

## Louisiana Law Review

---

Volume 68 | Number 3  
*Spring 2008*

---

# A Closer Look at Iraqi Property and Tort Law

Dan E. Stigall

---

### Repository Citation

Dan E. Stigall, *A Closer Look at Iraqi Property and Tort Law*, 68 La. L. Rev. (2008)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol68/iss3/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# A Closer Look at Iraqi Property and Tort Law

Dan E. Stigall\*

## TABLE OF CONTENTS

I.	Introduction.....	766
II.	Property.....	768
	A. Background.....	768
	B. Property Defined.....	771
	1. Ownership and Its Privileges.....	772
	2. Possession and Its Effects.....	774
	a. Obtaining and Losing Possession.....	774
	b. The Effects of Possession.....	776
	c. Acquisitive Prescription.....	777
	3. Ownerless (“Free”) Property.....	783
	4. Lease.....	785
	5. Dismemberments of Ownership.....	788
	a. Servitudes.....	788
	b. Usufruct.....	790
	c. Use and Habitation.....	791
	6. Security Devices.....	793
	a. Authentic Mortgage.....	794
	b. Possessory Mortgage.....	795
	7. Other Ottoman and Mesopotamian Remnants.....	797
	a. <i>Tassaruf</i> .....	797
	b. <i>Musataha</i> .....	800
	c. <i>Mugharassa</i> .....	801
	d. <i>Al Musaqat</i> .....	802
	e. <i>Al Muzara’a</i> .....	805
	f. <i>Shuf’a</i> (Preemption).....	806

---

Copyright 2008, by LOUISIANA LAW REVIEW.

\* Dan E. Stigall is a U.S. Army Judge Advocate (JAG). J.D., 2000, Louisiana State University Paul M. Hebert Law Center; B.A., 1996, Louisiana State University. Any opinion expressed is solely that of the author and not necessarily the United States Department of Defense.

The author would like to thank Professor Symeon Symeonides and Professor Sean Foley for taking the time to read this article and offer suggestions. The author would also like to thank the Perles Law Firm, PC for allowing him insights into their litigation. Most importantly, the author wishes to thank the Iraqi attorneys and students in Tikrit who so patiently entertained his questions and comments on so many hot afternoons.

III. Torts.....	809
A. Background.....	809
B. Torts Defined.....	810
C. Vicarious Liability.....	812
D. Iraqi Tort Law in U.S. Courts.....	814
E. The U.S. Occupation and Immunity from Civil Liability.....	817
IV. Conclusion.....	821

## I. INTRODUCTION

The conflict in Iraq has rapidly developed into one of the most complex undertakings ever faced by the United States.<sup>1</sup> In the shadow of the military conflict are multitudes of state-building efforts aimed at restoring peace to a country riddled with civil strife.<sup>2</sup> Among these additional objectives are numerous efforts aimed at rebuilding the legal infrastructure, restoring the rule of law, resettling displaced persons, and finding workable legal solutions to ongoing disputes regarding land and resources.<sup>3</sup>

---

1. See JAMES A. BAKER, III ET AL., *THE IRAQ STUDY GROUP REPORT* xiii (2006) (“The challenges in Iraq are complex. Violence is increasing in scope and lethality. It is fed by a Sunni Arab insurgency, Shiite militias and death squads, al Qaeda, and widespread criminality. Sectarian conflict is the principal challenge to stability. The Iraqi people have a democratically elected government, yet it is not adequately advancing national reconciliation, providing basic security, or delivering essential services.”).

2. See Testimony of Howard J. Krongard, Inspector Gen., U.S. Dep’t of State & Broadcasting Bd. of Governors, before the House Comm. on Gov’t Reform, Subcomm. on Nat’l Sec., Emerging Threats, & Int’l Relations 2 (Oct. 18, 2005), available at <http://oig.state.gov/documents/organization/55371.pdf> (“OIG was aware of some 19 entities including U.S. Government agencies, NGO’s, and private contractors, as well as foreign countries and multinational organizations, that were contributing in one form or another to rule-of-law activities in Iraq. We set out to create an inventory of such activities, to identify overlaps and duplication, and to find gaps that might exist.”).

3. See generally *Iraq: In Kurdistan, Land Disputes Fuel Unrest*, HUMAN RIGHTS WATCH, Aug. 3, 2004, <http://www.hrw.org/english/docs/2004/08/03/iraq9174.htm>. See also Rhodri C. Williams, *Applying the Lessons of Bosnia in Iraq: Whatever the Solution, Property Rights Should Be Secured*, BROOKINGS, Jan. 8, 2008, [http://www.brookings.edu/papers/2008/0108\\_iraq\\_williams.aspx](http://www.brookings.edu/papers/2008/0108_iraq_williams.aspx).

Rebuilding a legal system and restoring property rights will require a thorough knowledge of the legal regime that governs the ownership and use of property. Mediating disputes at which some form of property is a central issue will require knowledge of how property rights are conceived, how property is acquired, the allowable limits of extant property rights, and how such rights are lost. This article, therefore, provides a closer look at Iraqi property law. The major characteristics, substantive rules, underlying theories, and historical roots are discussed in order to illuminate the legal landscape and guide policymakers, international actors, and investors currently at work in this fascinating yet troubled area of the world.

Inextricably linked to the issue of legal reconstruction, property rights, and restitution is the regime of law that governs liability for damage caused to another. It is that area of law—commonly referred to as the law of torts—that determines the viability of civil actions for those in society who are aggrieved. Further, recent events have highlighted the potential for liability resulting from damage caused by those working in Iraq and the need for an understanding of the law that governs such legal action.<sup>4</sup> This article, therefore, discusses the Iraqi law governing torts, its applicability to those working in Iraq, and its treatment in U.S. courts.

This author has elsewhere detailed the sources and general outlay of Iraqi civil law and, thus, shall repeat little of that information here.<sup>5</sup> Prior work, however, has focused on the historical and epistemological origins of Iraqi law and did not extensively elaborate on certain aspects or discuss areas important for practitioners working in this specific field. This article,

---

4. See *Iraqi Families Sue Blackwater in U.S. Court*, CNN.COM, Oct. 11, 2007, <http://www.cnn.com/2007/US/law/10/11/blackwater.suit/> (“A Philadelphia law firm filed suit against Blackwater USA on Thursday on behalf of the families of Iraqis killed and injured in last month’s shooting in Baghdad’s Nusoor Square.”).

5. Dan E. Stigall, *Iraqi Civil Law: Its Sources, Substance, and Sundering*, 16 J. TRANSNAT’L L. & POL’Y 1 (2006). See also Dan E. Stigall, *From Baton Rouge to Baghdad: A Comparative Overview of the Iraqi Civil Code*, 65 LA. L. REV. 131 (2004). For an Iraqi jurist’s overview of Iraqi civil law, see S.H. AMIN, *THE LEGAL SYSTEM OF IRAQ* (1987).

therefore, seeks to focus greater attention on the laws of property and torts as they are understood in Iraq, discuss their applicability, and highlight these emergent issues of salience.

## II. PROPERTY

### A. Background

A brief outline of Iraq's legal roots is required for any complete discussion of Iraqi law, if only to set the backdrop for the discussion and provide some point of orientation. The territory of modern Iraq has a long and rich legal history that included complex, secular legal regimes such as that of the Mesopotamians and the fifth century Syro-Roman Code.<sup>6</sup> In the early seventh century, however, the legal aspect of the region would be profoundly impacted by the emergence of Islamic law.<sup>7</sup> Although secular legal institutions have long held sway in modern Iraq, the importance of Islam should be kept in mind when pondering contemporary legal institutions—even the most seemingly secular. This is not only because Islamic law still exists as a subsidiary source of law under the Iraqi Civil Code, but also because it allows one to better appreciate the cultural context of Iraqi law and the legal issues under consideration. As Sait and Lim note when discussing property law in the Middle East,

---

6. See CHIBLI MALLAT, *INTRODUCTION TO MIDDLE EASTERN LAW* 16–32 (2007).

7. See *id.* at 31–32. There are numerous schools of law in Islam, including four major Sunni schools of law: Hanafi, Shafi, Maliki, and Hanbali. See John Makdisi, *Islamic Law Bibliography*, 78 *LAW LIBR. J.* 103, 104–05 (1986). The Shi'a also developed their own schools such as the Jafaari school. See SIMON W. MURDEN, *ISLAM, THE MIDDLE EAST, AND THE NEW GLOBAL HEGEMONY* 214 (2004). Each school (maddahib) is named after its leading jurist, has its own specific rules, and occupies its own distinct place in various jurisdictions throughout the Islamic world. Scholars note that while differences appeared among the schools in terms of legal methodology and principles of law, these differences are slight relative to their similarities. See JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 60, 67 (1964). Thus, speaking of "Islamic Law" is akin to speaking of "Western Law" with all of its variances. Therefore, although this article refers to Islamic law generally, it should be recognized that these differences exist and that any reference herein to "Islamic Law" refers to a general commonality in the legal tradition to which an exception may exist.

[a] lack of engagement with the internal Islamic dialogue risks creating land systems that are bereft of authenticity and legitimacy and thereby of effectiveness and durability. Even where well-intentioned donor-driven efforts to establish modern land systems succeed, the obduracy of informal norms, practices and processes leads to unattended dualisms that undermine the prospect of integrated and unifying land policies.<sup>8</sup>

Aside from that underlying Islamic influence, one must also understand the impact of Ottoman rule on modern Iraq. The territory of modern Iraq was once a part of the Ottoman Empire and governed by Ottoman law. As late as the early twentieth century, Iraqi law was largely comprised of numerous Ottoman legal codes:

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 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*).<sup>9</sup>

As will be demonstrated more fully below, Ottoman law was not necessarily coterminous with Islamic law and must be understood as a separate, distinct influence. For instance, the Ottoman period saw a period of reform in the nineteenth century, known as the *Tanzimat* legal reform movement that resulted in the adoption by the Ottomans of a great deal of French-based law, such as the French Model Commercial Procedure Code, the French

---

8. SIRAJ SAIT & HILARY LIM, *LAND, LAW, AND ISLAM: PROPERTY AND HUMAN RIGHTS IN THE MUSLIM WORLD* 2 (2006).

9. Zuhair E. Jwaideh, *The New Civil Code of Iraq*, 22 *GEO. WASH. L. REV.* 176, 177 (1953) (footnotes omitted).

Model Penal Code, the French Model Commercial Code, the French Model Land Code, and the French Model Maritime Code.<sup>10</sup> In addition, the Ottoman government enacted the Ottoman Land Code of 1858 that maintained Islamic property law categories.<sup>11</sup> This period of reform, which introduced secular French law to the Ottoman polity, and served as a facilitator for the adoption of legal systems based on the French model in contemporary Middle Eastern states.

In the twentieth century, Iraq blended into its legal culture many elements of the continental civil law tradition with the enactment of its modern civil code. The code was principally authored by Abd al-Razzaq Al-Sanhūrī, who was then working as the dean of the Iraqi Law College.<sup>12</sup> Jwaideh notes that as Iraq approached modernity, “[t]he conditions under which [Ottoman law] had been enacted had completely changed and legislation for a new and unified civil code became a necessity.”<sup>13</sup> The substance of this new civil code was taken largely from Egyptian law (which mirrored the French civil code), then-existing Iraqi laws (such as those from the *Mejelle* and other Ottoman legislation), and from Islamic law. “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.”<sup>14</sup>

Structurally, the Iraqi Civil Code is divided into a preliminary part and two main parts, with each main part composed of two books.<sup>15</sup> The preliminary part contains definitions and general principles that find application throughout the rest of the code.<sup>16</sup> Part I of the Code addresses obligations in general and subdivisions of that area of law, such as contracts, torts, and unjust

---

10. Corinne Souad Aftimos, *Reconciling the Right of Return with Shari'a in Gaza*, 15 U. MIAMI BUS. L. REV. 1, 5 (2006).

11. *Id.*

12. Jwaideh, *supra* note 9, at 180.

13. *Id.* at 178.

14. See Oussama Arabi, *Al-Sanhūrī's Reconstruction of the Islamic Law of Contract Defects*, 6 J. ISLAMIC STUD. 153, 167 (1995) (citing AL-QĀNŪN AL-MADANĪ, No. 40 (1951)).

15. Jwaideh, *supra* note 9, at 182.

16. *Id.* at 183–84.

enrichment.<sup>17</sup> Part II addresses property, ownership, and real rights.<sup>18</sup> This article focuses on those parts of the Iraqi Civil Code dealing with torts and property law.

### B. *Property Defined*

Before launching into a discussion of the rules governing property, it is prudent to first ascertain the meaning of “property” in the context of Iraqi legal culture. In Islamic law, which influences and informs secular Iraqi civil law, property generally falls under three distinct rubrics of public property, state property, and private property.<sup>19</sup> Property in those categories is further subject to certain land tenure arrangements, such as *mulk* (private full ownership), *miri* (state ownership), *waqf* (endowment), and *metruke* (common land).<sup>20</sup> Private ownership of property is recognized, though with the understanding that everything ultimately belongs to God. Therefore, private property rights may be impinged upon when there is a compelling societal need.<sup>21</sup>

Under the provisions of the Iraqi Civil Code, every right having a material value is considered property.<sup>22</sup> The Iraqi Code states that everything is the subject of pecuniary rights except those things that are by their nature incapable of being so subjected (things to which no one may claim possession) or things that are by law excepted from being subject to pecuniary rights.<sup>23</sup>

Immovable property is comprised of those things that are fixed so that they are impossible to move or convert without damaging them, such as land, buildings, mines, dams, and other things that are, by their nature, immovable.<sup>24</sup> In contrast, movable property is anything that can be moved or converted without causing damage,

---

17. *Id.*

18. *Id.* at 184.

19. SAIT & LIM, *supra* note 8, at 11.

20. *Id.* at 12.

21. *Id.* at 12–13.

22. IRAQI CIV. CODE art. 65 (Nicola H. Karam trans., 1990).

23. *Id.* art. 61.

24. *Id.* art. 62(1).



such as money, animals, things that are measured by volume, and other things that are, by their nature, movable.<sup>25</sup>

The Iraqi Civil Code also defines three other categories of property: fungible property, intangible property, and public property. Fungible things are those things that may be substituted for each other when making a payment. These are things that are normally measured by number, measure, volume, or weight.<sup>26</sup> Intangible property consists of non-material things such as copyrights.<sup>27</sup> The immovable and movable property of the state or other public entities is considered public property. Such property cannot be alienated, encumbered, or appropriated through any sort of time limitation (such as acquisitive prescription).<sup>28</sup> However, its status as public property may be lost by the termination of its allocation for public use.<sup>29</sup>

Though the Iraqi Code does not expressly define the corollary opposites of these categories of property (non-fungible property, tangible property, and private property) their definitions are clear from an *a contrario sensu* reading of the codal language: non-fungible property consists of things that may not be substituted for one another, tangible property refers to material things, and private property is property that does not belong to the state.

### 1. *Ownership and Its Privileges*

The Iraqi Civil Code recognizes the right to complete private ownership of property. Under the Iraqi Code, perfect ownership vests the owner with the absolute right to dispose of his or her property through use, enjoyment, and exploitation of the thing owned, its fruits, crops, and anything the property produces.<sup>30</sup> Further, the owner of the property is considered to be the owner of everything commonly considered to be an essential element of it.<sup>31</sup> This comports with the Western notion of property ownership that

---

25. *Id.* art. 62(2).

26. *Id.* art. 64.

27. *Id.* art. 70.

28. *Id.* art. 71.

29. *Id.* art. 72.

30. *Id.* art. 1048.

31. *Id.* art. 1049.

Blackstone described as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”<sup>32</sup>

Property in Iraq may be owned by a single owner or jointly.<sup>33</sup> Joint ownership occurs when two or more persons own a thing. In such circumstances, their shares are presumed equal absent proof to the contrary<sup>34</sup> and each co-owner may avail himself or herself of the entirety of the jointly owned property.<sup>35</sup> In the situation of joint ownership, the Iraqi Civil Code recognizes the primacy of ownership by stating that every co-owner is the absolute owner of his or her share and may exploit it in any manner deemed appropriate so long as it does not adversely affect the other co-owners. The owner may also lease, sell, mortgage, or dispose of his own share without the permission of the other co-owners.<sup>36</sup> However, consistent with the primacy of private ownership, a co-owner may not dispose of the share of another co-owner and may not alienate or encumber any part of the jointly owned property if that property has not been partitioned.<sup>37</sup>

Jointly owned property must be jointly managed by all co-owners.<sup>38</sup> Normally, the management decisions of the majority of the co-owners will be binding on the whole, though a co-owner may petition a court for redress or to take necessary action when there is not a majority decision. The court may even appoint someone to manage the property jointly and delineate the extent of his powers.<sup>39</sup> Otherwise, if one of the co-owners assumes the task of managing the property without objection from the other co-owners, that person is considered the agent acting on behalf of all owners.<sup>40</sup>

---

32. See II WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 3 (Wayne Morrison ed., 2001) (1803).

33. IRAQI CIV. CODE art. 1061 (Nicola H. Karam trans., 1990).

34. *Id.*

35. *Id.* art. 1063(1).

36. *Id.* art. 1061(1).

37. *Id.* art. 1062(2).

38. *Id.* art. 1064(1).

39. *Id.* art. 1064(2).

40. *Id.*

## 2. *Possession and Its Effects*

The right of possession is a concept in civil law doctrine that allows for a property right that is separate from ownership, but allows for the right of use of the thing based on continued possession. Professor Yiannopoulos notes that, in civil law systems, the right to possess signifies a possession protected by the possessory action. Thus, possession, as factual authority over a thing, is distinguishable from the right to possess, which is a possessor's claim to remain in undisturbed possession of a thing and to be restored to the possession of the property if he or she has been evicted.<sup>41</sup> Restoration of possession in civil law systems is achieved by the possessory action, which has been designed to protect the right to possess and the factual authority over a thing.<sup>42</sup> Note that this right is distinct from the right of use (*usus*) that is conveyed by the owner to someone, but is a separate right that may be obtained through continuous possession of the land—and which can even result in its ownership. The elements of possession are physical control over the thing (the *corpus*) and the intent to exercise ownership (the *animus*).<sup>43</sup> In order for possession to have any effect, it must be continuous, peaceful, public, and unequivocal.<sup>44</sup> According to the civil law tradition, possession by violence or deceit has no legal effect.<sup>45</sup> Iraqi civil law has largely incorporated this concept.

### a. *Obtaining and Losing Possession*

The Iraqi Civil Code defines possession as the physical domination, directly or through an intermediary, of a thing which

---

41. A.N. Yiannopoulos, *Possession*, 51 LA. L. REV. 523, 524 (1991).

42. *Id.* at 532.

43. BRIGITTE HESS-FALLON & ANNE-MARIE SIMON, DROIT CIVIL 128 (5th ed. 1999).

44. *Id.* at 128–29.

45. *Id.* See also Yiannopoulos, *supra* note 41, at 547 (“In Louisiana and in France, the vices of possession are four: violence, clandestinity, discontinuity, and equivocality. In accord, Article 3435 of the Louisiana Civil Code declares: ‘Possession that is violent, clandestine, discontinuous, or equivocal has no legal effect.’” (footnotes omitted)).

may be the subject of a pecuniary right.<sup>46</sup> This is in accordance with traditional civilian doctrine that regards possession as a state of fact that consists of the detention of a thing in an exclusive manner and in the performance of material acts of use and enjoyment as if the possessor were owner.<sup>47</sup>

Iraqi law states that a possessor's good faith is always presumed. The result of this is that, generally, a person is not considered in bad faith unless there is proof to that effect.<sup>48</sup> The good faith of the possessor does not cease until he or she becomes aware that the possession is an encroachment on the right of another.<sup>49</sup> In the case of a universal successor in title, he or she stands in the shoes of the possessor and may invoke the privileges of good faith even when his or her predecessor was in bad faith. All successors in title, universal or otherwise, may add to their possession the possession of their predecessors.<sup>50</sup>

If dispossessed of property, the possessor of an immovable may apply to the court within a year of the date of dispossession to have the immovable restored to him or her. If the dispossession was clandestine in nature, the time limit for bringing the action begins when the dispossession was revealed.<sup>51</sup> If the person who was dispossessed has not been in possession for a year, he may not recover possession except from someone with inferior possession. The best possession is by a person with title. When two people have title, the person with the oldest title has better possession.<sup>52</sup> If the titles are of equal value or if neither has title, the person with

---

46. IRAQI CIV. CODE art. 1145 (Nicola H. Karam trans., 1990).

47. See 3 PLANIOL ET RIPERT, *TRAITE PRATIQUE DE DROIT CIVIL FRANCAIS* 158 (2d ed. Picard 1952). See also LA. CIV. CODE ANN. art. 3421 (2007) ("Possession is the detention or enjoyment of a corporeal thing, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name. The exercise of a real right, such as a servitude, with the intent to have it as one's own is quasi-possession. The rules governing possession apply by analogy to the quasi-possession of incorporeals.").

48. IRAQI CIV. CODE art. 1148(1).

49. *Id.* art. 1148(2).

50. *Id.* art. 1149.

51. *Id.* art. 1150(1).

52. *Id.* art. 1150(2).

the oldest possession wins out.<sup>53</sup> In the odd event that all title and possession are equal, the two are considered to possess jointly.<sup>54</sup>

The Iraqi Civil Code takes a strong stance against forceful or deceptive dispossession. If possession is coupled with coercion, obtained secretly, or ambiguous, it has no effect against the person coerced, the person from whom it was concealed, or the person who was confused as to its nature.<sup>55</sup> Likewise, if a person has been dispossessed but reinstates his or her possession through coercion, the original dispossessor may go to court and get a judgment reinstating his possession.<sup>56</sup> Possession may not be obtained by such means—even if it is to retake previous and rightful possession. The only means of reinstating possession is through judicial process. This is consonant with the civil law tradition of reclaiming possession through a possessory action.<sup>57</sup> Thus, in matters of dispossession and the reclaiming of land, the Iraqi civil courts occupy a preeminent role.

#### *b. The Effects of Possession*

A person who has uninterrupted possession of an immovable for one full year but whose possession is impeded may, within one year from the date of the impediment, commence proceedings to have this impediment eliminated and his or her possession restored.<sup>58</sup> Likewise, a person having possession for one year who fears his possession may be impeded by some pending work may file a claim to have that work suspended, provided that one year has not elapsed since the commencement of the work.<sup>59</sup> The right of possession is not interrupted by the loss of corporeal possession if the possessor has regained it or commenced proceedings for repossession within one year.<sup>60</sup>

---

53. *Id.*

54. *Id.*

55. *Id.* art. 1146.

56. *Id.* art. 1150(3).

57. Yiannopoulos, *supra* note 41, at 538.

58. IRAQI CIV. CODE art. 1154 (Nicola H. Karam trans., 1990).

59. *Id.* art. 1155(1).

60. *Id.* art. 1161.

If a dispossessed possessor has commenced proceedings for reinstatement, he may demand that the defendant be prevented from erecting buildings or planting trees on the disputed land for the duration of the proceedings—if he provides some security to cover any loss that would be occasioned by such abstention in the event that the court finds that the defendant is the true possessor.<sup>61</sup> Conversely, if the defendant has already erected buildings or planted trees before an order to abstain from such activity is issued, the defendant may demand that those buildings or trees remain in his possession for the duration of the proceedings—again, if he provides some security to cover any loss that would be occasioned by such a ruling should the court find that the defendant is not the true possessor.<sup>62</sup>

If a possessor is in good faith, he or she is allowed to appropriate the surpluses and benefits of the thing possessed during the time of his or her possession.<sup>63</sup> A bad faith possessor is liable to the owner for all the fruits received—even those the bad faith possessor failed to collect—during the period of bad faith possession.<sup>64</sup>

### *c. Acquisitive Prescription*

One of the fundamental distinctions between Islamic property law and continental civilian property law is the effect of nonuse on property. Islamic property ownership is traditionally tied to use so that nonuse can lead to the loss of ownership.<sup>65</sup> Under traditional civil law principles, however, property ownership is absolute, exclusive, and perpetual so that ownership is never lost by nonuse alone.<sup>66</sup> Despite this difference, some shared tenets subsist. Civil law jurists since the nineteenth century have noted that acquisitive prescription is rooted in the belief that it is in the best interest of society to have property used and maintained rather than to have it

---

61. *Id.* art. 1151.

62. *Id.* art. 1152(1).

63. *Id.* art. 1165.

64. *Id.* art. 1166.

65. SAIT & LIM, *supra* note 8, at 12.

66. HESS-FALLON & SIMON, *supra* note 43, at 120–22.

abandoned.<sup>67</sup> This is different, but not wholly hostile to Islamic land law, which holds that a landowner who neglects to use land and leaves it uncultivated for three years loses ownership.<sup>68</sup> The emphasis on land use is the same.

In addition to the loss of land through nonuse, Islamic law also allows for a kind of acquisitive prescription based on adverse possession. Professor John Makdisi has illuminated this area of the law, noting that possession in Islamic law for a ten-year period of time (called a *hiyaza*) served to give a presumption of ownership to the possessor. This was a way to settle claims to property and give judicial finality to lingering ownership concerns. Makdisi notes that even when a plaintiff could show proof that he purchased land from the defendant, he nevertheless lost the suit if the defendant remained in possession for ten years after the sale. This procedural device is conceptually different from the civil law device of acquisitive prescription in that it does not technically convey ownership based on adverse possession, but rather limits the action that may be brought against the possessor, thus creating an irrebuttable presumption of ownership from lengthy possession.<sup>69</sup> Though conceptually different, the practical result of the two devices is the same. As one scholar has noted:

In the early part of this century, scholars disputed whether prescriptive acquisition existed in Islamic law as it did in Roman law. In April 1935, Rectenwald took a position against other scholars in the field in favor of the existence of prescriptive acquisition, arguing that the possession of long duration (a period of ten years called *hiyaza*) in Islamic law was analogous to the Roman concept of usucapion according to his reading of some of the Islamic texts. A few months after Rectenwald's article and in the same law journal, however, Jules Roussier-Theaux

---

67. *Id.* at 128 (citing nineteenth century jurist Savigny for the proposition that "il est préférable, dans l'intérêt public d'avoir des propriétés immobilières entretenues plutôt qu'abandonnées par leur propriétaire").

68. SAIT & LIM, *supra* note 8, at 62 (citing a *hadith* which states, "Land belongs to God, whoever leaves it uncultivated for three consecutive years will have it taken away and given to someone else.").

69. See John A. Makdisi, *The Islamic Origins of the Common Law*, 77 N.C. L. REV. 1635, 1670 (1999).

provided a more considered study of the sources and pointed out the words of Ibn Rushd: "By consensus, the possession of long duration in itself does not transfer property but manifests it." In other words, the acquisition of property was not accomplished by a prescription that extinguished one ownership and created another. Rather, possession was the manifestation or evidence of ownership that could bar other evidence of ownership after a lengthy period of time.<sup>70</sup>

The nature of the adverse possession also impacted one's rights under Islamic property law. Islamic law did not allow an adverse possessor who took possession by force to gain title against the prior possessor by the passage of time unless it was a very long period of time, such as fifty years. In these cases, Islamic law protected the prior possessor by giving him an action for recovery (called *istihqaq*) against the adverse possession or usurpation (known as *ghasb*). The prior possessor had merely to show his possession (*yad*) in order to recover his land from the adverse possessor, without having to justify how or why he held the property.

Thus, if a usurper took forcible possession of land from a true owner and then immediately was ejected by a second usurper who took forcible possession, the first usurper would have the right to recover against the second usurper by the mere fact of his prior possession (*yad*) and could bring an action to eject the second usurper. *Yad* in this case was a presumption of ownership in favor of the plaintiff.<sup>71</sup>

Continental civil law, in contrast, gives no effect whatsoever to possession by force.<sup>72</sup>

Ottoman law also incorporated this device of barring actions to recover immovable property. The *Mejelle* states that in an action for corporeal property, the only person who can be sued is the

---

70. *Id.* (footnotes omitted).

71. *Id.* at 1674.

72. HESS-FALLON & SIMON, *supra* note 43, at 128 (noting that, in order for possession to have any effect, it must be "aussi exempte de violence").



person in possession of the property.<sup>73</sup> However, actions to recover most private property, including most immovable property, could not be brought if that property had been abandoned after fifteen years.<sup>74</sup> This rule applies not only to immovable property, but to *mulk* property (private property) generally.<sup>75</sup> It is clear that the *Mejelle* does not consider this a rule of property law but, rather, a procedural rule barring actions after a lapse of time.<sup>76</sup> Though Ottoman law disallowed the taking of another's property,<sup>77</sup> there is no exception for forceful displacement in the *Mejelle's* articles barring actions based on lapse of time.

Under the Iraqi Civil Code, a person in possession of a thing is presumed the owner of the thing unless the contrary is established.<sup>78</sup> That presumption can become a reality through the process of acquisitive prescription, which is provided in articles 1157 and 1158 of the Iraqi Code. An action by another to prove ownership of a thing or a right in rem will be barred after five years if a person continuously possesses property (or possesses a right in rem therein) which is not registered in the Land Registration Department and on the assumption that it is his own property. However, the basis of the possession must be valid title or possession occasioned by "valid grounds." Valid grounds are defined as any of the following circumstances: acquisition of wetlands, transmission of property by inheritance or will, gifts and donations, or sale.<sup>79</sup>

If a person continuously possesses (or possesses a right in rem over) a movable or immovable that is not registered in the Land Registration Department on the assumption that it is his own property, an action by another to prove ownership of the thing or the right in rem will be barred after fifteen years.

---

73. ISLAMIC CIV. CODE [MEJELLE] art. 1635 (C.R. Tyser et al. trans., 1980).

74. *Id.* art. 1660.

75. *Id.*

76. *Id.* art. 1663.

77. *Id.* art. 905 ("If the thing taken without leave is *mulk* immoveable property, the person, who takes it, must return it to the owner without any change or diminution." (emphasis added)).

78. IRAQI CIV. CODE art. 1157(1) (Nicola H. Karam trans., 1990).

79. *Id.* art. 1158(3).

In the specific case of movables, no case can be brought against a person who has possession of a movable thing and whose possession is based on a valid cause.<sup>80</sup> Rather, possession alone brings a presumption of valid cause.<sup>81</sup> The exception to this rule is for movables that have been lost through physical destruction, theft, usurpation, or what the Iraqi Code terms “abuse of confidence.”<sup>82</sup> In such cases, the owner may recover the movable from a good faith possessor within three years of the loss, theft, usurpation, or abuse of confidence. As with all cases of possession, good faith is presumed.<sup>83</sup>

It is worth comparing the Iraqi scheme to that of its progenitor, the Egyptian Civil Code. Under the Egyptian Code, when a person remains in possession of a movable or immovable, in good faith and by virtue of a just title, the property is acquired through acquisitive prescription in five years. However, a person who has possession of a movable or immovable without being its owner, or a real right over a movable or immovable without just title thereto, may acquire the ownership of the thing or the title to the real right so long as his or her possession continues uninterrupted for fifteen years.<sup>84</sup>

Interestingly, the Egyptian Code allows for the outright acquisition of property—and a concomitant loss of ownership—based on acquisitive prescription. The Iraqi Code, however, couches its laws in the language of barred rights and lost actions. Thus, while the Egyptian Code views acquisitive prescription in the more civilian sense, the Iraqi Code reflects the Islamic concept in which possession is the manifestation or evidence of ownership that bars other evidence of ownership after a lengthy period of time.<sup>85</sup>

Under both legal systems, the shorter prescriptive period is five years. Under the Egyptian Code, that shorter period is for possession in good faith and by virtue of a just title. Under the Iraqi Code, that shorter period is for possession that is not

---

80. *Id.* art. 1163(1).

81. *Id.* art. 1163(2).

82. *Id.* art. 1164.

83. *Id.* art. 1163(2).

84. EGYPTIAN CIV. CODE art. 968 (1999).

85. Makdisi, *supra* note 69, at 1671.

registered in the Land Registration Department because of the assumption that it is the possessor's own property, and then only in the case of acquisition of wetlands, transmission of property by inheritance or will, gifts and donations, or sale. The Iraqi Code, therefore, defines its concept of "good faith" and "just title" more elaborately for purposes of acquisitive prescription<sup>86</sup> than its Egyptian ancestor and sets forth specific requirements for the kind of transaction that can give rise to the shorter period.

The longer prescriptive period under both systems is fifteen years. Under the Egyptian Code, this longer period is for possession without just title. Under the Iraqi Code, it is for possession which is not registered in the Land Registration Department. However, the Iraqi Code further requires that this possession still be based on the assumption that it is the property of the possessor—a requirement that is not present in the Egyptian codal language. The result is that, under Iraqi law, one may acquire property with bad title, but one must still possess under the assumption that one is the owner of the property. Those who know they do not own the property but adversely possess anyway cannot avail themselves of acquisitive prescription in Iraq.

The Iraqi system also contains a separate provision for movable property that bars an action against a person who has possession of a movable thing and whose possession is based on a valid cause.<sup>87</sup> However, where the movables have been lost through physical destruction, theft, usurpation, or an "abuse of confidence," the owner may recover them from a good faith possessor within three years of the time that they were lost. This, in effect, creates a shorter prescriptive period for movable property—a three-year period rather than a five-year period. This conforms to traditional civil law rules regarding acquisitive prescription over movable property, according to which "[le] propriétaire a un délai de 3 ans pour revendiquer le meuble; ce

---

86. Iraqi Civil Code article 1148 actually defines "good faith" as a situation in which a person has possession of a thing not knowing that he is encroaching on the right of a third party. Though this general definition of good faith has implications in other areas of Iraqi property law, the codal language for acquisitive prescription is sufficiently narrow to exclude its application for purposes of those articles.

87. IRAQI CIV. CODE art. 1163(1) (Nicola H. Karam trans., 1990).

délai court à compter du jour de la dépossession du véritable propriétaire.”<sup>88</sup>

Thus, in the final analysis, one sees in Iraq’s provisions on acquisitive prescription a classic example of Al-Sanhūrī’s blending of two systems of law in a way that preserves essential elements of both. By comparing the Iraqi provisions to their Egyptian antecedent, one sees that the Iraqi law of acquisitive prescription is in part derived from traditional civil law doctrine. The Iraqi Code basically takes those Egyptian provisions (which reflect the pure continental civil law concept of acquisitive prescription) and rewords them in a way that maintains their substance. It reflects the Islamic notion that property is essentially transferred by limiting the actions that can be brought against the possessor. However, in all other respects, the substance of Iraqi law in this matter mirrors continental civil law. For instance, one does not lose ownership through nonuse under Iraqi law, and possession coupled with coercion or deceit has no effect whatsoever.

### 3. Ownerless (“Free”) Property

According to the Iraqi Code, a movable becomes ownerless if its owner has abandoned it with the intent of giving up ownership.<sup>89</sup> A person may acquire ownership of a free, ownerless movable by taking possession of it with the intent of owning it. This possession must be demonstrated by physical acts of possession.<sup>90</sup> These provisions of the Iraqi Code reflect the civilian notion of occupancy, which is a mode of acquiring ownership of a corporeal thing by taking possession of it.<sup>91</sup> According to traditional civilian doctrine, occupancy applies to a *res nullius* (a thing that belongs to no one) such as wild animals

---

88. HESS-FALLON & SIMON, *supra* note 43, at 131.

89. IRAQI CIV. CODE art. 1104.

90. *Id.* art. 1098.

91. PLANIOL ET RIPERT, *supra* note 47, at 603. *See also* LA. CIV. CODE ANN. art. 3412 (2007) (“Occupancy is the taking of possession of a corporeal movable that does not belong to anyone. The occupant acquires ownership the moment he takes possession.”).

and abandoned property.<sup>92</sup> Like the Louisiana Civil Code, the Iraqi Code contains no provision for occupancy of an immovable.

In spite of that similarity, the Iraqi Civil Code has an interesting set of provisions governing the use and enjoyment of free or ownerless land which departs a bit from traditional civil law systems. According to the Iraqi Code, water, grass, and fire are deemed to be public things and the general public may enjoy and acquire them when it causes no harm.<sup>93</sup> Thus, provided no harm is caused by their acts, both humans and animals are entitled to drinking water that has not been acquired and to the water of drinking places (such as fountains and canals) that are owned by third parties.<sup>94</sup> Likewise, when there is a pasture or grazing land in the borders of a village, the inhabitants of the village may graze their cattle on such land and enjoy the grass and plants of the field—as may those from other villages if their use of the area does not cause harm.<sup>95</sup> Similarly, every person may take materials such as stones and timber from ownerless mountains that are needed for construction, fuel, agriculture, and other similar needs.<sup>96</sup> However, there are limits to this open enjoyment of water, grass, and fire, however. For instance, the grass that grows on the property of another person is deemed ownerless, yet the owner may prohibit people from coming onto his or her land.<sup>97</sup>

Civilian doctrine, traditionally, has maintained that running water is a common thing that is the province of all persons. For instance, the Louisiana Digest of 1808 stated, “[t]hings which are common are those whose property belongs to nobody, and which all men may freely use, conformably to the use for that nature has intended them, such as air, running water, the sea and its shores.”<sup>98</sup> Iraqi law is, therefore, consonant with traditional civil law in that regard. The Iraqi provisions on grass, however, mark an interesting departure from traditional civilian doctrine that would not consider grass a common thing, but rather a part of the

---

92. LA. CIV. CODE ANN. art. 3412 cmt. d (2007).

93. IRAQI CIV. CODE art. 1099(1).

94. *Id.* art. 1099(2).

95. *Id.* art. 1100(2).

96. *Id.* art. 1100.

97. *Id.* art. 1099(2).

98. LA. CIV. CODE ANN. art. 3 (1808).

immovable and, therefore, the property of the owner of that immovable.<sup>99</sup> This departure is a direct influence of the *Mejelle* which held that water, grass, and fire are free to be used by all.<sup>100</sup> This is also likely influenced by traditional land use in the Middle East in which “[p]astoral lands, as opposed to cultivated land, were held as the traditional communal domain of particular tribes both for residence and herding, according to local custom.”<sup>101</sup>

#### 4. Lease

Ottoman law recognized a property law device called *Ijar*, which corresponds to the right of lease.<sup>102</sup> The *Mejelle* contained numerous provisions governing contracts of this sort. For those in the Ottoman Empire, there were basically four types of lease: the lease of merchandise, the lease of immovable property, the lease of

---

99. See *State Dep’t of Highways v. Henderson*, 138 So. 2d 597, 600 (La. App. 3d Cir. 1962) (“[T]here are a host of decisions in our jurisprudence that crops of rice, cane, corn, cotton, grown by the owner of the soil, are immovable by nature, form part of the land, and pass with it if the same be sold before they are harvested, unless expressly reserved and excepted from the sale. This is a basic concept in our law, and is so well settled as to require no further citation. Planiol, *Traité Élémentaire De Droit Civil*, has this to say regarding the interpretation placed upon the corresponding articles of the Code Napoleon: ‘2205. All plants which grow from the ground are immovable as long as they are attached to the soil. This rule applies to the most humble of plants as well as to the greatest oaks of the forest. The French Code takes this rule for granted but does not express it in general terms. The lawmaker applies it solely to crops and fruits, “to standing crops and the fruits of trees not gathered” to use the common formula (500). Foreign Codes, on the contrary, have an explicit provision covering this point (Italian Code, Art. 410, Spanish Code, Art. 334, S. 2; German Code, Art. 94).’ (Emphasis added.)”).

100. MEJELLE art. 1234 (C.R. Tyser et al. trans., 1980) (Isr.) (“Water, grass and fire are free to be used by all. In these three things mankind are partners.”). See also *id.* art. 1241 (“In the same way as grasses which grow wild on land, which has no owner, are free for the use of all, so also grasses which grow wild without anything being done to make them grow, on the *mulk* property of someone, are free for the use of all.” (emphasis added)).

101. SAIT & LIM, *supra* note 8, at 66.

102. MEJELLE art. 405 (C.R. Tyser et al. trans., 1980) (Isr.) (“In the technical language of the *Fiq-h* it is used to express the sale (*Bey*) of a known benefit in return for its known equivalent.”).

animals, and the lease of work.<sup>103</sup> In Ottoman law, the rules for each kind of lease depended on the subject matter of the contract.<sup>104</sup> As demonstrated more fully below, the Iraqi Code draws from Ottoman influences in its concept of lease (and other property rights), but, insofar as the general theory of lease is concerned, the Iraqi Code largely abandons the distinct categories of *Ijar*. Instead, it adopts a more modern, civilian theory of lease—one broad right of lease that governs the letting of various kinds of property. The Iraqi Code defines a lease as the alienation of a definite advantage in return for a defined consideration for a certain specified period by which the lessor will be bound to enable the lessee to enjoy the leased property.<sup>105</sup> This is a definition that comports with both continental civil law and Ottoman law.<sup>106</sup>

Under Iraqi law, a lessor is bound to repair and restore any defect in the leased property that has resulted in interference with its intended use.<sup>107</sup> If the lessor fails in this regard, the lessee may either rescind the contract or, with a court's permission, carry out the repairs and restoration and claim the expenses from the lessor.<sup>108</sup> If, for some reason not imputable to the lessee, the property becomes unfit for its intended use, or if such use is appreciably diminished, the lessor must restore the land to its original condition.<sup>109</sup> If the lessor fails to do so, the lessee may demand a reduction in the rent or rescind the contract.<sup>110</sup> If the leased property perishes in its entirety during the lease, the contract is considered rescinded.<sup>111</sup>

The lessee may claim from the lessor the cost of repairs carried out with the lessor's permission if they relate to maintaining and

---

103. *Id.* art. 421.

104. *Id.*

105. IRAQI CIV. CODE art. 722 (Nicola H. Karam trans., 1990).

106. LA. CIV. CODE ANN. art. 2669 (1870) ("*Lease or hire* is a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of a thing, or his labor, at a fixed price."). *See also* MEJELLE art. 421 (C.R. Tyser et al. trans., 1980) (Isr.).

107. IRAQI CIV. CODE art. 750.

108. *Id.* art. 750(2).

109. *Id.* art. 751(2).

110. *Id.*

111. *Id.* art. 751(1).

repairing the property. However, the lessee is responsible for minor repairs associated with usage.<sup>112</sup> This provision is consistent with the *Mejelle*, which stated more pedagogically:

If the lessee has done repairs, with the leave of the lessor, if the repairs are connected with the improving of the house, like changing the tiles of the roof or with the preservation of it from harm coming to it, if there is no express condition that this expense is to be paid by the lessor, still the lessee takes the expense from the lessor.

And if it concerns, only the benefit of the lessee, like repairing the oven, for that, so far as there is no express condition, the lessee cannot recover from the lessor the expense of it.<sup>113</sup>

The leased property is considered to be a trust in the hands of the lessee. Any use by the lessee of the property other than in accordance with ordinary use is considered to be an encroachment and the lessee will be held liable for all damage resulting therefrom.<sup>114</sup> Like other Iraqi contracts, a contract of lease may contain stipulations such as an option to rescind the lease within a certain period of time.<sup>115</sup> If such an option was for both the lessor and the lessee, the lease will be rescinded if either party rescinds the contract within the stated time limit.<sup>116</sup> There is an automatic option available to every lessee who has leased a thing without inspecting it, allowing him or her to accept or rescind the lease upon inspection. This right does not extend to lessors.<sup>117</sup>

It is interesting to note that both the *Mejelle* and continental civil law systems group lease and contracts-of-hire together.<sup>118</sup> The Iraqi Civil Code, however, separates contracts-of-hire or employment from its provisions on lease and enumerates the rules for that specific contract in a separate section—differentiating it a bit from the style and structure of its parents.

---

112. *Id.* art. 763.

113. MEJELLE art. 530 (C.R. Tyser et al. trans., 1980) (Isr.).

114. IRAQI CIV. CODE art. 764 (Nicola H. Karam trans., 1990).

115. *Id.* art. 726.

116. *Id.* art. 727.

117. *Id.* art. 733.

118. *See supra* note 106 and accompanying text.



### 5. *Dismemberments of Ownership*

Traditional civil law systems recognize "ownership" to be the conjunction of three rights: the right to use a thing (*usus*), the right to enjoy the fruits of a thing (*fructus*), and the right to dispose of the thing (*abusus*).<sup>119</sup> The owner is permitted to transfer some or all of these rights, in various combinations, to others. Among the rights the owner may transfer—rights known collectively as "dismemberments" of ownership—are: (1) the predial servitude (part of *usus*), (2) usufruct (*usus* and *fructus*), (3) use (part of *usus*), and (4) habitation (also part of *usus*). Iraqi law retains these traditional civil law principles.

#### a. *Servitudes*

The notion of the servitude can be traced back to Roman law, which allowed that land and buildings could be placed under a burden to adjacent property, thereby allowing the owner of one immovable (the dominant immovable) to do something on the land of the burdened (or servient) immovable.<sup>120</sup>

The Iraqi Civil Code defines "servitude" as "a right which limits the enjoyment of an immovable for the benefit of another immovable belonging to another owner."<sup>121</sup> Servitudes in Iraqi law are acquired by a contract, by inheritance, or by will.<sup>122</sup> Servitudes may be created with time limitations so that they automatically expire after a certain period of time.<sup>123</sup> They are governed by the rules laid down in the document that created them, by customary usage, and by the statutory rules that govern servitudes.<sup>124</sup>

The owner of a dominant immovable may carry out such work as is necessary to exercise the right of servitude and maintain it.<sup>125</sup> However, he or she must do so in the manner which is the least

---

119. See HESS-FALLON & SIMON, *supra* note 43, at 138.

120. ALAN WATSON, *ROMAN LAW AND COMPARATIVE LAW* 49 (1991).

121. IRAQI CIV. CODE art. 1271 (Nicola H. Karam trans., 1990).

122. *Id.* art. 1272.

123. *Id.* art. 1272(2).

124. *Id.* art. 1275.

125. *Id.* art. 1276(1).

injurious.<sup>126</sup> The owner of the servient immovable may not do anything that inhibits the exercise of the servitude. Specifically, he or she may not change the condition of the immovable or change the place originally designated for the servitude.<sup>127</sup> However, when the original location of the servitude makes the servitude more burdensome or where the original location makes it difficult to improve the servient property, the owner of the servient immovable may demand that the location of the servitude be transferred—even to another immovable that he owns or to a consenting third party's immovable.<sup>128</sup> Likewise, the owner of the dominant immovable may demand transfer of the servitude when it is to his or her benefit and does no harm to the owner of the servient immovable.<sup>129</sup>

In the absence of an agreement to the contrary, specific restrictions limiting an owner's right to build, such as a prohibition against building to a certain height, will constitute servitudes in favor of the buildings benefited by such restrictions.<sup>130</sup> Any damage resulting from a breach of such restrictions will give rise to a claim by the aggrieved party. This claim may be for specific performance but can be for compensation if it is determined that compensation is a fair and adequate form of redress.<sup>131</sup>

In the absence of an agreement to the contrary, the cost of the work required for the exercise and maintenance of the servitude is borne by the owner of the dominant immovable. If it is agreed that the owner of the servient immovable is responsible for such costs, he or she may always be freed of this obligation by abandoning the entire servient immovable or by abandoning that part of the immovable that is subject to the servitude.<sup>132</sup> If the servitude benefits both immovables, then the costs of exercise and maintenance is to be borne by both owners.<sup>133</sup>

---

126. *Id.*

127. *Id.* art. 1278(1).

128. *Id.* art. 1278(2).

129. *Id.* art. 1278(3).

130. *Id.* art. 1274(1).

131. *Id.* art. 1274(2).

132. *Id.* art. 1277(1).

133. *Id.* art. 1277(2).

The *Mejelle* contains numerous articles addressing property rights and limitations on the exercise of property ownership that correspond to servitudes, but does not contain any provisions laying out a general theory of servitudes or defining anything as a servitude.<sup>134</sup> Rather, for the Ottoman code, these rules were a list of limitations vis-à-vis the relations between neighboring property owners. The idea of “a right which limits the enjoyment of an immovable for the benefit of another immovable belonging to another owner” as it exists in Iraqi law<sup>135</sup> and Roman law<sup>136</sup> is not seen in the *Mejelle*. Accordingly, the regime of law pertaining to servitudes in the Iraqi Civil Code is primarily rooted in traditional civil law principles.

*b. Usufruct*

When the owner of a thing transfers the ability to use and enjoy the fruits of a thing (the *usus* and the *fructus*) to another, he or she is transferring the right of usufruct to that person. The usufruct is a legal institution that finds its origins in Roman law and is useful for allowing a third person to enjoy a thing and the products of that thing without transferring full ownership to that third person.<sup>137</sup>

Consistent with civilian doctrine, the Iraqi Civil Code allows that the right to use and enjoy the fruits of a thing can be owned apart from the bare title.<sup>138</sup> According to Iraqi law, the usufructuary may use the property encumbered by the usufruct and its accessories. He or she may also enjoy the fruits and products of the encumbered property.<sup>139</sup> The Code also allows that a portion of the principal can even be expended in enjoyment of these rights, but must be replenished by the usufructuary.<sup>140</sup>

---

134. See, e.g., MEJELLE art. 1198–1233 (C.R. Tyser et al. trans., 1980) (Isr.).

135. IRAQI CIV. CODE art. 1271 (Nicola H. Karam trans., 1990).

136. See WATSON, *supra* note 120, at 49.

137. See *id.* at 139 (“C’est une institution qui remonte au droit romain; l’usufruit permet d’assurer à une personne la jouissance d’un bien sans que celui-ci sorte du patrimoine du nu-propiétaire. L’usufruit est encore très utilisé.”).

138. IRAQI CIV. CODE arts. 1249, 1252.

139. *Id.* art. 1252.

140. *Id.*

Usufructs under Iraqi law are acquired by contract or through a testament<sup>141</sup> and, absent some agreement to the contrary, may be disposed of with or without consideration.<sup>142</sup> It is important to note that, in the case of an inheritance, Iraqi law allows only for the usufruct to be created by a will, as opposed to being transferred by a will, for an Iraqi usufruct is extinguished by the death of the person to whom it was originally granted.<sup>143</sup> Therefore, even though it may be transferred, its life is inextricably bound to the life of the original owner and, assuming the usufructuary outlasts any stated time period for the right, it is extinguished by his or her death.<sup>144</sup> This is in accordance with the traditional civilian rules governing usufructs, which hold that the usufruct terminates upon the death of the original usufructuary rather than upon the death of the purchaser of the usufruct.<sup>145</sup>

The usufruct ends by expiration of the time limit fixed therefor: if no time limit has been fixed it will be deemed as having been determined for the duration of the usufructuary's lifetime; it will in every case end by the death of the usufructuary even where the death takes place before the lapse (expiration) of the time limit fixed for it.<sup>146</sup>

### *c. Use and Habitation*

The Iraqi Civil Code allows that an owner may confer on another the rights of use and habitation: the rights to simply use a thing or inhabit an immovable.<sup>147</sup> These two rights in rem are common features of modern civil codes and are consistent with the theory of a tripartite dismemberment of ownership rights. Under

---

141. *Id.* art. 1250.

142. *Id.* art. 1253.

143. *Id.* art. 1253(2).

144. *Id.* art. 1257.

145. *See* 2 AUBRY ET RAU, DROIT CIVIL FRANCAIS 670 (7th ed. Esmein 1961); 2 COLIN, CAPITANT ET JULLIOT DE LA MORANDIERE, TRAITE DE DROIT CIVIL 162 (1959).

146. IRAQI CIV. CODE art. 1257 (Nicola H. Karam trans., 1990).

147. *Id.* art. 1261.

traditional civil law doctrine, they are personal rights that generally cannot be transferred to third parties.<sup>148</sup>

In the framework of the German and Greek Civil Codes, real rights that confer on a person limited advantages of use or enjoyment over an immovable belonging to another person are termed "limited personal servitudes." They constitute an intermediary category between personal and predial servitudes. Like usufruct and habitation, they are charges on things in favor of a person rather than an estate; like predial servitudes, they are necessarily charges on an immovable belonging to another person and are confined to certain advantages of use or enjoyment. Thus, they are both "personal" and "limited."<sup>149</sup>

The Iraqi Code largely maintains the personal character of these rights, stating that they are not transferable unless there is an express agreement allowing it or if there is some "strong justification" that would justify deviating from the general rule.<sup>150</sup> Beyond that, the Iraqi Code lays out few rules regarding use and habitation but does state that if the house for which a right of habitation has been granted is in need of repair, the holder of the right of habitation shall carry out those repairs; any new buildings constructed by the person with the right of habitation shall belong to him and shall be transferable to his heirs.<sup>151</sup> If the holder of the right refuses to carry out such repairs, the court shall lease the house to another person and deduct the cost of the repairs from the rent. Thereafter, upon expiration of the term of the lease, the house will be returned to the holder of the right of habitation.<sup>152</sup> Otherwise, the rights of use and habitation are largely governed by the same rules that govern usufruct so long as such rules do not conflict with the nature of these two rights.<sup>153</sup>

---

148. See LA. CIV. CODE ANN. art. 637 (2007) ("The right of habitation is neither transferable nor heritable. It may not be alienated, let, or encumbered.").

149. See *id.* art. 639 cmt. c.

150. IRAQI CIV. CODE art. 1263.

151. *Id.* art. 1264(1).

152. *Id.* art. 1264(2).

153. *Id.* art. 1265.

Civilian tradition requires a holder of a right of habitation to use it as a prudent administrator and make ordinary repairs.<sup>154</sup> Iraqi law, as noted above, also requires the holder of a right of habitation to make repairs but allows the holder of a right of habitation to acquire ownership of new buildings built on the immovable subject to his or her right of habitation. This marks a departure from traditional civilian doctrine, which restricts the right of habitation to gratuitous dwelling (as opposed to the right to start building additions to the property) and would not allow ownership to evolve therefrom. Likewise, it differs from the provisions of the *Mejelle* which has a specific article that allows for a gratuitous loan of a house. This article states that if one gives his house to another, to do the repairs and live in it without rent, and that person does the repairs by himself and occupies it for a time, then the expense of repairs falls on the person who made them and the owner cannot take anything from him for that time in the name of rent.<sup>155</sup> Though one can see in the Iraqi Code the influence of this Ottoman provision, not even this article from the *Mejelle* vests ownership of improvements in the occupier of the house. Therefore, this ownership-granting provision does not find its epistemological origin in Ottoman law, but is a more modern development.

#### 6. Security Devices

The Iraqi Civil Code contains provisions for two different kinds of mortgage: an authentic mortgage in immovable property and a possessory mortgage in any kind of property that could be the subject of commerce. Ottoman law provided for a kind of possessory mortgage that was called a *rahn*, in which a person could give movable or immovable property to be held as collateral for a debt.<sup>156</sup> However, Ottoman law did not have a non-possessory device save a kind of sale in which property was registered as sold to the lender but with the right of resumption by

---

154. See LA. CIV. CODE ANN. art. 635 (2007).

155. MEJELLE art. 481 (C.R. Tyser et al. trans., 1980) (Isr.).

156. See *id.* art. 701.

the debtor upon payment of the full debt.<sup>157</sup> The Iraqi Code contains provisions for both an authentic mortgage and a non-possessory mortgage—maximizing the sorts of security devices available under Iraqi law.

*a. Authentic Mortgage*

An authentic mortgage is a contract by which a creditor acquires a right in rem over an immovable by which he or she is preferred over ordinary creditors and creditors who are subordinate in rank for purposes of repayment.<sup>158</sup> “An authentic mortgage may not be constituted except on an immovable or on a right in rem over an immovable.”<sup>159</sup> This right corresponds with the civil law device of mortgage or *l’hypothèque*—a nonpossessory right in property to secure the performance of an obligation.<sup>160</sup> As it is a nonpossessory right, the mortgagor retains the right to administer the immovable and may even sell it subject to the limitations of the existing mortgage.<sup>161</sup> Among those limitations are the mortgagee’s right to demand cessation of certain acts which expose the mortgaged immovable to harm.<sup>162</sup>

An authentic mortgage includes the accessories of the thing mortgaged that are deemed to be constituent parts of the immovable.<sup>163</sup> In particular, it includes the trees and buildings that exist at the time of the mortgage and those planted or built thereafter. In addition, it includes all servitudes, improvements, and installations made on the immovable after the mortgage.<sup>164</sup> If

---

157. See MARTHA MUNDY & RICHARD SAUMAREZ SMITH, GOVERNING PROPERTY, MAKING THE MODERN STATE: LAW, ADMINISTRATION AND PRODUCTION IN OTTOMAN SYRIA 46 (2007). See also MEJELLE art. 396 (C.R. Tyser et al. trans., 1980) (Isr.) (“In *Bey’ il vefa*, the seller by returning the price, can demand back the thing sold, and the buyer, by returning the thing sold, can demand back the price given.”).

158. IRAQI CIV. CODE art. 1285 (Nicola H. Karam trans., 1990).

159. *Id.* art. 1290(1).

160. See LA. CIV. CODE ANN. art. 3278 (2007). See also HESS-FALLON & SIMON, *supra* note 43, at 348.

161. IRAQI CIV. CODE art. 1295.

162. *Id.* art. 1296.

163. *Id.* art. 1292(1).

164. *Id.* art. 1292(2).

the debt secured by the authentic mortgage has not been paid on the date the debt is due, the mortgagee may (without having to obtain a judgment) demand the sale of the mortgaged immovable.<sup>165</sup>

The Iraqi Civil Code states that every part of the mortgaged immovable is a security for the entire debt and every part of the debt is secured by the whole of the mortgaged immovable.<sup>166</sup> This reflects the civil law notion of “indivisibility” of mortgage. “The concept of indivisibility is central to the understanding of mortgage. In essence, ‘indivisibility’ expresses the notion that each portion of the mortgaged property secures every part of the mortgaged debt.”<sup>167</sup>

#### *b. Possessory Mortgage*

A possessory mortgage is defined as “a contract by which the mortgagor gives property to be held in possession of a mortgagee or of an [*adl*] against a debt that the mortgagee may collect.”<sup>168</sup> Its object may be anything that can be the subject of commerce, be it movable, immovable, or a debt.<sup>169</sup> In order for a possessory mortgage to be completed and become binding on the mortgagor, the mortgagee must receive the thing mortgaged.<sup>170</sup> Such a mortgage includes the fruits and accessories of the thing mortgaged.<sup>171</sup>

The Iraqi concept of a possessory mortgage is clearly derived from the *Mejelle*'s provisions on *rahn*. Under Ottoman law, property could be given to another as collateral for a debt or deposited with an *adl*.<sup>172</sup> Further, as in the Iraqi Code, any form of property could be subject to a *rahn* so long as that property was capable of being sold.<sup>173</sup>

165. *Id.* art. 1316(1).

166. *Id.* art. 1294.

167. *See* LA. CIV. CODE ANN. art. 3280 cmt. a (2007).

168. IRAQI CIV. CODE art. 1321 (Nicola H. Karam trans., 1990).

169. *Id.* art. 1328.

170. *Id.* art. 1322.

171. *Id.* art. 1330.

172. MEJELLE art. 705 (C.R. Tyser et al. trans., 1980) (Isr.).

173. *Id.* art. 709 (“It is a condition that the thing pledged be a thing that is good to be sold.”).



It is worth noting that in civil law jurisdictions, such a contract would be considered a contract of pledge rather than, as the Iraqi Code terms it, a mortgage. A pledge, in the civil law tradition, is a contract by which one debtor gives something to his or her creditor as security for a debt.<sup>174</sup> Civil law systems generally consider a mortgage to be a nonpossessory right in an immovable. Even so, civil law systems have adopted similar devices to allow security interests in movable property. Max Nathan, Jr. has noted that the use of movables as security was very limited in the early nineteenth century as the only effective security device that was available was the pledge, which required the debtor to give up possession of the thing in order to comply with the legal requirement of delivery of possession to the creditor or some other mutually agreed-upon third party.<sup>175</sup> However, as Nathan notes, with the increased mechanization of commerce and industry, movables began to replace immovables as a primary form of collateral for security. Numerous factors, such as the difficulty of pledging the inventory in a store or the equipment used in a business without hampering business activities, led to Louisiana's departure, in 1912, from the civil law tradition and the adoption of a chattel mortgage act. This act permits the mortgagor to maintain possession of the property and yet gives the creditor a preferred position with regard to the seizure and sale of the chattel that is mortgaged, as well as a right of pursuit.<sup>176</sup> Thus, the Western civil law evolution of the modern pledge came long after the Ottoman equivalent.

Analysis of the Iraqi law reveals that, in the area of security devices, the Iraqi Civil Code takes from both modern civil law and Ottoman law. In the area of the authentic mortgage, Iraqi law borrows more from the civil law and its notion of *l'hypothèque*. However, in the area of possessory mortgage or pledge, the Iraqi Code derives its legal scheme from the Ottoman *Mejelle* and the legal device of *rahn*. This was a sensible parsing as Ottoman law had a less developed idea of nonpossessory mortgages and

---

174. See, e.g., LA. CIV. CODE ANN. art. 3133 (2007).

175. Max Nathan, Jr., *The Civil Code and Modern Methods of Financing*, 50 TUL. L. REV. 583, 586 (1976).

176. *Id.* at 587.

continental civil law, as Nathan's historical excursus reveals, had a less developed regime of possessory mortgages. The end result was the adoption of the best from both systems.

### 7. *Other Ottoman and Mesopotamian Remnants*

In addition to the traditional civilian property rights enumerated above, there exist within the Iraqi Civil Code hosts of property rights that bear no relation to French law but that are vestiges of Iraq's past. These characteristically Middle Eastern legal institutions are blended into the Iraqi Civil Code and are a mark of Al-Sanhūrī's comparativist mastery. A review of these property rights is especially beneficial to Western lawyers and jurists who might be otherwise unfamiliar with them and, therefore, unable to fully understand the opportunities and limitations of agreements for the use of property.

#### a. *Tassaruf*

One of the more markedly Middle Eastern aspects of the Iraqi Civil Code is the regime of laws defining and governing the legal institution of the *tassaruf*. The origins of this property right are rooted in Iraq's unique legal history. As noted above, prior to Iraq's adoption of the Civil Code, it was governed primarily by Ottoman law. From the fifteenth century onward, Ottoman land law departed from notions of private land ownership and adopted a view that vested ownership of all land in the state.<sup>177</sup>

All land, apart from towns and the areas surrounding them, originally was owned by the family of the sultan and later on by the state. Only a few categories of farmers had full rights of ownership of land (*mulk*), a privilege conceded in return for services rendered to the state. The problem of ownership of conquered land became an issue during Mehmed II's reign because Islamic law recognized the

---

177. See MUNDY & SMITH, *supra* note 157, at 12 ("The new doctrine articulated in the fifteenth century viewed ownership of agricultural land not as arising from possession by individuals but as vested in the treasury/imam and delegated in different forms to intermediaries and cultivators.").

private ownership of arable land and allocated only a fifth of the occupied territories to the sultan. Under the Ottoman system, all arable land, trees in the mountains and honey from wild bees were considered to be *miri*, that is, the sovereign's property. The status of *miri* lands, which was not recognized by Islamic law, caused serious problems for Ottoman legal advisors such as Ebu's-Su'ud and others who from the second half of the sixteenth century onwards attempted to reinterpret the Ottoman system of land ownership rights in terms of *shari'a*.<sup>178</sup>

Thus, the state owned the land and the cultivator who was to work the land was given a right in it referred to as a *tassaruf*.<sup>179</sup> Although the Ottoman theory of land ownership no longer applies in Iraq, vestiges of this early regime of property law remain—including the notion of *miri* land and the corresponding legal device called the *tassaruf*.

Iraqi law grants the holder of a *tassaruf* extraordinary power over the property subject to the right. According to the Iraqi Civil Code, a person who is the holder of a *tassaruf* in *miri* land (government-owned land) may enjoy the land and its accessories and may grow crops and build agricultural buildings thereon. He or she may plant vineyards and trees on the *miri* land which is subject to the *tassaruf*, and may use it as a garden, orchard, forest, or pasture for grazing.<sup>180</sup> He or she may build houses, shops, or factories for agricultural purposes or tear down existing buildings to convert the land to a farm.<sup>181</sup> Vineyards, buildings, trees, and things erected on the land are considered part of the land and subject to the *tassaruf*.

178. YUNUS KOC, EARLY OTTOMAN CUSTOMARY LAW IN SHATTERING TRADITION: CUSTOM, LAW AND THE INDIVIDUAL IN THE MUSLIM MEDITERRANEAN 94 (2005).

179. SAIH & LIM, *supra* note 8, at 65 ("Ultimate title to land lay with the state or *bayt-al-mal*, which distributed through a *timar*, an Ottoman equivalent of the *iqta* (Islamic grant of land) . . . , the right to revenue of a *sipahi* (individual cavalryman). The subsistence farmer or cultivator of the land had *tassaruf* (possession) vested in him." (citation omitted)).

180. IRAQI CIV. CODE art. 1169(1) (Nicola H. Karam trans., 1990).

181. *Id.*

No person may exploit *miri* land that is subject to another's right of *tassaruf*. Another may not acquire its produce, pass through it without permission, use it as pastureland, take firewood from it, or encroach on it in any way.<sup>182</sup> Any encroachment on land that is subject to another's right of *tassaruf* renders the offending party liable for damages.<sup>183</sup> Where a person does dispossess or usurp *miri* land that is subject to another's *tassaruf*, the holder of the *tassaruf* may recover the property and claim the amount of rent for the period of time he or she was dispossessed.<sup>184</sup> If the offending party has planted things or erected buildings on the land, the holder of the *tassaruf* may demand their uprooting or demolition.<sup>185</sup> If the holder of the *tassaruf* learns of the adverse activity in time, he or she may repossess the land and demand that all construction or planting cease.<sup>186</sup>

Every Iraqi citizen may, with permission of the government, take possession of uncultivated *miri* land in areas in which it is deemed legally permissible. If he or she revives that land, then a right of *tassaruf* is established.<sup>187</sup> However, if he or she leaves the land for a period of three years, then the land will be taken and assigned to another.<sup>188</sup> If he or she has taken possession of the land without permission from the government, it will only be assigned to him or her after payment of compensation.<sup>189</sup> These provisions directly reflect traditional Islamic land law:

It is widely held amongst Islamic scholars that plain land (in its natural state) is under state ownership. Here, the state, representing the will of God, holds the land in trust for the *umma*, with powers to alienate use of the land to deserving grantees. But rights of possession are conditional upon the continued use of land and the proscription of hoarding. A landowner who neglects to use land and leaves it uncultivated will lose the right to retain it, as in the *hadith*

---

182. *Id.* art. 1175.

183. *Id.*

184. *Id.* art. 1176(1).

185. *Id.* art. 1176(2).

186. *Id.* art. 1177.

187. *Id.* art. 1186(1).

188. *Id.*

189. *Id.* art. 1186(2).

that: "Land belongs to God, whoever leaves it uncultivated for three consecutive years will have it taken away and given to someone else."<sup>190</sup>

Under Iraqi law, a person may acquire a right of *tassaruf* by cultivating *miri* land for ten consecutive years without being contested—whether or not he or she holds a title granting a *tassaruf*.<sup>191</sup> However, if this type of corporeal possession is discovered before the passage of ten years, or if the possessor admits that he or she is using the land without permission, the land will be offered to him or her for fair consideration and, if that offer should be rejected, it shall be assigned to a successful bidder at an auction.<sup>192</sup> In all cases, the possessor will be charged rent for the period during which he or she did not have the *tassaruf*.<sup>193</sup>

The *tassaruf* may be alienated, leased, or encumbered by a mortgage.<sup>194</sup> However, a *waqf* may not be established on the land subject to the *tassaruf*.<sup>195</sup> Likewise, pre-existing servitudes imposed on the *miri* land remain in force, though the Iraqi codal provisions state that, if the old right exercised was injurious (cattle allowed to graze in the vineyard) then the right will not be honored and the owner of cattle will be liable for any damage they cause.<sup>196</sup>

#### b. Musataha

*Musataha* is a "surface right" in an immovable that vests in its holder the right to build on the land of another.<sup>197</sup> Constructions built by the holder of this right are wholly owned by the builder and, absent an agreement to the contrary, may be alienated or encumbered so long as the action does not prejudice the owner of the land.<sup>198</sup> The right of *musataha* may be likewise alienated.

---

190. SAIT & LIM, *supra* note 8, at 62.

191. IRAQI CIV. CODE art. 1184 (Nicola H. Karam trans., 1990).

192. *Id.* art. 1184(2).

193. *Id.* art. 1184(3).

194. *Id.* art. 1169(2).

195. *Id.* art. 1172.

196. *Id.* art. 1174(1).

197. *Id.* art. 1266.

198. *Id.* art. 1269(1).

The right may be for a specific term that may not exceed fifty years.<sup>199</sup> In the event that no term has been fixed, either party to the contract may terminate it after notice is given and three years pass.<sup>200</sup> Similarly, though rent may be stipulated as consideration for the right, if that rent is not paid for three consecutive years, the landowner may demand rescission.<sup>201</sup>

The *musataha* is not extinguished by the alienation of the building before expiration of the term.<sup>202</sup> However, upon extinction of the right, the ownership of the buildings and other constructions are transferred to the landowner. The landowner must then pay for their value unless there is an agreement otherwise.<sup>203</sup>

This property right would be desired in a situation where one simply wishes to build on another's property without purchasing or owning it and where no agricultural development is contemplated. It would seem the perfect legal device for foreign forces who may wish to construct buildings on Iraqi soil but who, for cultural or other reasons, may not wish to be the owners of the property.

### c. Mugharassa

The Iraqi Civil Code defines a *mugharassa* as a contract in which one person gives his or her land to another to plant it with certain specified trees and tend them for a certain period of time.<sup>204</sup> At the end of a specified term, the trees and land—or just the trees—will become their common property.<sup>205</sup> The owner of the land must deliver it to the cultivator free of any occupancy.<sup>206</sup> The cultivator, unless it has been agreed otherwise, shall then complete the planting within five years from the commencement of the contract.<sup>207</sup> If the cultivator does not fulfill this obligation, then

---

199. *Id.* art. 1267(1).

200. *Id.*

201. *Id.* art. 1268.

202. *Id.* art. 1267(2).

203. *Id.* art. 1270.

204. *Id.* art. 8.

205. *Id.* art. 824.

206. *Id.* art. 826.

207. *Id.* art. 827.

the owner of the land may rescind the contract and claim damages.<sup>208</sup> Unless there is an agreement to the contrary, the cultivator bears all expenses and carries out the work needed for and the maintenance of the land during the whole term.<sup>209</sup>

A *mugharassa* is not terminated by the death of either party, but passes to their heirs. If, however, the heirs of the cultivator are unable to carry out performance of the contract, the owner of the land may rescind the contract but must first compensate the heirs for their share of the trees and any damages incurred.<sup>210</sup>

This property device is ideal for a landowner who wishes to exploit treeless land but who lacks either the resources to plant trees or the skills and experience to effectively cultivate trees. It is likewise of use to cultivators who are without land but who still wish to apply their skills for profit.

One sees the origins of this right in Section 60 of the Code of Hammurabi, which states,

If a man give a field to a gardener to plant as an orchard and the gardener plant the orchard and care for the orchard four years, in the fifth year the owner of the orchard and the gardener shall share equally; the owner of the orchard shall mark off his portion and take it.<sup>211</sup>

Thus, one sees elements of secular, pre-Islamic law manifest in the modern Iraqi Code.

#### d. Al Musaqat

The *Mejelle* defines *al musaqat* as a kind of partnership in which trees are found by one, cultivated by another, and that the fruit produced is shared between them.<sup>212</sup> The Iraqi Civil Code adopts this Ottoman legal device, stating that "*al musaqat* is a

---

208. *Id.*

209. *Id.* art. 828.

210. *Id.* art. 831.

211. THE CODE OF HAMMURABI, KING OF BABYLON 33 (Robert Francis Harper trans., 2002).

212. MEJELLE art. 1441 (C.R. Tyser et al. trans., 1980) (Isr.).

contract whereby trees are given to someone who would tend them in return for a certain specified share of the fruits thereof.”<sup>213</sup>

This particular right may be for a term, but if it is not set for a term, it shall apply to the fruit produced during that year.<sup>214</sup> It shall be null and void if the parties have fixed a long term that would likely be beyond their lifespan or for so short a term that would not permit the fruit to grow.<sup>215</sup> Where the contracting parties have fixed a term during which the fruit may or may not grow, the contract is considered valid where the fruit grows and will be divided in accordance with the terms of the contract. Where the fruit does not grow within the term, but later grows, the *al musaqat* is void and the cultivator shall be granted wages for his work. If no fruit grows, the contract is void and neither party is entitled to anything.<sup>216</sup>

Unless there is an agreement to the contrary, the work needed for the fruit before it ripens, such as watering, pollination, and preservation, is the responsibility of the cultivator, and the work needed after the fruits have ripened, such as clipping and pruning, is the responsibility of both parties.<sup>217</sup> The contract may be rescinded if the cultivator fails to do his or her part of the work or if the cultivator cannot be trusted with the fruits.<sup>218</sup>

A contract of *al musaqat* is terminated by the expiration of its term.<sup>219</sup> If the trees have produced fruits that are not ripe, the cultivator has the option to either continue the work until the end of the harvest without owing any rent to the owner of the trees, or the cultivator may cease working, in which case the owner of the trees has the option of dividing the unripened fruit in accordance with the contract or continuing to tend the crop at his own expense until they are ripe and then claiming those expenses from the cultivator.<sup>220</sup>

---

213. IRAQI CIV. CODE art. 816 (Nicola H. Karam trans., 1990).

214. *Id.* art. 817.

215. *Id.* art. 818(1).

216. *Id.* art. 818(2).

217. *Id.* art. 819.

218. *Id.* art. 821.

219. *Id.* art. 822.

220. *Id.*



The *al musaqat* is not terminated by the death of the owner of the trees, nor is it terminated by the death of the cultivator.<sup>221</sup> When the cultivator dies, his or her heirs may claim rescission of the contract only if they establish that the duties of the contract are onerous beyond their capabilities.<sup>222</sup> If the contract is rescinded while the trees are tender, the owner of the trees again has the option of dividing the unripened fruit in accordance with the contract or to continue to tend the crop at his own expense until they are ripe and then claim those expenses from the cultivator.<sup>223</sup>

The cultivator may not sublet the *al musaqat* to a third party except with the permission of the owner of the trees. If the cultivator does so without permission, the fruits belong to the owner of the land who will pay the sublessee wages for his labor, leaving nothing to the offending cultivator.<sup>224</sup>

This kind of contract is similar to *mugharassa* in that it is for the cultivation of trees, but is of use in the situation where the owner of the trees asks that they be cultivated and agrees only to share the fruits (as opposed to *mugharassa* in which at the end of a specified term, the trees and land—or just the trees—will become their common property).<sup>225</sup> Therefore, one need not be the landowner in order to enter into a contract of *al musaqat*—merely the tree owner—and one need only share ownership of the harvest.

It is worth noting that the right of *al musaqat* finds its early origins in the Code of Hammurabi, which laid out detailed provisions for sharecropping and the agricultural development and cultivation of orchards.<sup>226</sup> The same is true of the right of *al muzara'a*.<sup>227</sup>

---

221. *Id.* art. 823(1).

222. *Id.* art. 823(2).

223. *Id.* arts. 822, 823(3).

224. *Id.* art. 820.

225. *Id.* art. 824.

226. MALLAT, *supra* note 6, at 21–22.

227. *Id.*

e. Al Muzara'a

*Al muzara'a* is a contract for farming in which the landowner and the cultivator agree to share the resulting crop.<sup>228</sup> Although one sees its epistemological roots in early Mesopotamian law, this property right, in its more developed form, is derived from Ottoman law as reflected in the *Mejelle* which defines *al muzara'a* as "a kind of partnership, where the land comes from one, and the work from the other, i.e., a partnership to cultivate and divide the crops."<sup>229</sup> The Iraqi Civil Code contains a more elaborate set of rules governing this property right than its Ottoman predecessor. Even so, the basic idea of *al muzara'a* is maintained.

According to the Iraqi Code, upon concluding a contract of *al muzara'a*, the cultivator's share must be designated as common property.<sup>230</sup> The landowner retains the authority to supervise the exploitation of the property, subject to agreement by the parties.<sup>231</sup> The cultivator bears the expenses of the agricultural work, maintenance of the crop, harvesting and preserving the crop, and repair of the tools and minor repairs of agricultural buildings.<sup>232</sup> The owner of the land shall bear the cost of major repairs to agricultural buildings and improvements to the land.<sup>233</sup> Both parties share the expenses for seeds, fertilizers, and insecticides in accordance with their share of the crop.<sup>234</sup>

A cultivator who is in an *al muzara'a* contract may not sublet the land to a third party or assign his right to a third party without the consent of the owner.<sup>235</sup> If the cultivator violates this rule, the owner of the land may rescind the contract or claim damages.<sup>236</sup> Likewise, if the cultivator is unable to perform his duties and no

---

228. IRAQI CIV. CODE art. 805 (Nicola H. Karam trans., 1990).

229. MEJELLE art. 1431 (C.R. Tyser et al. trans., 1980) (Isr.).

230. IRAQI CIV. CODE art. 806.

231. *Id.* art. 808.

232. *Id.* art. 809(1).

233. *Id.* art. 809(2).

234. *Id.* art. 809(3).

235. *Id.* art. 810.

236. *Id.*

one in the cultivator's family can do so, the owner of the land may rescind the contract.<sup>237</sup>

If the contract is rescinded while the crop is still green, the owner of the land may either divide the crop in accordance with the terms of the agreement, or, in the event that the cultivator has died and the heirs rescind the contract, the owner of the land may either give the heirs the value of the decedent's share or may wait until the crop ripens and deduct any expenses associated with that delay from the share of the dead cultivator.<sup>238</sup>

If the term of the contract has expired before the crop has ripened, then the crop will be left in the field until it has ripened. In such a circumstance, the cultivator must pay rent for the area of the land occupied by his share of the crop.<sup>239</sup>

A contract for *al muzara'a* is not rescinded by the death of the owner of the land or the cultivator.<sup>240</sup> Rather, it is a heritable right. If the cultivator dies, his heirs may only claim rescission of the contract only if they establish that the duties are onerous beyond their capabilities.<sup>241</sup> Where the contract has been rescinded, the crop will fall to the owner of the seeds and the other party will receive a comparable wage.<sup>242</sup>

#### *f. Shuf'a (Preemption)*

The notion of preemption is a direct influence of Islamic land law. It serves as a sort of automatic right of first refusal that is vested in individuals who may have an interest in who owns certain property, such as other co-owners or the owners of adjacent property. It is a limitation on the right to transfer property, but one that is considered acceptable given the interests of other property owners.

*Shuf'a* (pre-emption) does set a barrier in Islamic law upon the free disposal of *milk* land. It is the means by which a

---

237. *Id.* art. 811.

238. *Id.* art. 813.

239. *Id.* art. 814.

240. *Id.* art. 812(1).

241. *Id.* art. 812(2).

242. *Id.* art. 815.

co-inheritor or neighbour may use a privileged option to purchase land when it is for sale. For instance, the application of Islamic inheritance rules to a deceased's estate will in general lead to property, such as a house, being owned in fractional shares by two or more co-owners. When one of those co-owners sells his or her share to a third party who is not one of the joint owners, the sale can be pre-empted by another co-owner. The co-owner will receive the share after compensating the third party buyer for the price paid. *Shuf'a* is a process capable of keeping strangers to communities on the outside and thereby placing limitation upon certain kinds of economic development. Different schools of law take different approaches to pre-emption, with the Maliki and Shafi'i schools limiting its scope to co-owners, while the Hanafi school extends the right to an adjoining neighbour.<sup>243</sup>

The *Mejelle* gives the following example of how this property device sometimes worked during the period of the Ottoman law:

*For example*—When several gardens share in a [right in rem] and one of them is sold, all the owners of the other gardens become entitled to buy the garden sold at the price for which it was sold, whether they are adjoining neighbours or not.

Likewise, when a house is sold, whose door opens on a blind alley, the whole of the owners of the other houses having their doors on that blind alley have together the right to purchase the house sold, for the price at which it was sold, whether they are adjoining neighbours or whether they are not.

But when a house is sold, which is one of those houses which take water from a river which is for the public benefit, or whose door opens on a public road, there is no right of pre-emption for the owners of the other houses, which take water from that river, or the doors of which are on that public road.<sup>244</sup>

---

243. SAIT & LIM, *supra* note 8, at 63 (citations omitted).

244. MEJELLE art. 1008 (C.R. Tyser et al. trans., 1980) (Isr.).

The Iraqi Civil Code defines preemption as a right to appropriate an immovable that has been sold for the purchase price and expenses.<sup>245</sup> This right is given to the co-owner of a jointly owned immovable or the owner of a joint servitude over an immovable. It is also given to the owner of contiguous property when the two immovables are houses or plots for building houses, or when one of the contiguous immovables has a servitude over the other.<sup>246</sup> A person who intends to exercise the right of preemption (the preemptor) must declare the intention to do so to both the vendor and the purchaser or to the Department of Land Registration within fifteen days from the date of service on him or her of a formal notice of the sale.<sup>247</sup> If such a declaration is not made, then the preemptor forfeits the right of preemption.<sup>248</sup> The person claiming the right of preemption must commence his or her action against both the vendor and the purchaser within thirty days of declaring his or her desire to preempt.<sup>249</sup> Once a claim of preemption comes before a court, it is to be considered one of the court's most urgent cases.<sup>250</sup>

The right of preemption under the Iraqi Civil Code is indivisible.<sup>251</sup> A person claiming this right may not simply claim a part of the immovable but must claim the entire thing.<sup>252</sup> Once a court rules in favor of a claim of preemption, the judgment is registered in the Land Registry Department.<sup>253</sup> When a person buys a piece of property that is susceptible to preemption but sells it before the preemptor can claim the right of preemption, the right of preemption lapses vis-à-vis the first owner but is revived against the person to whom the property was sold.<sup>254</sup>

---

245. IRAQI CIV. CODE art. 1128 (Nicola H. Karam trans., 1990).

246. *Id.* art. 1129.

247. *Id.* art. 1138.

248. *Id.*

249. *Id.* art. 1139(1).

250. *See id.* art. 1139(2).

251. *Id.* art. 1135.

252. *Id.*

253. *Id.* art. 1141.

254. *Id.* art. 1137.

## III. TORTS

## A. Background

In classical Islamic law, there is no separate concept of tort.<sup>255</sup> This is partly due to the fact that classical Islamic law broadly mandated that those who cause harm repair it.<sup>256</sup> A corollary to this principle is that Islamic legal systems tend to follow a rule of strict and “specific” liability when it comes to civil liability for torts. As Chibli Mallat notes, the general *hadith* on the illegality of doing harm imposed a need to repair it irrespective of fault, negligence, or intent on the part of the person who caused it.<sup>257</sup> This legal principle is evident in the *Mejelle*, which states, “A person who does an act, even if he does not act intentionally, is responsible.”<sup>258</sup> The *Mejelle* also is reticent to find culpability in anyone save the person who actually commits an act, noting, “The 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.”<sup>259</sup> Likewise, “In a case in which there are both a perpetrator, i.e., someone who in person does a thing, and a person who is in the indirect cause of its having been done (*Muttesebbib*) the judgment falls on the actual perpetrator.”<sup>260</sup> As Mallat phrases this general rule, “liability is strict and stops with the tortfeasor.”<sup>261</sup>

This notion of “specific” liability<sup>262</sup> and the absence of vicarious liability 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 whom one is responsible or by the things under one’s

---

255. See MALLAT, *supra* note 6, at 288.

256. See *id.*

257. *Id.* at 290.

258. MEJELLE art. 92 (C.R. Tyser et al. trans., 1980) (Isr.).

259. *Id.* art. 89.

260. *Id.* art. 90.

261. MALLAT, *supra* note 6, at 290.

262. I use the term “specific” liability to avoid confusion with the concept of “strict” liability. The latter refers to liability without fault. The former is intended to convey the idea of fault strictly tied to the wrongdoer.

responsibility and control.<sup>263</sup> Many modern Middle Eastern legal systems have, however, adopted a more Western approach and have incorporated notions of fault and respondeat superior.

### *B. Torts Defined*

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."<sup>264</sup> 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.<sup>265</sup> Every assault that causes damage other than damage expressly detailed in other articles also requires compensation.<sup>266</sup>

S.H. Amin, when discussing the basic concept of liability under Iraqi law, has remarked on the implications of strict liability in the codal language: "The ramifications of this Article for personal injuries are many. First, this Article, no doubt deliberately, omits any references to the concepts of intention, culpa or fault. Accordingly, all personal injuries should be compensated for under Iraqi law, whether they be caused intentionally, negligently, or otherwise."<sup>267</sup>

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.<sup>268</sup> Financial damage to third parties also merits compensation.<sup>269</sup>

Damages may be awarded to spouses and immediate relatives of the family of the victim resulting from moral injury caused by

---

263. See CODE CIVIL [C. CIV.] art. 1384 (Fr.).

264. IRAQI CIV. CODE art. 202 (Nicola H. Karam trans., 1990).

265. *Id.* art. 203.

266. *Id.* art. 204.

267. AMIN, *supra* note 5, at 413.

268. IRAQI CIV. CODE art. 205(1).

269. *Id.*

disease.<sup>270</sup> 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.<sup>271</sup>

Courts are to calculate damages commensurately with the injury and the loss sustained by the victim, provided the loss was the result of the unlawful act.<sup>272</sup> This calculation includes the loss of benefits of things, lost wages, etc.<sup>273</sup> If 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.<sup>274</sup>

The amount of damages to be paid is normally calculated monetarily; however a court may, in certain circumstances, order that a party restore the situation to the *status quo ante* or perform a certain act.<sup>275</sup> 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.<sup>276</sup>

In situations where a person is ordered to commit an unlawful act that 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.<sup>277</sup> Public officials, however, are not responsible for damage done by their acts when ordered by superiors to perform them. 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.<sup>278</sup>

Civil penalties are separate from criminal penalties and the imposition of the former in no way impacts the latter.<sup>279</sup> Civil

---

270. *Id.* art. 205(2).

271. *Id.* art. 205(3).

272. *Id.* art. 207(1).

273. *Id.* art. 207(2).

274. *Id.* art. 208.

275. *Id.* art. 209(2).

276. *Id.* art. 209(1).

277. *Id.* art. 215(1).

278. *Id.* art. 215(2).

279. *Id.* art. 206(1).



courts are bound to decide civil liability and compensation without regard to criminal judgments or principles of criminal law.<sup>280</sup>

Although the general notion in Islamic and Iraqi law is that liability attaches irrespective of fault, negligence, or intent on the part of the person who caused it, the Iraqi Code does allow for certain defenses, such as *force majeure*. Generally, unless there is an agreement to the contrary, liability can be evaded if a person can establish that the injury has arisen from a cause beyond his or her control.<sup>281</sup> Further, 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.<sup>282</sup> Those who act in self defense or in the defense of a third party are not liable so long as they do not use more force than is required.<sup>283</sup> Likewise, personal injuries are permissible when committed in order to ward off public injury.<sup>284</sup>

### C. Vicarious Liability

As noted above, the general articles on Iraqi torts track the Islamic principle of strict liability. Iraqi law also adopts the principle of "specific" liability in mandating that the offensive act is attributed to the person who commits it rather than the person who procures it. Such a rule constrains liability to the actual wrongdoer and, in general terms, eliminates the possibility of vicarious liability. Nonetheless, the Iraqi Code does contain a few narrow—albeit significant—exceptions to this rule which, although not establishing a regime of respondeat superior, effect such a result in specific situations. For instance, owners of animals are liable for offenses committed by their animals when they fail to exercise reasonable control and take precautions to safeguard others from harm.<sup>285</sup> Likewise, the father or grandfather of a minor who causes injury is obligated to compensate for that harm

---

280. *Id.* art. 206(2).

281. *Id.* art. 211.

282. *Id.* art. 210.

283. *Id.* art. 212(2).

284. *Id.* art. 214(1).

285. *Id.* arts. 221–26.

unless he can establish that he exercised sufficient control over the minor or, where sufficient control was not exercised, that the harm would have occurred regardless.<sup>286</sup> Liability also attaches to owners of buildings which collapse due to dilapidation.<sup>287</sup>

The most significant exception to the rule against vicarious liability in the Iraqi Civil Code—and the one most likely to be invoked in future litigation—is the liability of government municipalities and commercial entities for injuries caused by their employees during the course of their service. Article 219(1) of the Iraqi Code reads: “Government municipalities and other institutions which perform a public service as well as every person who exploits an industrial or commercial enterprise are responsible for the damage (injury) caused by their employees if the injury resulted from an encroachment committed by them in the course of their service.”<sup>288</sup>

Thus, government and commercial employees’ actions can give rise to causes of action against their employers for acts committed in the course of the employees’ service. As discussed more fully below, the bulk of the personnel in Iraq who support the Coalition would fall neatly under this rubric, though employees of non-commercial entities such as Nongovernmental Organizations (NGOs) would not.

A defense to this form of liability exists for government and commercial entities in that the employer may relieve itself of liability by establishing that the requisite amount of control to prevent the injury was exercised. Even where the requisite amount of control was not exercised, the employer may still escape liability by showing that the injury would have happened even if the requisite amount of control had been exercised.<sup>289</sup>

Similar kinds of liability are imposed on the owners of buildings that fall and hurt another,<sup>290</sup> persons who unnecessarily stop an animal in a public road,<sup>291</sup> and owners of machinery that

---

286. *Id.* art. 218.

287. *Id.* art. 229.

288. *Id.* art. 219(1).

289. *Id.* art. 219(2).

290. *Id.* art. 229.

291. *Id.* art. 225.

requires special care but who fail to take adequate precautions to prevent injury.<sup>292</sup>

No claim for damages resulting from any unlawful act can be brought after three years from the day that the injured person became aware of the injury. In no case can a claim be brought fifteen years from the day of the occurrence.<sup>293</sup>

#### *D. Iraqi Tort Law in U.S. Courts*

A recent legal phenomenon associated with the U.S. presence in Iraq is the increasing use of Iraqi civil law in U.S. courts. Several courts have already had occasion to consider Iraqi civil law's applicability to domestic U.S. cases. A recent case in Georgia is exemplary of this trend and demonstrates how Iraqi substantive law can suddenly become the determinative factor in domestic civil litigation.

*Baragona v. Kuwait Gulf Link Transport Co.* involved the tragic death of an Army Officer named Lieutenant Colonel (LTC) Baragona, who, while serving in Iraq, was killed in a traffic accident by employees of Kuwait Gulf Link Transport Company ("Kuwait Gulf"), a Kuwaiti contractor who was also operating in Iraq.<sup>294</sup> The accident occurred when the vehicle LTC Baragona was driving collided with a truck owned by Kuwait Gulf and driven by a Kuwait Gulf employee. A wrongful death suit was brought in Georgia against Kuwait Gulf by LTC Baragona's parents.<sup>295</sup>

The court found that it had jurisdiction over the action against Kuwait Gulf "based on its extensive business contacts with the state of Georgia under the Georgia long-arm statute."<sup>296</sup> As Georgia law states that the *lex loci delicti* determines the

---

292. *Id.* art. 231.

293. *Id.* art. 232.

294. 2007 WL 2071534 (N.D. Ga. July 16, 2007).

295. *Id.* at \*1.

296. *Id.* Kuwait Gulf, although served, never entered an appearance. *Id.*

substantive rights of the parties,<sup>297</sup> the court was obliged to analyze Iraqi law and to apply it substantively to the case before it.<sup>298</sup>

The court noted that the United States commenced hostilities against Iraq on or about March 19, 2003 and that, by May 1, 2003, the regular Iraqi army had surrendered, Saddam Hussein no longer controlled the government, and President Bush had declared an end to major combat operations. "On May 16, 2003, the Coalition Provisional Authority ('CPA') declared itself the governing authority in Iraq. The CPA declared at that time that the laws then-existing in Iraq remained in force until superseded. The accident in which Lt. Col. Baragona died occurred on May 19, 2006."<sup>299</sup>

The court interpreted CPA regulations to mean that the law of civil damages in force in Iraq in 2003 should apply to LTC Baragona's damages claim. Notably, this meant that the Iraqi Civil Code of 1951 and Code of Civil Procedure were applicable to a tort committed on Iraqi soil in 2006,<sup>300</sup> a finding that is critical for the purposes of understanding the effect of the U.S. occupation on Iraqi civil law.

Although there was a period of significant unrest and confusion between the fall of Saddam Hussein and the rise of the CPA, this unrest indicates a breakdown in enforcement, not the absence of laws. The Court understands the CPA

---

297. See, e.g., *Risdon Enter., Inc. v. Colemill Enter., Inc.*, 324 S.E.2d 738, 740 (Ga. Ct. App. 1984).

298. Georgia's *lex loci* rule is subject to a public policy exception if the harm occurred in a foreign state and the foreign state's rule contravenes "established public policy, or the recognized standards of civilization and good morals." *Alexander v. Gen. Motors Corp.*, 466 S.E.2d 607, 609 (Ga. Ct. App. 1995), *rev'd on other grounds*, 478 S.E.2d 123 (Ga. 1996) (quoting *S. Ry. Co. v. Decker*, 62 S.E. 678, 680 (1908)). The public policy exception applies "where the foreign statute is designed to redress an injury, but prescribes a form of redress which is radically dissimilar to anything existing in our own system of jurisprudence." *Id.* If the otherwise applicable forum law violates Georgia public policy, Georgia applies its own law. *Id.* The court in *Baragona* did not find that Iraqi law contravened public policy or good morals and thus was applicable to the case before it. See *Baragona v. Kawait Gulf Link Transp., Co.* 2007 WL 4125734 (N.D. Ga. Nov. 5, 2007).

299. *Baragona*, 2007 WL 4125734, at \*2.

300. *Id.* at \*2.

Regulation to adopt Iraqi civil law as it existed under Saddam Hussein at the end of his reign.<sup>301</sup>

Noting that article 219 and Iraqi jurisprudence both allow for a kind of vicarious liability,<sup>302</sup> the court found the defendant culpable.

Iraqi law . . . provides for a cause of action for wrongful death. Article 203 of the Iraqi Civil Law provides, “[i]n case of murder and in case of death resulting from wounds or any other injurious acts renders the perpetrator liable to pay compensation to the dependant of the victim who has been deprived sustenance on account of the murder or death.” Negligent unsafe driving is a source of injury that can give rise to a cause of action if it results in harm. Iraqi Civil Code No. 40, Article 227, provides that “every person has the right of passage on the public road provided he (observes) the safety (precautions) so that he will not cause injury to a third party or to himself in the cases where (safety) precautions may be taken.”

Plaintiffs allege that Serour [defendant’s employee] violated Lt. Col. Baragona’s right of safe passage on a public road by negligent driving that ultimately resulted in Lt. Col. Baragona’s death. Because Serour’s negligence resulted in death, a cause of action exists under Iraqi law. Iraqi law on this issue is thus not inconsistent with Georgia public policy.<sup>303</sup>

Thus, the fate of a case before a district court in Northern Georgia turned on its interpretation of the Iraqi substantive law of torts. CPA Regulations were interpreted so as to give force to the Iraqi Civil Code of 1951, the content of which was determinative

---

301. *Id.* at \*2 n.3.

302. *Id.* The court incorrectly stated that “Iraqi law provides for vicarious liability in master-servant relationships.” *Id.* As discussed above, Iraqi law contains a few exceptions to the general rule against vicarious liability, in this case the liability of commercial entities for injuries caused by their employees during the course of their service provided in article 219(1) of the Iraqi Code. *See supra* note 288 and text accompanying.

303. *Baragona*, 2007 WL 4125734, at \*2.

of the outcome. This case shall surely be a prologue to future litigation.

*E. The U.S. Occupation and Immunity from Civil Liability*

In March 2003, a coalition of forces led by the United States invaded Iraq and deposed the existing government of Saddam Hussein. An occupation followed during which the initial responsibility for overseeing administration of Iraq and its governmental functions was initially assigned to the Office of Reconstruction and Humanitarian Assistance (ORHA).<sup>304</sup> On May 6, however, L. Paul Bremer III was appointed by President Bush as the civilian administrator of Iraq. Mr. Bremer would exercise this authority as the head of an entity called the “Coalition Provisional Authority” (CPA), which replaced ORHA as the entity in charge of the administration of the newly occupied Iraq.<sup>305</sup>

The UN Security Council adopted Resolution 1483 on May 22 of that year, which did several things, including

recogniz[ing] the United States and the United Kingdom as “occupying powers under unified command” in Iraq and call[ing] upon them “to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.”<sup>306</sup>

Pursuant to this power, the Coalition Provisional Authority promulgated four types of legislation: “regulations,” “orders,” “memoranda,” and “public notices.”<sup>307</sup>

---

304. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law, Use of Force and Arms Control: Coalition Laws and Transition Arrangements During Occupation of Iraq*, 98 AM. J. INT'L L. 601, 601 (2004).

305. *Id.* at 601–02.

306. *Id.* at 602 (quoting SC Res. 1483 (May 22, 2003), 42 IML 1016 (2003), pmb. & para. 4).

307. *Id.*

The first CPA regulation stated that the CPA “shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration” and that it “is vested with all executive, legislative and judicial authority necessary to achieve its objectives.”<sup>308</sup> Importantly, the regulation also provided that “[l]aws in force in Iraq as of April 16, 2003 shall continue to apply’ unless they would inhibit the CPA or conflict with its regulations or orders, and only until such time as they were suspended or replaced by the CPA or ‘democratic institutions of Iraq.’”<sup>309</sup>

The most important CPA “legislation” in terms of tort liability was Coalition Provisional Authority Order Number 17, which stated that, “[u]nless provided otherwise herein, the MNF [Multi-National Forces], the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process.”<sup>310</sup> That same order also stated that all “MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the exclusive jurisdiction of their Sending States and immune from any form of arrest or detention other than by persons acting on behalf of their Sending States.”<sup>311</sup> With regard to contractors, it expressly provided that,

Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto. Nothing in this provision shall prohibit MNF Personnel from preventing acts of serious misconduct by Contractors, or otherwise temporarily detaining any Contractors who pose a risk of injury to themselves or others, pending

---

308. *Id.* (quoting CPA Regulation 1 (May 16, 2003), available at <http://www.iraqcoalition.org/regulations/index.html#Regulations>).

309. *Id.* (quoting CPA Regulation 1 §§ 2, 3).

310. Coalition Provisional Authority Order Number 17 (Revised): Status of the Coalition Provisional Authority, MNF—Iraq, Certain Missions and Personnel in Iraq 4 (2004), [http://www.iraqcoalition.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf).

311. *Id.*

expeditious turnover to the appropriate authorities of the Sending State.<sup>312</sup>

Thus, as a result, most Coalition personnel working in Iraq were granted a rather generous shield of immunity. Federal jurisprudence indicates that such immunity would be recognized in U.S. courts insofar as it prevents actions based on Iraqi law.<sup>313</sup>

The number of individuals thus immunized is considerable. Michael N. Schmitt, Professor of International Law and Director for the Program in Advanced Security Studies, George C. Marshall European Center for Security Studies, notes that the “[e]stimates of the number of government civilian employees and contractor personnel present in Iraq range from twenty to thirty thousand, making civilian workers the second largest contingent in [the] country.”<sup>314</sup> These civilians perform a wide range of work, such as transportation, logistics, and combat service support. However, they also perform a great deal of work that puts them in closer proximity to hostile forces and armed conflict, such as conducting interrogations and providing security.<sup>315</sup>

Private security companies (“PSCs”) have even been protecting employees and facilities of the US government, other governments, and private companies. PSCs (over fifty operate in Iraq) range in size from a few individuals to hundreds. Global Risks, for example, employs 1100 personnel, including 500 Gurkha and 500 Fijian troops, thereby making it one of the larger “military” contingents in Iraq. Contractors provided personal security for Coalition Provisional Authority (“CPA”) Administrator L. Paul Bremer, as they currently do for senior civilians and

---

312. *See id.* at 5.

313. *See Dalkilic v. Titan Corp.*, 516 F. Supp. 2d 1177, 1192 (S.D. Cal. 2007) (“Coalition Provisional Authority No. 17 provides ‘that government contractors are not subject to Iraqi law’ for contract and tort claims, and therefore by default California law as the law of the forum state applies.” (citing Doc. No. 75 at 22; Doc. No. 81 at 10 (“CPA No. 17 precludes any sort of conflict between California and Iraqi law”))).

314. *See* Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 512 (2005).

315. *Id.*



distinguished visitors. They also guard nonmilitary facilities at the Baghdad airport and inside the Green Zone, protect convoys, and shoulder the lion's share of training for the New Iraqi Army, paramilitary forces, and law enforcement organizations.<sup>316</sup>

Schmitt notes that some of the activities appear indistinguishable from military operations, such as an incident in 2003 during which employees of Blackwater USA, a private security firm based in the U.S., engaged in a firefight with insurgents who were attacking the CPA headquarters in Najaf.<sup>317</sup> "Thousands of rounds of ammunition and hundreds of 40mm grenades were expended in the firefight, and the company used its own helicopters to resupply employees during the battle."<sup>318</sup> Brigadier General Karl R. Horst, deputy commander of the Third Infantry Division in July, 2005, described the general conduct of contractors by saying, "These guys run loose in this country and do stupid stuff. There's no authority over them, so you can't come down on them hard when they escalate force . . . . They shoot people, and someone else has to deal with the aftermath."<sup>319</sup>

The immunity granted by Order 17 would allow for the use of force in such a manner without fear of recourse by the innocents who might be harmed in the process. This is because it forecloses Iraq as a potential forum and bringing a lawsuit in a U.S. civil court is beyond the capability of the average Iraqi for numerous legal, economic, and geographic reasons. Furthermore, the United States government has been somewhat slow to prosecute

---

316. *Id.* at 513–14 (footnotes omitted) ("And contractors, particularly those in the security sector, do not come cheap. By July 2004, Kellogg, Brown & Root (Halliburton) alone had been awarded \$11.4 billion in contracts for Iraq and Afghanistan. In light of the number of contractors and contract values, critics have taken to calling the Pentagon-contractor relationship a coalition 'of the billing.'")

317. *Id.* at 514.

318. *Id.*

319. See Human Rights First, Ending Contractor Immunity, [http://www.humanrightsfirst.org/us\\_law/pmc/pages.asp?country=us&id=10&misc1=exec-sum](http://www.humanrightsfirst.org/us_law/pmc/pages.asp?country=us&id=10&misc1=exec-sum).

contractors for unlawful killing,<sup>320</sup> recently noting difficulties in obtaining convictions due to jurisdictional issues.<sup>321</sup>

There are, however, signs of potential change. Recently, following a shooting incident on September 16, 2007 in which seventeen Iraqis were killed by contractors working for Blackwater USA, Iraq's cabinet approved a draft law to end foreign security firms' immunity from prosecution—annulling the CPA provisions giving immunity to foreign contractors.<sup>322</sup> The bill will next move to Iraq's parliament.<sup>323</sup> Human Rights Watch has recently urged the Iraqi government to approve the proposed legislation.<sup>324</sup> Whether or not the result will be the end of blanket immunity for contractors and others is, at this time, difficult to predict. There has been, however, a stirring in the ether—the subtle reverberations of which may eventually garner enough force to change the status quo.

#### IV. CONCLUSION

Iraqi property law is based on continental civil law but is heavily influenced by Ottoman law and, to some extent, traditional Islamic legal principles. One even sees glimpses of ancient Mesopotamian law and faintly hears the echoes of Hammurabi. That rich blend supplies Iraqi law with a regime of property law

---

320. See Adam Zagorin & Brian Bennett, *Will Blackwater Be Rehired?*, TIME, Jan. 23, 2008, available at <http://www.time.com/time/nation/article/0,8599,1706121,00.html>.

321. See James Risen & David Johnston, *Justice Dept. Cites Obstacles in Blackwater Case*, N.Y. TIMES, Jan. 16, 2008, available at <http://www.nytimes.com/2008/01/16/washington/16blackwater.html?ref=world> (noting that federal officials have expressed concern that “federal law that applied to civilians employed by or accompanying the American military overseas might not apply to contractors in Iraq working for the State Department. Blackwater is under contract to the State Department to provide security for American diplomats in Baghdad.”).

322. See Ross Colvin, *Iraq Cabinet Okays Law to End Contractor Immunity*, UK REUTERS, Oct. 30, 2007, <http://uk.reuters.com/article/worldNews/idUKL3020512720071030>.

323. *Id.*

324. See Human Rights Watch, *Iraq: Pass New Law Ending Immunity for Contractors*, UK REUTERS, Jan. 8, 2008, <http://www.alertnet.org/thenews/newsdesk/HRW/5e1df431a1818e84a73d78a6aaedb9f2.htm>.

that recognizes and respects private ownership of property, provides mechanisms for protection of property rights, and discourages the forceful and fraudulent taking of property. While maintaining this respect for ownership, however, it still promotes the continued use of property by maintaining a variant of acquisitive prescription—the notion that an adverse possessor can obtain ownership through years of unforced, open, and uninterrupted possession—which is heavily influenced by Islamic property law. It also provides a broad array of property rights and legal devices to allow for full use and exploitation of property, such as lease, use, habitation, loan, and a host of rights and institutions that reflect Iraq's complex and fascinating history and culture.

Iraqi tort law has an equally rich pedigree and has evolved on its own to address the needs of contemporary Iraq. With the potential diminution in legal immunity for contractors and other entities, one may expect to see the increased application of Iraqi law in U.S. courts. Thus, understanding the contours of this magnificent legal landscape can greatly assist both governmental and non-governmental actors in making appropriate choices when operating in modern Iraq.