leads to denying the status of justice in foreign law, while knowledge of comparative legal systems and its application is the first function of private international law (Fauvarque-Cosson, 1987, p. 112). An opinion on jurisprudence goes to say that the privacy of private international law is that the judge can implement another law other than the national law, which confirms that the implementation of foreign law (that may be the fair law) is a

² In fact, the growing movement of individuals, money, commodities, services, and commercial relations across the borders. The development of these relations and the emergence of ties with a foreign component has developed a sense of the movement between the borders that the implementation of the law of the country that they have moved to does not agree with what they have seen in their country, which necessitated finding a solution to this issue. These solutions represent rejecting the idea of the absolute application of the judge's law and allowing foreign law to be applied to these relations with a foreign element. *See* Albustani (2009, p. 51).

fundamental base for international litigation (Fauvarque-Cosson, 1987, p. 183).

As for the differences between the two types, they can be clarified through several pillars.

First, precedence in the judgment of the rule of dispute, the way it is established for precedence justice in the judgment of the rule of dispute, as it is necessary to work in accordance with disputed justice — that is, through the search for the most relevant law to the dispute regardless of the considerations related to the material content of the disputing laws. However, this precedence gives the original characteristic of disputed justice and gives the exceptional characteristic of objective justice in the application. Therefore, such material considerations will interfere in resolving the dispute of laws (Kegel, 1964).

However, we note that with regard to the advanced legal systems, the issue of applied succession of attributive justice has almost disappeared. Because of these regulations, the issue of applying objective justice has become the original in order to present legal concepts in it to the current of change or what is called the legislative situation that made the legal rule a reformist tool of a specific purpose, especially in the scope of international private relations. Yet the late legal systems, such as Iraq, still adhere to the rules of traditional attribution that are not compatible with the rapid developments taking place in the global legal scene within the scope of private law.

Second, the functional approach of both types. The role of disputed justice is the concentration of the legal relationship through an abstract mechanical mechanism characterized by neutrality. Its goal is to achieve a fair balance in the distribution of the legislative specialist. If this goal is achieved, it is possible to say that disputed justice has been achieved, which may happen through dispute settlements with a foreign element according to the appropriate law regardless of the content of laws except after applying the rule of dispute. That is why it is clear that the concept of disputed justice is closer to the concept of justice because justice is based on the form of justified equality (formal), which is accustomed to the dominant situation and justice is generally, and abstract is the same as any legal rule and is characterized by hardness and extremism.

As for objective justice, it is concerned with the content of the laws with the intent to reach a material result that will lead to the mechanisms of attribution. This means that the difference between the two types is taking into account the type of solution because disputed justice does not pay attention to the solution given to the dispute if it is appropriate or fair, and this is contrary to objective justice. Therefore, they always seek a kind of kindness, humanity, and mercy from the severity of the laws in some cases. It is the gateway of the law to the requirements of mercy and humanity, even if it sacrifices the requirements of justice.

Therefore, it can be said that there are many issues that can help us to distinguish between two types of justice: first, the material end — the material purpose can be clarified as the intended value in achieving legal certainty, protecting the weak party, and defending the public interest — i.e., protection of the legislative policy; second, it is related to the means of achieving objective justice, such as the multiplicity of attribution rules, the distinctive performance standard, the standard of the most trusted bond, and other means. Pairing between the two issues (the material goal and the means) through the legislator and the judge by forming legal rules with a design that guarantees the achievement of objective justice using attributive rules that include the achievement of the target interests by the legislator, which can be public or private interests. That can happen also through the authorization of the specialized court of a specific law that provides the intended protection in the event of a legislative deficiency. Third, the attributive approach aims to achieve legislative appropriateness, but through a special perception of this concept, which is achieved by choosing the most relevant and fair law. The intended justice here is “disputed justice,” which allows to choose the most engaged law to the legal relationship spatially. In order to solve the problems of the dispute of laws, the approach confirms that each legal relationship has a specific spatial center, so the relationship must be analyzed, determining its nature, to focus it on a specific place. Then, applying the law of that place in its matter, and the status of the relationships in this way is the place where it is achieved all or most of these consequences (Sadiq, 1974). It has been clear that this method involves analyzing the nature of legal relations to know its place and then defining the best appropriate laws for them (Albustani, 2009, p. 84).

The legislative appropriateness here is dominated by the characteristic of neutrality and focuses on choosing in the sense that the judge cannot exclude a law that is not appropriate because he does not know the content of this law in the first place except after being applied. His choice may not be intended for itself without any focus on achieving a specific result or goal (Ancel, 1955, p. 256). The selection process targets the overall legal rules in the competent legal system, not a specific law, nor a specific rule (Foussard et al., 2022, p. 489).

As for the legislative appropriateness from the perspective of objective justice, it is achieved through consistency and proportionality between the stability of individual relations across borders and the provision of safety regarding their expectations regarding the law that must be applied in the event of a dispute between them by choosing the most appropriate law for their rule when adopting the attributive rules used as objective attributive determinants of a material purpose. The attributive approach has become a more specific function, so its task is no longer engaging in the legal relationship with a legal system only. Rather, the search for the best material result that can be applied to resolve the dispute, through the process of choosing the legal rule and not the choice of the legal system (Foussard et al., 2022, p. 491).

Indeed, the legislative appropriateness within the framework of objective justice is close to the principle of realism, which is the compatibility between the law and the social, economic, and political reality. Here the legal rule translates it without violating the generalization and abstraction that characterizes the legal rule in general. Through this principle, a new characteristic of legislative continuity is highlighted in the rule of attribution as it leads to harmony or the effectiveness of the base of the attribution and its compatibility with the reality and developments of daily life. This was a reason for the increasing codification of the bases of attribution with the material end in countries that pursue the legislative intervention approach, such as the European countries, the legislation in national laws or international agreements. We see that the legislation that lacks automation, which is represented by the attributive development and keeping pace with the comparative legislative developments, leads to the conquest of itself as long as it is used by traditional attributive means.

IV.1. Explanation of Relying on Disputed Justice to Objective Justice

In fact, there are many reasons that justify justice from achieving disputed justice to objective justice, and these reasons can be explained in two issues. First, the subjective reasons are related to the disputed approach, and the other is related to the material reasons that were a cause for choosing a specific legal rule in particular.

First: Self-causes

The problems that were the cause of the crisis that the disputed approach suffers from are the stagnation, impartiality, and concentration of the class of attribution. The main idea revolves around that the traditional rules cannot deal with the content of the laws with sufficient flexibility because the legislator undertakes the lead of the attribution rule, and the judge is obligated to implement the law indicated by this rule. Thus, these rules of a subjective nature ignore the legal relationship. In addition, the rules of attribution are only a mechanical tool for choosing the appropriate law to the ruling of the relationship between the laws through the comparison mechanism. For example, this can be seen in Art. 27 of the Iraqi Civil Code, which includes rigid attribution by identifying the determinant of the harmful act as a rigid attribution determinant.³ However, the state of rigidity can be eliminated through the use of the evaluation means of the base of the attribution, which starts from a social focus of facts and conditions without relying on the material or geographical focus. This is done through the work of the principle of neighborhood.⁴

This appears in the form of exceptions, which is considered a corrective means of what may be generated by material or geographical attribution from an unfair result. Therefore, it can be applied to all assumptions in a way that achieves the goal of the dispute base, respects the expectations of the parties, achieves the protection of their legitimate

³ The first paragraph of Art. 27 states that: “1 – non-contractual obligations shall apply to the law of the State in which the incident occurred for the commitment.”

⁴ The principle of neighborhood means that method that depends on assigning jurisdiction to the most reliable laws related to the relationship subject (Lagarde, 1986, p. 77).

interests across the borders, and ensures the provisions that are issued in the field of responsibility arising from the harmful act in an executive future with which the goal of civil responsibility is achieved. This is the reparation of harm, and these goals in their entirety represent a practical application of objective justice.⁵

On the other hand, this problem coincides with the attributive rules for personal status issues, especially the bases of attribution related to inheritance. The Iraqi legislator has adopted Art. 22 of the Iraqi Civil Code, which states that “inheritance issues are applied in accordance with the law of the inheritance at the time of the person’s death” on the mechanism that aims to engage the legal relationship to one automatic legal system regardless of any social consideration or the conditions of that happen accidentally. In other words, there is no sacrifice of the law of citizenship of the dead for the interest of the law of residency — i.e., the law according to which the person has lived, died, and left money and properties in. This is what makes the choice of an automatic focus. To get out of this problem, the legislation had to be included in a corrective means of multiple optional attributive determinants represented by the law of the heritage at the time of death, the law of the usual residence, and the place of the whereabouts of the money. However, this pluralism is a precaution: when certain conditions are not available to implement the first determinant, the second determinant should be taken into consideration, and so on.

The rules of attribution may suffer from an important problem represented by the legislative deficiency through the lack of legislative treatment and the legislative silence on many issues. The bases of attribution do not include special attributive items for some issues. In this situation, the judge may apply a law through his/her diligence, and this law may not achieve the desired justice represented in the protection of certain parties or specific situations. However, it may happen only from the perspective of the judge for the most relevant law of the dispute. Therefore, we remain in the same circle of the problem

⁵ You notice this attributive trend in Art. 133 of the Swiss Special Law and the third paragraph of Art. 4 and the second paragraph of Article Five of the European Convention on Human Rights (ECHR) regarding the law that must be applied to the non-contractual obligations of Rome 2 of 2007.

given the fact that the chosen law can be part of the focus system. For example, in matters of a personal status — e.g., the crippled marriage — which appears in the form of an incorrect marriage from the viewpoint of the State of which both parties are citizens, yet it is correct according to the law of the judge of the dispute. Modern law has included an attributive solution in the case of depending on the factor of residency as a personal attributive determinant for the certificate of marriage and in the State of the subject/citizen. Undoubtedly, this helps in making the parties of the dispute submit their lawsuit before the court whose law is originally in the dispute, which in turn helps in limiting the problems resulting from this marriage.⁶

This is also what the recent decisions of the French Court of Cassation for the year 2020 demonstrated have done. This Court preferred to implement the law of the place of marriage, which is the same law of residency on the implementation of the judge's law (the French law). The Court it decided that the registration of the marriage certificate outside France in the absence of the wife is not contrary to the French public order as long as the marriage was concluded with the consent of the spouses as one of the objective conditions for the marriage according to Art. 3 of the Franco-Moroccan agreement of 10 August 1981 related to the statute of the persons, family, and judicial cooperation. Therefore, the marriage certificate concluded according to Moroccan law (the wife's law) does not contradict the French public order, which appears to be the trend to ensure the stability of social relations at the international level and to unify the individual's personal status to avoid counting him divorced under the law of another State. Accordingly, it is possible to benefit from the idea of the most accurate law to solve the problem of crippled marriage since the Iraqi law does not clearly include that situation (Ahmed, 2023).

The solution to this problem may be reached through the pairing of the means of multiple determinants and the possibility of granting the possibility of choosing between these determinants, which is known as “the most suitable law.” This method is often directed towards protecting the interest of the weak party in the legal relationship, such

⁶ As in the third paragraph of Art. 18 of the Austrian Cartel Act of 1972.

as being “a child, a harmed party, a wife, a worker.” Undoubtedly, this method can be very flexible because it has different mechanisms of attribution that can make choosing fair solutions easily. The will that is given by the legislator to choose can be directed towards the individuals themselves within predetermined rules according to the rule of dispute. Then, we may encounter the “capability of legislative option,” so this may be directed towards the specialized judge. Therefore, if the process of choosing is entitled only by the judge, we will be encountering the “objective judicial choosing capacity” (Ancel, 1955, p. 258).

We can give several examples in this regard, such as Chapter 50 of the Tunisian International Private Law by saying: “The judge applies the best law to prove the child’s filiation between: 1 – personal law of required person or law of the residency 2 – personal law of the required person or its residency 3 – The personal law of the child or a law of the residency while the dispute over the filiation is subject to the law in which it was established. Also, Art. 68 of the Private International Law of Switzerland states that “the establishment, development, and competition of the parent-child relationship is governed by the law of the State in which the child habitually resides.” However, if the father or mother is not residing in the regular residence State, and if the child and parents are citizens of the State, the law of that State applies.” However, the Iraqi legislator relied on the attributive method on this issue. Para. 4 Art. 19 of the Civil Code states that “Matters related to legitimate parentage, guardianship, and all other duties between parents and children are governed by the law of the father.” Here, we note that this article is unable to determine the law that must be applied after a dispute occurs as a result of the father’s change of nationality, which leads to the lack of certainty and legal safety. In this situation, is the law that must be applied according to the father’s nationality at the time of marriage, birth, or filing the lawsuit? Therefore, we suggest redrafting the Article to be compatible with the interest of the child (the weakest party) by applying the law that is more suitable. Also, this can ensure the interest of the Iraqi child if the child is a party to the lawsuit by including the same base in another way of attribution, which is unilateral attribution. This can also be one of the means of objective attribution that aims to consider material provisions in the judge’s law,

which achieves the interests of the states or the individuals alike by considering the social impact of the rules of dispute.

Second: Material reasons

Establishing the material purpose in drafting the rules of dispute means confirming the primary goal or principle on which these rules are based. It helps to achieve justice and stability in resolving disputes. The consolidation of the material end in drafting the rules of dispute includes clarifying the basic purpose behind the existence of these rules, such as achieving justice, facilitating dispute resolution, and ensuring social stability. This can happen by defining the basic principles and values that direct the drafting of these rules, which contributes to a deeper understanding of their purpose and applying them more effectively. The material goals may vary within the rule of dispute. Some of these are about the necessity of resolving the dispute and not leaving the dispute under the pretext of contradiction with the rule of dispute with the problem of “ignorance of foreign law” because the final resolution of the dispute constitutes a guarantee of fair litigation and one form of the human rights. When resorting to the traditional method of solving this problem, the specialized court intends to implement its national law as one of the solutions provided by the legislation and the jurisprudence and judicial attitudes within the scope of international law.⁷

This in turn leads to a change of the law that must be applied, and the basis of this application is that the law of the court is not a strange law on the offered dispute because it is related to it. That happens when the legislator grants the international judicial jurisdiction to its courts to adjudicate the dispute that includes a foreign factor. In this case, the court uses the principle of necessity to engage between the dispute and its court. In this case, the law of the specialized court can achieve the base of the attribution in the application of the relevant laws with the international private legal relationship. In addition, this shall not violate the expectations of the parties and let them avoid the rejection of their lawsuit when it is impossible to prove that the foreign law is

⁷ These solutions are represented in the rejection of the lawsuit, or the request submitted by the litigants — or applying of the most relevant law to its provisions to the law that could not be proven — or applying the court’s law. For details, see Sourani (2013, p. 35).

fair (Jaber, 2019). This is why it is considered a fair solution.⁸ For this reason, this solution has become the predominant principle in many legislations. Although the justifications are removed, it is not always possible to rely directly to the law of the judge because there might not be enough power between the relationship and the judge's law that qualifies this law to apply.⁹

IV.2. The Rule of Courts

The judge's law may not be appropriate to the ruling of the relationship. Therefore, for the purpose of achieving the goal of the national attribution base, the judge's law must not be applied directly, but this can be considered a solution after exhausting the following trends: a) applying the most relevant law to the provisions that were not disclosed, b) searching for the most relevant laws that are engaged to the issue after confirming that the current law was unable to be implemented, c) looking for the law that needs to be implemented according to the rule of attribution in the law of the judge, such as implementing the law of the homeland or the law of citizenship.

Therefore, we see that the Iraqi legislator can reach one of these laws through the principle of the most trusted bonds of the "principle of the neighborhood," which facilitates access to appropriate and fair solutions by engaging the legal relationship with the legal system of the State with which it has a strong bond. This principle achieves the hope of that the assigned law is objective and appropriate. In order to reach this result, it is preferable for the Iraqi legislator to seek to draft the rule of dispute for the ignorance of the foreign law in the manner of

⁸ As is the solution in the second paragraph of Art. 16 of the Swiss Private International Law Act, which states that: "Swiss law applies if it is not possible to prove the content of foreign law." Also, Chapter 32 of the Tunisian Private International Law that states "if it is impossible to prove the content of the foreign law, the Tunisian law is implemented."

⁹ For example, as if an international contract between an Italian and Swiss contract is concluded and this contract is implemented in the two countries together, it is an event that the parties pleaded before the French judiciary, and the latter concluded that the Swiss law is the competent, so the litigants did not succeed in proving its content, so the application of the French law here with its precautionary competence is justified.

multiple attributions with successive characteristics by organizing the determinants of the chain of transmission in a sequence.¹⁰ The most relevant law is applied to the case after the foreign law, which cannot be proven, but if this is not possible, the next regulating attribution of the judge's law is to be resorted to.

The material reason that objective justice seeks to reach is the phenomenon of specializing in the rules of private international law, which means that each part of the relationship requires an independent law. This means that there are different kinds of attribution and multiple and specialized regulations of attribution. This phenomenon aims to enable the rules of attribution to reach a level of appropriateness of the assigned ideas presented in a specific dispute and reach a fair solution. In fact, this can be a result of the parties of the dispute, legislative drafting, or the estimated mechanism of the judge of dispute.

The first method represents the submission of the parties of an international contract to more than a specialized law.¹¹ The rule of the attribution for international contracts in Art. 25 of the Iraqi Civil Code does not state the possibility of the voluntary determination of the attributive partitioning. In the second method, the national legislator may resort to partitioning the types of attribution, e.g., a variety of attributive ideas, and assigning each of them to the specialized law, such as the non-contractual responsibility. Therefore, some laws are divided into ideas assigned to this rule into multiple types (e.g., harmful act, enrichment, electronic damage, such as assaulting the right to digital privacy, and so on), such as Art. 4–12 of the Second Rome Regulation regarding applying the law on the non-contractual obligations. Perhaps the reason for this specialization is the desire to keep pace with the developments that have affected the attributed ideas that made it diverse, distinctive, and multiple (i.e., not confined to traditional

¹⁰ When the legislator sets a serial arrangement for the determinants of the support and associates it with an objective standard, it reveals to the addressees with the rule of dispute, his intention is to a strict ruling on the method of achieving the legislative policy of the court that is confused despite the existence of the possibility of choosing from the determinants It restricts the scope of choice alone, but also its content (Jorge, 1988, p. 83).

¹¹ Art. 3-1 of the Rome Agreement.

attribution ideas). On the other hand, the competent law may not be compatible with the original rule of attribution to all these types. Therefore, the legislator tends to assess these varieties with multiple rules of attribution to reach a fair solution that is compatible with the nature of the dispute. While we see that other legislations are still using individuality and comprehensiveness in the rule of dispute, this rule expands to govern all these items, e.g., the case in Art. 27 of the Iraqi Civil Code regarding the law that must be applied to non-contractual responsibility, so the Iraqi judge is forced to use this text, which leads to achieving formal justice only. This is why we recommend that the Iraqi legislator use the method of dividing the types of attribution or using the flexible formula method because it allows the judge the capacity of estimation in choosing the appropriate law by surrounding the circumstances for each case separately. This method is compatible with the privacy of electronic disputes in particular and leads to ultimately reaching the desired goal, which is objective justice.

The third method is determined by the role of the national judiciary in the assignment of specialization as in the case in related matters or the so-called “procedural engagement.” This engagement in general is an engagement between two procedures or more, which would subject the engaged procedure to the same procedural rule as the original procedure, so the court’s specialization extends to the original procedure in order to unify the ruling issued and to prevent the contradiction of the rulings in the related matters (Abu Elwafa, 1954). We find the applications of procedural engagement in several issues. For instance, the initial issues are defined as the issues in which they must be ruled in the beginning for the purpose of ruling in the original case that is under the specialization of the ruling court (Salama, 2008, p. 335). The role of the judiciary appears through the use of the authority to divide the issue and distribute the attribution. Perhaps the reason for this is the necessity of resolving the dispute in a way that consists of the expectations of the opponents by following a specific method. However, the characteristics of justice here may differ according to the method followed by the judiciary. This method may aim to achieve the disputed formal justice if the attribution is directed towards the application of the law of the judge, which comes from the procedural appropriation that is

based on the performance of justice and the guarantee of the litigation unit based on the existence of an engagement between the cases in order to prevent the dispute of rulings. In addition, the jurisdiction in favor of the law of the judge would achieve the intellectual homogeneity of private international law, which is based on unifying solutions to the dispute of laws that should not differ according to whether the issue was presented originally or primarily.¹²

However, in the other direction, the court can use the partitioning method in solutions and separate the idea of the initial case and the original case in defining the specialized law to reach material justice through the lack of pre-determination of the specialized law. However, the determination is according to the concrete material results that are achieved through the application of the law of the judge or the foreign law. In this case, the initial case is attributed to the legal system that arranges the best result. Regarding the legislative deficiency that the Iraqi rules suffer from of not assigning a rule for attribution for initial issues, it is possible to benefit from this judicial trend of partitioning the resolutions and using this method while formulating the rule of the initial cases by relying on the most relevant law in determining the specialized law, which might be the Iraqi or a foreign law – whichever is relevant to achieve the targeted material outcome by using the multi-choice regulations.

In light of the developments that afflicted the rules of attribution and its continuous endeavor to reach objective justice without limiting disputed justice, all the basic theories in the international law on this reformist movement, including the referral, had to be affected after the referral. After the referral was seeking to achieve a specific type of justice for the parties of dispute, which is the attributive formulating disputed justice, through the attribution to the law of the judge and recognizing the first-class referral in consideration of the idea of a reserve settlement (Pigeonniere, 1924), taking into account the idea of public order (Buruianã, 2016), or by relying on the idea of coordination between different legal systems (Audit, 2003; Batiffol and Lagarde, 1993).

¹² For more about the justifications for resorting to the judge's law in these issues, see Salama (2008, p. 351).

Whatever the perception that the court relies on to implement its law in the case of the first referral, this leads to the goal of the court in the application of its national law considering its application compared to the application of a foreign law, which calls for the protection of some national interests that require it to be surrounded by rules of a protectionist nature. However, it later became an instrumental tool of a functional nature by relying on an analytical approach in light of a high interpretation of each of the rules of dispute separately. Therefore, the aim of the referral is to hold the jurisdiction of the most appropriate law for the disputed subject whether it is the law of the court or the law of a third country (Sadiq, 1974, p. 319). Thanks to the jurist Francescakis (1958, p. 203) in taking the functional analysis of the referral where the theory depends on the goals of the disputed rule and focuses on the search of whether the referral corresponds with the basis of the rule of the dispute in question or not. Within the framework of the functional perspective, there is nothing to prevent from taking the second-degree referral. If its endorsement achieves the considerations and the goals on which the rule of the attribution is based on the judge of dispute. Therefore, achieving the functions of the national attribution rules is one in the position of referring its types according to the modern foundations in the interpretation of resorting to referral (Khalid, 2014).

Therefore, we call on the Iraqi legislator, who rejects the idea of referral, to adopt a more flexible approach with a goal based on referral or rejection whenever it seems appropriate with restriction in this with the Iraqi national and international interests of individuals by respecting the goals that the Iraqi dispute rule aims to achieve and not implementing automatically the judge's law because relying on this mechanism leads to a contradiction with the function of Iraqi dispute rules within the scope of its coordination with the rules of foreign attribution and reaching the coexistence between the various legal systems. Indeed, the referral here serves the interest of foreign law through its rejection of the judicial jurisdiction and in return does not serve Iraqi law because it will apply the latter even after the Iraqi dispute rule rejects the jurisdiction of it in the first place. The Iraqi law will be implemented in this case as a reserve law and not the most appropriate law for the ruling of the incident subject to the dispute.

V. Conclusion

The author of this research has reached the following conclusions.

1. The concept of material justice is the intended meaning of studies on justice, and the philosophical difference in the meaning is a difference in the way it appears. Yet, it has one meaning and a fixed core that does not change. What changes are the methods of their appearance. There is a fundamental difference between legal justice and justice in the fundamental meaning, and that justice resulting from the rules of attribution, in its current traditional form, is justice described as formalism, which we compared with abstract legal justice. The rules of attribution were previously used in order to achieve justice, but the traditional understanding of this vocabulary wasted the opportunity to achieve justice in the objective goal (material).

2. Getting out of the traditional approach to the work of the rules of attribution represents a major challenge for the Iraqi legislator and the Iraqi judge, and the judicial diligence alike in order to reach the modern concept of justice under study.

3. To reach the material purpose, one needs several means, including legislative drafting, relying on the multiple determinants that are either in the form of the choice regulations or successive regulations or through the most proper ties.

4. The specialized court has an important role in reaching objective justice through the estimated mechanism granted to the specialized court. Therefore, discretionary authority takes place as a result of an implicit agreement between the legislator and the judiciary. The judiciary seeks the legislator from its report to bring about and give the nature of harmony or balance between the changing reality and the restrictions of the text in order to keep pace with the new developments. Also, regardless of the perfection of the legislation and the formulation of the rules of attribution, the legislator will keep being unable to find solutions for all of the offered disputes before the court. As a result, the rule of the judiciary will rise in developing the rule of attribution and make it work with reality.

We also have some recommendations to follow:

1. We recommend the Iraqi legislator include the rule of the harmful act as an evaluation means, which is one of the most trusted laws,

by adding another paragraph to the text of Art. 27 of the Civil Code to be as follows: “If it becomes clear from the circumstances that the relationship is on a strong bond with the law of another country, the judge may implement the law of that State.

2. We suggest that the text of Art. 22 of the Iraqi Civil Code be formulated as follows: “The inheritance law shall apply at the time of the person’s death, the law of another State (law of residence), or the law of the State in which he left the property.”

3. We suggest that the Iraqi legislator add a text to the first paragraph of Art. 19 of the Iraqi Civil Code, and it will be formulated as follows: “It is due in the objective conditions in the validity of the marriage to the law of each of the spouses. However, if the spouses do not hold the Iraqi citizenship, the most related law is applied to the dispute.”

4. We suggest amending the text of Para. 4 Art. 19 of the Iraqi Civil Code, so that it will be formulated as follows: “The judge applies the most appropriate law to prove the child’s filiation between: 1 – personal law of the defendant or the law of residency; 2 – personal law of the child or the law of residency; 3 – the Iraqi law is applied alone if the child is Iraqi or one of his parents is Iraqi at the time of birth.

5. We suggest that the Iraqi legislator (should) add a text that addresses this issue and be formulated as follows: “In all cases in which it is decided that a foreign law is to be implemented, the most relevant law to the issue is applied if the existence of foreign law or its meaning is not proven. Otherwise, Iraqi law is applied.”

6. We call upon the Iraqi legislator to use the method of partitioning of the types of attribution or the use of the flexible formula method, especially regarding Art. 27 because it allows the judge the capacity of estimation in choosing the appropriate law by surrounding the circumstances for each issue separately. This is appropriate to the privacy of electronic disputes and leads to ultimately reaching the desired goal, which is objective justice.

7. Taking advantage of this judicial trend of partitioning the solutions and using this method when drafting the rule for preliminary issues in Iraqi law by using the most relevant law to determine the specialized law, which can be an Iraqi or a foreign law, is the most relevant to achieving the required material results using that regulation of multiple choices.

8. We recommend that the Iraqi legislator amend Art. 31 of the Iraqi Civil Code as follows: “Renvoi shall not be accepted, whether it leads to the application of Iraqi law or the law of another state, unless the law expressly provides otherwise.”

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