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IRAQI CIVIL LAW: ITS SOURCES, SUBSTANCE, AND SUNDERING

BY: DAN E. STIGALL*

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Sovereignty has been defined as that state in which "a group of people within a defined territory are moulded into an orderly cohesion by the establishment of a governing authority which is able to exercise absolute political power within that community."[1] Implicit in the idea of a sovereign is its absolute monopoly over the internal affairs of its territory.[2] In order to be sovereign, the sovereign must have authority to impose law.[3]

A review of the legal history of the modern world reveals the need of nations to exist under a unified legal system—the same system of rules to equally govern each member of the polity. Western legal history is replete with examples of sovereigns using the law to consolidate power and authority in their respective realms. In early modern France, for example, the proliferation of different *coutumes* served to create legal uncertainty for common citizens and, for kings attempting to consolidate their power, divisions that inhibited the goals of political centralization.[4] The disjointed nature of French law during that period inspired Voltaire's famous remark: "Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws? . . . When you travel in this kingdom you change legal systems as often as you change horses."[5]

To counteract the uncertainty and legal instability of multiple legal systems, the political leaders of France sought to enact a single, unified code which could govern the civil matters of all its citizens. The result was the celebrated French *Code Civil* which is still in force today in France and numerous other nations which have based their legal systems on the French model.[6]

The codification of civil law in Western countries has served to unite territories and provide social cohesion and stability.[7] Fur-

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1. MARTIN LOUGHLIN, SWORDS AND SCALES 125 (Hart 2000).

2. HENRY E. STRAKOSCH, STATE ABSOLUTISM AND THE RULE OF LAW 50 (Sydney Univ. Press 1967).

3. H.L.A. HART, THE CONCEPT OF LAW 50 (Peter Cane et. al. eds., Oxford Univ. Press 2d ed. 1997).

> The doctrine [of sovereignty] asserts that in every human society, where there is law, there is ultimately to be found latent beneath the variety of political forms, in a democracy as much as in an absolute monarchy, this simple relationship between subjects rendering habitual obedience and a sovereign who renders habitual obedience to no one. This vertical structure composed of sovereign and subjects is, according to the theory, as essential a part of a society which possesses law, as a backbone is of a man.

Id.

4. *See* K. ZWEIGERT & H. KÖTZ, INTRODUCTION TO COMPARATIVE LAW 77 (Tony Weir trans., Oxford Univ. Press 3d ed. 1998) (1977).

5. *Id.* at 80 (citing *Oeuvres de Voltaire* VII (1838) Dialogues 5).

6. *See id.* at 74-84.

7. STRAKOSCH, *supra* note 2, at 219.

ther, codification has served to validate and enhance the authority and legitimacy of nation-states.[8] This historico-legal trend is not, however, limited to the West. Since antiquity, the legal history of Iraq has been that of a sovereign's struggle to maintain control over multiple groups and disparate ethnicities through the application of a uniform law. Ancient King Hammurabi, after achieving a unified Mesopotamia, imposed a uniform law on his polity in order to attain greater power and to eliminate the confusion and disorder that accompanies the existence of multiple legal systems and customs in a single realm.[9]

Likewise, from the moment modern Iraq was carved from the Ottoman Empire, its story has been that of a struggle to maintain disparate groups and traditions together in a single nation-state. Successive governments have sought to forge Shi'a, Sunni, Orthodox Christian, Arab, Kurdish, and other groups into a semblance of national coexistence.[10] Part of the attempt to bring these diverse elements under the unified authority of one nation has been the enactment of unified legislation, such as the Iraqi Civil Code and the Iraqi Code of Personal Status. These two legal documents

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> [T]he codification of civil law was an attempt to reconcile the modern notion of the state as the supreme public authority holding a monopoly of government with the idea of the rule of law as an objective and, indeed, absolute category of social cohesion, and as such not subject to the supreme will of public authority.

Id.

8. *Id.* at 5.

> The characteristic feature, indeed the constitutive principle of the modern state is its absolute sovereignty. The modern state is invested with a monopoly of government in the sphere of internal relations, and as a result it has given public authority a greater functional reality than ever before in the history of European civilization.

Id.

9. GEORGES ROUX, ANCIENT IRAQ 201 (Penguin Books 3d ed. 2002).

> While achieving by arms the unity of Mesopotamia, Hammurabi carried out a series of administrative, social and religious measures which aimed at concentrating in his hands and in those of his successors the government of a nation made up of several ethnic groups and conspicuous for the multiplicity of its laws and customs, the complexity of its pantheon and the persistence of local traditions and particularism.

Id.

10. *See* CHARLES TRIPP, A HISTORY OF IRAQ 1 (Cambridge Univ. Press 2d ed. 2002).

> The modern history of Iraq is a history of the ways in which the people who found themselves living in the new Iraqi state were drawn into its orbit. The creation of a state centered on Baghdad in 1920-1, with its frontiers, its bureaucracy and its fiscal system, established a new framework for politics, embodying distinctive ideas about government. . . . The history of the state, therefore, is in part a history of the strategies of co-operation, subversion and resistance adopted by various Iraqis trying to come to terms with the force the state represented. It has also been a history of the ways the state transformed those who tried to use it. These different forms of engagement over the years shaped the politics of Iraq and contributed to the composite narrative of Iraq's modern history.

Id.

have, for the majority of the nation's modern history, comprised Iraq's civil law.

This article explores the nature of Iraqi civil law, reviewing the legal history of contemporary Iraq, the sources of its current law, and the substantive provisions of the Iraqi Civil Code and the Iraqi Code of Personal Status. Key aspects of Iraqi civil law are detailed and contrasted along with other legal sources from which modern Iraqi law is derived. In so doing, this article seeks to tell the story of a legal system which has struggled to evolve from a complex, destabilizing tangle to a unified structure with strong ties to Western legal systems, particularly continental civil law. Finally, this article explores recent legal developments in Iraq that have resulted from the U.S. occupation—developments which serve to weaken the unified legal structure of this precariously situated nation and which risk pushing it toward greater Islamicization and legal discord.

I. HISTORICAL BACKGROUND

Iraq's legal system, like everything else in its tumultuous history, has been impacted by a variety of cultures and countries which sought to assert influence over its development. Therefore, to fully understand the legal culture of modern Iraq, one must step back to look beyond territory and time. One must look beyond the borders of Iraq to see the legal traditions of other Middle Eastern countries, such as Egypt. One must also look back past the too-familiar images of Saddam Hussein and the Ba'athist regime, beyond the period of British colonization, to the rule of the Ottoman Empire.

The Ottomans were originally a small, Turkic tribe from northwestern Anatolia.[11] From those beginnings, they quickly expanded their power in the Middle East and, from the thirteenth- through the fifteenth-century, gained control over a vast expanse of territory, stretching from the Balkans, across the Middle East to North Africa.[12] The dynasty's first sultans were capable administrators and their rule was largely successful.[13] However, in the eighteenth-century, the Ottoman Empire entered into a period of decline which would culminate in its disintegration.[14]

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11. MEHRAN KAMRAVA, THE MODERN MIDDLE EAST: A POLITICAL HISTORY SINCE THE FIRST WORLD WAR 22 (Univ. of California Press 2005).

12. *Id.* at 23.

13. *Id.*

14. *See id.* at 23-28.

At the end of the First World War, the United States sought to expand the Westphalian system of sovereign nation states into areas which had previously existed outside the framework of that system.[15] The idea was to put an end to competing empires and thereby prevent another great war. At the same time, European powers like France and Britain were engaged in the de facto colonization of Middle Eastern areas.[16] The compromise between these two foreign policy objectives was a series of treaties which carved up the Ottoman Empire into new territories. These territories were administered under the mandate system which consisted of a provisional recognition of these areas as independent nations subject to the "advice and assistance" of a stronger country. These stronger countries (or mandatory powers) were designated as trustees which were to be the "administrators" of their weaker mandates.

The countries to be administered were carved out of the Ottoman Empire without regard for the needs of the local populations. As Kamrava poignantly notes: "With rulers in hand, French and British negotiators drew national boundaries and gave shape to the Middle East of today. What constrained or concerned them were not the wishes and aspirations of the peoples whose lives they were influencing but rather their own diplomatic maneuvers and agendas."[17] One of the new countries thusly carved out was Iraq.

The modern state of Iraq was created by the British between 1914 and 1932.[18] The three provinces which comprised this country were among the first areas of the Ottoman Empire to be invaded by the British at the beginning of the First World War.[19] In

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15. TOBY DODGE, INVENTING IRAQ: THE FAILURE OF NATION BUILDING AND A HISTORY DENIED xiii (Columbia Univ. Press 2003).

> At the end of the First World War, Wilson and the briefly assertive United States strove to rework the Westphalian system on a global, extra-European basis. At the heart of this project was the mandate ideal, based on the universal application of the sovereign state even to those regions and peoples whose histories had been lived outside its framework. Open markets and politically independent governments would bring about a world without empire and would prevent another cataclysm like the one just endured.

Id.

16. KAMRAVA, *supra* note 11, at 38.

> [W]hen the French and British carved up the Asiatic Ottoman territories in the Sykes-Picot Agreement, Mesopotamia (Iraq), Arabia, and Palestine became British protectorates, while the Syrian and Lebanese protectorates went to the French. As for the Maghreb, which the French had generally come to consider not as colonies but rather as provinces linked to the mother country, independence had to come through warfare.

Id.

17. KAMRAVA, *supra* note 11, at 45.

18. DODGE, *supra* note 15, at 1.

19. *See* DODGE, *supra* note 15, at ix-xii.

1920, the League of Nations gave Britain the mandate for Iraq.[20] The idea of being a mandate ruled by Britain was unpopular on the Iraqi street and resulted in numerous protests which quickly blossomed into armed revolt.[21] Nationalist military officers declared the country independent and rallied around the constitutional monarchy of Abdullah ibn Hussein al Hashem.[22] Hashem, in turn, gave the throne to his older brother Faisal I.[23] Britain quickly found itself facing a resistance.[24]

In 1930, Britain and Iraq entered into a twenty-five year treaty which entailed a common Anglo-Iraqi foreign policy, allowed Britain to station troops in Iraq, and committed Britain to protect Iraq against foreign invasion.[25] Two years later, Britain would end its mandate in Iraq, which became a member of the League of Nations and began its tumultuous journey as a sovereign nation.[26] It would evolve to become a government quite unlike that of its English occupier, attaining its own identity and, most importantly for purposes of this article, its own unique Iraqi civil law system.

II. THE ROAD TO CODIFICATION

The Code of Hammurabi, perhaps the most celebrated of ancient Iraqi legislation, was not a codification in the sense of a true systematized legal code.[27] Rather, it was merely a list of laws enacted by the king "[t]o cause justice to prevail in the country[;] [t]o destroy the wicked and the evil, [t]hat the strong may not oppress the weak."[28] Even so, modern Iraq has a long and interesting his-

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20. DODGE, *supra* note 15, at 5.

21. TRIPP, *supra* note 10, at 43.

> At the end of June 1920 armed revolt broke out, triggered by a number of incidents. Following the arrest of his son, Ayatollah al-Shirazi (. . .) issued a *fatwa*, seeming to encourage armed revolt. Hoping to pre-empt any rebellion, the British authorities arrested a number of tribal chiefs in the mid-Euphrates region, but the arrests had exactly the opposite effect. The revolt gained momentum, deriving its strength from the weakness of the British garrisons in the area, as well as from the strong links between the spiritual centres of Shi'ism in Najaf and Karbala and the powerful armed tribes deployed against the British. By late July much of the mid-Euphrates region was in the hands of the rebels.

Id.

22. DILIP HIRO, IRAQ: A REPORT FROM THE INSIDE 22 (Granta Books 2003).

23. *Id.* at 22.

24. *Id.*

25. *Id.* at 23.

26. *Id.*

27. *See* ROUX, *supra* note 9, at 202 ("It should be stressed, however, that the word 'Code' is somewhat misleading, since we are not confronted here with a thorough legislative reform, nor with an exhaustive corpus of logically arranged legal dispositions, such as Justinian's *Institutes* or Napoleon's *Code Civil*.").

28. *Id.*

tory of true codification. Like its political landscape, Iraq's legal aspect has been in constant evolution since its inception. From the British mandate, through its nascent independence, and even in its contemporary state, a variety of forces—both external and internal—have worked to shape the development of Iraqi law. Of all these factors, two pieces of legislation stand out as the most significant in their influence: the *Mejelle* and the Egyptian Civil Code.

A. The Mejelle

As the Ottoman Empire was declining, in the eighteenth- and nineteenth-centuries, Western Europe was experiencing an advance in legal development with the advent of comprehensive legal codification.[29] The Ottoman Sultans of that period, wishing to emulate European states, began to enact various judicial reforms including legal codifications.[30] These Ottoman codifications were mainly adaptations of French codifications and incorporated French substantive law.[31] Exceptions to this reliance on French law were the areas of contracts and torts.[32] There, the Ottoman government chose to attempt a European-style codification of Islamic law of the Hanafite school.[33] This code, enacted in 1869, was to be called the *Mejelle*.[34]

The principal drafter of the *Mejelle* was a jurist named Cavdet Pasha, an Ottoman scholar and statesman[35] tasked with producing a compilation of the laws in force in the Ottoman caliphate.[36] The preliminary part of his final work is composed of 100 articles containing general principles of law.[37] These maxims are designed for courts to use as a basis for its judgments of a variety of issues.[38]

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29. Herbert J. Liebesny, *Impact of Western Law in the Countries of the Near East*, 22 GEO. WASH. L. REV. 127, 130 (1953).

30. *Id.* ("In the succeeding years reforms of the judicial system were gradually accomplished, secular tribunals were introduced (*Nizamiyah* Courts) and codes of procedure and substantive law were enacted in the fields of criminal law, commercial law, civil procedure and contracts and torts.").

31. *Id.* at 130-31.

32. *Id.* at 131.

33. *Id.* The Hanifite school is a doctrinal school of Islamic law that is based on the legal interpretations and scholarship of Abū Hanīfa. *See* WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 155-77 (Cambridge Univ. Press 2005).

34. Liebesny, *supra* note 29, at 131.

35. Majallah El-Ahkam-I-Adliya, *translated in* THE MEJELLE: AN ENGLISH TRANSLATION OF *MAJALLAH EL-AHKAM-I-ADLIYA* AND A COMPLETE CODE OF ISLAMIC CIVIL LAW v (C.R. Tyser et. al. trans., The Other Press 2001) [hereinafter THE MEJELLE].

36. *Id.*

37. *Id.*

38. *Id.* ("The introductory part of the *Mejelle*, consisting of 100 articles, are legal maxims or legal formulae for immediate application in the court of law.").

Following that preliminary part are 16 books which mainly address Islamic commercial law, including the subjects of sale (*bey'*), hire (*ijarah*), guarantee (*kafalah*), transfer of debt (*hiwalah*), pledges (*rahn*), trust and trusteeship, gifts (*hibah*), wrongful appropriation (*ghasb*), destruction of property (*itlaf*), interdiction, constraint and preemption (*hajr, ikrah wa shuf'a*), joint ownership (*shirkah*), agency (*wakalah*), settlement and release (*sulh wa ibra'*), admissions, actions, evidence, administration of oaths, and the administration of justice by the court.[39]

While the *Mejelle* is a code of sorts, it is not a code in the continental or *civilian* sense of the word as it is primarily a compilation of rules rather than an analytical and logical statement of general principles of the law to be applied by deduction to specific cases and extended by analogy to cases.[40] Although it has some general provisions, those provisions are, for the most part, only applicable to a specific kind of contract or scenario and never general enough to apply across a broad spectrum of legal issues. The result is that the articles of the *Mejelle* only achieve enough generality to apply to the specific nominate contract they address. For instance, the articles of the *Mejelle* addressing the law of sale (*bey'*) do not start with articles laying out the general theory of contracts or obligations.[41] Rather, all the articles relating to obligations address specific nominate contracts, beginning with the rules for completing and conducting sales.[42] As they are narrowly focused on the law of sales, they have no application to the law of lease, etc.

Another limiting characteristic of the *Mejelle* was its intrinsically subsidiary status. It was considered a digest of opinion that did not supersede earlier authorities, but was to serve as a non-binding guide to the application of Islamic law in the Ottoman Empire.[43] In that respect, the *Mejelle* was more like a Restatement of the Law than a civil code.[44]

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39. *Id.* at x. "The *mukaddime* of the *Mejelle* contains, in 100 articles, a number of principles (*Qawaid*) as already elaborated by *Ibn Nudjaim* and his school." *Id.*

40. John H. Tucker, Jr., *Foreword* to the LA. CIV. CODE ANN. (2004).

> What is meant by the term 'code' . . . is to designate an analytical and logical statement of general principles of the law to be applied by deduction to specific cases and extended by analogy to cases where the aphorism *au-dela du Code Civil, mais par le Code Civil* (beyond the civil code but by the civil code) can be applied.

Id.

41. This is in contrast to the French *Code Civil* which begins with general articles defining contracts and their elements before addressing the specific contract of sale. *See, e.g.*, CODE CIVIL [C. CIV.] art. 1101 (Dalloz 1997) (Fr.) ("Le contrat est une convention par laquelle une ou plusiers personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose.").

42. *See* THE MEJELLE, *supra* note 35, art. 167, at 21.

43. Liebesny, *supra* note 29, at 131-32.

When Iraq was cobbled together and placed under British mandate, Ottoman law, including the *Mejelle*, was the law of the land. Though the British attempted to repeal Ottoman law and impose a code based on laws in force in India (the "Iraq Occupied Territories Code"), the *Mejelle* remained in force in Baghdad.[45] The influence of the *Mejelle* ensured its continuing vitality in other parts of Iraq as well.[46] Eventually, the "Iraqi Occupied Territories Code" was abolished and the *Mejelle* resurfaced as the official basis for civil law in Iraq.[47]

B. The Egyptian Civil Code

In contrast to other parts of the Ottoman Empire, which tended to blend French and Islamic law, Egypt adopted French law more completely. Much of this divergence is due to the fact that Egypt was far more independent than other Ottoman areas and maintained only weak and nominal ties to the Ottoman Empire.

After being conquered by Napoleon in 1798, the Ottoman Empire never fully regained control of Egypt. When it was reclaimed from the French in 1801, the man who would become Egypt's military governor, "Muhammed Ali, grew so strong as to challenge Ot-

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It should be noted that the *Mejelle*, while following to a considerable degree the form of European codes, is distinct in a number of respects. First of all the *Mejelle* does not supersede older opinion. In the words of a Cyprus decision where the *Mejelle* still applied even after British occupation: "The *Mejelle* was not intended to supersede the earlier authorities. The utterances of the Prophet, as recorded in the Koran and elsewhere and those of his earliest exponents, the *Imams*, are still part of the law of Cyprus and the articles of the *Mejelle* are to be construed in the light of those utterances." Secondly, to quote a Palestine decision: "The *Mejelle* is a digest of opinion rather than a formulation of the law." It was compiled as a guide for the judges of the *Nizamiyah* Courts who could not be expected to master the enormous materials of Islamic law.

Id.

44. *See* THE MEJELLE, *supra* note 35, at x.

Though the different parts were successfully sanctioned by Imperial *Khatt*, the *Mejelle* cannot be said to have had an exclusive authority in the matter regulated. The Judges were left free to form their own opinions as a result of the study of the *Hanafi* Law Books, and this compilation was used as a guide and a useful reference.

Id.

45. *See* Zuhair E. Jwaideh, *The New Civil Code of Iraq*, 22 GEO. WASH. L. REV. 176, 176-77 (1953).

46. *Id.*

47. *See id.* at 177.

On January 1, 1919, the decision was made to unify the legal systems of Basrah, Baghdad, and Mosul, by abolishing both the "Iraq Occupied Territories Code" and also most of the Indian acts then in force in the province of Basrah. The legal system of Baghdad [Ottoman law] was extended throughout the country except in tribal regions, where the tribal legal system was preserved.

Id.

toman suzerainty . . . ."[48] In the 1870s, Egypt was a largely independent force within the Ottoman Empire. It was that independence that allowed it, while nominally remaining a part of the Ottoman Empire, to plot its own legal course apart from the Ottoman pattern of judicial reform.

In 1876 Egypt signed a treaty with European countries, allowing for "Mixed Tribunals" to exercise jurisdiction within Egypt over suits in which either party was a foreigner.[49] The judges of these "Mixed Tribunals" were mostly Europeans and used what were known as "Codes Mixtes" as a source of law.[50] These codes were mainly versions of French legal codes.[51] Eventually, courts were established for suits between Egyptians, and these same codes were used to regulate those contests.[52]

Exceptions to the adoption of French law were matters involving family relations or inheritance.[53] In such matters, religious courts retained jurisdiction and applied religious law. This created a jurisdictional split between state courts and religious courts. Zweigert and Kötz note: "There thus arose in Egypt a sharp division between cases involving family relations or inheritance, for which there were *religious* courts applying *religious* law, mainly Islamic, and disputes on economic matters, for which there were *state* courts applying law principally of *French* origin."[54] Thus, in the 19th century, French law found a foothold in Egypt and became a part of its legal tradition.

In time, Egypt became fully independent and sought to adopt a legal model that comported with the more industrialized European countries. For the task of drafting a modern civil code for a Middle Eastern country, there was no one more suited than Abd al-Razzaq Al-Sanhūrī, a French-educated Egyptian jurist who was appointed principal drafter of the Egyptian Civil Code.[55] He was a law professor at Egyptian University and was considered Egypt's most prominent scholar of modern jurisprudence.[56] He remains well-known for his work with legal systems throughout the Arab world and has left, in the wake of his brilliant career, a legacy of numer-

48. KAMRAVA, *supra* note 11, at 24.
49. ZWEIGERT, *supra* note 4, at 110.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. Abdullahi Ahmed An-Na'im, *Globalization and Jurisprudence: An Islamic Law Perspective*, 54 EMORY L.J. 25, 47 (2005).
56. Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 729 (2004).

ous civil codes across the Middle East—all bearing his unique imprimatur.[57]

Al-Sanhūrī was part of an intellectual movement in the Middle East that, paradoxically, identified with European countries and traditions while simultaneously maintaining a nationalistic ideology that valued Middle Eastern culture and identity.[58] He was also a renowned comparativist, considered one of the foremost Comparative Law scholars of the Arab world.[59] As a result, his work is characterized by an eclectic blend of European and Islamic legal principles and a preoccupation with incorporating the Islamic legal tradition into modern civil codes.[60] From Al-Sanhūrī's eclectic, comparativist mind came the modern Egyptian Civil Code, modeled on the Code Napoléon and French substantive law,[61] but also containing some laws based on the Islamic legal tradition.[62]

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57. *Id.* at 729-30.

58. *See* Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043, 1092-93 (2004).

> The second group of legal elites to emerge during British colonial rule was the secular nationalists, descendants of the lawyers trained in the Capitulations as well as the earlier national court system. These lawyers were educated either in Europe or in the modern law schools set up in various Egyptian universities. The curriculum of these law schools was at this time (and still is today) based primarily on European civil law. These lawyers constituted an emergent power around the turn of the century and spearheaded, either as students or as professionals, the nationalist movement agitating against British colonialism (as well as against Egyptian royalty.) The rhetoric of the secular nationalists included the liberal discourse of constitutional rights. For the nationalists, the system of Capitulations came to symbolize not modernity and universalism but imperialism and violation of Egypt's sovereignty. Al-Sanhūrī [sic], the Egyptian jurist assigned the task of drafting a new Civil Code for an independent Egypt (promulgated in 1948) was a decided member of this group of elites, sharing its Europe-identified but also paradoxically nationalist liberal consciousness.

Id.

59. Amr Shalakany, Al-Sanhūrī *and the Historical Origins of Comparative Law in the Arab World (or How Sometimes Losing Your Asalah Can Be Good for You*, in RETHINKING THE MASTERS OF COMPARATIVE LAW 152, 161 (Annelise Riles ed., Hart Publishing 2001).

60. Abu-Odeh, *supra* note 58, at 1093-94 ("His Civil Code drafting project was marked by a preoccupation with incorporating Taqlid rules representing the Islamic in a piece of legislation that he also thought should include the latest and most advanced achievements in codification in the world."); *see also* Lama Abu-Odeh, *Egyptian Feminism: Trapped in the Identity Debate*, 16 YALE J.L. & FEMINISM 145, 166 (2004).

> Al-Sanhūrī's methodology relies on comparative law and various mediation strategies and injects the Western-transplanted law with *Taqlid* law. For instance, under the leadership of Al-Sanhūrī, the drafting committee of the 1949 Code considered not only the experience of the Egyptian judiciary since the changes of the nineteenth century, but also the modern codes in place in other civil law countries of Europe, as well as *shari'ah*.

Lama Abu-Odeh, *Egyptian Feminism: Trapped in the Identity Debate*, *supra* note 60, at 166.

61. *See* Liebesny, *supra* note 29, at 133.

62. *See id.; see also* ZWEIGERT, *supra* note 4, at 110.

> This Civil Code came into force in 1949, and rests largely on the work of the Egyptian legal scholar AS-SANHŪRĪ. Although AS-SANHŪRĪ and the Egyptian

> Egyptian law outside the law of personal status was thus dominated by French principles and it is interesting to note that this European-based code system had taken such a strong hold that British endeavors to reform the law along English lines after the occupation of Egypt by Britain were strongly, and on the whole successfully, resisted by the Egyptian bar. Many of the outstanding Egyptian jurists were educated in France and the type of legal literature as well as the form and content of court decisions followed fairly closely the French pattern. No case collections comparable to those of the areas dominated or influenced by common law where developed. Instead the bulk of the legal literature consisted of continental-European type commentaries, *repertoires* (. . .) and monographs.[63]

As the Ottoman Empire collapsed, so did the influence of the *Mejelle* throughout the Middle East, and the Egyptian code become a surrogate for the spread of the French legal tradition in Arab countries. Since its enactment in 1949, the Franco-Egyptian model has been accepted in Libya, Qatar, Sudan, Somalia, Algeria, Jordan, Kuwait, and, most notably for the purposes of this article, Iraq.[64]

C. Early Attempts at Iraqi Codification

In the early twentieth century, like many other countries in the Middle East, the legal landscape of Iraq was characterized by various, diverse laws and legal codes, mostly inherited from the Ottoman government.[65] Not only was such a sundry group of laws un-

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legislator emphasized that Islamic law was considered throughout in the preparation of the Code, the Code appears on closer investigation to be principally orientated towards *French* law, and to contain only a few rules of Islamic origin, such as those relating to gift and pre-emption. The code draws on the French-Italian draft Code of Obligations of 1928, the Italian Civil Code of 1942, and also on many legal ideas developed by the French courts.

ZWEIGERT, *supra* note 4, at 110.

63. Liebesny, *supra* note 29, at 133-34.

64. ZWEIGERT, *supra* note 4, at 111.

65. *See* Jwaideh, *supra* note 45, at 176-77.

The only civil code in existence was the *Mejelle*, which was a code of civil contracts rather than a complete civil code in the modern sense. In addition to the *Mejelle*, there existed the Land Code, the *Tapu* law, the law of disposition of immovable property, the law of succession to immovable property, and many other civil code rules scattered throughout the Code of Civil Procedure (. . .), the Land Commercial Code, and the Peace Judges' Law. On the other

wieldy, the majority of them were no longer sufficient for regulating their respective purposes.[66] Jwaideh notes that "[t]he conditions under which these laws had been enacted had completely changed and legislation for a new and unified civil code became a necessity."[67]

Prompted by this juridical tangle, the Iraqi quest for codification began in 1933 when a group of Iraqi jurists was assembled to study the status of Iraqi law and report their conclusions.[68] As was the case in Egypt, this first committee encountered opposition from religious leaders who objected to changes in the prevailing laws—especially those derived from Islamic legal sources.[69] This opposition resulted in the abandonment of any attempt at codification and the dissolution of the committee.[70]

The second attempt at Iraqi codification came in 1936 with a new committee, working under the leadership of the Acting Minister of Justice.[71] The principal jurist of this second committee was Abd al-Razzaq Al-Sanhūrī, who was then working as the dean of the Iraqi Law College.[72] He, along with his colleague Professor Munir as-Qādī, prepared an early draft of the Iraqi Civil Code.[73] However, the project was interrupted due to political reasons (a military coup and the resignation of the Iraqi cabinet) and was temporarily scuttled.[74]

Finally, in 1943, almost a decade after the push for a comprehensive modern code had begun, Al-Sanhūrī was invited back to Iraq by the Iraqi government and asked to complete the work he started.[75] Working as the chairman of a committee of Iraqi jurists, using the Egyptian Civil Code as a model, he completed a draft of what would become the modern Iraqi Civil Code.[76] The Iraqi Civil Code was enacted on September 8, 1951 and became effective two years later on September 8, 1953.[77]

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hand the religious law still applied to a large area of civil transactions, such as inheritance, succession, wills, marriage and divorce, and the administration of pious foundations (*waqf*).

Id. at 177.

66. *See id.* at 177.
67. *Id.* at 178.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 179.
73. *Id.* at 180.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 176.

III. THE IRAQI CIVIL CODE

Al-Sanhūrī indicated that the *Mejelle* would be used as the primary source for the Iraqi Civil Code but that it should be organized in the style of continental codifications.[78] He also indicated that there were some laws in practice which had repealed certain parts of the *Mejelle* and which should be made a part of the new code.[79]

> The provisions contained in this proposal were taken from the Egyptian draft proposal—which proposal is a selection from the most developed Western codes—and from the present Iraqi laws—in particular, the Majalla . . .—and from Islamic law. The overriding majority of these provisions derive from Islamic law with its different schools, with no preference given to any one particular school. The proposal put every effort to coordinate between its provisions which stem from two main sources: Islamic law and Western law, resulting in a synthesis in which the duality of sources and their variance is almost imperceptible.[80]

The Iraqi Civil Code is divided into a preliminary part and two main parts, each main part composed of two books.[81] The preliminary part contains definitions and general principles that find application throughout the rest of the code.[82] Part I of the Code and its two books address obligations in general and subelements of that area of law, such as contracts, torts, and unjust enrichment.[83] Part II and its two books address property, ownership, and real rights.[84]

A. The Preliminary Part

The Preliminary Part of the Iraqi Civil Code consists of seventy-two articles and sets out general provisions regarding matters such as application of the law, conflict of laws, persons, things, and

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78. *Id.* at 179.
79. *Id.*
80. Oussama Arabi, *Al-Sanhūrī's Reconstruction of the Islamic Law of Contract Defects*, 6:2 J. ISLAMIC STUD. 153, 167 (1995) (*citing Al Qānūn al-Madanī*, No. 40 (Baghdad: al-'Ānī Press, 1951), 4).
81. Jwaideh, *supra* note 45, at 182.
82. *Id.*
83. *Id.* at 183-84.
84. *Id.* at 184-85.

property.[85] It is in this initial section that the code lays out the definitions of basic terms and articulates basic ideas that are of general application throughout the rest of the code.[86] Most appropriately, it begins by identifying the sources of law.[87]

1. Sources of Law

The provisions of the Iraqi Civil Code make it abundantly clear that the written provisions of the Civil Code are dominant.[88] When the written law is silent on a certain topic, Iraqi courts will decide matters in accordance with normal custom and usage.[89] Should there be no applicable custom or usage to which the court can turn, then an Iraqi court may look to Islamic Shari'a to decide the merits of an issue.[90] Otherwise, courts may look to the principles of equity in making decisions.[91] In all instances, Iraqi courts may be guided by Iraqi jurisprudence and the jurisprudence of other countries with legal systems which are similar to the Iraqi legal system.[92]

This hierarchy of sources is clearly based on the European civil law model.[93] However, as he did in the Egyptian civil code, Al-Sanhūrī infused this Western legal hierarchy with Islamic legal principles by allowing that Islamic law may be a subsidiary source of law.[94]

In referencing Islamic law, the Iraqi Civil Code notes that, absent a codal provision or customary law, a court may look to Shari'a but may not be bound by any particular school of jurisprudence.[95] Jwaideh notes that this was probably included as an assurance to the Shi'a population that resort to Islamic jurisprudence is "not limited to the Hanafi school of law as it was in the *Mejelle*."[96] In comparing the sources of law to the corresponding Egyptian articles, Kristen Stilt agrees:

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85. IRAQI CIVIL CODE arts. 1-72.
86. *Id.*
87. *Id.*
88. *Id.* arts. 1(1), 2 (noting that where there is a written provision, no independent judgment (*ijtihad*) is possible).
89. *Id.* art. 1(2).
90. *Id.*
91. *Id.*
92. *Id.* art. 1(3).
93. *See* LA. CIV. CODE ANN. art. 1, cmt. (b) (2006) (citing A.N. Yiannopoulos, Louisiana Civil Law System §§ 31, 32 (1977)) ("According to civilian doctrine, legislation and custom are authoritative or primary sources of law. They are contrasted with persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity, that may guide the court in reaching a decision in the absence of legislation and custom.").
94. Jwaideh, *supra* note 45, at 181.
95. IRAQI CIVIL CODE art. 1(2).
96. Jwaideh, *supra* note 45, at 181.

> The main difference [in the Iraqi Code] from the Egyptian code is the provision that the principles could come from any school, which is an explicit recognition and inclusion of Sunni and Shi'ite jurisprudence. In Egypt Al-Sanhūrī had objected to such a clause on the grounds that it was redundant in a country of Sunnis, since a principle by definition rose to the level of uniform acceptance across the Sunni schools. In the case of Iraq, however, the failure of a Sunni-dominated government to include such a provision would be understood as an intentional and unacceptable exclusion of Shi'ites.[97]

Article 5 of the Iraqi Code makes it clear that the language of the Code may be amended or changed to address new issues or conform to changing circumstances.[98] However, laws are to have no retroactive effect unless the law so states or unless the new law relates to public order or morality.[99]

2. Persons

Regarding natural persons, Iraqi civil law considers the personality of a human thing to begin at birth and end with death.[100] Issues related to the unborn are relegated to the separate realm of personal status law[101] as are issues related to missing persons.[102] Those who reach the age of majority, enjoy their mental faculties, and have not been interdicted are entitled to full exercise of their civil rights.[103] Those who are of diminished capacity are not.[104]

The Iraqi Civil Code defines a person's family as being composed of people of common ancestry.[105] Relationships with family members are defined as direct or collateral.[106] Direct relations are those with a direct connection between the ancestors and descendants.[107] All others are collateral relations.[108] Relatives of spouses

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97. Stilt, *supra* note 56, at 747-48.
98. IRAQI CIVIL CODE art. 5 ("The change of provisions (rules) to conform to changing times is not denied.").
99. *Id.* art. 10.
100. *Id.* art. 34.
101. *Id.* art. 34(2).
102. *Id.* art. 36(2).
103. *Id.* art. 46(1).
104. *Id.* art. 46(2).
105. *Id.* art. 38.
106. *Id.* art. 39(1).
107. *Id.*

are considered to be the same kind of relative in the same line and degree.[109]

Every person is required to have a name and a surname, the surname devolving by law upon the children.[110] Any person whose right to use his or her surname is challenged without justification is entitled to damages.[111] Likewise, any person whose name is assumed by a third party is entitled to damages and may demand that the imposter cease using his or her name.[112]

The Iraqi Code considers a person's domicile to be the place where that person normally resides, whether that residence is temporary or permanent.[113] A person may have more than one domicile.[114] The domicile of a person's business is that place where his business, trade, or craft is conducted,[115] though parties may elect in writing to have a certain domicile apply to a certain legal act or business.[116]

The domicile of a minor or of an interdicted person is the domicile of the person acting on his or her behalf.[117] However, a minor who has been permitted to engage in business may have a specific domicile with respect to that business.[118]

In addition to natural persons, the Iraqi Civil Code contains provisions regarding a class of persons referred to as juristic persons.[119] These are the state; administrations and public institutions independent of the state but deemed by law to be a juristic person; political subdivisions deemed to be a juristic person; religious sects deemed to be juristic persons; religious dedications (*waqfs*); commercial and civil companies; incorporated societies; and every group of persons or combination of property which is granted a juristic personality by law.[120] Each juristic person must have an appointed representative.[121]

Juristic persons enjoy all of the rights enjoyed by natural persons save those that are inherent to natural persons.[122] Juristic persons have their own patrimony, can engage in business trans-

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108. *Id.*
109. *Id.* art. 39(3).
110. *Id.* art. 40(1).
111. *Id.* art. 41.
112. *Id.*
113. *Id.* art. 42.
114. *Id.*
115. *Id.* art. 44.
116. *Id.* art. 45.
117. *Id.* art. 43(1).
118. *Id.* art. 43(2).
119. *Id.* art. 47.
120. *Id.*
121. *Id.* art. 48(1).
122. *Id.* art. 48(2).

actions, can engage in litigation, and have a domicile.[123] A juristic person is considered domiciled in the place where its head office is located.[124] However, companies with head offices located overseas and conducting business in Iraq are deemed to be domiciled in that place in Iraq where their business is managed.[125]

The Iraqi Civil Code contains provisions defining two specific kinds of non-profit entities: societies and foundations.[126] A society is a permanent group formed by several natural or juristic persons for some purpose other than yielding profit.[127]

The notion of a foundation did not exist in pre-codal Iraqi law and is derived, in essence, from the Islamic legal notion of *waqf*.[128] Iraqi foundations are similar to the Islamic notion of *waqf* in that they are created by a dedication of goods, established for an indefinite period of time, and are considered non-profit entities.[129] However, the Iraqi concept of a foundation is much broader than that of *waqfs*.[130]

A foundation is defined as a juristic person which is created by devoting specific property for an indefinite period of time to a philanthropic, religious, scientific, technical, or sports activity for non-profit purposes.[131] Foundations are only created by an authenticated deed or by a will.[132] In either case, the document must express a desire to form a foundation, state the purpose for which the foundation is to be formed, designate its name and location, exactly describe the funds to be allocated to it, and contain a business plan.[133]

Thus, under Iraqi law, a foundation can be created by the dedication of any kind of goods (movable or immovable) while a *waqf* applies only to immovable property.[134] Likewise, the Iraqi concept of a foundation requires an express and specific purpose while a *waqf* is created for the benefit of certain individuals in return promoting charitable functions.[135] It should be noted that, although the foundation that exists in Iraqi civil law differs from the tradi-

123. *Id.* art. 48(3)-(6).
124. *Id.* art. 48(6).
125. *Id.*
126. *Id.* arts. 50(1), 51.
127. *Id.* art. 50(1).
128. Jwaideh, *supra* note 45, at 182.
129. *Id.* at 182-83.
130. *Id.* at 183.
131. IRAQI CIVIL CODE art. 51.
132. *Id.* art. 52(1).
133. *Id.* art. 52(2).
134. Jwaideh, *supra* note 45, at 183.
135. *Id.* ("[A]n example is the *waqf* for the benefit of preachers in mosques or teachers in religious schools. A *waqf* could also be created directly for some charitable work itself, as for combating illiteracy or certain diseases.").

tional *waqf*, the Iraqi Civil Code recognizes the existence of the *waqf* and, as noted below, expressly references this traditional Islamic legal entity in other articles of the code.

Foundations must be registered and are considered successfully registered when an application is filed by the founder or the person charged with control of the foundation.[136] The Iraqi Civil Code makes it clear that the person charged with control of the foundation shall take action to effect registration as soon as he or she becomes aware of its founding.[137] In cases where the foundation has been created by an authenticated deed, the person who has created it may revoke it by another authenticated deed if the revoking deed can be executed prior to the registration of the initial deed with the Court of First Instance.[138]

Foundations that are intended to serve the public interest may be created upon filing an application for a Royal Wish (*Irada*) which approves the bylaws of the foundation.[139] This *Irada* must name the person or entity vested with authority to control the foundation and may impose certain requirements on the foundation such as the appointment of multiple government managers.[140] The Government has the right to exercise control of foundations.[141]

The Court of First Instance where the foundation is located may take certain actions upon request of the controlling authority.[142] These actions include dismissal of negligent managers, amendment of the foundation's management system, or even abolition of the foundation in those circumstances where it is no longer possible for the foundation to serve its intended purpose or attain its stated goal.[143] The Court of First instance may also nullify the effects of ultra vires transactions undertaken by managers.[144]

Should the Court of First Instance abolish the foundation, the court shall appoint liquidators to determine the disposition of the assets of the foundation in accordance with the provisions of the basic documents creating the foundation.[145] Where those basic laws do not address how the foundation's property should be disposed after dissolution, the court may decide the fate of the property.[146]

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136. IRAQI CIVIL CODE art..53(1).
137. *Id.* art. 55(2).
138. *Id.* art. 54.
139. *Id.* art. 56(1).
140. *Id.* art. 56(3).
141. *Id.* art. 57(1).
142. *Id.* art. 59.
143. *Id.* art. 59(a)-(c).
144. *Id.* art. 59(d).
145. *Id.* art. 60(1).
146. *Id.* art. 60(2).

3. Things, Property, and Rights

The Iraqi Civil Code states that everything is subject to ownership except those things which are by their nature or by law excluded from ownership.[147] Property is defined as anything having a material value.[148]

The Iraqi Code divides property into several types: movable and immovable; tangible and intangible; public and private.[149] Immovable property is that which is fixed so that it is impossible to move or convert without damaging it.[150] Examples of such property are land, buildings, plants, bridges, dams, mines, and similar property.[151] Movable property, on the other hand, is that which can be moved and converted without damaging it, such as currency, animals, etc.[152] A movable which is placed by its owner on an immovable owned by that same person for the service of exploitation of the immovable is deemed immovable.[153]

The Iraqi Civil Code defines intangible property as referring to non-material things.[154] While the Iraqi Code contains no provision expressly defining tangible property, such property would be, *a contrario sensu,* that property that is material. Fungible things are those things which may be substituted for one another when making payment. [155] All other things are considered non-fungible.[156]

Public property consists of the movables and immovables that belong to the State.[157] Such property is not alienable or subject to attachment.[158] However, such property can lose its status when it is no longer allocated for the benefit of the public or the purpose for which it was allocated is no longer attainable.[159] While the Iraqi Code contains no provision defining private property, such property would be, *a contrario sensu,* that property which can be owned by private individuals.

Pecuniary rights may be either *in rem* or *in personam.*[160] A right *in rem* is a right of a specific person over a specific thing.[161]

147. *Id.* art. 61(1).
148. *Id.* art. 65.
149. *Id.* arts. 62, 70-71.
150. *Id.* art. 62(1).
151. *Id.*
152. *Id.* art. 61(2).
153. *Id.* art. 63.
154. *Id.* art. 70(1).
155. *Id.* art. 64(1).
156. *Id.* art. 64(2).
157. *Id.* art. 71(1).
158. *Id.* art. 71(2).
159. *Id.* art. 72.
160. *Id.* art. 66.

The primary rights *in rem* are ownership, usufruct, use, residence, musataha, servitudes constituting *waqfs*, and long term leases.[162] The Iraqi Code notes that certain other rights are secondary, namely the right of authentic mortgages, possessory mortgages, and privileged rights.[163]

A right *in personam* is a legal bond between two persons in which a creditor claims something from a debtor.[164] Such rights include an obligation to convey property (including currency) as well as an obligation to deliver a certain thing.[165]

B. Obligations in General (Contracts)

An area of the Iraqi Civil Code which represents a marked departure from earlier Iraqi law is that of obligations.[166] As Jwaideh notes:

> The general theory of obligations is considered to be the foundation of civil law. Since it is concerned with individual rights it becomes important in other branches of private and public law wherever an individual right is involved. The area of its influence is quite large and no legal system can discard it without serious trouble. As this theory is unknown in the modern sense to the *Mejelle*, its adoption in the Iraqi Civil Code was a true achievement.[167]

1. The Nature of a Contract

The Iraqi Civil Code defines a contract as the unison of an offer made between two parties to effect a certain object.[168] An Iraqi contract consists of three main elements: consent, a valid object, and a lawful cause. A valid contract is one that is lawful, concluded by parties with full capacity, free of defects, has a lawful cause, and has a lawful object.[169] It can be made for sale, gifts, loans, rent, or for a certain act or service.[170] Further, a contract is considered valid so long as its object is not forbidden by law, to the

161. *Id.* art. 67(1).
162. *Id.* art. 68(1).
163. *Id.* art. 68(2).
164. *Id.* art. 69(1).
165. *Id.* art. 69(2).
166. *See* Jwaideh, *supra* note 45, at 183.
167. *Id.*
168. IRAQI CIVIL CODE art. 73.
169. *Id.* art. 133(1).
170. *Id.* art. 74.

prejudice of public order, or against morals.[171] The Iraqi Civil Code states that the terms *offer* and *acceptance* are used to denote the creation of a contract—the first expression of a will to contract being considered the offer and the second being considered the acceptance.[172]

2. Forming an Iraqi Contract

For an Iraqi contract to be concluded, the acceptance must conform to the terms of the offer.[173] Acceptance conforms to the offer when both parties agree to all of the essential elements of the agreement.[174] Agreement to some, but not all, of the essential elements of the agreement is insufficient to form a contract.[175] However, where both parties agree on all the essential terms of a contract and reserve negotiation of secondary matters for a later date (without stipulating that a contract shall not be formed until agreement on those secondary matters), then the contract will be considered to have been formed upon agreement to the essential terms.[176] If a dispute later arises regarding agreement to those previously unresolved secondary terms, then a court may decide the terms of the contract by looking to the subject matter of the contract, provisions of law, common usage, and equity.[177]

The Iraqi Code's emphasis on the need for an offer and acceptance in order to form a contract should be underscored. The Iraqi articles make it clear that a unilateral expression of one's will is generally not binding absent some provision to the contrary.[178] Those situations appear limited to circumstances in which a person has offered consideration to whoever performs a certain act.[179]

Parties may enter into a preliminary agreement wherein they stipulate that they will enter into a contract if certain circumstances exist within a certain period of time.[180] Where the law prescribes a certain form for a contract, the preliminary agreement must also adhere to that form.[181]

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171. *Id.* art. 75.
172. *Id.* art. 77(1).
173. *Id.* art. 85.
174. *Id.* art. 86(1).
175. *Id.*
176. *Id.* art. 86(2).
177. *Id.*
178. *Id.* art. 184(1).
179. *Id.* art. 185(1); *See also id.* art. 185(2) (noting that where the promisor has not fixed a time limit for performance of the act he may revoke his promise, but is still bound to whomever performed the act within that six month timeframe).
180. *Id.* art. 91(1).
181. *Id.* art. 91(2).

Offer and acceptance may be oral, written, or by some sign which in common usage indicates a desire to contract.[182] Likewise, a contract can be formed by engaging in an exchange which indicates mutual acceptance and which was conducted in such a way that the circumstances make the desire to contract evident.[183] The parties need not both be present in order to form a contract.[184] A contract may be formed over the telephone or similar means of communication.[185] The contract will be deemed concluded in the place and at the time that the offeror becomes aware of the acceptance.[186]

The display of goods along with their price is considered an offer.[187] However, the publishing, listing, or advertising of current dealings is not.[188] Contracts may also be concluded at auctions, wherein a bid (acceptance) can be vitiated by a higher bid.[189]

Silence can be considered acceptance in situations in which there is a need for expression.[190] Silence is expressly deemed to be acceptance in situations in which a purchaser receives goods and remains silent or in which there have been past dealings between parties and the offer was related to those past dealings or was to the benefit of the person to whom it was addressed.[191]

The offeror can withdraw the offer before acceptance has been expressed.[192] Likewise, either party can prevent the formation of a contract by, prior to acceptance, expressing (vocally or otherwise) an intent to withdraw or reject the offer.[193] Repetition of the offer before acceptance has the effect of nullifying the first offer and replacing it with the second.[194] The offeror who has set a time limit for his offer will be bound by his offer until the set time limit expires.[195]

Unless stipulated otherwise, the use of "earnest money" is deemed to be proof that the contract is final and may not be repudiated.[196] Where both parties agree that the "earnest money" shall be a penalty for withdrawing from the contract, then either party

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182. *Id.* art. 79.
183. *Id.*
184. *Id.* art. 87(1).
185. *Id.* art. 88.
186. *Id.* art. 87(1).
187. *Id.* art. 80(1).
188. *Id.* art. 80(2).
189. *Id.* art. 89.
190. *Id.* art. 81(1).
191. *Id.* art. 81(2).
192. *Id.* art. 82.
193. *Id.*
194. *Id.* art. 83.
195. *Id.* art. 84.
196. *Id.* art. 92(1).

may withdraw.[197] If it is the payer of the "earnest money" who withdraws, he will forfeit the "earnest money."[198] However, if it is the receiver of the "earnest money" who withdraws from the contract, he will pay double the amount.[199]

Comparison with the Mejelle and French Civil Law

The general Iraqi provisions on contracts are derived primarily from continental civil law. The *Mejelle* does not contain a set of rules that apply to contracts in general, focusing almost exclusively on specific nominate contracts such as sale, lease, or hire. A survey of the provisions in the *Mejelle* reveals only a few articles intended to apply to contracts generally and those merely define the nature of a basic contract. Articles 101 and 102 of the *Mejelle* define offer and acceptance, while Article 103 states: "'*Aqd*' (concluded bargain) is the two parties taking upon themselves and undertaking to do something. It is composed of the combination of an offer (*Ijab*) and an acceptance (*Qabul*)."[200] These articles represent the entirety of what could be described as a regime of law allowing for innominate contracts of any sort. Therefore, all of the Iraqi articles that provide for contracts in general are taken from continental civil law.

In spite of that distinction, there are substantive similarities between the *Mejelle* and continental civil law. An example is found in the rules pertaining to offer and acceptance, which are part of both the *Mejelle* and traditional civil law. The *Mejelle* requires an offer and acceptance[201] and consent of the parties to form a contract.[202] Even a gift under the *Mejelle* requires offer and acceptance.[203] The sole exception to this requirement is in the *Mejelle's* articles governing contracts of suretyship.[204] Likewise, continental civil law requires offer and acceptance in order to form a contract and considers that "[u]n contrat est conclu quand l'offre, ferme, non équivoque, précise et complète, émanant d'un contractant est acceptée par l'autre contractant d'une manière explicite, non equivoque et sans réserve."[205] This commonality in civil law

197. *Id.* art. 92(2).
198. *Id.*
199. *Id.*
200. *See* THE MEJELLE, *supra* note 35, art. 103, at 16.
201. *See id.*
202. *See id.* art. 104, at 16.
203. *See id.* art. 837, at 131 ("A gift, by an offer and acceptance, becomes a concluded contract, and by receipt it becomes complete.").
204. *See id.* art. 621, at 91 ("By the offer of the surety alone, a suretyship becomes a concluded agreement and enforceable . . . .").
205. HESS-FALLON & SIMON, DROIT CIVIL 173 (Editions Dalloz 1999).

systems and the *Mejelle* make the Iraqi Civil Code's provisions, to an extent, accommodating and familiar to both legal traditions.

Likewise, though the manner in which contracts are defined in the Iraqi Code is clearly derived from French substantive law,[206] the Iraqi law of obligations is not offensive to the *Mejelle* as there is a certain degree of fundamental agreement between the *Mejelle* and continental civil law. Although the *Mejelle* contains no general articles in this regard, its articles on the contract of sale require a clearly defined object.[207] In addition to being clearly defined, the object of a sale must be lawful.[208] Thus, though the Iraqi definition of a contract is continental in inspiration, the provisions and requirements of the *Mejelle* comport with those European requirements.

Distinctions in the requirement for offer and acceptance also exist. The Iraqi Code extends the requirements of offer and acceptance to the requirements of suretyship, differing from the *Mejelle* by requiring, for the proper conclusion of a suretyship, an offer and an acceptance by the surety and the person guaranteed.[209] This rigid offer and acceptance requirement for suretyships also differentiates the Iraqi Code from other civil codes based on the French model.[210] However, unlike the *Mejelle*, the Iraqi Civil Code does not require an express offer and acceptance for unilateral donations or gifts,[211] an aspect which links it to continental civil law.

Another aspect in which the Iraqi Civil Code clearly diverges from the rules of the *Mejelle* is in the matter of preliminary agreements. The Iraqi Code allows that parties may enter into a preliminary agreement wherein they stipulate that they will enter into a contract if certain circumstances exist within a certain period of time.[212] This rule comports with articles of civil law systems based on the French model, but is in contrast to the *Mejelle*, which prohibits agreements to enter into contracts at a future date.[213]

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206. *See* C. CIV. art. 1108 ("Quatre conditions sont essentielles pour la validité d'une convention: . . . Sa capacité de contracter; Un objet certain qui forme la matière de l'engagement; Une cause licite dans l'obligation.").

207. *See* THE MEJELLE, *supra* note 35, art. 213, at 29 ("The sale of an unknown thing is [invalid] . . . .").

208. *See id.* art. 211, at 28 ("[The] sale of property . . . which is not [lawful] is invalid. . . .").

209. *See* IRAQI CIVIL CODE art. 1009(1).

210. *See, e.g.*, LA. CIV. CODE ANN. art. 3039 ("Suretyship is established upon receipt by the creditor of the writing evidencing the surety's obligation. The creditor's acceptance is presumed and no notice of acceptance is required.").

211. *See* IRAQI CIVIL CODE arts. 601, 603.

212. *Id.* art. 91(1).

213. *See* THE MEJELLE, *supra* note 35, art. 171, at 21 ("A sale (*Bey'*) is not concluded by words in the future tense, such as "I will take" "I will sell," which mean merely a promise.").

3. Defects of the Will

A contract executed under duress is not valid in Iraqi civil law.[214] Duress refers to the illegal forcing of a person to do something against his or her will.[215] It exists when there is a threat of death or bodily harm, a violent beating, or great damage to property, but does not exist when the threat is of a lesser measure, such as a threat of imprisonment or of a less severe beating.[216] However, the Iraqi Civil Code allows that the circumstances of the persons involved may impact whether or not the particular act of duress is sufficiently coercive.[217] A threat to cause injury to one's parents, spouse, or an unmarried relative on the maternal side may rise to the level of duress.[218] Likewise, a threat to one's honor may rise to the level of duress.[219]

In order for there to be duress, the person making the threat must be capable of carrying out the threat and the person being subject to coercion must fear the execution of the threat such that he or she is led to believe that the threat will be carried out unless he or she carries out a specific act.[220] The Iraqi Civil Code notes the special influence a husband has over his wife where duress is concerned, noting that, for instance, where a husband forces his wife to do something by beating her or forbidding her to see her parents in order to abandon her dowry, such abandonment shall not be effective.[221]

Where there is a mistake in a contract in respect to the object of the contract, a mistake in which the object differed from what was intended by one or both of the parties, the contract is void.[222] However, where the object is the same but differs only in description, the contract can be concluded upon approval of the contracting parties.[223] As paragraph two of Article 117 explains, if a stone has been sold as an emerald, but turns out to be glass, the sale is void.[224] However, where the stone was sold as a red emerald but the color turned out to be yellow, or where a cow was sold as a milk

214. IRAQI CIVIL CODE art. 115.
215. *Id.* art. 112(1).
216. *Id.* art. 112(2).
217. *Id.*; *see also id.* art. 114.
218. *Id.* art. 112(3).
219. *Id.*
220. *Id.* art. 113.
221. *Id.* art. 116.
222. *Id.* art. 117(1).
223. *Id.*
224. *Id.* art. 117(2).

cow but turned out to be otherwise, the sale is subject to the approval of the purchaser.[225]

A contract is void where there is a mistake as to the description of the thing which—in the view of the contracting parties—is essential to the contract.[226] Similarly, a contract is void where there is a mistake as to the identity of a party or as to the capacity of a party when that was the main cause for contracting.[227] A party to a contract who has made a mistake may not invoke that mistake to nullify the contract unless the other party made the same mistake, knew of the mistake, or could have easily detected the mistake.[228] A mere mistake of calculation or clerical error will not affect a contract, although that mistake must be rectified.[229] If the falsity of a certain assumption is apparent, then it has no legal effect on the contract.[230]

Fraudulent misrepresentation occurs when one party makes false representations to the other. A contracting party who has been the victim of fraudulent misrepresentation may claim damages from the other party whether the damages suffered are minor or serious.[231] These damages may be claimed when the misrepresentation was unknown to the aggrieved party and it was not easy for the aggrieved party to discover the misrepresentation.[232] Additionally, the action can be maintained where the thing which is the object of the contract was consumed prior to the aggrieved party becoming aware of the injury or where the thing subsequently perished, suffered a defect, or underwent an essential change.[233] In the event that the fraudulent party dies, the action for fraudulent misrepresentation may be brought against the fraudulent party's heirs.[234]

The mere fact of injury does not bar enforcement of the contract as long as the injury was not coupled with deceit.[235] A contract shall be null, however, when the injury is grievous and the injured party is interdicted or where the injury is sustained by the State or by a *waqf*.[236] Injury may not be claimed in contracts con-

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225. *Id.*
226. *Id.* art. 118(i).
227. *Id.* art. 118(ii).
228. *Id.* art. 119.
229. *Id.* art. 120.
230. *Id.* art. 118.
231. *Id.* art. 123.
232. *Id.*
233. *Id.*
234. *Id.* art. 121(1).
235. *Id.* art. 124(1).
236. *Id.* art. 124(2).

cluded by way of public auction.[237] Where the fraudulent misrepresentation was by someone other than one of the contracting parties, the contract will not be suspended unless one of the parties was aware of the misrepresentation at the time of the contract or if it was easy for him to be aware of this misrepresentation.[238] Where a contracting party has made false representations to the other party which results in serious damage, the contract is subject to the approval of the aggrieved party.[239]

When, to another party's detriment, a party takes advantage of the other party's need, rashness, urges, cravings, inexperience, or weal when concluding a contract, and the exploited party incurs serious damage, then the exploited party may demand reasonable redress within one year of the time of the contract.[240] If there was a gratuitous disposal of something, the exploited party may revoke the contract within that one-year period.[241]

Comparison with the Mejelle and French Civil Law

As demonstrated above, the Iraqi Civil Code contemplates three primary ways that consent to a contract can be vitiated: error, fraud, and duress. The notion of consent in traditional civil law jurisdictions includes the idea that consent can be vitiated by vices of consent.[242] In continental civil law, this concept is derived directly from the French civilian tradition.[243] However, the recognition of these three means of vitiating consent to a contract are recognized in both Islamic law and in the continental civil law tradition, though Islamic law places less emphasis on error and the greatest emphasis on duress:

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237. *Id.* art. 124(3).
238. *Id.* art. 122.
239. *Id.* art. 121(1).
240. *Id.* art. 125.
241. *Id.*
242. *See* C. CIV. art. 1109 ("Il n'y a point de consentement valable si le consentement n'a été donné que par erreur ou s'il a été extorqué par violence ou surpris par dol.").
243. *See* Saul Litvinoff, *Vices of Consent: Error, Fraud, Duress, and an Epilogue on Lesion,* 50 LA. L. REV. 1, 8-9 (1989).

> It seems that the French redactors were aware . . . that once the psychological processes of contracting parties were taken into account, great uncertainty would result concerning the stability of transactions. Indeed, the kinds of errors contracting parties can make are as innumerable as the kinds of more or less devious schemes a party may devise to induce another into a contract. On the other hand, distressing circumstances that may compel a party into making a contract even against his will cannot always be readily discerned . . . . The concept of a vice of consent thus came into existence as a practical solution that allows the paying of respect to the autonomy of the parties' will without overlooking the need to maintain the security of transactions.

Id.

> Islamic jurisprudence recognizes all three kinds of defects, but in an inverse order. Most prominent of all is its treatment of duress (*ikrāh*), which is accorded a separate and explicit analysis. Fraud (*tadlīs*) comes in the second place, after duress; fraud is recognized as a source of defective transactions in its own right, and some schools identify it by this very term. On the other hand, error (*ghalat*) is the least prominent of contract defects in Islamic law, as it is the most subjective type of defect.[244]

Therefore, the concepts are equally identified in both legal traditions, with varying degrees of emphasis. The reason for the differing emphasis is that, in Islamic law, the objective is given precedence over the subjective, with a strong preference for ensuring the stability of transactions. Accordingly, subjective error as a means of rescinding a contract is given less emphasis.[245]

The *Mejelle* reflects this Islamic view of defects of the will, stating that transactions tainted by duress,[246] fraud,[247] and error.[248] However, these articles are not collocated in one part of the *Mejelle*, but are scattered throughout. This contrasts with civil codes based on the French model, which group all of these consent-vitiating elements together.

The Iraqi Civil Code groups all of these elements together in the French style but borrows heavily from the *Mejelle* in the language used to articulate the legal concepts. For instance, Article 117 of the Iraqi Civil Code is very similar to the language of corresponding rules in the *Mejelle*.[249] Therefore, the substance of the *Mejelle* is reorganized into a form that corresponds to a modern civil code without abandoning the original substantive rules. However, the Iraqi Civil Code strays from the *Mejelle* and the Islamic legal tradition by incorporating a theory of error that is significant in its scope and impact as error is articulated as a formal source of legal rights.[250] Of this change, Arabi notes:

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244. *See* Arabi, *supra* note 80, at 156 (citing *A. al-Sanhūrī*, op. cit., vol. 2 (Cairo, 1955), 112).

245. *See id.*

246. *See* THE MEJELLE, *supra* note 35, arts. 1003–06, at 157-58.

247. *See id.* arts. 310–12, at 45.

248. *See id.* art. 208, at 28.

249. *Id.* arts. 72, 208, at 11, 28.

250. *See* Arabi, *supra* note 80, at 171 ("Al-Sanhūrī's construction, which transforms the peripheral consideration given to error by the classical Muslim authors into a full-fledged theory of *error as a formal source of legal right*, is a partial deformation of Muslim juristic thought.").

> Al-Sanhūrī's theoretical bringing into prominence of error as possessing legal effect in Islamic contract law—a misrepresentation of the latter—needs to be understood as the outcome of a decision to accommodate foreign material into the body of this law. This is a decision at the service of a historical practice of codification which explicitly recognizes—as demonstrated in the new Iraqi Code—the necessity of incorporating Western legal norms and conceptions into Muslim legal thought. In the nature of things, such an enterprise implies a significant reinterpretation and remoulding of extant Islamic legal doctrines if it is to serve its avowed purpose of accommodating modern European legislation.[251]

4. Object and Cause

Every enforceable Iraqi obligation must have an object. This object can be property, a debt, a benefit, a pecuniary right, work to be performed, or abstention from work.[252] If the object of an obligation is an impossibility, then the contract is void.[253] However, if the object is impossible for the debtor—but not absolutely impossible—then the obligation is not void.[254]

The object of a contract must be clearly described.[255] However, it is sufficient if the parties to the contract have a sufficient understanding of the object.[256] If the contract is not sufficiently described in the contract and is not known to the parties of the contract, the contract is void.[257] The object may be non-existent at the time of the contract, so long as it is obtainable in the future.[258]

An object may not be illegal nor may it be to the prejudice of good order or contrary to morality.[259] An agreement regarding the succession or estate of a living person is void.[260] The object of an obligation may contain a stipulation which is beneficial to one of the contracting parties or to a third party, so long as the stipulation is not prohibited by law.[261] Likewise, an obligation may con-

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251. *See id.* at 171–72.
252. IRAQI CIVIL CODE art. 126.
253. *Id.* art. 127(1).
254. *Id.* art. 127(2).
255. *Id.* art. 128(1).
256. *Id.* art. 128(2).
257. *Id.* art. 128(3).
258. *Id.* art. 129(1).
259. *Id.* art. 130(1).
260. *Id.* art. 129(2).
261. *Id.* art. 131(2).

tain a customary stipulation that corresponds to the object of the obligation.[262]

Every obligation must also have a lawful cause.[263] It is presumed that every obligation has a lawful cause, even when the cause in not mentioned in the contract.[264] This holds true unless evidence to the contrary is adduced.[265] Absent evidence to the contrary, the cause stated in the contract is deemed to be the real cause.[266] An obligation shall be considered null and void if the contracting party has assumed an obligation without a cause or for a cause which is unlawful or contrary to morals or public order.[267]

Comparison to the Mejelle and French Civil Law

The *Mejelle* and the continental civil law provision contain many identical requirements regarding the necessity of a lawful object. The *Mejelle* requires an object for a valid sale.[268] The *Mejelle*'s provisions mandate that the object be something possible of being the subject of the sale,[269] that the object of a sale be known,[270] and that it be a lawful object.[271] Without an object, there can be no sale.[272] French doctrine, similarly, requires an object that is possible, determined, and not contrary to public order.[273]

However, though the two systems share similarities where the requirement of an object is concerned, continental civil law does not consistently track the law of the *Mejelle* in all aspects. For instance, although the *Mejelle* requires the object of a sale to be lawful,[274] it contains no articles specifically articulating a concept such as cause or specifically requiring the presence of a lawful cause in order for a contract to be valid. This is in contrast to the French

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262. *Id.* art. 131(1).
263. *Id.* art. 132(1).
264. *Id.* art. 132(2).
265. *Id.*
266. *Id.* art. 132(3).
267. *Id.* art. 132.
268. THE MEJELLE, *supra* note 35, art. 197, at 27.
269. *See id.* arts. 209-10, at 28 ("The sale of a thing, the delivery of which is not possible, is invalid.") and ("To sell a thing which cannot be accounted as property among men, or to buy property sold, for such a thing, is invalid.").
270. *Id.* art. 200, at 27.
271. *Id.* art. 211, at 28 ("[The] sale of property . . . which is not [lawful] is invalid.").
272. *Id.* art. 197, at 27.
273. *See* C. CIV. art. 1108.
274. *See* THE MEJELLE, *supra* note 35, art. 211, at 28 ("[The] sale of property . . . which is not [lawful] is invalid.").

civil law tradition, which requires the existence of a lawful cause in order for a contract to be valid.[275]

As demonstrated above, the Iraqi Code, drawing from the civil law tradition, specifically articulates the requirement for a lawful cause in order for contracts to be valid and enforceable. Thus, Iraqi contract law comports more closely with continental civil law than it does with the *Mejelle*.

Another difference is in what the Iraqi Civil Code envisions as necessary to form a contract. Iraqi law requires that a valid contract be lawful, concluded by parties with full capacity, free of defects, and possessive of a lawful cause and a lawful object.[276] Consideration can be used for synallagamtic contracts, but is not required. This comports with the civil law notion that a bare agreement—an intersection of wills unattended by formalities—constituted the law between the parties.[277]

Likewise, the *Mejelle* strictly prohibits contracts regarding things that do not yet exist.[278] This is in accordance with Islamic law, which considers such contracts ("Gharar sales" or *Bey' al-Gharar*) to be forbidden.[279] Civil law systems, on the other hand, generally permit contracts for things that will come into existence at a later time. The Iraqi Code allows that an object may be non-existent at the time of the contract, so long as it is obtainable in the future.[280] Parties may enter into a preliminary agreement wherein they stipulate that they will enter into a contract if certain circumstances exist within a certain period of time.[281] Such

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275. *See* C. CIV. art. 1131 ("L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet.").

276. IRAQI CIVIL CODE art. 133(1).

277. *See* Shael Herman, *From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture*, 1984 U. ILL. L. REV. 597 (1984); *see also* Saul Litvinoff, *Still Another Look at Cause*, 48 La. L. Rev. 3, 5 (1987).

> It is not an overstatement to say that in the many centuries that have elapsed since Roman times all contracts have become consensual, that is, all contracts, with very few exceptions, can be validly formed by mere consent. It is as if the classic Roman category of consensual contracts, originally limited to four types, was expanded to cover the whole spectrum of contract. As a result of that expansion, for which jurists of the canonist school take a great part of the responsibility, modern legal systems of the French family allow private parties to bind themselves by their consent alone provided that, perhaps as a remnant of Roman caution, such consent is given for a reason, or cause, and further provided that such reason, or cause, is lawful.

Id.

278. *See* THE MEJELLE, *supra* note 35, art. 205, at 28 ("The sale of a non-existing thing is invalid. For example, [t]o sell a trees fruit, which has not appeared at all, is invalid.") (emphasis omitted).

279. ABDUR RAHMAN I. DOI, SHARI'A: THE ISLAMIC LAW 359 (TaHa Publishers 1997).

280. IRAQI CIVIL CODE art. 129(1).

281. *Id.* art. 91(1).

rules comport with articles of civil law systems based on the French model, but stand in contrast to the *Mejelle*.[282]

5. Effects of a Contract

It is a clear rule of law, under the provisions of the Iraqi Civil Code, that contracting parties must fulfill their obligations according to the contract.[283] Under Iraqi law, contracts are binding on the contracting parties and their universal successors unless the contract states otherwise.[284] When a contract relates to a specific thing which is subsequently transferred to a singular successor, the rights and obligations with which the thing is endowed will also transfer.[285]

When a contract is lawfully concluded, it is legally binding and neither party can revoke or amend it except when expressly allowed by the law or by mutual consent.[286] However, a court may amend a contract when extraordinary events have rendered an obligation so onerous that, in accordance with the principle of equity, the obligation must be lessened.[287]

Contracts must be performed according to its terms and must be performed in good faith.[288] Parties are bound not only by the express provisions of the contract, but also those provisions imposed by law, custom, and equity.[289] A secret contract is binding on the contracting parties and their universal successors.[290] A fictitious contract has no effect.[291] Where a real contract has been veiled by a fictitious contract, the real contract is given effect—so long as it complies with legal requirements for validity.[292] Even so, alienations of real property made pursuant to a fictitious contract may not be contested after they have been entered in the registers of the Real Estate Registration Department.[293]

A person who, in a contract, promises to procure a third party to perform an obligation does not thereby bind that third party.[294] If he or she fails to procure the third party to perform an obliga-

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282. *See* THE MEJELLE, *supra* note 35, art. 171, at 21 ("A sale (*Bey'*) is not concluded by words in the future tense, such as "I will take" "I will sell," which mean merely a promise.").
283. IRAQI CIVIL CODE art. 145.
284. *Id.* art. 142(1).
285. *Id.* art. 142(2).
286. *Id.* art. 146(1).
287. *Id.* art. 146(2).
288. *Id.* art. 150(1).
289. *Id.* art. 150(2).
290. *Id.* art. 148(1).
291. *Id.*
292. *Id.* art. 148(2).
293. *Id.* art. 149.
294. *Id.* art. 151(1).

tion, then he or she must either compensate the other party or perform the obligation that the third party was to perform.[295]

A person may contract to take on an obligation for the benefit of a third party if, in such an undertaking, he or she has a personal, moral, or material interest.[296] This third party may be a future person or institution or a person or party not yet designated at the time of the contract, so long as that person is identifiable at the time the effects of the contract are to be produced.[297] Such a contract vests in that third party a direct right against the obligee for performance of the obligation.[298] The obligee may invoke against the third party any defense he or she may have for nonperformance of the contract.[299] Likewise, the person who contracted for the benefit of the third party may also claim performance.[300]

The person contracting for the benefit of a third party may revoke the stipulation before the beneficiary accepts it, except when the revocation is contrary to the terms of the contract.[301] This revocation may take the form of a subrogation of another beneficiary for the original intended beneficiary and may even change the contract so that the benefit inures to the stipulator.[302] The revocation shall not relieve the obligee of any obligation owed to the person who made the stipulation for the third party.[303] The creditors or heirs of the stipulator may not revoke the stipulation in such a manner.[304]

6. Valid and Void Contracts

A contract is void if there is some defect of the will, if there is a defect in its formation (such as a defective offer or acceptance), if one of the parties is not competent to contract, or if there is an impossible or invalid object.[305] A contract is likewise void where it does not conform to necessary legal formalities,[306] or where a contract does not have a lawful cause.[307]

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295. *Id.*
296. *Id.* art. 152(1).
297. *Id.* art. 154.
298. *Id.* art. 152(2).
299. *Id.*
300. *Id.* art. 152(3).
301. *Id.* art. 153(1).
302. *Id.* art. 153(2).
303. *Id.*
304. *Id.* art. 1.
305. *Id.* art. 137.
306. *Id.* art. 137(3).
307. *Id.* art. 132(1).

A void contract is not performable, has no effects, and is void *ab initio*.[308] When a contract is void, every interested party may invoke its nullity and a court may declare the contract null *sua sponte*.[309] Once a contract is judicially declared null, it may not be ratified or validated.[310] Where only a part of a contract is void, and the remaining portions of a contract remain valid, the valid parts of the contract remain enforceable as a separate contract unless the contract would not have been concluded without the void portion.[311]

Once a contract is voided, the parties are returned to their respective positions prior to the contract. If such reinstatement is impossible, then an action for damages may be brought by an aggrieved party.[312] However, if a contract is void because a contracting party was of diminished capacity, then the person of diminished capacity is not bound to repay anything except that which he or she obtained from the contract.[313]

The Iraqi Civil Code defines a commutative contract as one which creates an obligation on the owner of a certain thing to deliver it to another person who is obligated to deliver consideration for the thing received.[314] In commutative contracts, the parties to the contract must establish their requisite titles to the things being exchanged.[315] It is the obligation of each party to deliver the property he or she wishes to exchange in furtherance of the contract.[316]

If a contract is not suspended by way of a suspensive condition, then it is presumed that the contract is for immediate performance.[317] Where a contract is subject to a condition and was concluded under duress, fraud, mistake, or while a party was interdicted, it may be revoked even after the cessation of the defect.[318] However, it may also be validated after the cessation of the defect.[319] If the decision is to revoke the contract, then whatever dispositions that have been made must be restored to the parties and commodities must be returned even if the thing has changed

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308. *Id.* art. 138(1).
309. *Id.* art. 141.
310. *Id.*
311. *Id.* art. 139.
312. *Id.* art. 138(2).
313. *Id.* art. 138(3).
314. *Id.* art. 144.
315. *Id.* art. 143.
316. *Id.*
317. *Id.* art. 133(2).
318. *Id.* art. 134(1).
319. *Id.*

hands.[320] Where the thing has perished while in the possession of the transferee, then the transferee will be liable for its value.[321]

In cases involving deception, the deceived party has the option of making a claim against the other party or against the person who exercised duress or deception.[322] There is no liability on a person who received consideration or a thing under duress or misrepresentation.[323]

Regarding a person who has disposed of the property of another without the owner's permission, that disposition is considered to be a valid legal act subject to the ratification of the owner.[324] If the owner ratifies the act, then he may claim the consideration or payment from the person who disposed of his property.[325] However, if the owner does not ratify the act, then the disposal will be null and void.[326] In such cases, the owner has the right to reclaim the property and the innocent party who paid for the thing has an action against the offending vendor.[327]

In the case where a person disposes of the property of another without the owner's permission, where the unauthorized agent gives the thing to another party who knows that the agent does not have authority to dispose of the thing, then the rules governing liability for loss of the thing change. If the thing perishes before the unauthorized agent can sell it to his purchaser, then the true owner can exercise a claim against either the unauthorized agent or the purchaser, though not both.[328] If the thing is given by the unauthorized agent for consideration, but that consideration perishes while in possession of the unauthorized agent, then the thing may be reclaimed by the true owner, and the party who bought the thing, knowing he or she was buying from an unauthorized agent, has no claim against his unauthorized vendor.[329]

Where a person sells the property of another, or where a person without capacity sells something, the Iraqi Civil Code treats such contracts as having a suspended obligation. Such conditional or suspended obligations can be ratified expressly or impliedly.[330] Ratification or revocation can be accomplished within three

320. *Id.*
321. *Id.*
322. *Id.* art. 134(2).
323. *Id.*
324. *Id.* art. 135(1).
325. *Id.* art. 135(2).
326. *Id.* art. 135(3).
327. *Id.*
328. *Id.*
329. *Id.* art. 135(3)-(4).
330. *Id.* art. 136(1).

months from the time of contracting.[331] If no indication of a desire to revoke is made during that time, then the contract is deemed valid.[332]

If the reason for the suspension was due to the diminished capacity of a contracting party, then the time limit for revocation begins from the time capacity is attained or from the time the guardian becomes aware of the contract.[333] If the reason for the suspension is the absence of authority over the object of the contract, then the time limit begins from the day on which the owner becomes aware of the contract.[334] Where the cause for the suspension was duress, mistake, or deception, the time limit begins to run from the time the duress, mistake, or deception has ceased.[335]

Express ratification of a contract occurs at the time the contract is concluded and the person who has authority to ratify the contract must be present.[336] It is not necessary that the original owner or the contracting parties be present for the ratification.[337]

7. Interpretation of Contracts

The Iraqi Civil Code notes that contracts are to be interpreted in accordance with the intention of the parties and not merely the words of the agreement.[338] Literal interpretations must give way to customary meanings.[339] It is preferred that the words be construed to make sense of the terms of the contract, but the language of the agreement can be disregarded where it denotes an impossibility or where the literal meaning would lead to an absurdity.[340] It is preferred that words in a contract are construed rather than disregarded, but they may be disregarded in such cases.[341] General terms are to be construed generally unless there is express or implied proof that they should be construed in a more limited fashion.[342] Any doubt in a contract is to be construed in favor of the debtor.[343] When a portion of an indivisible thing is mentioned in a

331. *Id.* art. 136(2).
332. *Id.*
333. *Id.* art. 136(3).
334. *Id.*
335. *Id.*
336. *Id.* art. 136(1).
337. *Id.*
338. *Id.* art. 155.
339. *Id.* art. 156.
340. *Id.* art. 158.
341. *Id.*
342. *Id.* art. 160.
343. *Id.* art. 166.

contract, it shall be interpreted as referring to the whole of the thing.[344]

The Iraqi Code gives a special place to custom in the interpretation of contracts. A custom can be operative in a contract when it is a continuous, widespread practice.[345] Contracts are to be interpreted in light of prevailing customs and customs and implied terms to a contract are treated like express stipulations to a contract.[346] The explanation to Article 163 gives the example of a boy who goes to train with a weaver.[347] If a person sends his son to train as a weaver but neither party stipulates a fee for this training, then the weaver makes a claim for the training and the boy's father makes a claim for wages, then the court may look to the custom in the village to see how such arrangements are customarily organized and remunerated.[348]

8. Capacity to Contract

The legal regime regarding the insane and Article 94 of the Iraqi Civil Code is of particular note as it represents a departure from modern civil law and the incorporation of traditional Islamic notions of insanity. In contrast to the Egyptian and Syrian codes of the same period, the Iraqi Civil Code eschews European codal provisions in favor of classical Islamic law.[349]

The Iraqi Civil Code states that every person is considered to have the capacity to enter into contracts unless the law states otherwise.[350] Examples of those deemed to be without legal capacity to contract are minors and insane people.[351] The rash or imprudent and the retarded must also be interdicted by the courts.[352] Likewise, deaf and dumb persons, blind and deaf persons, or blind and dumb persons who, because of their handicaps, are unable to

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344. *Id.* art. 159.
345. *Id.* art. 165.
346. *Id.* art. 163(1).
347. *Id.* art. 163 (explanation).
348. *Id.*
349. *See* Oussama Arabi, *The Regimentation of the Subject: Madness in Islamic and Modern Arab Civil Laws, in* STANDING TRIAL: LAW AND THE PERSON IN THE MODERN MIDDLE EAST 264, 282 (Baudouin Dupret ed., I.B. Tauris 2004).

> In modern Arab civil legislation on madness, the New Iraqi Civil Code of 1951 distinguishes itself by the wholesale adoption of the provisions of Islamic law. As in other areas of the code, a choice was expressly made in [favor] of the classical Islamic provisions rather than their European counterparts that prevailed in Egypt's and Syria's new civil laws of the same period.

Id.
350. IRAQI CIVIL CODE art. 93.
351. *Id.* art. 94.
352. *Id.* art. 95.

express themselves or their intentions may have guardians appointed for them.[353]

The significance of the Iraqi codal provisions is that they, on their face, obviate the need for judicial interdiction of the mad person and adopt the Islamic rule of *de facto* interdiction of the mad person.[354] However, in practical terms, the Iraqi judge will still be called upon to make the determination of whether or not a person is insane.

> If such . . . litigation arises before an Iraqi court, the judge would proceed in a way which would be very similar to that of an Egyptian or French judge. The judge would not take the claims of the alleged mad person's family of *de facto* interdiction at their face value, but he would seek to establish the general mental condition of the subject from all possible sources: the family, neighbors, personal history. He would interrogate the subject in court and would certainly seek psychiatric evaluation whenever there is doubt about one aspect or another of the subject's [behavior]. These *de jure* structures of procedure and evidence are indispensable when it comes to litigation [in] cases in which the acts of an alleged mad person are contested in court. Whether under . . . Egyptian or Iraqi models, in this context it is the judge who, in both systems, has to determine the veracity of the allegations regarding the mental health of the subject and, consequently, the validity of the legal acts in question. In these cases, the judge has to establish legal capacity *de jure*, using the modern methods of . . . procedure and evidence.[355]

The age of majority under the Iraqi Code is eighteen full years.[356] Anyone who has not yet attained the age of eighteen is considered a minor. Among minors, the Iraqi Civil Code further distinguishes between rational and irrational minors—a rational minor being one who has attained the age of seven full years.[357] A mentally retarded person has the same status in Iraqi law as a ra-

353. *Id.* art. 104.
354. Arabi, *supra* note 349, at 283.
355. *Id.* at 285-86.
356. IRAQI CIVIL CODE art. 106.
357. *Id.* art. 97(2).

tional minor.[358] A completely insane person has the status of an irrational minor.[359]

The Iraqi Civil Code allows for the interdiction of an imprudent person who squanders and spends his or her money in ways that demonstrate poor judgment.[360] Interdicted imprudent people have the status of a rational minor.[361] However, the will of an imprudent person divesting a third of his property will be considered valid.[362] If the imprudent person is deemed to have become prudent again, his or her interdiction is revoked.[363] These same rules apply to the mentally retarded.[364]

The natural guardian of a minor is his father.[365] If the father has a guardian, then that guardian is the guardian of the minor as well.[366] If the minor has no father (nor a father's guardian), then the minor's grandfather is his or her guardian.[367] If the grandfather has a guardian, then that guardian is the guardian of the minor as well.[368] If the minor has neither father nor grandfather, then the court—or a selected guardian appointed by the court—becomes the minor's guardian.[369]

Legal acts and dispositions of a rational minor are deemed valid if they are totally to the minor's benefit, even if the minor's guardian has not sanctioned the act.[370] Such acts by minors which are both beneficial and detrimental are valid only if sanctioned by the minor's guardian.[371] If the act or disposition is wholly detrimental to the minor, it is invalid even if sanctioned by the guardian.[372] Legal acts of an irrational minor are considered null and void even when such acts were sanctioned by his or her guardian.[373]

Guardians may, with a court's authority, hand over to a rational minor who has attained the age of fifteen, a portion of the minor's money and give him or her permission to use it in trading

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358. *Id.* art. 107.
359. *Id.* art. 108 (noting that a disposition made by a partially insane person during a period in which that person has full perception are treated like dispositions made by a person of sound mind).
360. *Id.* art. 109.
361. *Id.*
362. *Id.* art. 109(2).
363. *Id.* art. 109(3).
364. *Id.* art. 110.
365. *Id.* art. 102.
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.* art. 97(1).
371. *Id.*
372. *Id.*
373. *Id.* art. 96.

in order to test his or her ability to trade.[374] This permission can be limited or unlimited.[375] In such circumstances, the minor is treated by the law as one who has reached the age of majority so long as he or she is acting within the scope of the permission granted.[376] A guardian may move to interdict a minor who has been given such permission and revoke that permission.[377] A guardian's permission is not affected by the death or discharge of the guardian.[378]

Even where a guardian refrains from granting such permission, a court may grant the minor permission to use his money.[379] When the permission is obtained from a court rather than the guardian, then the guardian may not revoke it or interdict the minor.[380] However, the court may do so.[381]

Where the father and grandfather of a minor have disposed the minor's property for a fair value (or a value that is only a bit less than a fair value) then the contract is considered valid.[382] However, if the father and grandfather are known for their poor administration of the minor's property, then the court may terminate their guardianship.[383]

Management contracts regarding a minor's property which are concluded by a guardian are valid even when they contain a small degree of unfairness.[384] Specific examples of management contracts are leases not exceeding three years, contracts for safekeeping and maintenance, the collection of rights, the discharge of debts, the sale of crops, the sale of perishable movables, and contracts involving spending on the minor.[385]

Contracts regarding a minor's property which fall outside of the category of management contracts are not valid unless expressly authorized by a court.[386] Examples of such contracts are sales, loans, mortgages, composition, partition, and investment of money.[387]

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374. *Id.* art. 98(1).
375. *Id.*
376. *Id.* art. 99.
377. *Id.* art. 100.
378. *Id.* art. 98(2).
379. *Id.* art. 101(1).
380. *Id.*
381. *Id.* art. 101(2).
382. *Id.* art. 103(1).
383. *Id.* art. 103(2).
384. *Id.* art. 105(1).
385. *Id.*
386. *Id.* art. 105(2).
387. *Id.*

C. Torts (Delictual and Quasi-Delictual Acts)

The Iraqi Civil Code contains a general article stating, "Every act which is injurious to persons such as murder, wounding, assault, or any other kind of [infliction of injury] entails payment of damages by the perpetrator."[388]

In cases of murder or injuries resulting in death, the perpetrator is obligated to pay compensation to dependants of the victim who were deprived of sustenance because of the wrongful act.[389] Every assault which causes damage other than damage expressly detailed in other articles also requires compensation.[390]

In addition to redress for physical injury, the right to compensation for wrongful acts under the Iraqi Code entails redress for moral injuries, impingements on freedom, as well as offenses to one's morality, honor, reputation, and social standing.[391] Financial damage to third parties also merits compensation.[392]

Damages may be awarded to spouses and immediate relatives of the family of the victim resulting from moral injury caused by disease.[393] However, damages for moral injury do not pass to third parties unless the amount of damages has been determined pursuant to an agreement or a final judgment.[394] Courts are to calculate damages commensurately with the injury and the loss sustained by the victim, provided the loss was result of the unlawful act.[395] This calculation includes the loss of benefits of things, lost wages, etc.[396] Where for some reason damages cannot be adequately estimated, a court may reserve a right for the victim to apply for reconsideration of the estimate within a reasonable time.[397]

The amount of damages to be paid is normally calculated in monetary amounts, though a court may, in certain circumstances, order that a party restore the situation to the *status quo ante* or perform a certain act.[398] When monetary compensation is ordered, the court may determine the method of payment, such as ordering payment in installments or in the form of a salary to be paid to the victim.[399]

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388. *Id.* art. 202.
389. *Id.* art. 203.
390. *Id.* art. 204.
391. *Id.* art. 205(1).
392. *Id.*
393. *Id.* art. 205(2).
394. *Id.* art. 205(3).
395. *Id.* art. 207(1).
396. *Id.* art. 207(2).
397. *Id.* art. 208.
398. *Id.* art. 209(2).
399. *Id.* art. 209(1).

A court may reduce the amount of compensation or refuse to order any compensation in circumstances where the victim has contributed through his or her own fault to the injury or aggravated the injury.[400] Those who act in self defense or in the defense of a third party shall not be liable so long as they do not use more force than is required.[401] Likewise, personal injuries are permissible when committed in order to ward off public injury.[402]

In situations where a person is ordered to commit an unlawful act which results in injury of some sort, the perpetrator (rather than the person ordering or procuring the offense) is considered liable for the damage unless the perpetrator was forced to perform the act.[403] Public officials, however, are not responsible for damage done by their acts when ordered by superiors to perform them.[404] In such circumstances, it is incumbent on the public official to establish that he believed the act he performed was lawful and that his belief was reasonable.[405]

Civil penalties are separate from criminal penalties and the imposition of the former in no way impacts the latter.[406] Civil courts are bound to decide civil liability and compensation without regard to criminal judgments or principles of criminal law.[407]

Comparison with the Mejelle and French Civil Law

In the area of tort law, the Iraqi Civil Code seems to take more from the *Mejelle* than it does from the civil law tradition. The *Mejelle* states that "a person who does an act, even if he does not act intentionally, is responsible."[408] This article is strikingly similar to a corollary French article, which traces its roots to Justinian's laws in ancient Rome, and which is reflected in numerous other modern civil codes based on the French tradition.[409] Therefore, in this regard, both systems maintain a general theory that places liability on doers of harm—couching the principle in general terms so that there is no need to enumerate the specific harms that might give rise to liability.

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400. *Id.* art. 210.
401. *Id.* art. 212(2).
402. *Id.* art. 214(1).
403. *Id.* art. 215(1).
404. *Id.* art. 215(2).
405. *Id.*
406. *Id.* art. 206(1).
407. *Id.* art. 206(2).
408. *See* THE MEJELLE, *supra* note 35, art. 92, at 15.
409. *See, e.g.*, LA CIV. CODE ANN. art. 2315 ("Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.").

However, the *Mejelle* differs from French doctrine in its reticence to find culpability in anyone, save the person who actually commits an act, avoiding the placing of liability on anyone who does not actually cause the harm. According to the *Mejelle*, "[t]he judgment for an act is made to fall on the person who does it. And it does not fall on the person who gives the order, as long as he does not compel the doing of the act."[410] Likewise, "[i]n a case in which there are both a perpetrator, *i.e.*, someone who in person does a thing, and a person who is the indirect cause of its having been done (*Muttesebbib*) the judgment falls on the actual perpetrator."[411] This is in contrast to the civil law tradition, which allows for the liability of superiors and custodians through vicarious liability, maintaining that one is responsible not only for the harm one personally causes but also for that harm caused by persons for which one is responsible or the things under one's responsibility and control.[412]

The Iraqi Civil Code more closely follows the provisions of the *Mejelle* in this realm by excluding vicarious liability and maintaining a system that strictly holds the perpetrator accountable for harms committed. Therefore, although there are similarities in the general articles, a review of the sources of law reveals that the Iraqi law of torts owes more to the *Mejelle* than continental civil law.

D. Conflicts

The Iraqi Code states that Iraqi nationals shall be tried before the courts of Iraq when the suit is a matter of rights owed by the Iraqi national.[413] The rules regarding the competence of a court to hear a case and all procedural matters are governed by the law of the country where the proceedings were initiated.[414] Foreign nationals are to be tried before Iraqi courts if foreign nationals are located in Iraq, if the litigation concerns property located in Iraq, if the litigation concerns a contract which has been executed in Iraq, or if the case involves an event which took place in Iraq.[415] Foreign judgments have no effect in Iraq unless deemed enforceable by an Iraqi court.[416]

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410. THE MEJELLE, *supra* note 35, art. 89, at 14.
411. *Id.* art. 90, at 14.
412. C. CIV. art. 1384.
413. IRAQI CIVIL CODE art. 14.
414. *Id.* art. 28.
415. *Id.* art. 15.
416. *Id.* art. 16.

The law of Iraq is applied to persons of Iraqi nationality who hold dual nationality with any other country.[417] For foreigners who hold dual nationality with another country or countries, the Iraqi court determines the law to be applied.[418] When the foreigner is a national of a country which has several different legal systems, the law of that country will determine which of these legal systems applies.[419]

When determining whether a certain thing is to be considered movable or immovable, the law of the place where the property is located applies.[420] Likewise, when determining the capacity of an individual, Iraqi courts will generally look to the law of the foreigner's nation.[421]

Iraqi law normally applies to matters of marriage and divorce.[422] However, in the case of two foreigners or an Iraqi and a foreigner, the validity of a marriage is determined by referencing the law of the country where the marriage was effected.[423] In addition, a marriage will be considered valid if, in contracting the marriage, the laws of the countries of both parties were observed.[424] However, even though the law of either party's country may determine a marriage's validity, the laws of the husband's country determine all the effects of that marriage, including the effect of the marriage on property.[425] Likewise, matters of divorce, separation, and repudiation are determined by the laws of the husband's country at the time of the divorce or commencement of divorce proceedings.[426] Rules concerning alimony are determined in accordance with the laws of the country of the person from whom alimony is due.[427]

Matters of wills and testaments are decided in accordance with the national law of the deceased.[428] The laws of the decedent's country determine the effects of intestate succession as well as the interpretation of his or her will.[429] Iraqi nationals will not inherit

417. *Id.* art. 33(2).
418. *Id.* art. 33(1).
419. *Id.* art. 31(1).
420. *Id.* art. 17(2).
421. *Id.* art. 18(1). *But see id.* art. 18(2) (noting that in cases involving pecuniary transactions, in which the diminished capacity of a foreigner is not apparent, the foreigner will be deemed to be of full capacity).
422. *Id.* art. 19(5).
423. *Id.* art. 19(1).
424. *Id.*
425. *Id.* art. 19(2).
426. *Id.* art. 19(3).
427. *Id.* art. 21.
428. *Id.* art. 22.
429. *Id.* art. 23.

from a foreigner unless that foreigner's national law allows it.[430] However, the law of Iraq determines the validity of wills that impact immovable property in Iraq.[431] Further, property rights in movable property are governed by the law of the location of the movable property at the time of the death of the decedent.[432] Property of a foreign national who dies intestate in Iraq will pass to the state of Iraq regardless of the decedent's national law.[433]

Contracts are governed by the laws of the domicile of the contracting parties if they have a common domicile.[434] If the parties have different domiciles, then the laws of the place where the contract was concluded apply.[435] The form of the contract must conform to the laws of the state where the contract was concluded.[436] Contracts regarding immovable property are governed by the laws of the place of the immovable property.[437] Parties are free to agree as to the law which should apply to the contract, and Iraqi courts may even take into consideration the circumstances under which the contract was concluded to determine which law was intended.[438]

Non-contractual obligations are governed by the laws of the state in which the act giving rise to the obligation took place.[439] However, this rule does not apply to matters regarding acts or torts committed abroad which are considered unlawful in the place they were done but which are lawful in Iraq.[440]

With regard to business entities, foreign entities (juristic persons) are governed by the laws of the place where the entity is headquartered.[441] Where a foreign entity operates mainly in Iraq, it is governed by Iraqi law.[442] Regardless of any of the provisions in the Iraqi Civil Code, no foreign law may be used if it is inconsistent with the public order and morals of Iraq.[443]

The Iraqi conflicts regime is decidedly European in origin as it focuses on concepts such as nationality and domicile. This is in contrast to Islamic conflicts laws which do not recognize national

430. *Id.* art. 22(a).
431. *Id.* art. 23(2).
432. *Id.* art. 24.
433. *Id.* art. 22(b).
434. *Id.* art. 25(1).
435. *Id.*
436. *Id.* art. 26.
437. *Id.* art. 25(2).
438. *Id.* art. 25(1).
439. *Id.* art. 27(1).
440. *Id.* art. 27(2).
441. *Id.* art. 49(1).
442. *Id.* art. 49(2).
443. *Id.* art. 32.

laws[444] and which operate under a strict territorial theory for non-Muslims and under a "personality of laws" theory for Muslims.[445]

IV. PERSONAL STATUS COURTS

Although the Iraqi Civil Code governs the majority of legal affairs between Iraqi citizens, there is a separate law for that set of legal matters which, in the Middle East, falls under the rubric of personal status: marriage, testamentary dispositions, and inheritance.[446] As noted above, this paradigm of codal dualism—a civil code accompanied by a personal status code—is the remnant of the influence of traditionalists in the early development of Middle Eastern codification.

It should be noted that, when working on the Egyptian Civil Code, Al-Sanhūrī initially wanted to draft a part of the code which would govern family law for both Muslims and Coptic Christians, thereby breaking the tradition of codal dualism.[447] However, religious traditionalists again saw this as too dramatic a shift toward secularism and opposed such reform.[448] As a result, family law was not included in the Egyptian Civil Code and remained the province of a separate personal status law.[449] The Iraqi civil law system, influenced by many of the same traditional elements as Egyptian law, adopted this paradigm of codal dualism and maintained its regime of family law separately from the modernity of its civil code.[450]

The Iraqi Code of Personal Status was originally drafted in 1947.[451] This initial draft contained 177 articles, 91 of which were applicable to all Muslim Iraqis regardless of their particular school

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444. *See* Maurits S. Berger, *Conflicts Law and Public Policy in Egyptian Family Law: Islamic Law Through the Backdoor*, 50 AM. J. COMP. L. 555, 556 (2002).

> Islamic law disregards state borders and concepts like nationally or domicile and only recognizes two categories of legal subjects: Muslims and non-Muslims. The non-Muslims are subdivided into three legal categories: the *harbis* are those who reside outside the Islamic territories, the *dhimmis* are those who reside within the Islamic territories, and the *musta'mins* are foreign residents or visitors, i.e., the *harbis* who are allowed temporary entry into the Islamic territories.

Id.

445. *See id.* ("Islamic law is a personal law by being applicable regardless whether the Muslim travels or resides in or outside Islamic territory. With regard to non-Muslims, Islamic law is a territorial law by being applicable to anyone traveling or residing in Islamic territory . . . .").

446. *See* J. N. D. Anderson, *A Law of Personal Status for Iraq*, 9 INT'L & COMP. L.Q. 542, 543 (1960).

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. Anderson, *supra* note 446, at 542.

or sect.[452] The remaining 86 articles of the initial draft apply to Muslim Iraqis based upon their specific religious affiliation.[453] However, this initial draft was never promulgated due to opposition from certain religious factions.[454] Such sectarian division among Islamic legal schools has historically been something of a problem in Iraq. As Anderson notes:

> Half a century ago the differences between the four Sunnī schools constituted a major problem, and the promulgation of legislation which drew its provisions from an eclectic choice between their doctrines had to meet considerable opposition throughout the Ottoman Empire. Yet the Sunnī schools, for all their disputes, have always recognised each other's orthodoxy. But the case is very different between the Sunnīs and the Ja'farīs; for the former have traditionally regarded the latter as heterodox, while the Ja'farīs, on their part, have found it exceedingly difficult to apply their doctrine that "he who dies without recognising the Imām of his time, dies the death of an unbeliever" in a sense which puts the Sunnīs in any very favourable light.[455]

In 1959, the Iraqi Ministry of Justice set up a committee to draft a code of personal status based on generally accepted rules of Islamic law and the enactments of other Muslim countries.[456] The result of that effort was the existing Iraqi Code of Personal Status.[457] The current code is far shorter and more uniform in its application.[458] The result is that it applies the same rules to both Sunnis and Shi'as and gives the qādī far more discretion.[459] The opening statement of the code states:

> The committee has tried to bring together in this code the most important of the general principles of the law of personal status, leaving it to the *qadī* to consult the legal compendia in order to extract the detailed rules from those texts which are most suited

452. *Id.* at 543.
453. *Id.*
454. *Id.* at 542.
455. *Id.* at 547.
456. *Id.* at 544.
457. *Id.*
458. *Id.*
459. *Id.*

> to the provisions of this code, since the committee considers it impossible to draft a Law which includes all matters, general and detailed.[460]

Anderson notes that the passage of this law represented "a major sacrifice of sectarian principles on the altar of national unity."[461]

The first article of the code provides "that '[t]he legislative provisions of this code shall govern all matters covered by them, whether expressly or by implication'; . . . '[i]f there is no legislative provision which can be applied,'" then courts are to apply the principles of Islamic law most suited to the provisions of the code.[462] The courts shall be guided by legal precedent and Islamic jurisprudence in Iraq and other Muslim countries with legal systems that are similar to that of Iraq.[463] This hierarchy of legal sources is directly taken from Article 1 of the Iraqi Civil Code.[464]

A. Marriage

Marriage under the Iraqi Code of Personal Status remains essentially a contract between a man and a woman, and, like other contracts, it should be completed by offer and acceptance.[465] A valid marriage contract requires the presence of two witnesses, but may be effected by correspondence.[466] Lawful stipulations may be included in the marriage contract, and, notably, under Iraqi law a wife may demand annulment of the marriage contract if her husband does not observe a stipulation she has made in the contract.[467]

It should be noted that the Code of Personal Status differs from traditional Shi'a laws on marriage in that Shi'a doctrine requires no witnesses or ceremony. According to Shi'a principles, a man and a woman can even contract their marriage in secret and no other person or authority has the right to decide the legality of

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460. *Id.* at 545.
461. *Id.* at 547.
462. *Id.* at 545.
463. *Id.*
464. *Id.* ("'The committee took over the provisions of article 1 from the Civil Code, after remoulding them in a form that corresponds with the principles of the Sharī'ā.'").
465. MAJEED HAMAD AL-NAJJAR, ISLAM JAFARI RULES OF PERSONAL STATUS AND RELATED RULES OF IRAQIAN LAW 62 (A Group of Muslim Brothers 1978) ("The contract of marriage is a civil contract. It is an offer by a party and an acceptance by the other party in the same meeting, provided that they are attaining their puberty . . . .").
466. Anderson, *supra* note 446, art. 6(1)(d), 6(2), at 550.
467. *Id.* art. 6(4), at 550.

their marriage or deny it if the parties to the marriage claim they are married according to Shi'a rules.[468]

Generally, under Iraqi law, capacity to marry is complete upon the attainment of 18 years of age.[469] However, the essential characteristics for such capacity are those of "[s]anity and puberty."[470] If a boy or girl who is over the age of 16 claims that he or she has reached puberty and requests permission to marry, the qādī may grant permission for that person to marry.[471] However, the qādī must be satisfied of the truth of the claim of puberty and of the person's physical fitness for marriage.[472] The consent of the guardian of the person should normally be obtained, but if the legal guardian does not give his or her consent, the qādī may ask for it within a specified period.[473] If the legal guardian does not oppose the union or if the qādī finds the legal guardian's suspicion unreasonable, the qādī may permit the marriage.[474] A qādī may give permission for the marriage of a mentally defective person so long as it is established that the marriage will not be deleterious to public welfare, that it will be to the benefit of the mentally defective person, and the other party to the marriage expressly accepts such a union.[475]

Marriages can be confirmed after having been contracted through a process of acknowledgement. Article 11 of the Code of Personal Status states that if a man acknowledges a certain woman as his wife and they are legally marriageable, and she affirms his acknowledgement, their contract of marriage is complete.[476] If a woman acknowledges her marriage to a man, who has acknowledged his marriage to her during his life, then that marriage is confirmed. However, if the man only confirms her claim after her death, the marriage is not confirmed.[477]

1. Polygamy

Polygamous marriage is generally allowed in the Islamic tradition, with the main limit being that a man may generally not

468. *See* AL-NAJJAR, *supra* note 465, rule 103, at 61.
469. Anderson, *supra* note 446, art. 8, at 551.
470. *Id.* art. 7(1), at 551.
471. *Id.* art. 9, at 551.
472. *Id.*
473. *Id.*
474. *Id.*
475. *Id.* art. 7(2), at 551.
476. *Id.* art. 11, at 552.
477. *Id.*

marry more than four wives.[478] This tradition dates back to the Prophet Mohammad, who had many wives.[479]

Under Iraqi law, marriage to more than one wife is possible, but only with the express permission of a qādī who may authorize an additional wife only when the husband is financially capable of supporting an additional wife and when there is "some lawful benefit involved."[480] If there is a fear of unequal treatment of the co-wives, then the polygamy is not permitted. Anyone who concludes a contract of marriage in violation of these rules is subject to imprisonment for up to one year, a fine of up to 100 dīnārs, or both.[481] Further, a marriage to a second wife in violation of these rules is invalid.[482]

Iraqi law seems only to envision male-based polygamy, a paradigm consistent with Islamic law.[483]

Recent legislation in Iraqi Kurdistan has further limited polygamy in that region, prohibiting polygamy except in cases of chronic disease, infertility, and recalcitrance. The penalty for violating these conditions is a three-year imprisonment and a fine not to exceed two million Dinars.[484]

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478. *Id.* at 552; Todd M. Gillett, *The Absolution of Reynolds: The Constitutionality of Religious Polygamy* 8 WM. & MARY BILL RTS. J. 497, 508 (2000) ("Islam allows the practice of polygamy, permitting a husband to have multiple wives as long as he can 'treat them with equal fairness.'") (citing ASHGAR ALI ENGINEER, THE RIGHTS OF WOMEN IN ISLAM 22 (1992) (quoting THE KORAN 4:3)); *see also* AL-NAJJAR, *supra* note 465, rule 145, at 77.

> A man may marry up to four wives, and if he completes the number, he is forbidden to marry more than four wives and if he marries a fifth wife the contract is invalid, but he may marry if he divorce[s] one of his wives and the divorced [wife] complete[s] her waiting period. (footnote omitted).

AL-NAJJAR, *supra* note 465, rule 145, at 77.

479. *See* Heather Johnson, *There Are Worse Things Than Being Alone: Polygamy in Islam, Past, Present, and Future*, 11 WM. & MARY J. WOMEN & L. 563, 576 (2005).

480. Anderson, *supra* note 446, art. 3(4)(ii), at 549.

481. *Id.* art. 3(5)-(6), at 549.

482. *Id.* art. 13, at 550.

483. *See id.* at 563, 570.

> Polygamy in Islam is a strictly patriarchal ideal and a clear example of male favoritism in the eyes of Allah. *Sūrah* 4:3 permits only *men* multiple spouses. In Islamic patrilocal societies, children "belonged" to the father's family; thus, Muslim women could marry only one man at a time so that the paternity of her child was clear. A woman may marry again if her husband divorces her or if he dies.

Id. at 570; *see also* AL-NAJJAR, *supra* note 465, at 76 ("A married woman is forbidden to be married to another man unless she becomes divorced and completes her waiting period, if she has one.") (citation omitted).

484. *See* The Personal Status Law—A Kurdish View, Qadir Said (Member of the Kurdistan Parliament), available at http://www.niqash.org/content.php?contentTypeID=174&id=1691.

2. Temporary Marriage

One of the unique legal devices of Shi'a Islam is that of mut'a or temporary marriage. This practice is not allowed according to Sunni doctrine and is often considered a unique characteristic of traditional Shi'a family law, demonstrating a divergence between the two sects.[485]

Temporary marriage is a contract of marriage between a man and a woman, who are otherwise able to marry and contract, for a specific period of time.[486] A female virgin may not contract a temporary marriage, nor may a man tempt a female virgin into such a contract.[487] If a man is capable of supporting a wife and family, it is preferable that he choose a permanent marriage rather than a temporary one.[488]

The consequences of temporary marriage are fewer than those of a permanent one. A husband and wife in such an arrangement generally do not inherit from one another unless otherwise stipulated.[489] However, children conceived during a temporary marriage are legitimate and inherit from their parents.[490]

The period of time the marriage is to last should be fixed in the contract of marriage.[491] Otherwise, according to Shi'a doctrine, the marriage will be permanent.[492] Temporary marriages are considered automatically dissolved at the end of their period of duration but may be continued for another term or converted to a permanent marriage.[493]

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485. *See* James Thornback, *The Portrayal of Sharia in Ontario*, 10 APPEAL: REV. CURRENT L. G & L. REFORM 1, 4 (2005).

> The major Shia school of law is the Ithna Ashari. Theoretically, this school leaves more room for 'individual creative thinking and interpretation of the dogma and the law' than do the Sunni schools. In practice, the major difference is that the Ithna Ashari school allows for temporary marriage while the Sunni schools do not.

Id.

Id. at 4; *see also* Sachiko Murata, *Temporary Marriage in Islamic Law*, XIII AL-SERAT (1986), available at http://www.al-islam.org/al-serat/muta/.

> The Sunni authorities agree that mut'a was permitted by the Prophet at certain points during his lifetime, but they maintain that in the end he prohibited it completely. In contrast the Shi'is maintain that the Prophet did not ban it, and they cite numerous *hadith* from Sunni as well as Shi'i sources to prove this.

Id.

486. AL-NAJJAR, *supra* note 465, rule 108, at 66.
487. *Id.* rule 116(1), at 67.
488. *Id.* rule 116(2), at 67.
489. *Id.* rule 114, at 67.
490. *Id.* rule 115, at 67.
491. *Id.* rule 112, at 67.
492. *Id.*
493. *Id.* rule 113, at 67.

According to traditional Shi'a doctrine, "[t]he duration of a mut'a may be as little as one hour and as long as ninety-nine years."[494] At its inception, the contract must contain a specified duration.[495] Ambiguity in specifying duration may invalidate the contract or render it a permanent marriage.[496] Once properly formed, the temporary marriage (mut'a) simply ends upon the expiration of its stipulated time period. No formal divorce is required. However, should a husband desire to end the marriage sooner, Shi'a doctrine permits him "to rescind or unilaterally terminate the contract."[497]

Although the Iraqi Code of Personal Status has no provisions allowing such marriages, temporary marriage has seen a dramatic resurgence since the overthrow of the Ba'athist regime.[498]

3. Terminating Marriage

Under the Code of Personal Status, marriage may be terminated by *talaq* (repudiation). Such repudiation is normally accomplished when a man utters an unequivocal phrase such as "'You are divorced'" or "'My wife is divorced.'"[499] However, under Iraqi law, judicial recognition of the repudiation is still required. Article 39(1) states, "He who desires to repudiate his wife must commence proceedings in the Sharī'a court to demand that this be effected, and must seek a judgment accordingly."[500] If he cannot reach a court at that time, he must register the divorce during the "'*idda* period."[501]

Article 35(1) of the Code states that such repudiation has no legal effect if enacted by one who is drunk, acting under compulsion, angry, or otherwise lacking control of his mental faculties.[502] Likewise, a repudiation has no legal effect when it is postponed until a future date, suspended on an unfulfilled condition, or expressed in the form of an oath.[503]

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494. Brooke D. Rodgers-Miller, *Out of Jahiliyya: Historic and Modern Incarnations of Polygamy in the Islamic World*, 11 WM. & MARY J. WOMEN & L. 541, 552 (2005).

495. *Id.*

496. *Id.*

497. *Id.*

498. *See* Rick Jervis, *'Pleasure Marriages' Regain Popularity in Iraq*, USA TODAY, May 4, 2005 ("Pleasure marriages began to resurface after the fall of Baghdad in 2003. One reason is that Shi'as, 60% of Iraq's population, have a greater ability to shape social mores than they did under Saddam, a Sunni Arab whose top aides were also Sunnis.").

499. *See* AL-NAJJAR, *supra* note 465, rule 240, at 109.

500. *See* Anderson, *supra* note 446, art. 89(1), at 554.

501. *Id.*

502. *Id.* art. 85(1), at 553.

503. *Id.* at 554.

In addition to the *talaq* manner of terminating marriage, Iraqi law also allows for judicial divorce. Article 40 of the Code of Personal Status allows for judicial termination of a marriage by either spouse in situations where one spouse maintains that the other has behaved in such a manner as to make continued marriage impossible.[504] Adultery and, in certain situations, drug abuse are also grounds for divorce by either spouse.[505] Notably, either spouse may seek a divorce in situations where the marriage contract was concluded without the agreement of a judge before one of the spouses attained the age of 18.[506]

A wife may seek divorce from her husband in such circumstances where her husband is not able to consummate the marriage or is afflicted with some mental or physical condition that poses a danger to her.[507] A wife may also divorce a husband who, in certain situations, refuses without reason to support her.[508] Such dissolution may be adjudged after an investigation by arbitrators into the marital situation.[509]

Finally, marriage may be terminated by mutual consent of both parties. In such cases, a divorce must be effected before the qādī.[510] However, interpretation of the law indicates that such a divorce may be effected extrajudicially so long as it, like a repudiation, is recorded with the court within an appropriate timeframe.[511]

4. The Waiting Period ('Idda)

After a marriage is terminated, traditional Islamic law requires a waiting period during which the divorced or widowed wife cannot remarry.[512] Iraqi personal status law contains such re-

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504. *Id.* arts. 40(1)-(2), at 554-55.

505. *See* Iraqi Code of Personal Status, Art. 40(1).

506. *See* Iraqi Code of Personal Status, Art. 40(3).

507. Anderson, *supra* note 446, art. 44, at 555.

> [T]he matter will depend on whether the court is of the opinion, after medical evidence has been given, that the defect or disease concerned is likely to prove temporary or permanent, for in the former case, only, the pronouncement of a judicial divorce will be postponed, although the wife may decline to cohabit during the interim period.

Id.

508. *Id.* art. 45, at 555 (noting this is when the husband refused to support the wife, "'after a respite of not more than sixty days' or on a wife's inability to obtain support because her husband is 'absent, missing, in hiding or imprisoned for more than one year.'") (citation omitted).

509. *Id.* art. 40, at 554.

510. *Id.* art. 39, at 555-56.

511. *Id.* at 556.

512. AL-NAJJAR, *supra* note 465, at 118 ("Waiting period ('idda) means that in certain conditions of divorce the divorced wife is forbidden to marry immediately and during a spe-

quirements, providing that an *'idda* period shall begin "immediately from the date of repudiation, judicial divorce, or the husband's death."[513] This is true "even if the woman did not know of the repudiation or death."[514]

Iraqi law states that if the husband dies while a woman is already observing her *'idda*, she is to continue serving an *'idda*—only she must now observe the *'idda* of a widow rather than the *'idda* of a divorced woman.[515] Thus, the *'idda* of widowhood must always be observed, even by a rejected woman waiting out another *'idda*.

Though the Iraqi Code of Personal Status gives no guidance as to the maximum duration of the *'idda*,[516] it does provide "that the *'idda* of a pregnant widow shall last either four months and ten days or until her delivery, whichever is the longer period."[517]

B. Successions

The principal impact of the Code of Personal Status was in the area of successions—the area where the Sunni and Shi'a doctrines differed most dramatically.[518] One of the aims of the codification of personal status law was to palliate the destabilizing tendencies of such disparate laws by unifying the entire population under a uniform legal regime.[519]

> It was, indeed, the desire to eliminate these differences which was alleged to be the major reason for this drastic innovation, for the Statement of Objects and Reasons asserts that "the differences in the laws of succession (which is, of course, one of the major ways in which property is acquired) has led to a disparity, as a result of sectarian differences, in the rights of heirs to inheritance, and this necessitates the unification of the relevant principles. This disparity, indeed, was one of the factors which led certain interested persons to change their religion or

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cific time which will be determined according to the kind of her divorce and her physical state.").

513. Anderson, *supra* note 446, art. 49, at 556.

514. *Id.* .

515. *Id.* art. 48(4), at 556.

516. *Id.*

517. *Id.* art. 48(8), at 556.

518. *Id.* at 546.

519. *Id.* at 546-47.

> sect in order to make a sport of the laws and the principles of Sharī'a.[520]

Thus, the enactors of the Iraqi Code of Personal status did away with the distinctions between the Shi'a and Sunni schools.

1. Testate Succession (Wills and Bequests)

In order for a testament to be valid under Iraqi law, it must be contained in a document which has been "'signed, sealed, or thumb-marked by the testator."'[521] If the bequest is "'real or personal property of a value of more than 500 dīnārs, it must be authenticated by the public notary."'[522] A testament may be by oral testimony if there is a material impediment that prevents the production of documentary evidence of the bequest.[523] A legatee must be alive at the time that the bequest was made and also at the time of the testator's death.[524]

Iraqi law states that "'[n]o more than one-third (of a net estate) may be bequeathed without the consent of the heirs."'[525] This is a kind of forced heirship that resembles French law but is actually independently rooted in Islamic tradition. Abdur Rahman I. Doi traces the rule to a *hadith* reported on the authority of Sa'd bin Abi Waqqas:

> I was taken very ill during the year of the conquest of Mecca and felt that I was about to die. The Prophet visited me and I asked: "O Messenger of Allah I own a good deal of property and I have no heir except my daughter. May I make a will, leaving all my property for religious and charitable property?" He (the Prophet) replied: "No." I again asked may I do so in respect of 2/3 of my property? He replied: "No." I asked: "may I do so with one half of it?" He replied: "No." I again asked "May I do so with 1/3 of it?" The Prophet replied: "Make a will disposing of one third in that manner because one third is quite enough of the wealth that you possess. Verily if you die and leave your heirs rich is better than leaving them poor and begging. Verily the money that you

520. *Id.* at 546.
521. *Id.* art. 65(1), at 557.
522. *Id.*
523. *Id.* art. 65(2), at 557.
524. *Id.* art. 68(1), at 557-58.
525. *Id.* art. 70, at 558.

> spend for the pleasure of Allah will be rewarded, even a morsel that you lifted up to your wife's mouth.[526]

If one dies without heirs, then the State is considered the heir.[527]

Article 71 of the Iraqi Code of Personal Status contains one of the more unusual provisions of Iraqi law, stating that personal property may only be bequeathed to one who differs in religion if there is a reciprocal disposition of property and the legatee is of a different nationality.[528] Anderson notes:

> Here the distinction between real and personal property represents an innovation for which there appears to be no precedent whatever, and it is strange that difference in religion should be made a bar to testate, as well as intestate, succession in 1959 when it has never been so regarded in the past; but the requirement that a foreigner may inherit from an Iraqī only where his own law would allow an Iraqī to inherit from him is based on similar provisions which have been introduced elsewhere.[529]

Otherwise, the Code states that bequests are governed by Articles 1108—1112 of the Civil Code.[530] The first of those articles restates provisions of the Code of Personal Status, noting that a bequest of up to a third of the estate can be made to an heir or someone other than an heir.[531] Any bequest in excess of that amount can only be made with the consent of the heirs.[532]

The Iraqi Civil Code states that every disposal of property made by a person who is fatally ill which is intended to be a donation shall be treated as having effect only after death, regardless of the name given to the transaction.[533] The same is true of a release of liability to a debtor or a guarantee by one who is fatally ill.[534]

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526. *See* DOI, *supra* note 279, at 328.
527. Anderson, *supra* note 446, art. 70, at 558.
528. *Id.* art. 71, at 558.
529. *Id.* at 558 & n.66 (noting that similar provisions have also been enacted in Egypt and Syria).
530. *See id.* art. 73, at 558.
531. IRAQI CIVIL CODE art. 1108(2); Anderson, *supra* note 448, at 558-59.
532. *See* DOI, *supra* note 279, at 328.
533. IRAQI CIVIL CODE art. 1109.
534. *Id.*

No person may, while fatally ill, pay the debt of any of his or her creditors and nullify the rights of other creditors.[535] However, a person may pay the price of property he or she has purchased or of loans for which he or she has contracted during the time of illness.[536]

If, during a time of fatal illness, a person acknowledges a debt to an heir by way of alienating property, that alienation shall be considered part of a testament. If such a debt is established by an admission or other proof that he received or disposed of property entrusted to him, then such a debt can be held against the debtor's entire estate—even if his or her heirs have not consented.[537] "[C]onfirmation by the heirs of the acknowledgement during the lifetime of the legator is binding on them."[538]

The person to whom the debt is owed (and in whose favor the acknowledgement has been made during the time of sickness) is not entitled to that which has been acknowledged in his favor until payment of all the debts owed by the legator during his or her time in health have been paid.[539] Those debts determined to be due (though not acknowledged) during the time of sickness are deemed to be tantamount to those debts incurred during a period of good health and are payable, along with debts incurred during good health, before those debts which were established by the admission of the sick person on his deathbed.[540]

If, during a fatal illness, a person has acknowledged having received payment of a debt and if it is established that such debt was due while the creditor was in good health, the acknowledgement of payment is sufficient to extinguish the debt. However, where it is established that the debt was due during the illness of the creditor, acknowledgement of payment during the period of illness has no effect.[541]

If the ill person has acknowledged standing as the security for another while he was in good health, that acknowledgement is effective against his entire estate, but only after all debts incurred during his good health and those tantamount thereto have been discharged.[542]

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535. *Id.* art. 1110.
536. *Id.*
537. *Id.* art. 1111(1).
538. *Id.*
539. *Id.* art. 1111(2).
540. *Id.*
541. *Id.* art. 1112(1).
542. *Id.* art. 1112(2).

2. Intestate Succession

The regulation of intestate succession was initially given over to the Iraqi Civil Code. The Iraqi Code of Personal Status, as first enacted, stated that intestate succession would be governed by Civil Code Articles 1187—1199. This was unusual as those particular articles of the Iraqi Civil Code are focused on the inheritance of a *tassaruf* over Government land rather than intestate succession generally.[543] Although this peculiar legal crossover was later repealed, it is worth briefly highlighting the rules governing the inheritance of a *tassaruf* over Government land, which remains part of the Iraqi Civil Code and, albeit briefly, controlled the entirety of Iraqi intestate succession.

i. Intestate Succession of a Tassaruf

A *tassaruf* is a specific property right which gives its owner limited rights in government-owned land.[544] Where a *tassaruf* holder has died, the land is transferred to his successors in ranks outlined by the Iraqi Civil Code.[545] These ranks form a hierarchy, each precluding inheritance by members of any lesser order.[546] The first order consists of children and grandchildren, with males and females taking equal shares.[547] The priority among those in this rank goes first to the children, then to the grandchildren, and down the line with each descendant barring inheritance from his or her own descendant.[548]

If the descendant has died before the death of the *tassaruf* holder, then the descendants (rank by rank) replace him or her by representation.[549] Where the descendant had several children, all of whom predeceased him or her, those children inherit a pro rata share.[550]

The second order consists of the parents of the deceased and their descendants.[551] If both parents are alive, then the succession

543. *See* Anderson, *supra* note 446, at 559.

544. *See* IRAQI CIVIL CODE art. 1169; *see also* Dan E. Stigall, From Baton Rouge to Baghdad: A Comparative Overview of the Iraqi Civil Code, *65 La. L. Rev. 131* 150 (2005) (discussing with more specificity the effects and parameters of the right of *tassaruf*.)

545. *See* IRAQI CIVIL CODE art. 1187; *see also* Anderson, *supra* note 448, at 559.

546. *See id.* art. 1191; *see also* Anderson, *supra* note 446, 559.

547. *See id.* art. 1188(1); *See also* Anderson, *supra* note 446, 559.

548. *See id.* art. 1188(2); *See also* Anderson, *supra* note 446, 559.

549. *See id.*

550. *See id.*

551. *See id.* art. 1189(1); *see also* Anderson, *supra* note 446, at 559.

is limited to each of them with each taking an equal share.[552] If one parent has died before the deceased, then his or her descendants (children, then grandchildren, etc.) will take the share. If the surviving parent has no descendants, then the entire estate goes to the surviving parent.[553] If both parents are dead, then the entire estate is to be divided among the descendants of both parents, and if one parent is without descendants, then it devolves to the descendants of the parent who has descendants.[554]

The third order consists of the grandparents of the deceased and their descendants.[555] If all four grandparents are alive, they will divide the estate equally. If any of the four grandparents is deceased, then his or her children take that share. If a predeceased grandparent has no descendants, then his or her spouse inherits that portion. If a predeceased grandparent has no children and his or her spouse has also died, then the children of the deceased spouse inherit that portion. If the deceased spouse has no children, then that share devolves to the grandparents on the other side.[556]

Even though the existence of members of any greater order generally excludes inheritance by members of any lesser order, there is an exception. If the parents of a *tassaruf* holder are living or if either is living upon the death of the *tassaruf* holder and if there are people of the first order in existence, then one sixth of the estate will still devolve to the parents or surviving parent.[557]

Likewise, if there is a surviving spouse along with an heir of the first order, then that spouse will inherit one fourth of the estate.[558] If there is a surviving spouse along with an heir of the second order or third order, then that spouse will inherit one half of the estate. In situations where a descendant of a grandparent would inherit, then the surviving spouse would take that portion in addition to the half to which he or she is entitled. Where there is no heir of the first or second order and no grandparent, the surviving spouse of a person who died intestate would receive the entire estate.[559]

Article 1199 is unusual as it states that there is no right to convey property between persons disputing a debt or between an

552. *See id.* art. 1189(2); *see also* Anderson, *supra* note 446, at 559.
553. *See id.*
554. *See id.* art. 1189(2); *see also* Anderson, *supra* note 446, at 559-60.
555. *See id.* art. 1190(1); *see also* Anderson, *supra* note 446, at 560.
556. *See id.* art. 1190(2); *see also* Anderson, *supra* note 446, at 560.
557. *See id.* art. 1192.
558. *See id.* art. 1193.
559. *See id.*; *see also* Anderson, *supra* note 446, at 560.

Iraqi citizen and a foreigner.[560] This is in apparent contrast to Article 22 of the Civil Code, which states that Iraqi nationals will not inherit from a foreigner unless that foreigner's national law allows it, a rule limiting—but allowing—foreign inheritance.[561] Both rules are likely influenced by the Islamic rules which frown upon inheritance by non-Muslims.[562] Anderson notes:

> [I]t is equally obvious that article 1199 is in open contradiction with article 22 of the Civil Code (as incorporated in this code by article 2 (2)), for article 22 expressly permits a foreigner to inherit both real and personal property from an Iraqī, provided the foreigner's own law allows reciprocity in this respect. The solution to this enigma may perhaps be found in the suggestion that article 1199, at least, is intended to apply to real property alone, and thus to represent an exception to the general rule, as enunciated in article 22 of the Civil Code.[563]

However, a more likely solution to this quandary is found by interpreting Article 1199 so as to apply only in the limited case of a *tassaruf*. Such an interpretation would make sense as there would be a greater state interest in preventing government land (the only sort over which there can be a *tassaruf*) from falling under foreign control. Therefore, in the case of a *tassaruf*, the limitations on allowing foreigners to inherit are fortified.

The articles of the Iraqi Civil Code governing inheritance of a *tassaruf* also state that where there is a fetus among the heirs (a child *en ventre de sa mere*) the succession is postponed until its birth.[564] This is in accordance with both traditional Islamic law[565] and continental civil law.

The Civil Code also states that males and females were to inherit equally.[566] Thus, under the initial Iraqi personal status law,

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560. *See id.* art. 1199; *see* Anderson, *supra* note 446, at 561.

561. *Id.* art. 22(a); *see* Anderson, *supra* note 446, at 561.

562. *See e.g.*, AL-NAJJAR, *supra* note 465, at 133 ("If the deceased is muslim and has a nonmuslim heir who converts to Islam before dividing of the property of the deceased he has the right to share the muslim heirs. But if his [sic] comes after dividing of the property he has no right of succession of the deceased.").

563. *See* Anderson, *supra* note 446, at 561.

564. *See* IRAQI CIVIL CODE art. 1195.

565. *See* AL-NAJJAR, *supra* note 465, at 20 ("The legal personality of man begins with the beginning of his existence *en ventre sa mere*—in his mother's womb—on condition that, he must be born alive. But if he is born dead, his rights and duties are abolished from the time he was assumed [to exist]."), 132 ("A child *en ventre de sa mere* is entitled to inherit if it is born alive.").

566. *See* IRAQI CIVIL CODE art. 1194(1).

there was true gender equality in the area of inheritance. This was in contrast to traditional Islamic inheritance law which draws distinction between the sexes and allots greater shares and rights to male heirs.[567] For instance, under Islamic law, the eldest son of a deceased person should receive his father's movable property, with younger sons taking rights in descending order of age.[568]

However, the regime of law governing the inheritance of a *tassaruf* would only be of general applicability for a short while. Changes to the law of personal status would replace its equitable provisions and again confine its application to the narrow realm of inheritance over a specific property right.

ii. The 1963 Amendments

In March of 1963, the government which succeeded that of Abd al Karīm Qāsim enacted an amendment to the Iraqi personal status law which swept away the secular regime of intestate succession law and made Ja'farī law of intestate succession uniformly applicable to all Iraqi citizens, regardless of religious sect.[569] Under this amendment, one may inherit by virtue of a biological relationship or a valid marriage.[570] Upon death, the estate of the descendant must be used first for the burial of the deceased in a lawful manner, secondly for the payment of his or her debts, thirdly for the execution of his legacies (if any) from one third of his property, and finally for the distribution of the remainder to those who may be entitled to it. [571]

Parents and children are entitled to inherit, with the male taking twice the share of the female. Thereafter, grandparents, brothers and sisters, and the children of brothers and sisters are allowed to inherit, then uncles and aunts (paternal or maternal) and "uterine" relatives.[572] According to Ja'farī law, each class of heirs inherits to the exclusion of the next class.[573] A husband is entitled to a quarter share of his wife's estate when his wife dies and is succeeded by a descendant. A wife is entitled to an eighth of

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567. *See* AL-NAJJAR, *supra* note 465, at 138–42.

568. *See id.* at 141-42.

569. *See* J. N. D. Anderson, *Changes in the Law of Personal Status in Iraq*, 12 INT'L & COMP. L.Q. 1026, 1027 (1963).

570. *Id.* at 1029.

571. *Id.*

572. *Id.*

573. *Id.* at 1031 ("Shī'ī law is much more consonant with modern life than is the Sunni system—for the Shī'īs (to give a single example) would allow an only daughter to inherit the whole of her parent's estate, rather than share it with a distant cousin.")

her husband's estate when her husband dies and is succeeded by a descendant.[574]

V. THE NEW IRAQI CONSTITUTION

After the invasion of Iraq in 2003, a period of occupation began under the auspices of the Coalition Provisional Authority (CPA). This entity had transitional responsibility for the immediate post-war reconstruction of the civil administration of Iraq and the establishment of a transitional government.[575] The stated goal of the CPA was to transform Iraq into a unified and stable democratic Iraq that could provide effective and representative government for the Iraqi people, that would contain new and protected freedoms for all Iraqis and a growing market economy, and that could defend itself while no longer posing a threat to its neighbors or international security.[576] One of the major goals of the post-war administration was a legal overhaul that included the drafting and enactment of a new constitution to govern Iraq.[577]

The initial strategic goal of the CPA was to enact a permanent constitution by convening a convention of Iraqi representatives to be appointed by the CPA and who would author the document in a sort of Iraqi reenactment of the American constitutional convention. The CPA wanted this permanent constitution to be enacted under the administration of the Governing Council, a group of Iraqis chosen by the CPA to serve as a temporary Iraqi governing body. However, the idea of a permanent constitution was initially blocked by a non-governmental authority—a *fatwa* issued by a powerful and influential Shia leader, Ayatollah Sistani, which stated that a permanent constitution could only be acceptable if written by Iraqis who were chosen by the Iraqi people in a full, direct election.[578] Therefore, the CPA settled for a plan which would create a temporary interim constitution to be authored by the Governing Council. A direct election would follow in which a transi-

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574. *Id.* at 1030.

575. *See* AMERICA'S ROLE IN NATION-BUILDING FROM GERMANY TO IRAQ 168 (Dobbins, et. al. eds., Rand 2003).

576. *See* Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT'L L. 1, 58 (2006).

577. *See* L. PAUL BREMER III, MY YEAR IN IRAQ 43 (Simon and Schuster 2006) (quoting himself as saying that at the outset of his tenure as head of the CPA:

> First, the important takeaway is that the president insists that since the interim Iraqi government will have to write a new constitution, a new legal code, and oversee Iraq's economic reform, that governing body *has* to be fully representative of all Iraqis, north and south, Sunni, Shia, Kurd, Turkmen, and Christian.

Id.

578. *See id.* at 224–25.

tional government would be chosen by the people of Iraq. The permanent constitution would be authored by directly elected Iraqis who were part of the transitional government.[579] On October 15, 2005, immediately after the direct elections had come to pass, the final draft of the Iraqi Constitution was approved by national referendum.

The legal ramifications of the American occupation of Iraq are manifold. However, Iraq's substantive civil law will be most sharply impacted by the enactment of the new Iraqi Constitution.[580] The most dramatic changes will likely result from constitutional provisions which serve to make the authority of the Iraqi central government more diffuse and to vest religious leaders with greater legislative and religious authority.

A. Impact on the Iraqi Civil Code

Article 2 of the Iraqi Constitution states that Islam is the official religion of the state, the basis for all legislation in Iraq, and that no law shall be passed that contradicts the undisputed rules of Islam.[581] That same article goes on to say that no law may be passed that contradicts the principles of democracy or basic rights and freedoms outlined in the constitution.[582] This article, by reorganizing the basis of law so that it is now rooted in Islam, will have a tremendous impact on Iraqi civil law—at a minimum placing a stronger Islamic influence on all Iraqi law and, at most, serving to uproot the majority of the Iraqi Civil Code and replace it with Shari'a.

Looking first at the language mandating all legislation be based on Shari'a, this constitutional statement adds a greater Islamic dimension to Iraqi civil law than has ever existed in the modern history of Iraq. Since the enactment of the Iraqi Civil Code, Iraqi civil law has treated Shari'a only as a subsidiary source of law, unequivocally stating that the written provisions of the Civil Code are dominant.[583] The Civil Code states that when the written law is silent on a certain topic, Iraqi courts will decide matters in accordance with normal custom and usage.[584] Only when there is no applicable custom or usage to which the court can

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579. *See id.* at 225.

580. *See* Joseph Khawam, *A World of Lessons: The Iraqi Constitutional Experiment in Comparative* Perspective, 37 COLUM. HUM. RTS. L. REV. 717 (2006).

581. *See* Constitution of Iraq, art. 2.

582. *See id.*

583. IRAQI CIVIL CODE arts. 1(1), 2 (noting that where there is a written provision, no independent judgment (*ijtihad*) is possible).

584. *Id.* art. 1(2).

turn may an Iraqi court look to Shari'a to decide the merits of an issue.[585]

The new constitutional language changes that in that all laws must now be rooted in Shari'a and may not contradict the undisputed rules of Islam.[586] Not only does this make the sources of law expressed in the civil code problematic, ratcheting Shari'a to the top of the hierarchy, but it calls into question the continued applicability of the majority of laws and provisions in the Iraqi Civil Code. The analysis of the Iraqi codal provisions above reveals that the majority of civil laws in force in Iraq are derived from Western legal systems—namely continental civil law—rather than Shari'a. A literal reading of Article 2 of the Iraqi Constitution would abrogate those provisions and require that they be replaced by traditional Islamic rules. Therefore, all of the articles concerned with contracts in general and conflicts would be repealed with nothing certain to replace them.

Some comfort might be sought in the fact that constitutional provisions which identify Islam as the source of legislation are common in the Middle East.[587] For example, the Egyptian constitution, which exists alongside a similar civil code, has a provision that declares Islam to be the main source of legislation.[588] The practical effect of this provision in Egypt is that Islamic legal principles are considered another source of law that exists alongside domestic legislation.[589] However, the Iraqi Constitution goes a step beyond merely declaring Shari'a the main source of legislation by specifically abrogating any law that contradicts the undisputed rules of Islam. That express negation removes Article 2 of the Iraqi Constitution from the realm of aspirational or symbolic language and makes it an unambiguous constitutional prohibition.

B. Impact of the Iraqi Code of Personal Status

The Iraqi Code of Personal Status is currently in an awkward state as its applicability has been the express subject of debate and a target for elimination. On December 29, 2003, the Iraqi Governing Council, by a narrow majority, adopted a resolution (Family Law Resolution 137) that would have repealed the Iraqi Code of

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585. *Id.*

586. *See* Constitution of Iraq, art. 2.

587. *See* Khawam, *supra* note 580, at

588. *See* Constitution of Egypt, art. 2 ("Islam is the religion of the state and Arabic its official language. Islamic jurisprudence is the principal source of legislation.").

589. *See* Khawam, *supra* note 580, at 742-45 (noting that Egyptian courts have interpreted the provision in such a way that "the" main source of legislation has been interpretively blurred with "a" main source of legislation).

Personal Status and replaced that body of law with uncodified, sectarian Islamic law.[590] The push to repeal the Code of Personal Status came from Iraqi officials who sought to transfer jurisdiction over personal status matters from the central government to local Shari'a judges and give religious leaders legislative and judicial authority over such matters.[591] However, under intense lobbying by human rights groups, Ambassador L. Paul Bremer refused to approve the resolution and the Governing Council eventually repealed it.[592]

Even if those political forces did not prevail initially, the final enacted Constitution represents their eventual triumph. Article 39 of the Iraqi Constitution states, "Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices. This shall be regulated by law." This framework seems to give individuals the right to choose personal status laws to govern them according to their specific religions, sects, beliefs, or choices. However, Article 39 does not explicitly overturn preexisting personal status law.[593] The last sentence of Article 39, indicating that "This shall be regulated by law" is ambiguous language in that it could possibly be construed as referring to the Iraqi Code of Personal Status, but does not expressly do so. Another interpretation would be that the Constitution anticipates future legislation which is different from the prior law. The result is the possibility that Iraqi family law is now *a la carte*, allowing those who wish to be governed by the Iraqi Code of Personal Status to choose that set of rules, but allowing them to choose another set of rules depending on preference. Qadir Said, a member of the Kurdistan Parliament, seems to take the view that the Iraqi law of personal status is still in effect but in need of amendment so that it can conform to the mandates of the Iraqi Constitution.[594] As at least one commentator has noted, "Article 39 is the result of

590. *See* Stilt, *supra* note 56, at 753-54; *see also* Khawam, *supra* note 585, at 751.

591. *See* Khawam, *supra* note 580, at 751.

592. Stilt, *supra* note 56, at 748-54.

593. *See* Khawam, *supra* note 580, at 751-52.

> Under this framework, sub-national group rights are seemingly protected by providing individuals the right to choose personal status laws to govern them according to their "religions, sects, beliefs, or choices." At the same time, however, "Article 39 does not explicitly overturn the 1959 [Code]." So it seems that those who wish to be governed by the 1959 Code can opt to have it govern them, but it certainly can no longer act as a uniform national code.

Id.

594. *See* Said, *supra* note 484 ("I believe that it is the right of every sect and religion to practice their personal status according to their sect or religion. Therefore, there are two solutions: either every sect should have its own law issued by the parliament or to amend the Personal Status Law in a way which allows sects and religions to practice their personal status according to their beliefs.")

an unharmonious compromise and attempts to satisfy all parties without looking to the practical reality of its application."[595]

Thus, like the provisions of the Iraqi Civil Code, a strict reading of the new Constitution renders continued force of the Code of Personal status problematic. This is unfortunate as the Iraqi Code of Personal Status represents a concerted effort to create a legal regime that is faithful to the Islamic legal tradition, while simultaneously striving to eliminate sectarian differences and unify the Iraqi polity.[596] A repeal of this law would only exacerbate the differences its drafters sought so carefully to quell. Given the goals and aspirations of the new Iraqi Constitution, the impact of its provisions on the Iraqi Code of Personal Status is lamentable.

C. Gender Equality and the Changes to be Wrought

Chapter Two of the Iraqi Constitution is entitled "Liberties" and enumerates the rights and freedoms expressly granted to Iraqi citizens.[597] A panoply of articles under this section seem to obliterate any discrimination based on sex, ethnicity, or religion. For instance, Article 14 expressly states that Iraqis are equal before the law without discrimination because of sex, ethnicity, nationality, origin, color, religion, sect, belief, opinion or social or economic status.[598] In addition, Article 41 states that every individual has the freedom of thought and conscience.

Personal status law would be the most profoundly changed by the implementation of true gender equality. Specifically, the institutions of polygamy, divorce, and *'idda* would be drastically altered as, even under the progressive rules of the Iraqi Code of Personal Status, the laws in force treat males and females disparately.

Polygamy is a paternalistic legal device that favors males by allowing men to marry multiple spouses but does not extend to females the same privilege.[599] If Iraqis are truly now equal before the law without discrimination because of sex, as the new Consti-

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595. *Id.* at 750.

596. *See* Anderson, *supra* note 446, at 547.

597. *See* Constitution of Iraq, chap. 2.

598. *See* Constitution of Iraq, art. 14.

599. *See* Iraqi Code of Personal Status, art. 8; *see also* Johnson, *supra* note 483.

> Polygyuy [sic] in Islam is a strictly patriarchal ideal and a clear example of male favoritism in the eyes of Allah. *Sūrah* 4:3 permits only Men multiple spouses. In Islamic patrilocal societies, children "belonged" to the father's family; thus, Muslim women could marry only one man at a time so that the paternity of her child was clear. A woman may marry again if her husband divorces her or if he dies.

Id. at 570.

See also AL-NAJJAR, *supra* note 465, at 76 ("A married woman is forbidden to be married to another man unless she becomes divorced and completes her waiting period, if she has one.").

pressly states, then women should also be allowed to take up to four spouses. Although the thought of the matrimonial web that this would generate, with multiple spouses taking multiple spouses, is intimidating, the advent of gender equality into the regime of polygamous marriage would require it. Given the social effects of such omnibus polygamy, it may be preferable to abolish the practice altogether. In any event, the practice of extending the right to multiple marriages to men while denying it to women would clearly violate the newly enshrined constitutional principles of gender equality.

Where divorce is concerned, females would necessarily be able to invoke every manner of terminating marriage that is available to men. The ability to end a marriage by repudiation would have to be extended to females, allowing a wife to terminate a marriage in a similar fashion to husbands, by stating "You are divorced" or "My husband is divorced."[600] In the area of temporary marriage, should it be considered legal, both males and females would be able to unilaterally terminate the arrangement as true gender equality could not abide investing such power solely in the male spouse.

After divorce, true gender equality would require either abolition of the *'idda* period for females or extension of the requirements of a waiting period to males. It is completely inequitable to deprive females of a right to remarry for a period of time while not imposing such a requirement on divorced or widowed men. Therefore, the provisions regarding *'idda* would either gain applicability to both genders or be ruled altogether unconstitutional.

Should these constitutional provisions be construed in a way that provides true gender equality, there will be a predictable impact on certain specific provisions of the Iraqi Civil Code. For instance, as noted above, under the current codal provisions, the natural guardian of a minor is his father.[601] If the father has a guardian, then that guardian is the guardian of the minor as well.[602] If the minor has no father (nor a father's guardian), then the minor's grandfather is his or her guardian. If the grandfather has a guardian, then that guardian is the guardian of the minor as well.[603] If the minor has neither father nor grandfather, then the court—or a selected guardian appointed by the court—becomes the minor's guardian.[604] This regime of guardianship is completely

600. *See* AL-NAJJAR, *supra* note 465, at 109.
601. IRAQI CIVIL CODE art. 102.
602. *Id.*
603. *Id.*
604. *Id.*

paternalistic, favoring males and neglecting females entirely. A strict reading of the new constitutional provisions would render such articles unconstitutional insofar as they favor male guardianship.

Of course, the regime of law applying to guardianship is not the sole area of civil law that would see such impact. Any such provision in Iraqi civil law, favoring males or excluding females, would likewise be abrogated.

D. A Constitutional Quandary

Should the Iraqi Civil Code and Code of Personal Status be truly abrogated by Article 2 of the Constitution, then the provisions of the Iraqi Constitution will have created an intractable quandary. It seems impossible to maintain gender equality and religious freedom in a society in which all laws must be based in Islam. Take, for example, the following mandate from the Qu'ran:

> Men are the protectors [a]nd maintainers of women, [b]ecause Allah has given [t]he one more (strength) [t]han the other, and because [t]hey support them [f]rom their means. Therefore the righteous women [a]re devoutly obedient, and guard [i]n (the husband's) absence [w]hat Allah would have them guard. As to those women [o]n whose part ye fear [d]isloyalty and ill conduct, [a]dmonish them (first), ([n]ext), refuse to share their beds, ([a]nd last) beat them (lightly); [b]ut if they return to obedience, [s]eek not against them means (of annoyance).[605]

Gender equality would seem to be at odds with judicially sanctioned wife-beating. However, if all laws are abrogated save those which are rooted in Islam, then it would seem impossible to avoid giving force to this express provision of the law, placing a man within his rights when beating a disobedient wife.

Similarly, it will be difficult to reconcile any kind of religious freedom with the limitations Islamic law places on marriage between Muslims and non-Muslims.[606] If there is to be true freedom of religion and no discrimination based on one's religion, then no such limitations could exist. However, if there is a regime of law which places no such limitations, then such law is not based in Is-

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605. *See* QU'RAN 4:34.
606. *See* DOI, *supra* note 279, at 136–37.

lam, etc. The result is an infernal loop, a constitutional quandary that seems to have no easy resolution.

VI. CONCLUSION

As the end of his reign drew near, Hammurabi ordered that his laws be carved on steles to be placed in the temples to memorialize his great work.[607] Along with the laws that he gave to posterity, he wrote a warning to future kings and rulers who may consider changing his laws:

> If that man do not pay attention to my words which I have written upon my monument; if he forget my curse and do not fear the curse of god; if he abolish the judgments which I have formulated, overrule my words, alter my statutes, efface my name written thereon and write his own name; on account of these curses, commission another to do so—as for that man, be he king or lord or priest-king or commoner, whoever he may be, may the great god, the father of the gods, who has ordained my reign, take from him the glory of his sovereignty, may he break his scepter, and curse his fate![608]

Although a review of the history of Iraq might be enough to convince certain observers of this curse's reality and continued force, it is far more likely that instability and violence, depriving successive Iraqi governments of the glory of sovereignty and breaking so many scepters, is rooted in those economic, social, and governmental circumstances which have plagued so much of the developing world.[609] One of those characteristic challenges has been the ethnic conflict that has persisted since Iraq's formation.[610]

The codification of civil law has been in Iraq, as it has been throughout the rest of the world, an attempt by the modern state to develop or maintain a monopoly over its internal affairs.[611] Governments have sought to concentrate power and assimilate

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607. *See* ROUX, *supra* note 9, at 203.

608. *See* ROBERT FRANCIS HARPER, THE CODE OF HAMMURABI, KING OF BABYLON 103 (Univ. Press of the Pacific 2002).

609. *See* HOWARD HANDELMAN, THE CHALLENGE OF THIRD WORLD DEVELOPMENT 1-19 (Simon and Schuster 2006) ("[T]he most frequent arena for violent conflict has not been wars between sovereign states, but rather internal strife tied to cultural, tribal, religious, or other ethnic animosities.").

610. *See* HIRO, *supra* note 22, at 22–49.

611. *See* STRAKOSCH, *supra* note 2, at 219.

modern Iraq's diverse ethnic and cultural groups into a single nation through the enactment of the Iraqi Civil Code and the Iraqi Code of Personal Status.[612] Those legal documents have, for decades, comprised the bulk of modern Iraqi civil law.

The Iraqi Civil Code represents a synthesis of Western civil law (mostly inherited from the French via the Egyptian Civil Code) with Islamic legal principles. An analysis of the substantive law reveals a sophisticated blending of the two systems in a way that allowed Iraq to possess a modern civil code that was compatible with Western countries while maintaining ties to traditional Islamic law.

The Iraqi Code of Personal Status, which contains the majority of Iraq's family law and law of successions, was carefully drafted in an attempt to mitigate deep-seated ethnic differences and was considered "a major sacrifice of sectarian principles on the alter of national unity."[613] Though based on Islamic law, careful and expert care was taken in its drafting to eschew sectarianism and unify the population under a single law to create a cohesive society of uniform, stable, and consistent rights and duties.[614]

In the wake of the U.S. invasion of Iraq, political forces have emerged which seek to shift the locus of authority from the central government to religious figures in the Iraqi community. The new Iraqi Constitution, though heralded as a mark of a unified and democratic Iraq, contains provisions which could serve to unravel the Iraqi Civil Code and Code of Personal Status, jeopardize Iraqi civil law, and dilute the power of the central government. Provisions which mandate that every law be based in Islam and which allow for each Iraqi to be governed by his or her own sectarian law of personal status will only serve to weaken legal structures which were designed to consolidate the power of the state and mitigate ethnic divisions. These provisions may indeed undermine all secular law in Iraq and push the legal landscape of Iraq further toward a more fundamentally Islamic legal system. Thus, the ironic impact of the new Iraqi Constitution may be to exacerbate ethnic divisions and efface Al-Sanhūrī's comparativist influence in favor of greater Islamicization.

True sovereignty requires the absolute monopoly over internal affairs—a condition which cannot exist without the authority to impose law.[615] In Iraq, as in so many other countries, codification of civil law has served to unite territories and provide social cohe-

612. *See* Jwaideh, *supra* note 45, at 178.
613. *See* Anderson, *supra* note 446, at 547.
614 . *See* Anderson, *supra* note 446, at 546-47.
615. *See* HART, *supra* note 3, at 50.

of civil law has served to unite territories and provide social cohesion and stability.[616] A review of the substance of the laws which have comprised the civil law of modern Iraq reveal a sophisticated, well-drafted system of laws which have served to regulate the domestic matters of all Iraqis for decades. Discarding these laws will have a destabilizing and divisive effect on the new Iraq and may well give its future leaders cause to reflect on Hammurabi's curse.

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litical forms, in democracy as much as in absolute monarchy, this simple relationship between subjects rendering habitual obedience and a sovereign who renders habitual obedience to no one. This vertical structure composed of sovereign and subjects is, according to the theory, an essential part of a society which possesses law, as a backbone is of a man.

Id.

616. *See* STRAKOSCH, *supra* note 2, at 219.

[T]he codification of civil law was an attempt to reconcile the modern notion of the state as the supreme public authority holding a monopoly of government with the idea of the rule of law as an objective and, indeed, absolute category of social cohesion, and as such not subject to the supreme will of public authority.

Id.