



**ANALYSIS OF THE LEGAL FRAMEWORK
GOVERNING CIVIL
DOCUMENTATION IN IRAQ**



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Background and Context

Birth registration and issuance of a birth certificate is a fundamental right of every child regardless of where he/she is born, his/her birth status, the marital status of his/her parents or their legal or any other status in the country.¹ It is both a right in itself and also an enabling right which enables the person to enjoy other rights. The birth certificate is one of the legal documents or civic documents that a person should have in any country. Birth certificates and other civil documents (legal personal documents) are among the most important means of protecting the human rights of the individual as it lays the foundation for safeguarding civil, political, economic, social and cultural rights.

Historically, Iraq has high rates of birth registration for children, at more than 95%. However, the latest Multiple Indicator Cluster Survey (MICS-VI, 2018) revealed that while at the national level the birth rates in Iraq is 93%, there are wide regional differences with Ninewa governorate having the lowest rate at 76.6%, well below the national average. Ninewa was one of the governorates occupied by the Islamic State of Iraq and the Levant (ISIL). Following the defeat of ISIL in Iraq in July 2017, anecdotal evidence emerged that many children in the five governorates² formerly under ISIL occupation did not have birth certificates or other civil documents such as national identity or citizenship cards. As a result, these children were at risk of no or restricted access to basic services like education and health. This caseload included children born during ISIL occupation who could not be registered because the relevant government facilities had been destroyed children who were registered by ISIL officials, but their documentation is not recognized by Iraqi Authorities, and children whose documents had been lost during the multiple displacements. There are also cases of children who were born of rape, and children whose fathers were foreign fighters whose identity is unknown, who were not issued any documents.

Sexual violence including sexual slavery and systematic rapes have been used by ISIL as a tactic of terror and conflict, systematically and primarily targeting women and girls of specific ethnic and religious minority groups in Iraq. The many children born to women in areas formerly under the control of ISIL, including children born out of conflict-related sexual violence, do not have legal documentation. Reports from partners on the ground indicate these women and children experience extreme stigma from communities that can result in expulsion, violence (including renewed sexual violence), restrictions on their movements and denial of services, and are facing very complex legal bottlenecks to birth registration and civil documentation. Birth certificates, marriage certificates and other civil documents issued by ISIL are not recognized by Iraqi Authorities and must be reissued, adding another layer of complication to an already-sensitive process.

Consequences for children when they lack birth certificate and other Civil Documents in Iraq

In Iraq, lacking an identity document could have the following consequences for the person:

- a) Denial of access to health, education, housing and employment.
- b) Restricted movement due to risk of arrest by security forces.
- c) Cannot apply for welfare benefits (social protection cash transfers)
- d) Statelessness

Concerned with these cases, the reported numbers involved, and the vulnerabilities faced by affected individuals, UNICEF and other UN Agencies aimed to find a coordinated way forward to address the needs of these children.

¹ Article 24, paragraph 2 of the International Covenant on Civil and Political Rights and Article 7 of the Convention on the Rights of the Child

² Baghdad, Ninewa, Anbar, Salah al Din and Kirkuk

Given the lack of existing body of knowledge on this issue, a decision was made to undertake an assessment of the legal framework governing birth registration and civil documentation in Iraq to

- i) Identify legal bottlenecks faced by families seeking to obtain birth certificates and civil documentation for their children and
- ii) Identify concrete and actionable recommendations to overcome bottlenecks.

This paper presents a summary of the findings and key recommendations of the assessment.

Objective of the assessment

- 1) To provide an overview of the current issues governing civil documentation and registration affecting women and children who are victims of Conflict-Related Sexual Violence (CRSV) and violence in general in Iraq.
- 2) To conduct a comprehensive review of legislation, rules, policies, action plans, procedures relevant to survivors of CRSV; and examine gaps in legislation.

Iraqi Civil Documents

In Iraq the civil documents are:

- 1) Birth certificate
- 2) Civil Status ID
- 3) Nationality Certificate
- 4) Passport (for travel outside the country).

Domestic Legislation governing and/or relevant to birth registration and civil documentation in Iraq

The following domestic legislation in Iraq governs or is relevant to birth registration and issuance of birth certificate and civil documents.

- 1) Nationality Status Law No. 65 of 1972³
- 2) National Card Law No. 3 of 2016
- 3) Iraqi Nationality Law No. 26 of 2006
- 4) The Law for the Registration of Births and Deaths No. 148 of 1971
- 5) The Regulation of Personal Status No. 32 of 1974
- 6) Minors Care Law No. 78 of 1980
- 7) Personal Status Law No. 188 of 1959

Other domestic laws that may not be directly governing birth registration and civil documentation are:

- 1) The Iraqi Constitution of 2005
- 2) The Civil Code No. 40 of 1951
- 3) Civil Procedures Law No. 83 of 1969
- 4) The Penal Code No. 111 of 1969
- 5) The Criminal Procedures Code No. 23 of 1971
- 6) The Public Prosecutor Law No. 159 of 1979⁴
- 7) The Juveniles Welfare Act No. 76 of 1983

Findings of the Assessment

³ Repealed by the Iraqi Nationality Card Law No. 3 of 2016 but still in force and applicable in many regions of Iraq.

⁴ Repealed by the Public Prosecutor Law No. 49 of 2017 but still applicable in the Kurdistan Region of Iraq.

Data collection methods employed by the consultant include: field visits, focused group discussions, key informant interviews and desk review of relevant laws and literature on the subject. The assessment revealed the following findings.

Affected Population

The caseload of affected population can be divided into the following categories or groupings. While these categorizations are useful from an analytical perspective, it is worth mentioning these are broad categorizations and no two cases are identical. Each individual case has its own peculiarity.

Category One: Children born in the areas under the control of ISIL (both parents are Iraqi nationals and were married before ISIL control of their provinces).

Category Two: Married couples who conducted their marriage procedures under ISIL control (and who are well-known and not affiliated to ISIL). There are two sub-categories thus:

- a) Married couples without children
- b) Married couples with children

Category Three: Children fathered by ISIL fighters as a result of rape or forced marriage,

Category Five: Children found in areas under the control of ISIL whose parents are untraceable, and the child lacks any documentation.

The Legal Framework governing birth registration and issuance of civil documentation

The legal procedures and the law or article of the law to rely on differs for each of the above categories of caseloads as outlined below.

Category One: Children born in areas under the control of ISIL (both parents are Iraqi nationals and were married before ISIL control of their provinces).

For this category of children, the official requirement to register children is that both parents must go to the personal status court and the court to issue proof of paternity and a birth certificate for the child. If one of the parents is deceased or unknown, the death certificate for the deceased spouse should be produced, If the father is the unknown parent, the child is presumed to be born out of wedlock. The child is termed a foundling under Iraqi Law and if the presumed mother wants to keep the child, she must undergo a DNA test to prove she is the biological mother. There are no legal remedies in Iraqi legislation concerning single mothers.

Category Two: Married couples who conducted their marriage procedures under ISIL control (and who are well known and not affiliated to ISIL). There are two sub-categories:

- a) Married couples without children
- b) Married couples with children

The legal procedure differs slightly for each of the above sub-categories. For married couples without children, the requirement is for the couple to appear in court and start a new registration of their marriage. Two witnesses are required to register the marriage. In other words, the authorities treat these marriages as “external” marriages conducted outside the court and outside of the law. If one of the spouses is deceased, the marriage can still be registered by the surviving spouse producing a death certificate.

Under Article 10 (5) of the Personal Status Law No. 188 of 1959 it is a criminal offence, punishable with a fine or prison term, to conclude a marriage outside the court or to conclude a second marriage outside the court while still married.

For married couples with children, the same procedures implemented in category (i) above, with slight variations. The marriage is treated as a marriage conducted outside the court, and the marriage contract must be registered again. To register the birth of a child, both parents must go to the Personal Status Court and the court must decide regarding proof of paternity and registration of the child's birth certificate. The court will then inform the relevant civil status directorate to issue the civil documents.

During field work for this report, it was discovered that judges from the Mosul region are making it a condition to get approval of the Public Prosecutor's Office (PPO) before they issue proof of paternity certificate. A review revealed this practice is not backed by the law and it is based on misinterpretation of a law which mandates the PPO "to protect family and child". However, judges from other areas were not implementing this practice, and it is viewed by many as adding another layer of complication, causing further delays and acting as an additional obstacle to obtaining birth registration and civil documentation for children. The involvement of the PPO is necessary only when the executive authority is not implementing the laws and procedures concerning registration of children or is reluctant to issue civil documentation for certain groups of women and their children due to political influence. The PPO can intervene to protect the child, and in cases concerning minors. The court can request the PPO to intervene, and families or citizens may also file a claim to the PPO. The PPO can go to court to get an order of mandamus, which obliges the executive to issue necessary documentation to the child.

Category Three: Children fathered by ISIL fighters (as a result of rape or forced marriage), in the situation when the father is a foreigner and the mother is an Iraqi national.

These children are treated as foundlings and put into state care. The authorities provide such children with documents based on article 28 (1) of the Regulation of Personal Status No. 32 of 1974 which stipulates that,

“the child born out of wedlock and one of the parents is known, shall be registered in the birth register after providing a decision from the personal status court that includes a proof of paternity, the name of the child, birth date and place. The court to choose the name of the foundling whom both parents are unknown and to transfer the child's register from the birth register to the civil register”.

For children born of rape and sexual slavery where proof of paternity may be impossible, the Iraqi law does not have any provisions for this category of children. Also, in this category are children born to mothers from forced marriages to ISIL fighters who are now dead or of unknown whereabouts. Current legislation does not provide remedies to solve this issue.

These types of cases are considered very sensitive and a special court was established to deal with them. There are only few registered cases where the women want to keep their children who were born as result of sexual violence. The special court will require a DNA test and, based on the results, will examine the case. There is a need for a new legislation to tackle the issue of children born of rape by ISIL to find remedies. This is especially pertinent to the situation of children born to Yazidi survivors. There are no legal provisions in the Iraqi law to explain legal status for single mothers.

Category Four: The father is an Iraqi national and the mother is an Iraqi national.

If the father is an Iraqi citizen and affiliated to ISIL, the mother is Iraqi citizen, and they have children a proof of marriage is required together with paternity proof for the children. Article 53 of the Personal Status Law No. 188 of 1959 provides that “acknowledgment of fatherhood or motherhood of the one whose descent is unknown is established if the father or mother believes it and if such a child could be born to such a parent”.

Article 54 of the same law states that acknowledgment of kinship such as uncles, aunts, and grandparents in cases other than fatherhood and motherhood is not established unless the concerned party, i.e. relatives such as uncles, aunts, and grandparents, believes it. It is understood from Article 53 that it is up to the parents, whether mother or father, to establish the process of recognizing kinship to the unknown child.

For those who were affiliated with ISIL or suspected to be ISIL sympathizers as determined by the Iraqi National Security Services, the government will require death certificate of the spouse. Many women deny being affiliated with ISIL or ISIL sympathizers, or are unable to obtain a death certificate for their dead spouses. This means they are unable to remarry or inherit property and their children cannot obtain civil documents. Judges from some affected areas have been insisting that the woman provide the court with a death certificate for the husband. However, the issuance of these certificate requires the existence of the body. In many cases, military operations in Mosul have made it difficult or impossible to recover remains. The dead spouse would then be registered as an untraceable person. According to the Iraqi Federal Court of Cassation Decision No. 19 of 27/05/2018 the absence of the spouse for two years without any trace or information due to terror acts a reason to consider the spouse a dead person.⁵

The majority of cases related to obtaining death certificates are treated as 'untraceable persons'. When this happens, women must wait two years from the time of the court decision before they can be issued a death certificate on presumption of death. This waiting period is extremely long, and it is recommended to give judges a one-off limited time flexibility to decide based on the merit of each case. Flexibility should be considered for areas that were severely affected by military operations that have made it challenging to identify or find the spouse's dead body. For example, Article 93 (2) of the Minors Care Law No. 78 of 1980 gives the court discretion concerning declaring the untraceable person dead in certain cases - for example, if the person has been missing for four years, or if his disappearance was under circumstances strongly indicating his death and there have been two years of announcing his disappearance.

Decision 19 Federal Court of Cassation falls in line with article 93 (2) of the Minors Care Law No. 78 of 1980. It is important to highlight that there is no clear provision in Islamic Sharia to govern regulation of the 'untraceable person' status to be considered as dead. Muslim scholars have provided different views and interpretations, and many left this issue to the *Ijtihad*⁶ of the judge and his power to decide, while considering the general interest of the country.

Category Five: The father and mother are both known and are both foreigners (ISIL fighters or affiliated to ISIL) with or without children.

The Iraqi government does not recognize their marriage. If they were married under ISIL occupation and after being duly prosecuted and found guilty, they are considered foreigners, border trespassers and terrorists (prosecuted under Article 4 of the Iraqi Counter-Terrorism Act No. 13 of 2005). It is however not clear if the Iraqi government would recognize the marriage if they were legally married in the home countries before they became associated with ISIL. Suffice to say that children born in Iraq to foreigner couples married under ISIL are not recognized and treated as foundlings and abandoned children. While there is no Law in Iraq which says their births cannot be registered, the births of many of these children are not registered for political reasons. The authorities try to contact and send the children to their countries of origin. This despite a provision in the Iraqi Nationality Law which states thus:

“Article 3 (b) of the Iraqi Nationality Law No. 26 of 2006 provides that, a person shall be considered Iraqi if he/she is born in Iraq to unknown parents. A foundling found in Iraq shall, in the absence of proof to the contrary, be considered to have been born therein”.

⁵ See appendix B, Federal Court of Cassation Decision No. 19 of 27/05/2018 (available in Arabic).

⁶(Arabic *داهتجا*) is a technical term of Islamic law that describes the process of making a legal decision by independent interpretation of the legal sources, the Qur'an and the Sunnah.

However, it is worth adding that the above provision is on condition that the person entered and stayed in Iraq legally, hence couples who have entered Iraq illegally are not covered by this provision. This method was applicable concerning foreign children with mothers whose nationality is known.

The authorities require the presence of the spouse to recognize the marriage. In the case of women married to ISIL the right to pass nationality to their children is not applicable if the spouse is a terrorist and wanted by the authorities. In other words, it is impossible for the woman to prove her marriage, if it was completed while under ISIL occupation; the court considers such marriages to ISIL fighters illegal.

The majority of marriages to ISIL fighters were considered illegal by Iraqi authorities and during the interviews for this report, many women explained they were forced into these marriages. The authorities treated children born as a result of such marriages as foundlings.

Category Six: Children found in the areas that were under the control of ISIL, for whom the parents are untraceable and for whom there is no documentation.

These children are treated as foundlings and are provided Iraqi documents according to Article 28 (1) of the Regulation of Personal Status No. 32 of 1974. The juvenile court is to issue a decision. According to Iraqi Nationality Law No. 26 of 2006 provided in Article 3,

“A person shall be considered Iraqi if:

a. he/she is born to an Iraqi father or an Iraqi mother;

b. he/she is born in Iraq to unknown parents. A foundling found in Iraq shall, in the absence of proof to the contrary, be considered to have been born therein”.

Bottlenecks

According to the findings of the assessment, the main bottlenecks faced by this caseload to have access to birth registration and civil documentation are:

1. **Restriction of movement:** Displaced Iraqis living in the camps are restricted from moving out of camps. They do not have security clearance to allow them to move and therefore unable to access the Civil Affairs Offices or local courts in order to replace or apply for new documents.
2. **Security Clearance Requirement:** At the time of the study in 2018, the Ministry of Interior’s Intelligence and National Security Service (NSS) requires security clearance and are responsible for the issuance of the security approval for someone to get civil documents. The families will automatically fail if they have relatives on the list of people wanted due to their affiliation to ISIL and many can suffer consequences like being arrested while applying for the security screening. It is being used by many security offices in areas that were under ISIL’s control, as a form of punishment of families with relatives who are wanted for or merely suspected of being affiliated with ISIL. It is tantamount to collective punishment which is prohibited under international law. Due to fears of arrest and stigma of being labelled as ISIL collaborators, many mothers who lived in areas that were under ISIL control do not want to approach the authorities and register their children or obtain civil documents.
3. **Inconsistent Application of Procedures in practice:** It has been noted by legal assistance partners that courts or civil status offices may apply different requirements to obtain birth registration. The practices listed below are applied in some locations but not others:
 - a) Requirement of a blood sample;
 - b) Recognition of birth certificate issued under ISIL administration to issue civil identity card;
 - c) Endorsement of un-stamped birth certificate issued under ISIL administration;

- d) Refusal to issue documentation when it is suspected that the husband or father of a child is associated with ISIL;
 - e) Legal proof of the father's presence – this has been waived in some courts when it is suspected the father is deceased.
 - f) In many cases the length of registering proof of paternity in the courts takes longer in areas formerly under ISIL control than other parts of Iraq. It can take more than 6 months for courts in such areas to issue a decision, while in other parts of Iraq it can take between 15 days to one month. Due to the legal nature of the personal status claims there is no specific requirement of a special competence of the claim. During interviews with Judges in Baghdad, it emerged a large number of cases from Mosul area concerning claims for registering proof of paternity or age estimation for a child were finalized faster in Baghdad.
- 4. Proof of Marriage or Father's Presence:** It is not always possible to show proof of marriage or to have the physical presence of the father. And this has prevented children from getting birth certificate and/or other civil documents. Examples of such scenarios are:
- a) Children born because of sexual violence against women which took place in ISIL controlled territory;
 - b) Children who have been abandoned by both parents because of stigma (child born as a result of sexual violence);
 - c) Children whose father or both parents are untraceable or died during the military operations.
- 5. High Volume of Cases:** Due to the sudden and unexpectedly substantial number of children needing birth registration and civil documentation services, the civil registration offices and courts are overwhelmed causing delays in processing applications.

Key Recommendations

As stated earlier, historically Iraq has good civil registration system evidenced by the high birth registration rates before the onset of violence link to ISIL and their occupation of parts of Iraq. However, the system was not designed to handle the current caseload of children born to foreign terrorist fighters or to handle this substantial number of cases at once. In this regard and based on the findings of the legal assessment and after talking to stakeholders on the ground the following are recommendations to address some of the identified bottlenecks.

- a) Establishing mobile courts that can move to affected areas and provide women and children with civil documentation. This can give flexibility to the process of issuing documentation and lower the costs for the beneficiaries. It will also eliminate the problem of not being able to leave camps or pass through checkpoints to go and get birth registration due to lack of civil documents. Such courts can coordinate their work with international organizations working on the ground.
- b) The High Judicial Council (HJC) to establish clear procedures for registration of births and issuance of civil documentation for these caseloads of children.
- c) Extending discretionary powers given to the judges working with cases of civil registration, especially cases that require registration of paternity proof due to the differences between one case and another.
- d) Activate, but clarify, the role of the Public Prosecutor in Iraq according to Article 2 (6) of the Public Prosecutor Law No. 49 of 2017. The PPO can intervene in cases concerning minors and in

accordance with Article 6 of the above-mentioned law to oblige judges to do their work i.e., issue birth certificate and civil documentation to applicants.

- e) As Article 4 of the Iraqi Nationality Law of 2006 contradicts the Constitution, the Constitution takes precedence based on the supremacy of the Constitution over all other domestic laws. The High Judicial Council should issue an official letter to all concerned courts especially the Personal Status Courts, obliging them to apply the supremacy of the Constitution over Article 4 of the Personal Status law and to rely on the constitution in these cases.
- f) To advocate for a repeal of Article 4 of the Iraqi Nationality Law of 2006 which restricts the right of Iraqi women to confer nationality to children born only outside Iraq, given its contradiction of the Constitution.
- g) The Iraqi authorities, in cooperation with the United Nations, should engage with both religious and tribal leaders in areas severely affected by conflict to ensure positive acceptance to certain processes and complicated civil registration cases. In other words, creating a special socio-legal program in such areas.
- h) Facilitating the procedural part of registration process. For example, establishing a committee responsible for the age estimation process concerning children who undergo paternity proof.
- i) Use of the media to inform the public of any new regulations and exceptions to the law and inform concerned judges on regular basis through the HJC. This will help affected groups understand their rights and applicable laws. It can encourage also those who did not register to apply.
- j) Improve the system governing security clearance to be more transparent. Involve both Iraqi Bar Association (IBA) and the HJC in the process of issuing security clearance to eliminate any political influence and minimize situations whereby security clearance could be used as an instrument for collective punishment concerning certain groups.