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MIDDLE EAST LEGAL SYSTEMS

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CHAPTER 4

THE LEGAL SYSTEM OF IRAQ

I. General Background

1. Factual Data

Iraq has an area of about 170,000 square miles (about 438,446 sq km). It is bound on the north by Turkey, on the east by Iran, on the south by Kuwait and the Persian–Arabian Gulf, on the south-west by Saudi Arabia and Jordan and on the north-west by Syria.

Iraq, formerly known as Mesopotamia, was absorbed by the Ottoman Empire in 1638 and remained under Ottoman domination until the First World War. During 1917–18 Great Britain occupied Iraq and after the disintegration of the Ottoman Empire Iraq became a British mandate (April 1920). Later in 1921 under British sponsorship, Iraq adopted a constitutional monarchy. In 1924 Iraq signed a treaty of alliance with Great Britain but this was replaced by subsequent treaties in 1926 and 1930. This latter treaty recognised Iraq's independence and eventually Iraq attained full independence when in 1932 the League of Nations terminated the British mandate in Iraq. The 1930 Iraq–UK Treaty was terminated by the Baghdad Pact in 1955 signed between Iraq, Turkey, UK, Iran and Pakistan.

The monarchical regime in Iraq was destroyed in 1958 by a bloody revolution, and the country has been a Republic since then. Historically, Iraq has been a popular base for anti-imperialist movements in the Middle East region and one of the major factors contributing to the 1958 revolution and the downfall of General Nuri Said's government was his support of the US-sponsored Baghdad Pact which brought together Iraq, Iran, Turkey and the United Kingdom.

Following the 1958 revolution and the overthrow of the monarch an Interim Constitution was declared. This Interim Constitution has been changed by subsequent constitutional instruments all of which demonstrate the political and constitutional instability of Iraq during the post-1958 period.

Occupying a narrow sector in the northern edge of the Gulf, Iraq is the most geographically disadvantaged state amongst the countries bordering the Persian–Arabian Gulf. Iraq has a very short coastline at the head of the Gulf flanked by Iran and Kuwait. This geographical position is a disadvantage for Iraq in both strategic and economic terms. In economic terms, Iraq's portion of the oil rich continental shelf resources in the Gulf is negligible. This also limits its share of the exclusive fishing zone in the high seas of the Gulf. In strategic terms, Iraq's naval capability is restricted as a direct result of its limited access to the Gulf waters.

With about 14 million population, Iraq has the largest population amongst the Arab States of the Gulf.

2. Economy and Trade

Iraq is an upper middle-income country. It had a gross national product (GNP) of US$9.6 billion in 1980. The GNP per capita as reported in 1978 by IMF was US$1,860. By far the most important single commodity which dominates the economy of Iraq is oil and natural gas. Other natural resources include sulphur and phosphate. Iraq ranks first in sulphur production among the Middle East countries (producing 750,000 tons in 1979). So far as phosphate production is concerned, Iraq is the fifth major producer in the Middle East region.

In contrast with other Arab oil producers which are economically dominated by single oil industry, Iraq has a substantial potential for diversifying its economy. Agriculture and fisheries can provide Iraq with a diversified economy based on oil and mineral resources on the one hand and agriculture on the other. Iraq's agrarian productivity is due to two factors: abundant agricultural land and adequate water resources; two advantages not shared by amny Arab countries. Furthermore, Iraq's oil and chemical industries have developed to such an extent that they are capable of providing cheap fertilizers for agricultural use.

Iraq's economy is currently divided into three sectors. First, the Socialist or State economic sector which actually dominates the national economy. Secondly, the private sector which is positively inhibited and restricted in Iraq. Thirdly, the mixed sector which results from commercial activities undertaken by the private sector in participation with the Socialist sector.

(*a*) *Socialist Sector.* Similar to other Arab socialist countries (such as Algeria, Libya and Syria), Iraq's economy is dominated by a strong centralist and socialist public sector, focusing on economic and social development through national planning. The public sector was consolidated by the Socialist Laws of 1964 which nationalised the whole banking and insurance system (as well as some 30 major commercial and industrial enterprises) and set up the Economic Organisation for the Control of Public Establishments for Industry, Trade, Insurance and Banking. Later by Law No. 166 of 1965 the Public Establishments were granted financial and administrative autonomy but were placed under the overall control of the respective Ministries in charge of those Establishments. The 1970 Constitution declared that, "Natural resources and basic means of production belong to the nation and the central government will use them according to the need of general planning of the national economy". Accordingly the government pursuing these

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socialistic and centralised policies has expanded and consolidated the Socialist sector in such a way that the central government now controls all major economic activities in the country. Thus the Socialist sector not only has a monopoly over banking and insurance, but it also owns and operates all heavy industries. In 1980, the Socialist sector's share in foreign trade reached 91 per cent, while its share in sectoral distribution of gross domestic product was 79 per cent for commodity, 48 per cent for distribution, and 78 per cent for services industry.

(*b*) *Private Sector.* The Iraqi government, giving priority to centralised economic planning and development, believes that only public enterprise can fully and efficiently utilise natural and human resources. Accordingly the private sector is tightly controlled and strictly regulated in Iraq. Concentrated in areas such as food processing, textile, manufacturing, tourism, services and retailing, the purely private sector contributes no more than 20 per cent of the GNP. Again while the volume of imports reached the record of US$18·9 billion in 1981, the private sector purchased only about 9 per cent of the total imports.

(*c*) *Mixed Sector.* This sector is designed to combine public and private entrepreneurship. However, by Article 7 of the Companies Law 1983, the shares of the Socialist sector in mixed companies cannot be less than 51 per cent. In point of fact, the government, through the nationalised banking system and the Industrial Bank in particular, owns majority shares in the commercial ventures in the mixed sector.

Like many other developing and socialist countries Iraq has been following successive "development plans" in the field of economic development. The current development plan was launched in 1980 as the five-year plan (1981–1985). The major objectives of this major development plan (worth $135 billion) are:

(*a*) to achieve self-sufficiency in food production and industry,

(*b*) to build a more extensive base for infrastructure, and

(*c*) to attend to the development of human resources through education, health care and social security.

Iraq's economy has suffered very badly because of its inconclusive war against Iran (1980–85). First, the war expenditure almost completely eroded Iraq's vast foreign exchange reserve. Secondly, as a result of war conditions and loss of oil revenues the Iraqi economic development plan had to be cut in size and largely modified. Finally, considerable physical damage was done to industrial plants and economic bases of Iraq as a result of the Iranian attacks. The total loss to Iraq is estimated in tens of billions of dollars.

Iraq's economy since the war began in 1980 has been sustained by very generous financial support lent to her by Saudi Arabia, Kuwait and the United Arab Emirates. The total value of these foreign subsidies is estimated to be more than $25 billion. As a result of the financial aid given to Iraq by Saudi Arabia and the Gulf Arab States since 1980, Iraq's trade has shifted in favour of the OECD countries. In point of fact Iraq imported 75 per cent of its requirements in 1983 from OECD countries. At present Iraq's largest trading partners in the West are France, West Germany, Japan, Italy, Great Britain and the United States. Since the war began in September 1980 France has sold more than $6,000 million worth of armaments to Iraq while French contractors have won orders worth more than $4,500 million. The American business leaders, frightened by the Iranian revolution, the Iran–Iraq war, the nationalisation of foreign investments in Iraq, Iran and Libya, and the revolutionary-nationalist Arab tendencies in the region, have serious doubts for increasing their business involvement in Iraq. While such concerns are legitimate one cannot dismiss the great business opportunities and trade potential of Iraq.

It is interesting to note that since the Gulf war began in September 1980, US–Iraqi relations have considerably improved. The Reagan administration condemned the Israeli bombing of the Iraqi nuclear reactor in June 1981 and censured Israel in a United Nations Security Council vote. The text of the resolution was agreed upon by both the United States and Iraq being one of the harshest censures of Israel endorsed by the United States at the United Nations. Also in June 1981 the United States removed Iraq from the list of "terrorist countries" and lifted US restrictions against exports to Iraq. In May 1984 the United States provided some financial assistance to Iraq to sustain Iraq's agricultural and development programmes. At present US trade with Iraq is estimated at $1 billion a year, and although the United States does not directly supply arms to Iraq, it has consistently supported France's policy of supplying equipment to this country.

The history of relations between Iraq and the western oil companies is one of bitter confrontation and constant conflict. King Faisal in 1925, under British pressure, signed a concession in favour of the Iraqi Petroleum Company (IPC) which provided the IPC consortium with a monopoly throughout the Iraqi territory. After its independence in 1932 and particularly following the 1958 revolution, the Iraqi government attempted to rationalise the excessive control of the IPC consortium but failed. In October 1961, under the terms of the Law No. 80 of 1961 the Iraqi government nationalised parts of the assets of the IPC consortium and stripped the transnational's affiliates of 99.5 per cent of their concession areas. In retaliation, IPC which held a practical monopoly over Iraq's oil reserves reduced its oil production in Iraq and increased production in neighbouring countries.

The resultant reduction in oil revenue inflicted considerable hardship on Iraq. In 1968 the Iraqi government informed IPC that Iraq needed more

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income for its five-year plan and wanted the companies to propose how to provide it, either changing the sharing arrangements, expanding production, or raising prices. As the IPC declined to take note of the Iraqi requests, Iraq in 1972 eventually nationalised the rights and assets of the IPC in the Kirkuk, Tambur and Bail Harsan oilfields. The reduction in the Iraqi oil production to less than half was a calculated act by IPC in order to force the Iraqi government to pay them a higher compensation for areas taken over by the Iraqi government under the Nationalisation Law No. 80 of 1961. The nationalisation of the IPC's assets in 1972, therefore, was seen by the Iraqis as a justified struggle against "oil Imperialism". Accordingly the late Iraqi President Ahmad Hassan al-Bakr, in prefacing his decision of 1 June 1972 to nationalise IPC linked the country's economic needs to political considerations and ideological principles. According to al-Bakr both the independence of Iraq and its economic development plans were in jeopardy because of IPC's exploitation of the country's oil resources. Furthermore, he stated that the Western oil companies were "the dangerous tools which represent imperialist logic, the logic of plunder the monopolistic exploitation and the impoverishment of the masses".[1]

After the 1972 nationalisation, IPC called for a boycott against Iraq's oil and major oil companies refused to take up deliveries from the nationalised venture. However, Kuwait and Libya lent support to Iraq and thus IPC failed to force Iraq into "denationalisation". Although Iraq's production fell immediately after nationalisation of 1972, by 1973 Iraq's oil production was up to a record level of 2 million barrels per day. In these circumstances the legal dispute arising out of the 1972 oil nationalisation was settled in early 1973 between IPC and Iraq. Accordingly IPC agreed in February 1973 to settle Iraqi claims for back royalties by paying £141 million and to waive its objections to Iraq's Nationalisation Law No. 80 of 1961. In return Iraq agreed to deliver a total of 15 million tons of crude oil as compensation for the expropriation of IPC's assets. The Mosul Petroleum Company relinquished all its assets without compensation, and the Basrah Petroleum Company undertook to increase output from 32 million tons in 1972 to 80 million tons in 1976. These agreements were considered as favourable to Iraq.

During the Arab–Israeli war of October 1973, Iraq nationalised the interests of two American firms, Exxon and Mobil, in the Basrah Petroleum Company on 7 October 1973. The Iraqi government's nationalisation move was prompted by the unremitting and massive political, military, and financial backing offered by the United States to Israel.

Iraq's nationalisation of its oil was motivated by political considerations on the one hand (as perceived by the Ba'th ruling party, a

[1] MEES Supplement, 2 June 1972, p. 7.

socialist–nationalist movement, which has dominated Iraqi politics since 1968) and the country's bitter experience of IPC on the other. Not surprisingly, therefore, Iraq strengthened its trade ties with the Soviet bloc while minimising its contacts with the West. The Iraqi National Oil Company (INOC) began to work with Soviet and Czech engineers in the development of the Iraqi oil fields in the north with a view to increasing production. Iraq also arranged barter deals against its oil exports with the Soviet Union and Eastern European countries. However, this cooperation did not create the expected result and Iraq soon turned for assistance to state-owned companies in Western Europe and Latin America such as France, Italy and Brazil.

In the late 1970's Iraq was the second largest Arab producer of oil (after Saudi Arabia) producing about 3.7 million barrels a day of 12.3 per cent of OPEC production. After the Iran–Iraq war began in September 1980, each country attempted to cut off the other side's oil production. Within a week of the outbreak of the war, Iraq was forced to suspend virtually all its oil exports. Although this reduced production it did not have any significant adverse impact on the world oil market (owing to an oil glut which then existed), the damage to Iraqi domestic economy, in terms of lost revenue, has been irreparable. Gradually, however, Iraq has managed to recover its production. By March 1982 Iraq increased its production of oil up to 1.4 million barrels per day. In April 1982, Syria closed its borders with Iraq and also closed its pipeline (the old Iraq Petroleum Company pipeline) which has a capacity of 1.4 million barrels per day. These restraints, reduced the Iraqi output and it is estimated that Iraq's average production in 1984 is about one million barrels per day of which some 800,000 is exported.

3. Form of Government

Iraq attained formal independence in 1922, when she signed a Treaty of Alliance with Great Britain. This Treaty recognised the elected ruler, sponsored by the British, as the constitutional King of Iraq. The First Iraqi Constitution, drawn up by the British, was established in 1925. It provided that the sovereignty of the Kingdom was vested in the people of Iraq, and entrusted to the King and his male descendants succeeding him according to the law of succession.

Under the constitutional provisions of 1925, Iraq set up its own legislative body. This new legislature, however, did not make any fundamental change in the laws of the country during the period 1922 to 1932. That is to say that the applicable laws of Iraq until the early 1930s were to a large extent the Ottoman laws and to a lesser degree limited number of statutes introduced by the British during the 1914 to 1921 period.

The Monarchical Constitution of 21 March 1925 was repealed after the

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1958 revolution. Since then the following constitutional laws have been promulgated:

(*a*) The Interim Constitution of 17 July 1958 (repealed in 1968).

(*b*) The Law No. 25 of 1963 promulgated by the National Council of the Revolution's Command on 4 April 1963.

(*c*) The Law No. 61 of 1964 promulgated by the National Council of the Revolution's Command No. 61, 1964 on 29 April 1964.

(*d*) The Provisional Constitution of 22 September 1968.

(*e*) The Constitutional Amendment of 1973 giving more power to the President.

only 1970 Constitution

The Revolutionary Council

The supreme authority in the state is vested in the Revolutionary Command Council which legislates by decree. Under the present constitutional arrangement the President and the Vice-President are elected by a two-thirds majority of the Revolutionary Command Council. The President may appoint and remove the Prime Minister and other members of the cabinet at will.

The Revolutionary Command Council is empowered, by a two-thirds majority, to remove any of its members; it may also accept the resignation of any member by an ordinary majority vote. In any of these two cases, the Council should appoint a new member by a majority decision. Members of the Council enjoy "political privilege" and are immune from liability which may arise in the ordinary course of their discharging their political function. This political privilege can be taken away by a two-thirds majority vote of the Revolutionary Command Council in which case the ensuing legal proceedings should be heard by a "special tribunal" according to the Law. The Constitution also provides that the Council should meet at least once a week under the chairmanship of the President, or the member appointed by the latter to preside over the meeting, that the meeting should be held upon an invitation issued by the President, or at least two members, and that all the meetings should be held in camera. The quorum is an ordinary majority of serving members. The decisions of the Council are taken democratically by a majority vote, unless otherwise provided for in the Constitution, and if the opinion of the members is equally divided, then the side with which the President votes prevails.

Powers of the Revolutionary Council

Article 44, which deals with the powers entrusted to the Revolutionary Command Council, provides that "the Council ... is the highest authority in the State ...", whose powers include:

1. The election of the President of the Republic.

2. The supervision over the armed forces and the forces of internal security.
3. The declaration of mobilization, and war, and the acceptance of truce, and the conclusion of peace.
4. The appointment of prime-minister, and ministers, the acceptance of their resignations, and their removal from office.
5. The approval of laws, executive statutory orders, Cabinet decisions, treaties, and international agreements.
6. The supervision over the affairs of the Republic in a manner ensuring the protection of the Revolution, and facilitating the realization of its aims which are referred to in its declaration.
7. The issuance of decrees which will be binding in accordance with the provisions of this Constitution and the Laws in force.

Significantly Article 58 of the Constitution 1968 entrusted legislative power to the Revolutionary Command Council till the National Assembly held its first session (1980). However, a member of the Revolutionary Command Council still has the right to stand as a candidate for the National Assembly upon approval of the Chairman of the Council and in case of being elected as a member therein, he would have the right of combining between the membership of the Councils. In addition, the following persons have the right to combine the membership of the National Assembly with other posts:

(*a*) Ministers, civil servants and public employees.

(*b*) The heads and members of the executive bureaux and central administrative organisations in the Trade Unions, Federations and Professional and Popular Organisations.

Furthermore, the Chairman of the National Assembly, his deputy, Secretary General of the Assembly and the heads of the permanent committees therein, are designated as full-time appointed members, and the Assembly may grant full-time appointment to any of its members.

Legislature

Under the present constitutional arrangements, the legislation originates from the authority of the National Assembly, elected under the terms of the Law No. 55 of 1980, which initiates and promulgates the appropriate laws and regulations.

Every Iraqi male or female has the right to vote or stand as a candidate. The only condition prescribed in the Law for qualifying to vote, is that the voter should be an Iraqi national of 18 years of age or more.

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I. Anyone standing as a candidate for the membership of the National Assembly should:

(*a*) Be an Iraqi by birth, from Iraqi parents by birth or from an Iraqi father by birth and a mother from any of the Arab States' Nationals.

(*b*) Be of full mental competence and have attained 25 years of age.

(*c*) Be a believer in the principles and aims of the 1958 Revolution.

(*d*) Have completed a Military Service or have been exempted from it.

(*e*) Not be married to a foreigner.

(*f*) 1. Not hold more than the maximum limit of land—in accordance with the laws of Agrarian Reform.

2. Not be subject to the public confiscation of properties or nationalisation with the exception of the shareholders in joint-stock companies so affected.

(*g*) 1. Not be convicted of crimes relating to the State's internal or external security after the 1958 Revolution, or "crimes infringing the public confidence", or the crimes against the national economy and the financial trust of the State or the crimes against public properties, and crimes prejudicial to public morality and ethics.

2. Not be convicted for a crime of premeditated murder.

(*h*) Be able to read and write.

II. Any personnel of the armed forces having fulfilled the conditions of the candidacy stipulated above, may present themselves for candidature of the National Assembly after the approval of their resignation by the competent Minister.

Current substantive laws are geared towards the present needs of the country. It is only in aspects of procedural law that the impact of foreign (i.e. European codes as adopted and modified by Egypt) is still evident.

The Executive

The Executive power (i.e., the Government) consists of the prime-minister, the vice-prime-minister, and the ministers, everyone of whom should carry out his responsibilities according to the interim Constitution and the Laws. The Government has the responsibility of executing the general policies of the State according to the Constitution and the Laws in force, and to regulate and execute the economic, educational, social, and health programmes set out for raising the standard of living and realising general prosperity. It should also design and carry out a rightful and a proper foreign policy. The specific powers of the government are:

1. The preservation of national security and the protection of the citizens' rights.
2. The direction, coordination, and supervision of the works of ministries, and public utilities and organisations.
3. Issuing administrative and executive decisions according to Law and executive statutory orders.
4. Agreeing to draft laws and executive statutory orders.
5. The appointment, dismissal, and discharge of officials and referring them to retirement.
6. The preparation of the State's budget and subsidiary budgets.
7. The preparation of the development plan of the State for developing the national economy and taking the required steps for its execution according to Law.
8. The supervision over the regulation and administration of the fiscal and monetary systems.
9. The obtaining and repayment of loans within the limits of the general policy of the State.
10. The supervision over all offices and organisations in the public/State and mixed sectors, and the management of the companies and institutions of public utility.
11. The observance of the execution of Laws, executive statutory orders, decisions, and executive orders.

Powers of the President

Article 50 which deals with the powers of the President of the Republic provides that:

> The President is the Head of State, the Chief of the Armed Forces, and the Chairman of the Revolutionary Command Council. The powers of the President are as follows
>
> (*a*) The confirmation of treaties, international agreements, laws, executive statutory orders, and Cabinet decisions, and the issuing of executive orders.
>
> (*b*) The appointment, removal and retirement of officials according to Law.
>
> (*c*) The appointment of military officers and referring them to retirement according to Law.
>
> (*d*) The appointment of judges, *qadis*, and political agents according to Law.
>
> (*e*) The acceptance of credentials of representatives of foreign states and international organisations.
>
> (*f*) The declaration, and the ending, of the state of emergency with the consent of the Revolutionary Command Council and the Cabinet in cases specified by the Law.

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II. The History of Iraqi Law

The ancient Iraq was the site of many great early civilisations such as Babylonia and Assyria; later it became the capital of the 'Abbasid caliphate who ruled the Islamic world for several centuries. It is, therefore, appropriate to give a brief account of the history of law in this ancient country in general and the historical development of the Islamic legal system in Iraq in particular. We can divide the history of law in Iraq into four distinct periods: the pre-Islamic era, the formative Islamic era, the Ottoman era and the British administration period.

1. The Pre-Islamic Era

Iraq was known as Mesopotamia during the ancient time. Its southern half was known as Babylonia and its northern half as Assyria, each with its own civilisation and kingdom which enforced their own codes of law in districts. Archaeological excavations have discovered a number of collections of laws, case laws, ordinances and decrees, deeds and letters of legal interest, written in cuneiform and preserved on clay tablets. The following codes of laws stand out as the most important collections:

(*a*) A collection of Old-Accadian Laws bearing the name of Bilalama, king of Isnunna, which approximately antedate the laws of Hammurabi by two centuries.

(*b*) The Sumerian Laws of Lipit-Istar, king of Isin (2217–2207 B.C.) whose laws preceded the Laws of Hammurabi by some 170 years.

(*c*) The Laws of Hammurabi, king of Babylonia (2123–2080 B.C.) which are probably the best known of all ancient codes of law worldwide.

These legal documents and codes covered a very wide range of matters, which were of interest to legislative authorities. Questions like those of offences and crimes, land and houses, commercial law, marriage and divorce, inheritance, adoption, assault and damage to persons or property, agriculture and court system were all dealt with in a precise and highly technical language. The underlying principle of all the Mesopotamian laws is the ubiquitous law of talion by which the punishment must be exactly like the crime.

As there is no direct relation between the modern Iraqi legal system and these ancient codes of law no further studies of those old laws are called for in this book.

2. The Formative Islamic Era

The Prophet of Islam died in 632 A.D. As long as the Prophet was alive,

legal issues were settled by him as the ideal person with the function of interpreting and explaining the provisions of the divine revelation. After the death of Prophet Muhammad four of his most intimate companions, Abu-bakr, 'Umar, 'Uthman and 'Ali, succeeded him as Caliphs. They considered the Qu'ran and the way of how the Prophet acted as the first two sources to which they referred. If no rule was found in these primary sources, the Caliphs would have recourse to *ra'y* (personal opinion) and give a decision in accordance with their own *ijtihad* (originally, discretion or estimate).

After the four Republican Caliphs, the Umayyad rule, founded in 661, adopted a new legal system whereby general uniformity prevailed in the sphere of public law, while diversity remained in private law. Being in charge of dispute resolution in private affairs, the Islamic jurists of the day tended to group together on a regional basis, and every major region, such as Medina,. Basrah, Kufa, Syria and Egypt, depended on the opinions of its local jurists. In particular, the more pious Muslim scholars, dissatisfied with the performance of the central governments and longing for the preservation of pure Islamic law and practice, formed a loose association in the last decade of Umayyad rule. This marked the formation of the early schools of thought in the Islamic jurisprudence.

The Umayyad dynasty was finally overthrown in 750 A.D. by the 'Abbasids who were the distant cousins of the Prophet of Islam. They pledged themselves to build an Islamic state and society which would reject the Umayyad tyranical rule and their unwarranted practices. To this end the legal scholars were entrusted to define the constitutional rules of the envisaged Islamic State. In response to this political initiative, two opposing schools of thought emerged. On the one hand Imam Ja'far as-Sadiq, the Sixth Shi'a Imam, rejecting the 'Abbasid political sponsorship, put forward his own ideological and philosophical viewpoint and asserted that the leadership of the Muslim community was vested in him personally as a direct descendent of the Prophet. On the other hand, several Sunni legal scholars accepted the claim of the 'Abbasids to the Caliphate and worked out the appropriate legal bases for the faithful under the emerging Islamic caliphate.

Of the many schools of law which flourished in the different parts of the Islamic state at the time of the 'Abbasids those of Medina and Kufa were the most important and enduring. While the legal methodology of the Medina and Kufa schools were basically the same, their systems of law differed considerably, reflecting the fundamental difference of local, political and social conditions in Medina (the birthplace of Islam in its earliest days) and Kufa (a military city very close to the newly conquered territories and full of immigrants and converts).

In terms of methodology two schools of thought existed. First, there were those who maintained that free use of human reasoning to develop the law was both legitimate and necessary. These jurists were called the

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"people of *ra'y*" (or Methodologists) and later came to be the Hanafi and Shafi'i schools. Secondly, there were those who advocated the exclusive authority of precedents and traditions of the Prophet ("people of *hadith*" or Traditionalists) and who later represented the Maliki and Hanbali schools.

The leader of the Methodologists was Abu Hanifa Al Numan ibn Thabit (699–767). His centre of activity was at Kufa. His analogical reasoning, known as *Qiyas* (analogy), was based on the Qur'an. Abu Hanifa accepted *hadith* only when he was fully satisfied as to its authenticity; but when he saw good reasons he would deviate from the text under his adopted doctrine of *istihsan* (deviation). The leaders of the Traditionalists was Malik ibn Anas (713–795). He founded his school of thought upon the traditions (*hadith*) of the Prophet Muhammad. The Maliki school is based upon *hadith* and custom prevalent in Medina and *istislah* (having regard for public interest). His book *Al Mowatta* is the first collection of *hadith*.

In response to the opposing views of Abu Hanifa (the leader of the Methodologists) and Malik (the leader of the Traditionalists) several attempts were made to unify these two methods by a process from within the law itself. This task was ultimately performed very aptly by the outstanding jurist Muhammad ibn-Idris ash-Shafi'i (767–821). He grew up in Hejaz, the school of tradition, and became a follower and disciple of Malik. Then he went to Iraq, where he studied the Methodological thought of the Iraqi jurists based chiefly upon analogical reasoning. Later he moved to Egypt where he wrote his famous book *Al Risala* on jurisprudence. He eventually died in Egypt. Shafi'i's school of thought, while paying particular attention to the *Sunna*, also approves of the two other sources of the law (i.e. consensus and analogy), while showing reluctance to apply certain methods of reasoning such as *istihsan* (juristic preference) and *ikhtilaf* (disagreement). *Ijtihad* (personal opinion) which had previously been practised by any jurist who thought himself fit to it was narrowed down in the time of Shafi'i to the discretion of the scholar. Shafi'i limited *ijtihad* to the use of analogy, prohibiting the exercise of personal opinion unless it were based on precedent.

On fundamental issues arrived at by consensus, Imam Shafi'i argues that there should be no disagreement, but on matters of detail, for which there may be two answers, one might be chosen by *istihsan*. The earlier jurists had permitted more degree of discretion. Shafi'i restricts disagreement only on matters on which the scholar may exercise personal reasoning (*ijtihad*) and on which each may take a decision which is right to his own way of thinking. Thus everyone will have to determine his own Kaaba (the direction toward the sacred mosque required for praying) by *ijtihad*; though each may take a slightly different position from one another, everyone is right in his own way. By providing a precise method of legal reasoning, Shafi'i achieved two important results. First, he

rationalised the theoretical basis of the law that earlier generations had handed down. Secondly, he narrowed the scope of legal reasoning. In this way Shafi'i sought to neutralise the forces of disagreement and disintegration by the exposition of a firm theory of the sources from which law must be derived. His school is the closest of the Sunni schools to the Shi'ite school. Shafi'i's legal theory was an attempt to compromise between the Qur'anic text and human reason (*aql*) with a view to bring about a complete uniformity in Islamic jurisprudence. In point of fact, however, Shafi'i's plan failed when, less than a century after his own death, the Traditions of the Prophet (as opposed to human reason) became the focal point of attention for Muslim jurists.

Ironically, the main outcome of Shafi'i's deliberation was the appearance of new schools of law. On the one hand, the views of Shafi'i himself, which represented the middle position between the Methodologists and the Traditionalists, were adopted as a new school—although he had not intended to bring a new school but to unify the old schools. On the other hand two more schools were developed by Shafi'i's opponents who rejected human reason in any form as a source of law and insisted that each and every legal rule should find its binding authority only in divine revelation (the Qur'an) and the Traditions of Muhammad. Those were the Hanbali school developed by Ahmad ibn-Hanbal (*d.* 855) and the Zahiri school founded by Dawud ibn-'Ali (*d.*883).

Among the schools which developed in opposition to Shafi'i, the most important one was the Hanbali school founded in Baghdad. The founder of this school, Ibn Hanbal devoted most of his life to gathering a record of actions and sayings of the Prophet Muhammad. His most extensive study of Traditions is elaborated in his famous book *Musnad*.

It was natural that the primary sources of the Hanbali theories, after the Qur'an, were the Prophetic traditions some of which were of questionable value. Owing to the high value it attaches to the Traditions of the Prophet the Hanbali jurisprudence belongs to the Traditionalist schools, as opposed to the Methodologists.

While the system of Abu Hanifa applied reasoning very freely and sought to deduce all questions from the Qur'an through mental reasoning, the system of Ibn Hanbal is distinguished by its limited use of reason and discretion. It is to be noted that differences of opinion between acknowledged jurists are encouraged so long as the opposed opinion on a certain secondary point is not contradictory to a fundamental basic rule. The differences only arise in regard to the selection of a particular tradition or to preference given to a certain tradition over one other or to the interpretation attached to a text which might have more than one meaning.

By the beginning of the tenth century (around the year 900 A.D.) a separate discipline by the name of Science of Traditions gathered momentum and many jurists limited their task to collecting, documenting,

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and classifying traditions. As a result of this development the reasoning or personal opinion of the early period was replaced by *ijtihad* of the four established schools and thus absolute *ijtihad* was confined to the use of disciplined reasoning within the framework of the accepted legal principles of a particular school of law. *Ijtihad* was exercised also in the use of disciplined judgement (*ijtihad fil fatwa*) on a particular case within the scope of the rules laid down for a general case in a particular school of thought. It is to be noted that differences in opinion between these four schools took place only in secondary and particular points of detail within the basic general rules universally admitted and such *ikhtilaf* (disagreements) were never ignored.

By the tenth century, it was generally recognised by Muslim jurists that the creative force of Islamic law had been exhausted. Accordingly, the doctrine known as "the closing of the door of *ijtihad* (reasoning)" was replaced by the duty of *taqlid* (imitation). Hence a jurist was a simple "imitator" bound to accept the precedents and statements of his predecessors. Since then an Islamic jurist's function became no more than that of a commentator upon the works of classic masters.

In addition to the Sunni schools of law, there was the Shi'ite school of law. The Shi'ites adhered to the view that the caliphate belonged, after 'Ali, to the issue of his marriage with the sole daughter of the Prophet, Fatimah. The question of who among the descendants of the Prophet is the rightful Imam (spiritual leader) split the Shi'ite movement into a variety of branches, the most important of which are the Zaidites, the Isma'ilites, and the more numerous group of the Ithna-'asharites or "Twelvers". In general the Ithna-'asharites, maintained a unique character diametrically opposed at times to that of the Sunni systems as a whole. In 945 the Buwayhids, zealous Shi'ites, captured Baghdad and ruled over a century. Eventually the Mongol invaders led by Hulagu (accompanied by his Shi'ite adviser Naseer Tusi) captured Baghdad in 1258 and put an end to the 'Abbasids and the Islamic Caliphate in the East.

3. The Ottoman Period

The Ottoman State founded in Turkey, seized Constantinople in 1453 and invaded Syria and conquered Egypt between 1516–1517. During the same century, the Ottomans extended their authority over all Arab countries, including Iraq. Accordingly the development of the law in Iraq became part of the general evolution of the law within the Ottoman Empire. During the early period of Ottomans, the Islamic law reigned over these countries and no official code of the whole corpus of the law was proclaimed as its sole authorised text. However, the Ottomans' adherence to the teachings of the Hanafi school naturally surfaced and was later officially endorsed by an Imperial Order issued by the Sultan Salim I (reigned 1512–1520). The works of a Hanefite author, Ibrahim al-Halabi

(*d.* 1549 A.D.), were highly regarded in the Ottoman Empire. Parts of his authoritative work called Multaq al Abhur have been translated into French by H. Sauvaire.

Although in Islamic law, the government does not have a general legislative authority (beyond the limits of the sovereign's prerogative power to take administrative measures) the Turkish Sultans exercised legislative powers by issuing numerous laws and regulations.

During the nineteenth century, in the course of legal reforms, inspired by the European models, a constitution was drafted in 1839 under the Sultan Abdul Majeed. This guaranteed certain rights to individuals and promised reform in both the executive and the judiciary. The promised reform did not materialise and only a Law of Commerce was enacted in 1850 as the sole example of law reform. In 1856 a second constitution was declared by the same Sultan. In this he repeated the promises previously given in 1839. This made no progress. In 1876 Sultan Abdul Hameed declared a new Ottoman Constitution but suspended it a few months later. Eventually in 1908 the Sultan, pressurised by the Turkish Party, was forced to assume constitutional rule which was followed only in name and never in practice. So far as law reform was concerned the most outstanding development was the enactment of many codes which relied, both in their form and substance, on European Codes. The major codes promulgated by the Ottomans were the following:

1. The Commercial Code of 1850, as appended in 1860.
2. The Land Law of 1858 and the Conveyancing Law of the State Lands of 1913.
3. The Penal Codes of 1840 and 1851 which codified the substantive rules of the Islamic law and the prevalent local customs. These penal codes were replaced by the Law of 1858 which drew on French law and was later amended in 1911 and appended three times between 1910–1915 by provisions taken from Italian law.
4. The Marine Trade Code of 1863 which was mainly borrowed from the French law with certain provisions taken from the Dutch and Portuguese maritime laws.
5. The Commercial Procedure Code of 1861 which remained in force till 1880 when it was replaced by the Civil Procedure Code of 1880 as amended in 1911.
6. The Criminal Procedure Code of 1879.
7. The famous "Majallat al Ahkam al-'Adliyah" (the Civil Code) of 1876. The Mejalia means the Book of Principles of Justice. The compilers of this code wrote in their report that they, "collected the opinions and ideas of the most eminent Hanafi jurists on the subject of transactions and obligations to suit the present conditions". This code covered the sale, hire, guarantee, assignment, pledges, trust and

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trusteeship, gifts, wrongful appropriation and destruction, interdiction, constraint and preemption, joint ownership, mandate, release, admissions, actions and rules of evidence. The code also laid down general rules for interpretation of contracts and the administration of justice, as well as certain rules of procedure such as estopped and time limitation.

In addition to these codes many other laws dealing with various questions, such as those regulating local administration of the provinces, police, prisons, public buildings, societies, trade-unions, civil servants and their pension were also promulgated.

4. British Mandate Administration

In 1916 the Sykes–Picot secret agreement signed by Great Britain and France placed Iraq within the British sphere of influence. By 1918, Great Britain was firmly established in Iraq as the *de facto* source of authority but it was not until April 1920 that the British sought to administer Iraq as a Mandate territory. Then the Supreme Council of the Allied Powers approved of the British mandate scheme in Iraq, a status later confirmed by the League of Nations. This position remained till 1932 when the British mandate authority in Iraq was terminated by the League of Nations.

Faced with increasing opposition to any direct British rule, the general policy of the British administration in Iraq from 1920 onwards became to create an Iraqi administration under British control. Thus a monarchy was established in 1921 which lasted till 1958. The 1958 revolutionary regime repealed the monarchical constitution and established a republican regime for the first time in the Gulf region.

III. The Development of the National Legal System

As part of the Ottoman Empire, the inhabitants of the territory now known as Iraq were subject to the Ottoman codes until the First World War. After the collapse of the Turks, Iraq became an "A" class British mandate territory. After 1915 the British gradually introduced to Iraq selective British Statutes taken from British Indian Codes. These regulations related to the administration of justice, organisation of criminal and civil courts, substantive criminal law and company law. To this extent, the application of the Ottoman laws and regulations was suspended in Iraq. However, the British did not extend the application of their extra-territorial jurisdiction to the entire British mandate areas in Iraq. Thus the Ottoman laws remained in force in certain parts of Iraq and were duly enforced even under the British administration.

From the 1930s onwards Iraq began to develop its own national legal system. In doing so Iraq was much influenced by the Egyptian legal system. Many Iraqi law students would go to Egypt to study law, particularly for higher degrees and research. Many more would consult Egyptian legal literature in Iraq both for academic and professional purposes. Egyptian legislation and legal literature produced by Egyptian professors are cited by their disciples in the Iraqi law schools and in Iraqi legal works; and, to a lesser degree, in the Iraqi courts and tribunals. To state the obvious this influence has progressively declined as the autonomy of the Iraqi legal system has grown.

The development of the Iraqi legal system since the country's independence has been marked by the changes of regime in 1958 and 1964. The 1958 revolution put an end to the monarchical system of government, whereas the 1964 change of government gave the socialists the upper hand. It is, therefore, appropriate to discuss the legal developments in modern Iraq in two separate phases, namely (*a*) the monarchical period of 1921–58 and (*b*) the republican period in the post-revolution era (1958 to date).

1. Legal Developments During 1915–1958

After the British landed in Iraq in 1915 they promulgated a law for the organisation of criminal and civil courts in the occupied regions of the country (August 1915). In total, 34 Statutory Instruments were annexed to the 1915 law, all taken from British Indian law. By the end of 1918, some six appendices had been added to the original British law. In this way the Ottoman laws were suspended in those areas where they conflicted with English law. However, the British enactments were introduced in the Basrah province only, and no attempt at their enforcement was made in the Baghdad region. Eventually, in 1920, the Ottoman laws became applicable again side by side with both the British enactments and the Iraqi national law emanating from the Iraqi Legislature set up under the terms of the monarchical Constitution of 1925. Examples of the Ottoman legislation which remained in force were the Ottoman Civil Code and the Law of Civil Procedure. On the other hand, examples of legislation introduced by the British mandate authority which remained applicable are the Baghdad Penal Code, 1918 and the Baghdad Law of Criminal Procedure, 1919.[1] These two pieces of British legislation remained in force until the late 1960's.[2] A third legislation emanating from the same authority, namely, the Companies' Law, 1919 remained applicable till the promulgation of the Law of Commercial Companies, 1957.

The Iraqi National Assembly, set up under the 1925 Constitution, assumed its legislative function and promulgated, as time went on, an

[1]These two pieces of British legislation constituted an amalgam of provisions taken from Ottoman, French, and British criminal law and procedure.

[2]The Baghdad Penal Code 1918 was repealed in 1969.

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enormous number of laws in various fields. Among these laws the Iraqi Civil Code, 1951 stands out as the most important piece of legislation. Other important Iraqi laws are the Law of Commerce, 1943; the Law of Civil and Commercial Procedure, 1957; the Law of Commercial Companies, 1957 as well as various other important enactments dealing with the various activities of individuals and corporations, civil services, the military and the police, and the judicial system.

Iraqi Civil Law

In its wider sense, civil law is the most important branch of law regulating the private relationship of individuals in society. In this way the Iraqi Civil Law is the basic source of Private Law. Thus, Law of Contract, Commercial Law, the Law of Civil Remedies, Private International Law, Law of Persons, Law of Employment, Law of Property, Agricultural Law, are, in fact nothing more than parts of civil law. They are regarded as special academic disciplines merely to emphasize their importance, either because they relate to a special class of persons or affairs, or because they can be distinguished by certain characteristics which necessitated a separate treatment. This is why it is always possible to fall back on the provisions of the Civil Code in all matters not covered by a special rule in the other branches of civil law.

As already said the most fundamental legislation put in the statute books in Iraq is the Iraqi Civil Code 1951. Until 1951 it was the Ottoman Civil Code which was the basic authority for the civil law of Iraq. In 1951 the Iraqi Civil Code replaced the Ottoman code. The Chairman of the drafting committee was the late Professor Abd al-Razzaq Sanhouri of Egypt. He had studied law in France and was, therefore, understandably, influenced by the rules of French law. Professor Sanhouri, an authority in Egyptian law, held the view that the Iraqi code could be the same as the Egyptian Civil Code 1948. The original Egyptian Civil Code was very much influenced by the French Code but differed from the latter in two ways. First, the Egyptian Code excluded matters of personal status in the code and secondly it incorporated certain Islamic notions in the Code such as *shuf'ah* (pre-emption) in the law of contract. Later further reform was made in favour of the French code. During 1936–42 Sanhouri was instrumental in formulating these principles of reform and actually codifying the new Egyptian civil code eventually enacted in 1948. According to Sanhouri, the Egyptian code had been derived from 20 civil codes representing countries in Europe, Asia, Africa and the Americas with particular reference to the Germanic codes. Sanhouri, therefore, tried to persuade the Iraqi committee to adopt the Egyptian code without much modification. The Iraqi members of the drafting committee objected to copying the Egyptian Code on the grounds that they wished to take into account the judicial views of all schools of Islamic law, including the Shi'a school and adopt the views which they would find most suitable to

the Iraqi nationals in a modern setting. As a result the committee made a compromise which was to use the same method of presentation as in the French and Egyptian Civil Codes, but with the provision that the Iraqi Civil Code must be drawn in order of priority, from the various schools of Islamic Law, and the French and the Egyptian Civil Codes should be consulted and drawn upon only as secondary sources in comparison to the Islamic law. As a result of this compromise the Iraqi code includes a great many more provisions derived from Islamic law than does the Egyptian code. Hence, unlike the Syrian Civil Code of 1949 and the Libyan Code of 1953 which are based on the Egyptian code of 1948, the Iraqi code is quite a distinct code.

The Iraqi Civil Code 1951 is divided into an Introductory Part, and two main Parts. The Introductory Part includes (*a*) General Principles concerning the enforcement and the application of law, conflict of laws in time and place, (*b*) persons, (*c*) things, property and rights.

The First Main Part of the Code deals with Personal Rights and Obligations as follows:

I. Book I deals with the general principles of the law of contract, or as the Code itself states "obligations generally". This book is sub-divided into six chapters, as follows:

Chapter 1
Sources of obligations which encompass:

(*a*) Contracts. This section deals with the necessary elements for the conclusion of a valid contract, and contractual liability in general. This section, as it can be expected, is very detailed and of considerable significance.

(*b*) Unilateral Undertakings. This section is very short comprising three articles only and dealing with unilateral gratuitous promises.

(*c*) Unlawful Acts. This section deals with tort and quasi-contract which would result in automatic liability.

(*d*) Unjust Enrichment. This section provides for compensation and reparation when someone is paid or otherwise enriched without any just cause.

(*e*) The Operation of Law.

Chapter 2
The Effects of Obligations, which deal with:

(*a*) Obligatory Enforcement. This section provides for specific performance and reparation in damages.

(*b*) Securing Rights of Creditors.

Chapter 3
Conditions Modifying the Effects of Obligations, which are:

(*a*) Conditions and Time Clauses.

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(*b*) Plurality of Places of Performance in an Obligation.

(*c*) Plurality of Parties to an Obligation.

Chapter 4
Assignment of Contract Rights. This chapter deals separately with:

(*a*) The Assignment of a Debt.

(*b*) The Assignment of a Right.

Each section provides for the conditions and elements required for a valid assignment as well as describing the implications of such an assignment.

Chapter 5
The Extinction of Obligations, by means of:

(*a*) Payment or Performance. This section deals with the parties to performance, types of performance, acceptance of payment or performance, rejection of the same, and the place, time, and costs of performance.

(*b*) Methods of Extinction Equivalent to Payment. This section relates to set-off and self-help.

(*c*) Extinction of Obligations without Payment or Performance. This section relates to waiver, frustration, and the statutes of limitation.

Chapter 6
Proof of Obligations, which deals with:

(*a*) General Maxims of Evidence.

(*b*) Documents.

(*c*) Admission.

(*d*) Oath.

(*e*) Evidence by Witnesses.

(*f*) Statutory Presumptions.

II. Book II, deals with Specific Contracts, and it is sub-divided into five chapters as follows:

Chapter 1
Contracts based on Ownership, such as:

(*a*) Sale.

(*b*) Gift.

(*c*) Partnership.

(*d*) Loans and Annuities.

(*e*) Settlement.

Chapter 2
Contracts based on the use of a thing, which include:

(*a*) Leases.

(*b*) Loans for Use.

Chapter 3
Contracts for the Hire of Services, which are:

(*a*) Contracts for Work and Concessions for Public Utility Services.

(*b*) Contracts of Service.

(*c*) Agency.

Chapter 4
Contingency Contracts, such as:

(*a*) Gaming and Betting.

(*b*) Life Annuities.

(*c*) Contracts of Insurance.

Chapter 5
Suretyship.

The second main parts of the Iraqi Civil Code, entitled *rights in rem* contains Books III and IV, which deal with rights in property as follows:

III. Book III provides for the principal real rights and is sub-divided into two chapters, as follows:

Chapter 1
The Right of Ownership in Things which is dealt with as follows:

(*a*) The Right of Ownership in General.

(*b*) Acquisition of Ownership.

Chapter 2
Rights derived from the right of ownership, which include:

(*a*) The Right of Possession.

(*b*) The Rights of Usufruct, of the User, of Occupation and of Levelling.

(*c*) Servitudes.

IV. Book IV governs accessory real rights or real securities. This book is divided into three chapters, as follows:

Chapter 1
Mortgages.

Chapter 2
Pledges.

Chapter 3
Privileged Rights.

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2. Developments After the 1958 Revolution

In 1958, Iraq entered a new phase in its legal development. The 1958 revolution put an end to the monarchy. Since then the following constitutional instruments have appeared: the Interim Constitution of 27 July 1958, the Constitution of 4 April 1963, the Constitution of 22 April 1964, the Interim Constitution of 29 April 1964 and the Interim Constitution of 21 September 1968.

The main features of these constitutional instruments are the following:

(*a*) The form of the State has been changed from a monarchical into a republican regime by the Constitution of 1958.

(*b*) The element of permanancy existing in the monarchical Constitution of 1925 has been lacking within the constitutional framework set up since 1958. No political regime has ever kept its promise to issue a permanent constitution.

(*c*) No clear line of demarcation exists between the exercise of the legislative and the executive authorities in the new constitutions.

Under the Constitution of 27 July 1958, the Cabinet was the real holder of political power, and exercised both the legislative and the executive authorities in the State. In this respect, the Cabinet was supposed to be aided by the Sovereignty Council, which was left with some measure of political power. In point of fact, however, the Council remained hopelessly weak *vis-à-vis* the Cabinet, or indeed the person of the Prime Minister himself.

This situation was somewhat changed after the coup d'etat of 8 February 1963. The Law of the Supreme Revolutionary Command Council No. 25, 1963 vested the Revolutionary Command Council with the legislative authority and a very wide range of executive functions. The 1963 Constitution was repealed by the Constitution of 22 April 1964 which was, however, very similar to its predecessor. The law of 22 April 1964 was followed by a declaration of the Interim Constitution of 29 April 1964 which repealed the Interim Constitution of 27 July 1958. It provided first for the concentration of the executive authority in the hands of the President and the Cabinet and secondly, for the establishment of a National Assembly to exercise the legislative authority in accordance with a law to be promulgated within no less than six months from the time in which the interim period (fixed to be three years) would come to an end, and thirdly, for the Cabinet and the Revolutionary Command Council to exercise the legislative authority during the interim period.

The Interim Constitution of 1964 was amended five times. First, Principle 63 of the Constitution was amended to give the legislative authority to a Consultative Assembly instead of the Council of the Revolutionary Command and the Cabinet. This amendment introduced

on 14 December 1964, was never enforced. Secondly, the amendment of 8 September 1964 which touched upon 12 Principles of the Constitution, effected an abrogation of the Law of the Council of the Revolutionary Command No. 61, 1964, and so it became necessary to amend all the references to that Council in the Constitution. There were also other amendments relating to the national rights of the Kurds, the rights of those married to foreign women to be ministers, prime ministers, or presidents, and the conditions to be met in the choice of the president. Thirdly, the amendment of 2 February 1967 which regarded Principle 62 as one paragraph, and added a second paragraph to the effect that the President has the right to appoint members in the Consultative Assembly the number of which to be determined by the law of election referred to in paragraph (*a*) i.e. original Article 62. Fourthly, the amendment of 3 May 1967, which extended the interim period referred to in Principle 102 of the Constitution by a further year, on the ground that, although the government had legislated the Law of Election of the Consultative Assembly, it was unable to hold the elections due to insufficiency of time and unsuitable circumstances. Fifthly, the amendment of 6 May 1968, which, on the one hand, added a third paragraph to Principle 62 to the effect that the National Assembly should be called within a period of two years as from 10 May 1968, and, on the other, transferred the legislative authority from the executive authority to a legislative council to be effective within a period of two years. Article 63 was again amended to include four paragraphs providing: (*a*) that the legislative authority is to be exercised by a Legislative Council sitting in Baghdad, the membership and the functions of which is to be determined by a special law; (*b*) that the Legislative Council should assume the legislative authority as soon as it is convened; (*c*) that the Cabinet continues to exercise the legislative authority till the Legislative Council is convened; and (*d*) that the Legislative Council should prepare the permanent constitution, which should be laid down before the Assembly in its first session. Finally, Principle 102, which deals with the length of the interim period, was abrogated, and the wording of Principle 104 was slightly changed by replacing the word "confirmed" for "drafted". Principle 104 provided that the Interim Constitution remains in force till the time when the permanent constitution "drafted" by the National Assembly is put into force.

Iraq was declared a socialist state in Principle 1 of the Interim Constitution of 1964 and during the years of 1964–1965, passed laws nationalising certain companies, banks and commercial enterprises. Iraq also passed laws which established a number of public economic institutions, and organised the distribution of profits gained by these companies and regulated their constitution and management. Labour laws and laws for social security were also enacted. In the petroleum field, developments of considerable interest have occurred since 1958. The Law No. 80, 1961, determined the areas in which the older foreign oil companies were allowed exploitation. The Law No. 11, 1964, established

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the Iraqi National Petroleum Co. and gave it an authority to work, internally and externally, in the field of the petroleum industry. This Law and its amendments were replaced by the much more elaborate Law for the Establishment of the Iraqi National Petroleum Co. No. 123, 1967, which founded a national enterprise for the same purposes as its predecessor. The area of exploitation for this national company was determined by the Law No. 97, 1967. In pursuance of this policy, the Iraqi National Petroleum Company concluded on 3 February 1968 a special agreement for the exploration, production, and marketing of oil with ERAP, a French company. That agreement was confirmed by the Law No. 5 1968.

The major development since the 1968 revolution in the Iraqi legal system is a drive on the part of the Ba'th government for law reform in order to introduce values of a more socialist nature to the existing Iraqi legal system.

3. Law Reform

In 1977 the Ministry of Justice prepared a working paper entitled Legal System Reform which was later passed by the Revolutionary Command Council as the Law No. 35 of 1977.[1] The paper was based on "the principles believed in by the Arab Ba'th Socialist Party and the goals which it endeavours to achieve". This working paper consisted of three parts dealing respectively with (*a*) the basis, (*b*) the goals and (*c*) the means of law reform.

(a) Basis of Reform

The paper identified the Iraqi revolution of 17–30 July 1968, which brought the Arab Ba'th Socialist Party to power, as being a socialist revolution in nature. Being a "liberating, democratic, socialist and unitary revolution", its goal was to introduce socialist culture, to rely on the revolutionary cadre and to fight the bourgeoisie. The Iraqi legislature, therefore, was charged to change and abolish the pre-revolution laws which continued to control the social and economic relations in the revolutionary era.

(b) Aims of Reform

According to the compilers of the 1977 Working Paper, the law, as a reflection of the ideas and economic interests prevailing in the society, is a tool in the hand of the State to direct, lead and control the economic and social order. The law should serve the revolutionary economic development through various State organs but at the same time "formulate the beginnings of a transition to socialism".

Certain principles of private law as contained in the Iraqi Civil Code 1951 are inconsistent with the socialist policies of the ruling Ba'th party.

[1] Al-Waqai al-Iraqiya (1977), *Gazette*, No. 37.

This conflict is evident in two major areas. Firstly, so far as the civil and personal rights are concerned the Iraqi Civil Code attempts to safeguard the rights of the individual citizens against any infringement by the State. This is in direct opposition to the Ba'th socialist nationalist policies which maintain that the State's priorities should prevail over the interests of individual citizens. Secondly, the full recognition of private ownership and unrestricted rights for the private natural and commercial persons run contrary to the policies of the Ba'th government which advocates the establishment of a socialistic economy in Iraq. Thus the government's long term objective is to change the entire legal system of Iraq. As part of this plan, in 1977 the Iraqi Revolutionary Command Council approved the text of a working paper titled "Legal System Reform" prepared by the Ministry of Justice. This paper criticized the shortcomings of the existing Iraqi civil law in the following ways:

> Reformation of Civil Law requires to amend its rules radically in order to make them respond to the economic and social process and philosophy of the Revolution and to satisfy the requirements of the development and building of the socialist society.

After this general introduction the working paper addresses itself separately to two major areas of civil law which are personal rights (obligations) and real rights (property ownership). In the first place the working paper dealing with personal rights (and obligations) refers to two subjects which are: the theory of obligation on the one hand and the specific contracts on the other. In order to support the socialist concepts and go along with the economic and social evolution in the country, the working paper advocates a radical amendment of these provisions. The recommended line of amendments are concentrated on the following foundations:

—To give priority to the interest of the society, represented by State over the interest of individuals, represented by the principle of rule of the will, in execution and interpretation of legal relations, and, consequently, to reduce those differences between the relations of the Public Law and those of the Private Law which find their foundation in the liberal and capitalist thought.

—To consider the obligation as a relation between two parties which does not prevent changing one or both of them and which responds to the requirements of social and economic evolution and satisfy the requisites for the national development plan.

—To draw up the rules which organize the contracts of the execution of national development plan and the extent of obligations and rights arising therefrom.

—To facilitate the formality to an extent which will safeguard the public interest and does not lead to neglect of the origin of right.

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—To concentrate in the contracts on the balance between the rights and the obligations resulting from them and to cancel what contradicts them and the admissibility of amending the contract by the judicature in such a way as will achieve this balance and to prevent disposal of the disputed rights. This is in fulfilment of justice, prevention of arbitrariness and weakening the force of the Autonomy of the Will in the sphere of contractual relations if they become a source of exploitation.

—To give the character of legal relation prevalence over the character of contractual relation and to expand the recognition of the liability arising from the rule of Law in the field of contracts. This is to protect the weaker party in the contractual relation and is an expression of belief in the duty of the State in controlling the legal relations and to complete the inadequacy of contractual liability to guarantee the rights of injured parties.

—To expand the cases of nullity as a punishment in the sphere of defect of consent, with the possibility that a decision to this effect might be accompanied by another punishment such as compensation if there is justification for it. This is to prevent exploitation by a strong party of a weak party in the contract and to eliminate the reasons and phenomenons of pressure in the conclusion of contracts.

—To recognise that nullity may not be the only just punishment when the contract contravenes a rule of public policy concerning the content of the contract.

—The judicature must also be enabled to reconsider the contract by omission or addition in a way that will ensure the subjection of the contract to the public policy which considers as one of its principal rules to make the public interests and requirements of national development prevail over the other interests.

—To reconsider the provisions of the nominate contracts and to draw up the rules which ensure the harmony of their provision with the requirements of the age. This is because some of the contracts to which detailed provisions have been devoted are frozen in their provisions as a result of the change in the economic and social conditions, so, special provisions on them were formulated which contradict the provisions of the Civil Law such as the Law for lease. It is also because the importance of some contracts, whose provisions were complying with the economic and social conditions of Iraq 25 years ago, has emerged at the present time and begun to play so important a role in the economic evolution and the development plans, that the treatment of their provisions requires great care and accurate details which respond to the requirements of evolution such as the contract of insurance and "agreement".

—To draw up the contract of public works, undertaking of the public utilities and contracts of "agreement" and importation in a way that will contain those formal and objective provisions which conform with their importance in executing the plans of national development.

—To introduce the non-contractual liability in the field of product liability (production of goods and productive services) and in the case of injury arising from things dangerous by their nature (such as the mechanical tools and the electrical and hydrological powers), on the basis of injury only and to exclude the element of negligence as a ground for liability, i.e., on the basis of bearing the consequences.

—To base the liability for the act of the other person on the factor of injury, depending on the concept of security, so that the master is liable for the injuries committed by his servant. He may have recourse to the servant if injury arose by the latter on his intention or gross mistake, and whoever is responsible, legally or by agreement for controlling a person who is in need to be controlled because of his minority or his physical or mental condition shall be liable to compensate the injury which is caused by that person to the other. But even if the injury is caused by a person who is in need to be controlled but there is no one who is responsible for him, or it is impossible to obtain the compensation from the responsible person, then the court may oblige the person who caused the injury to pay fair compensation taking into consideration the position of the litigants.

—To protect, by social securities, the injured persons where the provisions of non-contractual liability are not sufficient to remedy the injury caused to them, as an emphasis on the duty of the State to take care of the citizens and lifting the injustice inflicted upon them.

—To draw up, separately, social rules in the Civil Law dealing with protection of copyright in the fields of literature, fine arts and sciences and rights of discovery and invention and to organize their proper exploitation in a way that ensures the moral and material interest of the author, discoverer and inventor and to achieve the goals of the society in building up the socialism.

—To support the use of model contracts as a means of control on the administration and protection of the rights of citizens.

—To make a special code for the law of evidence which combines its adjective and substantive rules.

So far as the property rights are concerned the working paper prepared by the Ministry of Justice states that:

> The principle of the Iraqi Civil Law, in the field of original real rights, was the glorification of private property, as it considered the right of property as

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always exclusive right which allows the owner to dispose absolutely of what he owns, whether corporeal, interest or use. It was not restricted except in case it was grossly harmful to the neighbour; the law did not concentrate its care on what concerned the public interest in property ownership.

The Civil Law concerned itself with the protection and entrenchment of the big properties and the semi-feudal system and it did not restrict the ownership with any limit.

As regards the field of secondary corporeal rights it was, in the totality of its provisions, starting from a clear tendency preferring the interest of creditor to that of the debtor and the capital to labour. But all these are no longer going along with the policy and goals of the Revolution.

It is imperative, as starting from the actuality of economic, social and political evolution to define the basic starting points, in the title of corporeal rights, and then the public goals which are to be achieved.

As it can be seen the Iraqi government plan is to reform the legal system in such a way that socialist norms would prevail over the legal concepts of civil law as understood by the Islamic traditions.

4. The Characteristics of the Iraqi Legal System

The Iraqi legal system is a mixed system. The basic justification for calling the Iraqi jurisdiction a "mixed" system is the fact that the Iraqi legal system is based on both Sunni and Shi'a schools of Islamic law. Iraq in this way, compared with other Islamic countries, assumes a unique position. In contrast with other Arab countries, where the orthodox Sunni form the majority, in Iraq more than 50 per cent of the population are Shi'a. Furthermore, the best established centres of learning of the Shi'ite law are situated in Iraq—the City of Najaf in particular.

In addition to the above-mentioned dual and mixed character based on its historical sources in Islam, the modern Iraqi system has developed to a position which combines elements of the Anglo–American common law system, the Franco–German Civil law system and the Socialist legal system.

To western lawyers (and much to the dissatisfaction of non-westerners) the world's major legal systems are categorised into the civil law system based on Roman law on the one hand and common law and equity on the other as prevailing in England and North America. It should be emphasised that this categorisation disregards the distinctive character of many legal systems including religious systems of law (e.g. Jewish or Islamic law) and Socialist legal systems (e.g. USSR). Nevertheless to a western lawyer, all legal systems are based on either civil law or common law.

Iraq has historically experienced the administration of both systems:

4.1. English Law

The English legal system of common law and equity was introduced and enforced in Iraq during the British Administration in this country between 1915 and 1932. The period of British administration was short and the common law system did not take root in Iraq in the same way it had in the Republic of Ireland, Australia, New Zealand and North America or some other parts of the world once under British rule such as Nigeria, India and Pakistan. The existing legal order prevalent in Iraq successfully resisted any English law penetration into the local and religious norms. Nevertheless, Iraq, was influenced by the British justice particularly in procedural aspects of criminal law and substantive company law. This situation was recognised in an Iraq–UK agreement signed on 4 March 1931 which allowed British personnel to assume judicial functions in Iraq.[1]

4.2. European Civil Law

Civil Law, derived from Roman law and prevailing in Europe was also influential in the development of Iraqi law, in the same way that it has spread to Latin America, South Africa, Japan, Ethiopia, Quebec, Louisiana and many parts of the Muslim World including the Ottoman Empire of which Iraq was a small part.

The Iraqi jurisdiction has been called mixed because it has been influenced by both European Civil systems and English common law, the inheritance of Ottoman and British rule respectively. It is remarkable that after its independence, Iraq rejected the common law system and drew upon its historical sources in the Ottoman codes. These codes were originally based on European law, but later the Egyptian codes became a dominant source of inspiration for further development of Iraqi law. The Iraqi legal system, therefore, had certain attributes of both civil and common law systems, hence being called a mixed system. However, this assertion is true only in an historical context and it should be noted that the influence of the English common law has more or less disappeared in Iraq. Unlike the Republic of South Africa, Quebec Province of Canada and Israel which have preserved their "mixed nature", Iraqi law today has joined together with codified European-style law and can be regarded as a full member of the family of Civil Law tradition. Indeed, except for its rather distant historical link with British law, the Iraqi legal system can hardly demonstrate any positive resemblance to common law systems. The substantive peculiarities of the civil law system (and in particular a sharp division between public and private law on the one hand and a distinction between private law and mercantile law on the other) make the Iraqi system a first class candidate for being termed a Civil Law system.

The differences between common law and civil law (as later codified) are numerous. The most important is the doctrine of "precedent". In the

[1] As such Mr. Hugh Ifor Lloyd was for many years a Judge in Iraq (see (1953) 2 Lloyd's List Law Report, p. 371).

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common law system an inferior court is bound by a previous case in point decided by a superior court. The doctrine is not recognised in codified civil law-based legal systems. Hence, it is said that common law is judge-made law, whereas civil law system has "codes" such as civil code, commercial code and criminal code. In the light of this distinction, Iraq can hardly qualify as a mixed jurisdiction because it does not recognise the judicial precedent as binding. Hence there is no case law of binding legal authorities in Iraq in the same way as known to the common law system.

A qualification of the civil law system is that principles of law should take precedence over case law. The exposition of law is the task of eminent jurists in their publications which are considered as authoritative in law. By way of example South Africa accorded the force of law to certain legal writings produced by certain Roman–Dutch lawyers. Such an adoption is of course unprecedented in recent times except in the Islamic world where the writings of early Muslim jurists should, according to the fundamentalists, carry the force of law. Such a status is not, of course, accorded in Iraq to the writings of the learned jurists. In Iraq opinion of learned jurists and case law rank equally as secondary informal sources of law. Legislation and subordinate executive regulations are superior to decided cases.

Again the position of "equity" in Iraqi law is relevant to the characterisation of the Iraqi legal system. Equity is accepted in the Civil Code 1951 as a secondary source of law but there is no distinction between "common law" and "equity" in Iraq. Thus the influence of the English common law and equity upon the Iraqi system is so limited in modern times that it is not justified to describe it as a "mixed system" combining principles of "civil law" and "common law".

5. Substantive Law

Having outlined the characteristics of the Iraqi legal and judicial system it is appropriate at this stage to make reference to specific branches of substantive law.

5.1. Law of Contract

The Iraqi law of contract as contained in the Iraqi Civil Code 1951 is based primarily on Islamic law.

General Principles of the Law of Contract

Until comparatively recently, Islamic jurists never addressed themselves to an Islamic general theory of contract applicable to all types of contracts. As it can be observed from all traditional texts on Islamic law, the manuals on law of contract contain rules governing a number of individual kinds of contracts but not a general concept of contract. This

situation has given rise to a view, shared commonly by all modern secular lawyers commenting on Islamic law, that, like Roman law, the Islamic law of obligations is a law of contracts not of contract. This view, however, cannot be supported in either theory or practice because of the following reasons:

Firstly, the generality and extension of the relevant Qur'anic texts afford a general concept of contract applicable to any conceivable private agreement. For instance, the Qur'anic verse of "*ufu bil uqud*" (honour your contracts) covers all possible agreements however diverse and different they may be.

Secondly, in Islamic law, the contract of sale is usually considered as the typical contract after which other contracts are patterned. Thus apart from the inherent particulars relative to the subject matter, there is not a great deal of difference among various types of contract. Indeed, the Islamic jurists have applied the same principles as applying to the contract of sale to all contracts including marriage.

Thirdly, the prevailing view amongst the various schools of law rejects formalism as a necessary criterion for concluding contracts. Only according to the formalistic school of thought, highly differentiated formulas should be used for each type of contract. By contrast the majority of Muslim jurists accept that all mutually agreed contracts are enforceable whether or not formulated under one of the specific and nominate contractual legal frameworks (called *uqud*). Thus intention and consent, however expressed, lead to contractual obligations. Furthermore, the prevailing view of the overwhelming majority of contemporary jurists in Islamic countries including Iraq adhere to the doctrine which formally sanctions all private contracts regardless of their formal specifications. The traditional view which required specific verbal cause for the valid conclusion of contracts is no longer upheld in the contemporary Muslim world. Thus any agreement whether or not it conforms to the traditional legal frameworks is nowadays considered as binding in Iraq provided offer and acceptance has been made. Indeed, to suit the realities of the commercial and private situations of the changing social-economic orders, various frameworks (*uqud*) have been modified and varied considerably from their simple genesis in the early Islamic era. Furthermore, the legal framework of the contract of *Solh*,[1] namely settlement, originally designed for the particular purpose of the settlement of an existing dispute, has served in later times as a method to accommodate almost any sort of private contract.

Contract is concluded by offer and acceptance verbally or in writing. Interestingly, in many government contracts the English language has to be used in the contract and all engineering and design data including technical information must be in English.

[1]Also written "sulh" meaning compromise or settlement.

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For each obligation arising out of contract there must be an object (Art. 126). Under the same article, the object may be:

(1) property—real (movables and immovables), debts or benefits,

(2) other proprietory right,

(3) doing or refraining from doing an act.

Property is defined in the Code as every right having material value (Art. 65) and proprietory rights are either real or personal (Art. 66). A proprietory right is a direct power over a specific thing granted by the law to a definite person, which may be original or accessory (Art. 67). Of the original rights is the right of ownership, right of possession, right to benefit, to user or to residence, etc., while accessory rights are rights of mortgage, pledge and privilege (Art. 68). A personal right is a legal bond between two persons, creditor and debtor, whereby the creditor can require the debtor to transfer a real right, or to do an act or to refrain from doing an act (Art. 69). It is the *vinculum juris* of the Roman Law. The creditor is the obligee and the debtor the obligor.

The object of the contract may be lawful but is absolutely impossible of performance. In such event the contract is void (Art. 127). But where the object of the obligation cannot possibly be performed by the debtor and not because it is in itself absolutely impossible of performance, the contract is valid and binding, and the debtor must compensate the creditor for the non-performance of his undertaking (Art. 127). The object may be non-existent at the time of the conclusion of the contract provided it may possibly take place in the future and has been sufficiently indicated to negative any allegation of ignorance or fraud in respect thereof (Art. 129). The absence of the last circumstance renders the contract void (Art. 128). The object of an obligation shall not be contrary to public order, or to morality, or prohibited by law (Art. 130). Matters of public order, for example, are the provisions relating to personal status, e.g. capacity, inheritance, provisions relating to the transfer and possession of immovable property, dealings with properties of interdicts and State properties, compulsory pricing laws, etc. (Art. 130).

In just the same way as every obligation created by contract must have an object which is not prohibited by law, or contrary to public order or morality, it must also have a cause therefor not prohibited by law, or contrary to public order or morality. Every contract whereby a party assumes an obligation for no cause (consideration) or for a cause (consideration) prohibited by law or contrary to public order or morality is void (Art. 132). It is unnecessary to mention the cause (consideration) in the contract because the law presumes the existence of a lawful cause (consideration) for every obligation until the contrary is proved (Art. 132). Accordingly, where a risk insured against has become extinct or has happened at the time of entering into contractual relations or where one

of the contracting parties at least had knowledge of the fact, the contract of insurance against that risk is void (Art. 984) because there is no cause (consideration) therefor.

A void contract is incapable of conclusion. It does not exist. The parties to a void contract shall be put in the state in which they were before the contract unless this is impossible in which case an adequate compensation may be awarded (Art. 138). But where a contract is void in part only, that part only shall be void and as to the remainder the contract shall remain valid as being an independent contract, unless no contract could have been concluded without the void part thereof (Art. 139). And where a void contract contains the elements of another contract, it shall be valid as such if the intention of the parties was to conclude such contract (Art. 140). In void contracts every interested party may rely upon nullity of contract and the court may, on its own initiative, declare the contract void without the point being raised before it (Art. 141). The nullity cannot be ratified (Art. 141).

In discussing general principles of the Iraqi law of contract it is essential to outline the remedies for breach of contract. Generally, these remedies fall into two main categories. Firstly, there are remedies which can be exercised by a contracting party without judicial sanction and which as such can be properly described as self-help remedies. Secondly, there are remedies which are available only by resorting to the courts of law.

Remedies of self-help can be discussed under four categories:

(*a*) Right to avoid the contract because of an "option" which we shall not consider further because in most cases these are not relevant to modern commercial contracts.

(*b*) A right to withhold the performance or payment. By the doctrine of mutuality, if one party is in breach of contract the other party can withhold performance. This is known in Iraqi law as "*haq-al-habs*" (right to withhold).

(*c*) Right of automatic set-off. If one party is in breach of the contract, the injured party can in specified circumstances by way of set-off seek redress.

In addition to the self-help remedies there are certain judicial remedies for breach of contract under Iraqi law. These are (*a*) rescission, (*b*) specific performance and (*c*) award of damages for the creditor against the party who is in breach. The first remedy is developed under Islamic legal concept of various "options" which allows a party in specified circumstances to withdraw from the contract. The second remedy which entitles the creditor to require performance by the obligee is based on the Islamic maxim *ufu bil uhud* (fulfil your contracts). The last remedy, i.e. damages is based upon the principle of *la zarar* namely a tradition from the Prophet which says "no losses should be inflicted".

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The main remedy for breach of contract under Iraqi law is the payment of damages by the obligant who is in breach as incorporated in the Iraqi Civil Code. In short, if damages for breach are sued for, the plaintiff must establish that (*a*) there had been a contractual obligation, (*b*) the obligation was not performed, and (*c*) the losses sued for were the direct result of non-performance.[1]

It is for the non-performing defendant to establish the existence of the external cause for non-performance. Thus if a party can prove, in terms of Article 211 of the Iraqi Civil Code that the loss was either caused by an external cause or was unforseeable he is not liable.

Force Majeure and Frustration

Act of God or as known in Iraqi legal system, *force majeure*, relieves a party from effecting performance. The term *force majeure* (al-quwat al-qahira) is specifically mentioned in Article 211 of the Iraqi Civil Code of 1951.[2]

In standard form contracts by the Iraqi public sector reference is made to *force majeure* circumstances both in clause 67 of the General Conditions for Contracts of Civil Engineering Works 1972 and in clause 44 of the General Conditions of Contract for Electrical, Mechanical and Process Works promulgated in 1980. Accordingly in order to avoid any subjective interpretation of *force majeure*, the test of a contract should specify the circumstances which will be deemed to constitute *force majeure*.

In addition to circumstances of *force majeure*, by Article 146(2) of the Iraqi Civil Code of 1951 any unforeseen circumstances which are due to "exceptional events which have a widespread and general effect" and which result in inability to perform a contractual obligation as originally envisaged "even though performance is not intrinsically impossible", and the contracting party shows that performance will involve "enormous loss", justify judicial intervention. Thus after weighing in the balance the interests of both parties, the Iraqi court shall adjust the obligation to reasonable limits if justice so requires. This notion is based on the "theory of changed circumstances", which has its roots in the French theory of "*l'imprevision*". Hence whereas in circumstances of *force majeure* the contractual obligation is extinguished, in "changed circumstances", the contractual obligation is adjusted to a more reasonable task. Clause 44 of the General Conditions of Contract for Electrical, Mechanical and Process Works prepared by the Ministry of Planning in 1980 draws a distinction between *force majeure* and "frustration", but makes no reference to "changed circumstances".

[1]For details see my *Remedies for Breach of Contract in Islamic and Iranian Law*, Glasgow: Royston, 1984, pp. 23–49.

[2](This article is relevant to both tort and contract liability. For a translation of Article 211 and further discussion of its provisions see the section "Law of Tort", *infra*, pp. 188–

International Commercial Contracts

So far as medium-sized government contracts are concerned, the Iraqi Ministry of Planning has issued general guidelines and patterns for all contracts entered into by the public sector in various fields including civil engineering, mechanical, electrical and process works. These conditions are based on FIDIC (the International Federation of Consulting Engineers) standard form contracts with certain modifications and alterations made by Iraq.

These standard conditions are generally adhered to by the respective government-owned entities and public coroporations in Iraq. Only in exceptional cases, and particularly in major development projects, modification of these standard terms are allowed by the government authorities.

Tenders

The standard procedure for purchase by the public sector in Iraq is by the issue of tenders. There are two different methods of public tender: (*a*) open and (*b*) selective. Open tenders are published in the local press inviting any interested party to bid. By contrast selective or restricted tenders are sent only to approved companies inviting them to bid. The Commercial Supervision Department of the Iraqi Ministry of Trade, located in Baghdad, maintains a register of foreign companies interested in doing business in Iraq. Indeed, it is a developing trend in Iraq that tenders are increasingly being issued by direct invitation only. It is, therefore, important for exporters to Iraq to ensure that the issuing authorities have a record of their particular areas of speciality and add the name of their company to the list of approved suppliers. Companies wishing to begin trading with Iraq should, as a first step, notify their identity by writing to the relevant state organisations who are the major potential customers in Iraq. Such initial communications should seek to introduce the company, its products and services, referring to previous work done in the Middle East and ask to be included on tender lists.

The procedure in evaluating tenders is usually that they are considered firstly on technical merit, compatibility with tender specifications etc. and that those tenders which do not comply are then discarded. The remaining tenders are then considered in terms of financial/commercial competitiveness. Supply tenders frequently have unrealistically short bidding periods (three weeks is not unusual), so it is often very difficult to get tender documents from Iraq to the West and then back again with the bid before the closing date. It is therefore important to note that some Iraqi public sector bodies will accept the summary of a bid by telex before the closing date, with the follow-up detailed bid sent by post and post-marked before the closing date for submission of bids.

Iraqi government departments and government-owned agencies and

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instrumentalities inviting offers by way of public tender normally require a "bid bond" that is to say that all companies submitting a tender are required to give a banker's guarantee, sometimes a percentage of the value of the bid (not more than two per cent of the bid) or a deposit of a fixed sum, which is refundable. Bid bonds guarantee the commitment and the good faith of the tendering parties. Requests by prospective tenderers for a reduction in the size of the bid bond, or not to submit a bond at all, are considered as signs of unreliability and usually lead to automatic disqualification. The period of validity of the bid bond is invariably the period of validity of the tender price itself. A common period of validity is 90 days but it will vary according to the Iraqi parties' estimate of how long they expect to take for evaluating the bids. If the evaluation procedures or negotiations with short-listed bidders are protracted, the Rafidain Bank extends automatically the bonds of all tenderers until the conclusion of the contract. Only after the contract is awarded, the appropriate Iraqi government agency instructs the Rafidain Bank to release the bonds of the unsuccessful bidders. Bid bonds take the form of an unconditional bank guarantee issued by the Rafidain Bank in Iraq in favour of the Iraqi department in question, on the instructions of the tenderer's bank, which underwrites the Rafidain Bank's bonds.

Commercial Agents

The business of commission agencies in Iraq is strictly regulated by the Law No. 11 of 1983. This law, promulgated to control the activities of commercial agents, requires all agents to register with the Registrar of Commercial Agencies, under the jurisdiction of the Ministry of Trade. The law also attempts to control and punish irregular conducts by government officials thus forbidding public officials to make any approach to private sector agents except in most exceptional circumstances and with the explicit written authority of the Minister of Trade. Although registered agents are not forbidden from approaching public sector buying organisations, the 1983 law inhibits all but the most superficial contacts between agents and public sector. It is a declared public policy to discourage the public sector from using agents. The practical impact of this policy has been that since the coming into force of the 1983 law some public sector organisations refuse to do business with any supplier represented locally or elsewhere.

In spite of the limitations imposed upon agents' scope for dealing with the public sector, foreign companies may retain an agent in Iraq to deal with the public sector. However, they must ensure that each and every agreement between the overseas supplier and local agent is registered with the Iraqi Registrar of Commercial Agencies. This registration procedure is time consuming and calls for the principal to take responsibility for action taken (on their behalf) by an agent and to sign a boycott declaration. In appointing agents the following points should be borne in mind:

(*a*) *Scope of representation*—the registration application should specifically detail the agent's field of operation (i.e. the products and government departments which are his responsibility) and the authority held by the agent (e.g. whether the agent can quote final prices, initial contracts, etc.). This limits the liability of the principal *vis-à-vis* his agent and also leaves the principal free to deal direct on those products and with those government departments which do not deal with agents.

(*b*) *Responsibility for the agent*—the standard agency format requires the principal to be responsible for the "consequences of any infringement by him (the agent) of his obligation in Iraq". This particular requirement has wide-ranging implications but most foreign companies have interpreted it to have application only in respect of action taken specifically on their behalf. Some foreign companies have sought to protect their interests by obtaining an undertaking from the local agents to indemnify the principal for any loss resulting from the agency operations.

(*c*) *Affidavit concerning the Arab boycott of Israel*—similar to other members of the Arab League, Iraq requires such an affidavit. There are several versions of this affidavit in circulation in Iraq. A company is usually provided with a specimen affidavit by the Iraqi authorities. However, this specimen is a guide rather than a copy and the foreign contracting company can formulate its own wordings of the affidavit.

(*d*) *Defence sales*—Iraq's Ministry of Defence deals only with principals and no agent or middlemen are allowed to participate in concluding defence contracts.

So far as the commercial agency is concerned, agents are required by Law No. 11 of 1983 to register each individual agency even if they are dealing with sales only to the private sector. Copies of licences to carry out the work of a commission agent should be seen by the supplier. The private sector may not be given exclusive agencies (this right is reserved for the public sector). Exporters should take it as a general rule of thumb that in all dealings with Iraqi buyers, the public sector should be given preference.[1]

Performance Bonds

By submitting a tender the bidding company undertakes to produce a performance bond if it is awarded the contract. Failure to do so entitles the Iraqi client to call in the bid bond. Performance bonds are usually calculated in accordance with the following sliding scale:

[1] U.K. Department of Trade, *Iraq* (various fact-sheets and pamphlets), 1982–84.

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8% for the first ID 500,000 of the total contract price
6% for the next ID 500,000
5% for the next ID 1 million
4% for the balance

Thus the average performance bond for major projects in Iraq usually works out at around five percent. Once again the Rafidain Bank charges one per mille per month (0.1 per cent) calculated on the value of the bond and this is payable at the outset in full for the duration of the bond. Thus a two year bond will cost 2.4 per cent of the bond value and it cannot be paid in instalments. Bonding charges are payable by the contractor's bank, i.e. Central Bank regulations do not permit these to be paid locally from a Dinar source. Stamp duty is also levied on the bond at the rate of two per mille (0.2 per cent) of the bond value. The contract is effective upon signature, by which time the performance bond has been lodged and a stamp duty of two per mille (0.2 per cent) of the contract price has been paid, unless the contract is covered by Law No. 157 of 1973 which grants exemption from stamp duty and gives certain other privileges and exemptions. The performance bond is payable to the Iraqi client on demand and is arranged in the same way as the bid bond. The performance bond has to be raised before the bid bond is released. The performance bond is not normally released by the client until completion of the "maintenance period" at the end of the contract, and this is usually 12 months after completion of the contract.[1]

5.2. Law of Tort

In accordance with Islamic principles to intentionally or negligently cause physical injury to another, or to cause him financial loss engages liability in reparation as prescribed in traditional authorities. Although the liability for reparation for personal injuries is very well established in Islam in accordance with the Law of Retribution, reparation for the loss of use or profit sustained as a result of wrongful appropriation is a disputed question among Muslim jurists. Shafi'i maintained that in all cases there is liability for loss of use, while Abu Hanifa held that it should be limited to certain exceptional cases. Malik held that liability is present if it appears that the person wrongfully appropriating the property has profited from it.

The liability for fault under Iraqi law is contained in Chapter III Part 1 of the Iraqi Civil Code 1951 which is concerned with civil liability resulting from non-contractual relations in general. This Chapter deals with all obligations not arising from contracts including wrongful and/or negligent conduct. This part of the Civil Code is divided into, and draws distinction between, first loss and injuries to the property and secondly loss and injuries to the person. Articles 202 to 232 of the Civil Code are

[1]Ibid

relevant to personal injuries. Article 202 of the Iraqi Civil Code 1951 provides for damages in case of death or personal injury. It reads:

> Any conduct injurious to the person of another whether resulting in death, injury, beating up or any other type of harm shall render the person causing harm to be liable for damages.

This article which lays down the principle of Iraqi law on personal injuries is very wide and comprehensive. What is most important in Article 202 is the fact that the terms of this Article, no doubt deliberately, omit any reference 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. As if the rule of Article 202 were not wide enough, Article 204 of the Iraqi Civil Code under the heading of "Common Rules for Civil Wrongs" provides that: "Any wrong causing others (their property or their person) any other injury not mentioned in the preceding articles shall merit reparation". It seems that the intention of the Iraqi legislature is to formulate a very wide general rule with no, or as little as possible, exceptions. The actual terms in Articles 202 and 204 do not refer to natural or legal persons to whom the injuries were attributed. Significantly the law is directed to injuries and the injured person. In other words, the wordings of these articles refer to "any conduct" and to "any wrong" rather than "any person".

More importantly Article 231 of the Iraqi Civil Code, without prejudice to other rules, states that anybody who has under his control machinery or other equipment which requires special care, shall be liable for damages resulting from them, unless he can prove he has taken adequate care to prevent the occurrence of such loss and injuries. It is worth noting that this article is more or less a translation from Article 1384 of the French Civil Code which shifts the onus of proof from the plaintiff to the defendant on the basis of the "theory of risk". Hence when any injury or loss arises as a result of the operation of mechanical equipment or machinery, there is a presumption by the statutes that there is a fault on the part of those who control such mechanical equipment or machinery.

The relevant Iraqi law concerning the defence for tort liability is contained in Article 211 of the Civil Code 1951 which states:

> When a party can prove that the damage or harm has been caused by an external cause which was outside his control, such as a natural disaster or an unexpected/sudden (unforseeable) accident, or *force majeure*, or the act and conduct of a third party, or the fault of the injured party himself, such a party will not be liable for damages unless he has expressly accepted liability by agreement.

As it can be seen, the accident or loss should be forseeable, otherwise it falls within the terms of the above article. We have already dealt with the issue of *force majeure* but Article 211 is more extensive than the doctrine

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of *force majeure* because it covers areas of contributory negligence and fault of a third party. More specifically one of the examples given in the text of Article 211, i.e. "conduct of a third party" can clearly apply to the defences such as compulsory pilotage in shipping law. It follows, therefore, that unless the relevant contractual documents expressly state otherwise, under the Iraqi law the fault of a third party or contributory negligence is recognised as a valid defence against any claim of liability for negligence.

5.3. Family Law

The Iraqi family and personal status law is the legacy of the Islamic Shari'ah as practised by the Ottomans. The rules applicable to personal status remained uncodified for a long while in the Ottoman Empire with the exception of some minor regulation contained in the Mejallah on the one hand and two Imperial Orders issued in 1915 regarding separation in marriage on the other. However, rules of marriage and divorce to be applicable to Muslims, Jews, and Christians, as they appear in their respective religions and traditions, were ultimately codified in the Law of the Family Rights of 1917. After the Ottomans, the Iraqi courts continued the application of the Ottoman practices till the promulgation of the Iraqi Civil Code in 1951.

The Iraqi Civil Code 1951 provided rules relating to personal status, such as those concerning the characteristics of personality, nationality, the family, the name, the title, domicile, the age of majority and the like. This part of the Iraqi civil law is very much based on the Islamic law—but unlike the Ottoman legislation which adhered to the Hanafi school alone, the Iraqi code referred to all major schools of thought in Islam including the Shi'ite school.

Family relationships were further regulated by the Law of Personal Status No. 188 of 1959. The 1959 law, based on the whole corpus of the Shari'ah, promulgated a law the provisions of which were chosen irrespective of the schools of thought of Islam. The 1959 law was amended by Law No. 11, 1963. Accordingly court permission for a polygamous marriage is now essential in Iraq. Furthermore, under the 1959 legislation the taking of an additional wife is grounds for the existing wife to obtain a divorce.

It is significant that the amendments of 1963 to the Law of Personal Status made the Shi'a system of inheritance applicable to all Iraqis.

Religious minorities in Iraq are allowed to apply their own religious norms and practices in matters of family law and inheritance. The Church in Iraq can, therefore, celebrate and register marriage. Any document showing that the parties have gone through a religious ceremony in Iraq and attested by a Christian priest is recognized by Iraqi civil authorities and by the courts of law in Iraq as evidence of a regular marriage in Iraq.

The personal status of the religious minorities, heard by the Court of First Instance, is governed by the parties' respective religious and customary norms.

5.4. Commercial Law

In Iraq, in keeping with the Franco–German Civil Law tradition, there is a distinction between civil law and commercial law. The commercial law relates to legal relationships between merchants and regulates trade and business activities. It is thus, distinguished from civil law which deals with ordinary relationships between private citizens in circumstances where these transactions are done outside the normal course of their financial affairs. Thus the difference between civil law and commercial law is that the financial relationships which are governed by commercial law are determined either in accordance with the characteristics of a certain class of individuals, or on the basis of the nature of transactions. Accordingly it may be the case that the provisions of commercial law apply to transactions commercial by nature, although the individuals concerned in them are not merchants.

The Commercial Code of Iraq No. 60 of 1943 prescribed in Article 14 that transactions connected with matters enumerated in the article shall be commercial without regard to the status and intention of the persons undertaking them, and item (14) of the said article concerns life assurance and insurance against any risks by sea and land, whether against premium or for mutual benefit. This clear provision declares insurance activities as commercial irrespective of the status and intention of the persons undertaking them. Furthermore, the Iraqi Insurance Companies Law No. 74 of 1936 regards insurance activities as commercial operations (Art. 1 of the law). Also, Article 20 of the Commercial Code of Iraq lays down that where a contract is commercial as regards one of the contracting parties, then the provisions of the Commercial Law shall apply to the obligations arising out of the contract as regards all the contracting parties, unless the law otherwise expressly directs. Three more articles of the Commercial Code will have to be referred to, namely Articles 122, 123 and 3. Article 122 lays down that binding oneself by offer and acceptance is sufficient for the conclusion of a commercial contract and there shall be no need to draw up an agreement or observe any other forms. And Article 123 prescribes the adoption of some special form or procedure in the conclusion of a contract, or if the parties make the contract dependent upon the drawing up of an agreement, then the contract shall not be concluded unless such form or procedure has been adopted or the agreement has been drawn up. Article 3 deals with the manner of deciding commercial matters. It provides that a commercial matter shall be decided in accordance with the terms of the contract, where there is a legally valid contract. Where there is no such contract,

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the matter shall be determined in accordance with the rules, express or implied, of the commercial law. If it cannot be so determined, the trade custom shall be observed, provided that the local custom or special custom shall be preferred over the general custom. Where there is no commercial custom, the rules of the civil law shall be applied.

In contemporary Iraq, the government has full control over all major commercial activities. For instance, oil and gas, mining, banking, insurance, and foreign trade are all nationalised. In 1983 it was estimated that 95 per cent of all imports in Iraq were handled by government departments and government-owned agencies. Usually each ministry such as the Iraqi Ministry of Trade or Ministry of Oil, controls several state enterprises each of which in turn own many subsidiaries. Private sector enterprise in Iraq is confined to agriculture, construction industry, and small retail outlets. So far as foreign trade is concerned, the private sector handles only some five per cent of total Iraqi imports. Even this portion is decreasing because of the increasing pressures since the Iran–Iraq war on scarce foreign exchange.

Commercial activity in Iraq is regulated by an avalanche of detailed legislation. The most important authority on commercial law is the Iraqi Commercial Code 1970. This code contains the appropriate rules applicable to the determination of the characteristics of commercial activity. It specifies the criteria which establish the status of a merchant, such as the capacity, professional character, and legal personality in the case of corporate entities. The Commercial Code also deals with the duties imposed upon merchants, such as the duty to keep the prescribed commercial registers, and to maintain a commercial address. In addition it provides the rules governing bankruptcy and negotiable instruments like cheques, bills of exchange, bonds, promissory notes and other negotiable instruments.

Commercial relations in Iraq are governed by various laws promulgated in different periods and under different political and constitutional environments. In general, the Iraqi commercial law still reflects the old pattern of a mixed economy and does not take into consideration the expansion of the State activity in the field of commerce. For instance, the Commercial Code of 1970 recognised the freedom of contract and tends to protect the interests of creditors over the interests of debtors. The 1970 code also recognises the commercial nature and character of certain enterprises and works practised by the State. By contrast certain "progressive" laws such as the Law for Organisation of Trade No. 20 of 1970 (as amended) strengthened governmental control of the important aspects in the economic field. Iraq's goal in drawing and organising the commercial policy and supervising its execution within the frame of the development plan is to ensure the evolution and protection of national economy and prevention of monopoly and manipulation of prices of commodities and services.

A working paper prepared by the Iraqi Ministry of Justice on Legal System Reform (1977) recommended that not only foreign trade must be put under the control of the State but also domestic trade must be centrally controlled by the State. It was also recommended that the role of the cooperative and the private sectors in national economy must become a complementary one which conforms with the requirements of economic development and does not exceed its appropriate limits in a socialist system. Other recommendations of the 1977 working paper included the following concerning commercial law:

(*a*) Planning the activities of trade sector and linking it with the national development programmes in order to ensure the provision of commodities and services required.

(*b*) Making it a criminal offence to practise trade for persons who are forbidden to engage in trade under special laws and regulations.

(*c*) Entrusting the government authority concerned with the organisation of trade with issuing rules and by-laws to regulate the commercial books, commercial registers and conditions of business establishments.

(*d*) Unifying the existing dual provisions concerning competence in the civil and commercial matters and to include them in the text of the Civil Code for the purpose of coordination of the similar matters.

(*e*) Unifying the general principles of the law of obligation and those of contracts so that they govern both civil and commercial matters without distinction.

(*f*) Restricting the practice of commission by bringing the system of commercial agency under the provisions contained in the Civil Code.

(*g*) Repealing the provisions concerning the stock exchange because "speculation is one of the sources of exploitation on which the capitalist system is based and which conflicts with socialist policy".

Other recommendations of the 1977 Working Paper which directly related to reform in areas of commercial law were as follows:

—Adopting laws to regulate the operation of storage of commodities, making provisions concerning deposit in the public warehouse by an envisaged government authority concerned with the organisation of trade which should be competent to assign the stores and warehouses, and to organise their administration and operation either directly or by an authority appointed by it for this purpose.

—Drawing new laws governing (*a*) shipping traffic, (*b*) aviation and (*c*) land transportation.

—Law reforms concerning banking and negotiable instruments which

should conform with the requirements of socialist transformation of Iraq and the national development plans.

—Repealing the existing provisions on commercial bankruptcy and unifying the provisions governing the estate of an insolvent debtor whether he is a merchant or not and formulating new rules for the winding up of the debtor's estate in a "collective way in a frame of the public interest".

—Unifying the rules of evidence in both civil and commercial matters by introducing separate legislation which should simplify the existing formalities and recognise the principle of equality.

—Making new rules for organising and coordinating the financial and accounting matters for establishments, enterprises and companies in various economic sectors.

—Laying down detailed provisions for the administration of public commercial establishments and enterprises in the public sector, the existing legal provisions being inadequate to deal with these matters.

—Formulating unified rules applicable to all the establishments and enterprises in the public sector.

—Drawing up detailed rules for the companies in the mixed sector in order to ensure its support of the public sector at the present stage of development.

—Simplifying the provisions for the registration of companies in the private and mixed sectors and facilitating the practise of trade in these sectors for encouraging the investment of national capital.

—Restricting the permissible objects of trade in the case of companies applying for registration in the private sector so that the private sector companies cannot operate in a way incompatible with the planned economy.

—Making rules which emphasise the supervision and control of the State on the administrations of companies in the private sector, to define the range of their works and to direct them in accordance with the economic planning.

—Supervising the companies of the private sector so that they operate as complementary organisational form to ensure their movement within their own limited goals and those of the development plan. Companies in the private sector should not hinder the initiatives of the planned economy. They must be prevented from enjoying undue facilities or exemptions or otherwise operating in contravention of the laws and regulations.

—To draw up concentrated provisions for those companies in the private sector whose importance has diminished in recent years.

—To draw up provisions which guarantee subjection of the foreign companies to the control of the State and to ensure their carrying out the work entrusted to them within the public economic policy of the State.

5.5. Company Law

Company Law deals with the nature and formation of a company, various forms of commercial institutions, management, and dissolution of companies. The first comprehensive Iraqi Company Law of 1957 was repealed by Article 215 of the Law No. 36 of 1983. The 1957 Company Law therefore has no force of law but a general reference to it may be useful in the context of the Iraqi legal system and the development of commercial and company law in this jurisdiction. The 1957 Company Law was composed of four books as follows:

BOOK I covered the following issues:

(*a*) definitions of terms and phrases, (*b*) general provisions concerning all commercial companies, (*c*) Commandite Companies and Partnerships, and (*d*) joint ventures.

BOOK II covered very many areas concentrating on Joint Stock Companies. The areas covered in Part 1 of the Book II included:

General Provisions, Provisions Relating to Names, Incorporation, Capital, Shares and their Negotiation, Debentures, Membership of Joint Stock Companies, The Directors of a Company, General Meetings and Alteration of the Memorandum and Articles of Association.

Part 2 of BOOK II covered:

Limited Liability Companies, General Provisions, Shares, Management of Limited Liability Companies.

Also covered in this Book were:

Accounts and Balance Sheets and Audit and Control of Accounts.

BOOK III dealt with Dissolution and Liquidation and BOOK IV dealt with the following issues:

(*a*) branches and agencies of foreign companies, (*b*) control over companies, (*c*) penalties, and (*d*) miscellaneous provisions concerning the Style and Head Office of a Company, Minutes of Meetings and the Register of Directors, and Companies which transact business with less than the legally prescribed number of persons.

The Company Law of 1983 which replaced the 1957 legislation is designed, in the words of Article 2 of the 1983 law, firstly to encourage investment and secondly to control the activities of the companies. The 1983 Company Law comprises 216 articles divided into eight parts. Part One deals with basic provisions concerning company law such as the

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nature of company in Iraqi law, forms of companies and membership in the company. Part Two covers the requirements and procedures of the incorporation and registration. Part Three is devoted to the capital in some detail. Part Four relates to the administration of the company. Part Five deals with the supervision, control and public accountability of companies. Part Six relates to the dissolution of company. Part Seven defines the structure and provisions specifically related to a new type of business institution, incorporated by one person under the title "simple company".

Non-Arab nationals are prohibited from registering a corporation in Iraq. The only options open to Western companies wishing to invest in Iraq are (*a*) to enter into partnership with an Arab national partner or (*b*) to register a branch or (*c*) opening an office without registering it as a branch.

(*a*) Entering into Partnership.
In the event of forming a partnership the foreign partner is not allowed to hold more than 49 per cent of the equity shares in the enterprise. According to the Companies Law 1983 there are the following kinds of company in Iraq: joint stock company, company limited by share, collective (unlimited) company, simple company or individual project.

(*b*) Registering a Branch.
To qualify for the registration of a branch, the foreign company must have a contract in Iraq or must be a named subcontractor to another company which has a contract in Iraq.

(*c*) Opening an Office
Whether or not a branch office has to be registered depends on the nature of the foreign company's work in Iraq but broadly speaking, if the company is a contractor or sub-contractor or a consultant with large numbers of staff carrying out work in Iraq, the Registrar will normally require the company to register a branch office. The Iraqi authorities, however, discourage foreign companies from opening offices solely for sales promotion purposes but certain supply companies have successfully registered "technical support" offices. The Registrar of Companies reserves the right to insist on or refuse registration.

In practice the majority of foreign firms and companies operating in Iraq are required to register a branch. The procedure and requirements for registration are expensive, lengthy and time consuming. The most up to date provisions are contained in Article 205 of the Companies Law No. 36 of 1983 which provides that:

> Every branch of a foreign company or an economic enterprise, which is registered in Iraq, should:
>
> *Firstly*—Renew its registration within six months from the date this Law becomes effective if it has a permanent activity in accordance with a treaty, an agreement or a contract being concluded with the Government or has concluded a contract with Government offices or the socialist sector to execute a particular project.
>
> *Secondly*—Proceed with the liquidation formalities within sixty days from the termination date of its contract, if it had been executing a project for Government departments or the public sector, unless it has subsequently concluded a contract to execute another project. In the latter case it should renew its registration.
>
> *Thirdly*—Proceed with the liquidation formalities within sixty days from the effective date of this Law, if it has got no permanent activity to operate in accordance with a treaty, an agreement or a contract concluded with the Government, and it is not contracted to execute a particular project with Government departments and the public sector.

Article 206 of the Companies Law 1983 envisaged the promulgation of further regulations for branches of foreign companies and economic enterprises. These detailed regulations are designed to deal with the licence, administration, control and liquidation of foreign concerns in Iraq in accordance with the following bases:

> *Firstly*—The foreign company or economic enterprise shall not be granted a licence for opening a branch unless it is authorised to operate in Iraq a permanent activity in accordance with a treaty, an agreement, or a contract being concluded with the Government, or it is contracted to execute a particular project with Government offices or the socialist sector.
>
> *Secondly*—The branch shall acquire juristic personality from the date of its licence.
>
> *Thirdly*—The branch should have a manager who is authorised to administer the foreign company or the economic enterprise.
>
> *Fourthly*—The accounts of the branch and its activities shall be audited by the Supreme Audit Board (Al-Diwan).
>
> *Fifthly*—The liquidation formalities of the branch shall proceed within 60 days from the date on which the purpose of granting the licence no longer exists.
>
> *Sixthly*—The punishments stated in this Law shall apply on the branch if any contraventions of the law take place.

By Article 208 of the Companies Law 1983 a fine amounting to 20 Iraqi dinar (ID) is imposed for every day's delay subsequent to the period stated in Article 205 of this Law, on any branch of a foreign company which should have renewed its registration or liquidated its branch. Similarly, Article 211 states that any company which does not prepare the records which have to be maintained, in accordance with the Law, shall be punished by a fine amounting to not less that ID500 and not exceeding ID1,000. Further criminal provisions are provided in Articles 212 and 213 which say a company which does not present on time the statements and information due to be presented to a competent official party as required shall be fined by an amount of ID10, for each day of delay.

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Articles 213 states that:

> Any company officer who has given deliberately incorrect statements or information to an official party concerning the activities of the company shall be punished by imprisonment for a period not less than three months but not exceeding one year or a fine not less that ID1,000, but not exceeding ID3,000, or by both punishments.

In addition to the Companies Law 1983 there are several other Iraqi laws regulating the commercial activities in the country. Some of the most important legal texts are:

1. Law No. 25 of 1959, relative to Business Names.
2. Regulation No. 11 of 1959, relative to Business Names.
3. Law No. 20 of 1970 (with the latest amendments ending with Law No. 102 of 1979) on Regulation of Trade.
4. Law No. 64 of 1976 related to the Central Bank of Iraq.
5. Law No. 5 of 1979 on the Foreign Economic Relations Commission.
6. Law No. 8 of 1976 concerning Punishment of Unlawful Mediation.
7. Law No. 118 of 1978 regulating the Residence of Foreigners.
8. Law No. 95 of 1959 (as amended) on Income Tax.
9. Law No. 208 of 1969 concerning Regulation of Commercial Agencies.
10. Instructions on Foreign Exchange Control.
11. Law No. 65 of 1970 concerning Patents and Industrial Design.

It should be noted that certain areas of commercial law have developed in Iraq as independent disciplines on their own right. By way of example reference can be made to maritime law which, still based on the Ottoman Maritime Code, deals with the carriage of goods by sea, marine insurance, and all that relates to the sale of sea vessels, their gear and provisions. Other examples are the law of insurance, law and practice in banking transactions, corporate tax law, oil and gas law, mining law and similar aspects of commercial activities. Although full treatment of all these disciplines is beyond the scope of the present work, the following is an attempt to give a general account of these areas.

5.6. Maritime Law

Iraq has four sea ports. They are in order of significance, Basrah, Fao, Khor al-Amya and Um Qasr.

The maritime boundaries between Iran and Iraq in the Gulf are unsettled. The 1975 Treaty concerning International Borders and Good Neighbouring Relations between Iran and Iraq adopted the Thalweg line principle. The border line at the Shatt-al-Arab, therefore, was to follow the median line of the main channel, navigable when the water level is at its lowest navigation level, beginning from the point where the territorial border line is projected at the Shatt-al-Arab, through the sea.

Both Iran and Iraq claim 12 mile territorial sea. Iran by Article 3 of the law of 12 April 1959 extended its territorial sea to 12 miles. Similarly, Article Two of the Iraqi law No. 71 of 1958 extended the territorial sea of Iraq to 12 miles measured from the lowest water line of the Iraqi coast. Article 3 provided that in cases where the territorial sea of another state overlapped with the Iraqi territorial sea, the limits between the two territorial seas should be determined by agreement with the State concerned in accordance with the recognised rules of international law or such understanding as may be reached between the two States. Iraq has not yet settled her offshore boundaries with Iran and Kuwait.

After the 1975 Treaty, a Common Bureau of Co-ordination was established for navigation in the Shatt-al-Arab which was administered jointly and equally by Iran and Iraq. The Common Bureau issued certain regulations in 1975 to regulate the arrival, movement and departure of vessels; marine services safety, sanitary and anti-pollution measures, penalties and jurisdiction. Iraq claimed full sovereignty over its own sector of internal and territorial waters. Accordingly, pilots were to refer to the orders of the Port of Basrah Authority.

It was only on 17 September 1980 that the Iraqi Government officially abrogated the 1975 Treaty and claimed exclusive sovereignty over the entire Shatt-al-Arab. Then in an emergency session of the Iraqi National Assembly, Saddam Hussein, the Iraqi President, announced that vessels using the estuary and the waterway should fly the Iraqi flag and take on only Iraqi pilots. The Iraqi President stated:

> ... I hereby announce before you that the Accord of 6 March 1975 is terminated on our part too. Therefore, the legal relationship in the Shatt-al-Arab must return to what it was prior to 6 March 1975. This river must recover its Iraqi Arab identity as it had been throughout history in name and in reality, with all the disposal rights emanating from full sovereignty over the river.

The Ottoman Maritime Code promulgated in 1863, is, as amended, still in force in the Republic of Iraq (previously part of the Ottoman Empire). Article 249 of this code states:

> When a collision occurs at sea between two vessels as a result of pure accident in such a way that neither side can be blamed for the accident, then the damaged ship has no claim against the other. But, when this (collision) occurs as a result of the fault of one of the two ships' masters, then the ship which was negligent will be liable for damages. If the collision has occurred as a result of both parties' fault, or it is not known whose fault caused the damage, both the vessels, the damage sustained by them and the cost of repair will be valued. Then the liability of each party for damages will be apportioned between the two vessels according to the views of expert assessors.

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The Ottoman Maritime Code does not provide more specific provisions concerning the liability for negligence in shipping cases. However, Article 30 of this code deals exclusively with the liability of the Shipowner for the acts (or movements) and transactions of the Master. Also Article 35 states that "the Master, the head of the ship, or any other person who has control over the ship is liable for losses and injuries resulting from his control." A comparison between Articles 30 and 35 shows that while the shipowner is liable for the acts of the Master and the crew (under the terms of Article 30), he is not liable for the acts or omission of "any other person who may have control over the ship" (such as a compulsory pilot). Furthermore, Article 91 of the Ottoman code states that the ship and its freight are the subjects of security for the compensation of any loss or damage which may be suffered by the cargo owner as a result of the crew's negligence. As such Article 91 does not provide the applicable rules for liability for negligence in shipping cases but it states that once the liability is in point of fact established, the ship and its freight are considered as security subjects. Hence the applicable rules for liability in negligence in shipping cases are the provisions of Article 249 of the Ottoman Maritime Code on the one hand and the general principles of the law of tort contained in the Iraqi Civil Code of 1951 on the other hand. To date no legislation has been enacted in Iraq to modify these general principles.

The Iraqi Commercial Code 1970 contains a chapter on carriage of goods (Articles 252 to 335) but Article 243 specifically exempts the carriage by sea from said provisions.

Regulation No. 34 of 1980 promulgated by the Presidency of Republic established the State Organisation of Iraqi Ports.[1] Under this legislative enactment the Organisation is required to propose the draft text of laws and regulations pertaining to the Organisation's activities. The Marine Navigation Department of the Organisation is in charge of piloting vessels and other floating units within the coastal waters and navigable waterways of the Republic.

5.7. Banking Law and Practice

The Iraqi law relating to banking falls within the general principles of both private and public law. While the banker–customer's relationship is governed by the principles of the private law (e.g. law of contract, law of agency and commercial practice) the banking system in Iraq is a domain of public law because all banking facilities were nationalised in 1964. The Iraqi banking system is therefore completely State-owned and centralised. Nevertheless, the relationship between a banker and his customer is still essentially contractual. The applicable rules of contract which govern this relationship are primarily (*a*) that of debtor and creditor and/or (*b*) agent and principal.

[1]Iraq, *al-Waqai al-Iraqiya* (1981), No. 29.

Banks in Iraq are divided into three categories:

(*a*) The Central Bank (formerly National Bank of Iraq) which supervises and monitors all banking activities in Iraq and formulates policies at national level. This bank is located in Baghdad but it has branches in Mosul and Basrah also.

(*b*) The Rafidain Bank (established in 1941 and merged in 1974 with the Commercial Bank of Iraq) which is the only existing commercial bank in Iraq. With a pre-tax earning of US $737 million in 1983, the Rafidain Bank topped all Arab banks throughout the world in terms of income. It is also the largest bank in the Arab world. The Rafidain's main office is in Baghdad and it has about 120 branches throughout the country. In addition, the Rafidain Bank maintains five branches abroad; two in Bahrain, one each in London, Beirut and Oman. The Rafidain Bank provides normal banking services, mainly that of short-term financing, accepting deposits and transactions related to foreign trade.

(*c*) The specialised banks. There are three specialised banks in Iraq: the Agricultural Cooperative Bank (established 1936), the Industrial Bank (established 1940) and the Real Estate Bank.

The main function of the Industrial Bank is to develop national industry and encourage investment in industrial enterprise by means of: lending money for short, medium and long-term financing of industrial investments; participating as founder or shareholder in industrial enterprises to be undertaken by limited stock companies; to perform banking operations in general and for the benefit of industry only; and preparing feasibility studies for new projects to encourage and develop investments. Its primary sources of funds are capital and loans from the Government. It also receives loans from government agencies, the Central Bank and the Commercial Bank.

Foreign corporations trading with Iraq can safeguard their interest by requesting an irrevocable letter of credit. The Rafidain Bank will not confirm letters of credit but the beneficiary can get the letter of credit confirmed by another bank, at the beneficiary's expense. If in exceptional cases payment has to be on a CAD basis, original documents should be sent to the Rafidain Bank for presentation and not direct to the Iraqi importer in question. Importers take up the shipping documents on CAD terms only when the goods reach Iraq. There have been some delays since 1980 in obtaining payments on a CAD basis, though it should be emphasised that it has been only a matter of time before payments were received.

Exchange Control

Until 1982, there were few restrictions affecting the flow of capital into

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and out of Iraq. However in mid 1982 exchange controls were tightened up to reduce remittances for immigrant workers and to restrict the amount of money available to Iraqis for overseas trips. In November 1982, as part of a programme of austerity measures to control imports and limit foreign exchange allocations, the Central Bank introduced rigorous new controls requiring scrutiny of all foreign currency payments. This applies particularly to contractors and consultants carrying out ongoing projects in Iraq, but even suppliers of goods on a letter of credit basis were not immune from these new controls and there have been delays in release of post-shipment payments against letters of credit. The Rafidain Bank no longer has the right to commit any drawings against Iraq's foreign exchange reserves and all new business whether on a letter of credit basis or otherwise has to be vetted by the Central Bank before the foreign exchange allocation is approved. This also applies to revalidation of existing letters of credit which expire. Exporters should note the following:

—Foreign exchange transactions are no longer within the authority of the Rafidain Bank. They *all* have to be approved by the Central Bank.

—No goods may be imported without an import licence and exchange control permit; the former is required before a letter of credit can be opened.

—Letters of credit are normally valid for up to 365 days from date of opening, after which they have to be re-validated, though this may cause difficulty and delay. In certain circumstances it is possible, with the Central Bank's explicit approval, to open a letter of credit valid for more than 12 months, i.e. to cover the case where the buyer seeks extended credit terms, e.g. a letter of credit may be opened for presentation of shipping documents within four months of the opening date, and for payment 12 months after presentation of shipping documents.

—Foreign currency transfers for services rendered in Iraq by foreign firms—such as those of contractors and consulting engineers—require exchange control approval. Such approval is normally given except for such part of the total charges as may be assessed for local expenditure, but the principals, entering into a contract for provision of services are advised to ensure that the Iraqi party obtain preliminary exchange control approval beforehand and that the amount that can be transferred is written into the contract.

Iraq's currency is called Dinar which is divided into 1,000 Fils. The current exchange value of an Iraqi Dinar is US $3.

5.8. Law of Insurance

Until 1936, insurance business in Iraq was dominated by the British and remained outside State control. Indeed, most policies of insurance were effected outside Iraq. This situation changed when the Iraqi Government promulgated the Insurance Agent Licences Law 1936 which provided the legal framework within which insurance companies could operate in Iraq. Later, the National Company of Insurance Law 1950 provided for the setting up of a national insurance company which was eventually formed in 1952. Precisely 37 per cent of the capital of this company was contributed by the State. The National Company of Insurance is an independent legal entity and is managed by an administrative board of directors. The company may not be dissolved except by an Act of Parliament specifically enacted for the liquidation of the company. As far as the objects of the company are concerned, it can carry on all kinds of insurance business without restriction or limitation. The company succeeded in monopolising the insurance business of government agencies and government-owned corporations throughout Iraq.

It was only in 1960 that the government in Iraq increased its activities in the business of reinsurance. The Iraqi Reinsurance Company was then incorporated with an authorised capital of 5,000,000 Iraqi dinar (equivalent to £8,000,000) and with a paid-up capital of 1,250,000 Iraqi dinar. Exactly 60 per cent of the capital was contributed by the government and government-owned corporations and 40 per cent subscribed by the private sector. The principal feature of the legislation seems to be the Iraqi bias towards the employment of this newly-formed company. Thus all insurance companies and underwriters who practise the business of insurance in Iraq are obliged to reinsure at least 25 per cent of the amounts of their policies in the Iraqi Reinsurance Company. This provision obviously guarantees considerable profit for the Iraqi Reinsurance Company.

The Insurance Companies Law of 1960, replacing the Law of 1936, was intended to regulate the insurance industry within Iraq and to encourage domestic private enterprise. Thus, to protect the national industry, the new Law does not permit any person to insure outside the country the life of a person domiciled in Iraq, or movable or immovable property situated in Iraq.[1]

Iraqi Nationalisation

After the 1958 revolution, the Republic of Iraq joined the ranks of socialist Muslim countries. Iraq nationalised the insurance industry in July 1964 within its radical economic plan. The aim was to afford the public sector a stronger position in influencing the further development of Iraq's

[1] al-Khishtaini, S.N., *Essential Principles of Insurance Contracts*, Baghdad, 1977.

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national economy. Thus a number of nationalisation decrees were promulgated by the Iraqi Government which transferred to the public sector the banks, insurance companies, main heavy industries and certain major financial and economic establishments. These decrees stipulated that no further private companies could be incorporated for carrying on the same business as those covered by the decrees.

Article 1 of the Nationalisation Law, No. 99 of 1964, provided that:

> All insurance companies and underwriting companies and establishments named in the list attached to this Law are nationalised. Their ownership shall revert to the State.

At first the nationalised insurance companies retained their existing legal status and continued their work as usual. However, subsequently they were incorporated and the Board of Insurance was charged with their administration. The nationalised insurance companies have been classified into three groups, namely: the National Company of Insurance, the Iraqi Reinsurance Company and the Iraqi Company for Life Assurance. Under each group a number of insurance companies have been combined together to practise one line of business.

The modern Iraqi law of insurance has developed out of the Ottoman legislation. The Ottoman Maritime Code of 1863 was basically inspired by the French Code of Commerce, though the Belgian, Spanish and Russian codes were also consulted to a lesser degree. Chapter II of this code, dealing with marine insurance, consisted of 66 articles (175–240) and was divided into three parts. Part I provided rules for the formation of the contract; Part II dealt with the obligations of the insurer and the insured; and Part III covered the subject of abandonment. A new Law of Insurance was promulgated in 1905 by the Ottoman Government which dealt with certain aspects of insurance other than marine insurance (laid down in the Ottoman Maritime Code). The Ottoman Insurance Law of 1905 had its origin in the Belgian Law of 1874. It consisted of 25 articles dealing with some rules of insurance other than marine and life insurance and covered *inter alia* the creation of insurance policies, the subject-matter of insurance and the different types of policy which might be effected. However, the Ottoman Law did not sanction the legality of life assurance.

Substantive Law of Insurance

It was in 1936 that Iraq first attempted to provide a legal framework for the insurance business in the country, and a new Law dealing with insurance companies was promulgated for the first time; its main feature was that it gave official sanction to the business of life insurance. More important, the Iraqi Civil Code 1951, within a separate chapter entitled "The Contract of Insurance" (Arts. 983–1007), covered the elements and conditions of insurance contracts and their effects, and there are

particular provisions relating to various kinds of insurance such as life, fire and third party liability insurance. These provisions (which correspond to the Egyptian, Syrian and Libyan Civil Codes) were influenced mainly by the French Law of Insurance 1930. However, the Swiss Law of 1908 and the Lebanese Code of Obligations and Contracts were also consulted and drawn upon to a lesser extent.

The insurance provisions in the Civil Code are covered by Articles 983 to 1007 inclusive. They will be considered under four main headings, namely:

A. General Provisions which comprise
   (i) Validity of contract of Insurance,
   (ii) Effect of contract of Insurance.
B. Fire Insurance
C. Responsibility Insurance, and
D. Life Insurance.

A. General Provisions

There are a number of general legal provisions which apply to all types of contracts of insurance. They are imperative in their application, hence any agreement contrary to the provisions in question is declared, under Article 991, to be null and void unless such agreement be to the benefit of the assured or the beneficiary. Such a provision has been justified on the grounds that insurance is a contract of submission (adhesion) containing standard general conditions which the assured has to accept without discussion.

A contract of insurance, to be valid, must comply with the requirements of the law. It must not contain any matters which render it under the law null and void. To be valid, it must be executed by persons legally competent to contract and must be free from any defects affecting its validity. The discussion in detail of those matters falls within the general principles of the law of contract. In principle, every contract is valid on the face of it, unless its invalidity is proved either by general law or by special provisions applicable to contracts of insurance.

1. Definition: Insurance is defined in Article 983 as

> A contract whereby the insurer, in consideration of premiums or any other pecuniary amount made by the assured to the insurer, obliges himself to pay to the assured or to the beneficiary, in the case of the happening of the event insured against, a sum of money, or an annuity, or any other pecuniary prestation.

The same article proceeds to prescribe that by assured is meant the person who discharges obligations mutual to the obligations of the insurer

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and that by beneficiary is meant the person to whom the insurer pays the amount of the insurance. And if the assured is the rightful owner of the amount of insurance he shall be the beneficiary.

It is permissible under the Code (Art. 152) for a person to contract in his own name obligations which he stipulates for the benefit of third parties where he has a material or moral personal interest in the performance of these obligations. The effect of such a stipulation is that the third party acquires a direct right against the obligor, and, unless there is agreement to the contrary, can claim from him (the obligor) to discharge that right. On the other hand, the obligor may raise against the third party the defences arising out of the contract. Moreover, the stipulator may demand the performance of his stipulation in favour of the third party unless it appears from the contract that the third party alone can demand the performance of the stipulation. A stipulator who has made a stipulation in favour of a third party may alone, to the exclusion of his creditor or heir, revoke the stipulation before the beneficiary declares to the obligor or to the stipulator his desire to benefit from the stipulation unless the revocation is contrary to the spirit of the law. Such revocation by the stipulator does not free the obligor *vis-à-vis* the stipulator except where there is express or implied agreement to the contrary. Furthermore, the stipulator may substitute a beneficiary for the first beneficiary, or may retain for himself the benefit of the stipulation (Art. 153). In third party stipulations, the beneficiary may be a future person or institution or a person or institution not identified at the date of the contract so long as their identification is possible when the contract produces its effects (Art. 154).

2. Form of Contract of Insurance There is no express provision in the Code as to the form of the contract, whether oral or written, although in other places there are references to the policy of insurance. Can it be inferred that a contract of insurance may be verbal, particularly so inasmuch as the Code prescribes in Article 73 that a contract is the union of offer by a party with the acceptance by the other and in Article 90 that where the law prescribes a special form for a contract there shall be no binding contract if it does not take that form, unless there is provision to the contrary.

Turning to other provisions in the Code, e.g. those on partnerships, one will find it expressly laid down in Article 628 that the deed of partnership shall be in writing otherwise it is voidable. Also, with regard to compromise, the Code stipulates in Article 711 that a contract of compromise may not be proved except in writing or by an official minute (record). Furthermore, in matters of proof, the existence or discharge of a contractual obligation, other than a commercial obligation which may be proved by oral testimony, may not be proved by oral evidence if it

exceeds ten Dinars (£20 Sterling) unless there is legal provision or agreement to the contrary (Art. 488 of Code).

The conclusion to be adduced from the above-mentioned legal provisions is that a contract of insurance may be oral or in writing; although the rule is to reduce it always into writing. In this respect the Iraqi law differs from the Lebanese law which expressly provides in Article 963 of the Law of Obligations and Contracts that a contract of insurance shall be in writing, drawn up either notarially or by ordinary deed.

Objects of Insurance: Every lawful thing which, by reason of the non-occurrence of a specific risk, yields benefit to the person can be the object of a contract of insurance (Art. 984). The term "every lawful thing" is rather vague and general and requires some elucidation. To that end, one has to look to other provisions in the Code.

Void Conditions in Policy: The law, in Article 985, declares as void in a policy of insurance all and every one of the following conditions, namely:

(1) the condition which provides for the forfeiture of the right to the insurance by reason of contravening the laws and regulations, unless the contravention amounts to a felony or to a deliberate misdemeanour,

(2) the condition which provides for the forfeiture of the right of the assured by reason of the delay in notifying the Authorities of the incident insured or in producing the documents if in the circumstances the delay was for lawful excuse,

(3) every printed condition not put in a clear manner which relates to any of the instances leading to nullity or forfeiture,

(4) an arbitration clause put among the printed general conditions of the policy and not in the form of a special agreement independent of the general conditions.

(5) every other arbitrary condition, the breach whereof does not appear to have any effect on the incident insured against.

Paragraph (5) of Article 985 is identical with paragraph (5) of Article 716 of the Syrian Civil Code. The effect of the latter paragraph has been considered by the Civil Court of First Instance in Aleppo in an action before it on a policy of life insurance. The facts were that a certain Mr. Kayyali had on 1 July 1955, insured his life with the l'Union Company for 10,000 Syrian pounds. The assured paid the first premium but failed to pay and never paid the second premium which fell due on 1 January 1956. On 15 November 1956, the assured met his death through a motor car accident. The insurer company refused to pay the insurance amount

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and thereupon the heirs started proceedings against the company for the amount covered by the policy of insurance. In defending the action the company relied on two clauses in the policy of insurance, which stipulated that the premiums were payable at the offices of the company against receipt and that the company was under no obligation to notify the assured of the date of maturity of the premiums nor was it under any obligation to present the receipts to the assured for payment of the premiums, with the exception of the first, was optional, that that contract of insurance would not continue to give its effect unless the premiums were paid at maturity or within 60 days at the most from the date of maturity, subject, in the event of non-payment, to the revocation of the policy without notice, and that inasmuch as the assured did not pay the premium which fell due on 1 January 1956, within the period stipulated in the policy the company revoked the contract of insurance as from 31 August 1956. The point on which the case turned was whether the condition in respect of payment of the premiums on maturity or within 60 days from the date of maturity, at the offices of the company without any obligation on the part of the company to notify the assured of the date of maturity and without any obligation on its part to present the receipt for the premium which fell due to the assured non-compliance with which entitled the company to revoke the contract of insurance without notice, was valid and logical and therefore the case of the plaintiffs could not stand, or whether it was an arbitrary and void condition under the provisions of paragraph (5) of Article 716, and could not therefore be relied upon by the company in putting an end to the policy of insurance unless it complied with the general legal principles which regard the premium due a debt for the company to demand and collect and not for the assured to come forward and pay, in which event, the contract of insurance would cease to produce its effect upon notice by the company to the assured in accordance with the procedure laid down in the law. After citations from the works of learned Egyptian authors on the same point in controversy, the Court came to the conclusion that the above stated condition was an arbitrary one and therefore void under paragraph (5) of Article 716, and non-compliance therewith did not have any effect on the event insured against. Since the condition was arbitrary and therefore void, it followed that, in accordance with the general legal principles, it was for the company to demand and collect the premium which had fallen due, and in the event of non-payment it should have sent notice in the proper manner to the assured calling upon him to pay before it could revoke the contract for non-payment, and as the company did not adopt this procedure, the Court regarded the contract still effective and unrevoked and ordered the defendant company to pay the amount of the insurance to the plaintiffs.[1]

[1] The full text of the judgment of the Syrian Court of First Instance appeared in *En Nashra El Qadhaiyeh El Lubnanieh* (Lebanese Judicial Bulletin), 1958, p. 166.

Paragraph (3) of Article 1 of the Iraqi Civil Code prescribed that the Courts shall be guided in their decisions by the judicial precedents in Iraq, failing which by the judicial precedents of the Arab countries the laws of which are similar to the laws of Iraq. In virtue of this provision, and in the absence of any Iraqi judicial precedents, the Courts of Iraq usually refer to the judicial precedents in other Arab countries.

Effect of Contract of Insurance

A valid contract of insurance creates obligations on both parties thereto. Parties to the contract owe mutual obligations to each other.

(1) OBLIGATIONS OF ASSURED

Article 986 enumerates the obligations of the assured. It stipulates that an assured undertakes:

(*a*) to pay the premiums or other pecuniary payment on the date agreed upon,

(*b*) to declare at the time of conclusion of the contract all circumstances known to him which the insurer ought to know to enable him to estimate the risks which he is taking upon himself. Facts which were the subject of written questions are deemed important in this respect,

(*c*) to notify the insurer of any circumstances occurring during the currency of the contract, which lead to the aggravation of these risks.

If an assured fraudulently commits breach of his undertaking, the insurer may revoke the contract. The premiums already paid under the policy remain his and, in addition, he is entitled to claim the premiums which fell due but have not been paid (Art. 987 No. 2). But where the assured acted in good faith, the insurer shall return the premium paid or such amount thereof in respect of which he did not bear any risk (Art. 987 No. 2).

(2) OBLIGATIONS OF INSURER:

Articles 988 and 989 prescribe the obligations of the insurer. Article 988 lays down that where the risk is ascertained (has happened) or where the term of the contract has run the compensation or the amount due under the contract of insurance falls payable. This provision, it is submitted, applies to life insurance only. It is only in insurances on the life that the compensation or amount stipulated in the policy becomes payable on the happening of the risk insured against, i.e. the death of the assured, or the running of the term of the contract, whichever takes place earlier. It cannot possibly apply to third party insurance, it being an insurance of

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civil liability, or to fire insurance and all other classes of insurances other than life insurance referred to above, all of which are covered by the provisions of Article 989.

Article 989 of the Civil Code lays on the insurer the obligation of indemnifying the beneficiary under a policy of insurance for the injury caused by the risk insured against to the extent of the amount covered by the policy and no more. This provision applies to all the various types of insurances other than life insurance. It applies to third party insurance, fire insurance, civil liability insurance, e.g. transport of goods, etc. Here the insurer is liable to make amends for the injury caused, but only within the limits of the amount covered by the policy.

It has to be remarked that the obligations of the insurer do not arise except where the risk[1] insured against occurs or where the term of the contract in life insurance comes to an end and the assured is still alive, save, of course, certain instances which will be dealt with under the heading "Revocation of Contract of Insurance" below, on the occurrence of which the contract comes to an end.

Revocation of Contract of Insurance

Under the law, the insurer alone is entitled to ask for the revocation of the contract of insurance. If the assured deliberately concealed something or deliberately made a false statement which resulted in a change in the nature of the risk or in a diminution in its gravity in the eye of the insurer, the latter may demand the revocation of the contract. The revocation does not, in any way, affect the right of the insurer to withhold the premiums paid to which he becomes entitled of full right and to claim the matured-but-not-paid premiums (Art. 987 No. 1).

There are no legal provisions on the revocation of a contract of insurance by the assured. In point of law there is no necessity for such a provision. As has been remarked above, the obligations of the insurer do not arise till the risk insured happens or the term of the contract in a life insurance comes to an end and the assured is still alive. No failure on the part of an insurer may arise before the occurrence of either of the above events. On the happening of either, the contract becomes executory against the insurer. It ceases to have any effect in respect of the future. But circumstances may intervene which put an end to the contract of insurance, e.g. insolvency. Here the contract comes to an end. The assured may claim any remedies granted him by the law. No question of revocation arises, the contract as a whole comes to an end. These instances though rare are not impossible.

[1]The traditional Islamic law disapproves of a contract covering an unknown risk. See my *Islamic Law in the Contemporary World: Introduction, Glossary and Bibliography*, Glasgow: Royston, 1985.

Statutes of Limitation

It is stipulated in Article 990 that actions arising out of a contract of insurance shall be barred by negative prescription after three years from the time of the occurrence of the event which gave rise to such actions. But there may arise circumstances which interrupt the running of the period of prescription. The following are the two instances stipulated in the above cited article:

(*a*) In the event of concealment of particulars in respect of the risk insured against, or of making untrue or inexact particulars about the risk, the period shall not run except from the day on which the insured had knowledge thereof.

(*b*) In the event of the occurrence of the risk insured against the period shall not run except from the day on which those interested had knowledge of its occurrence.

It will be observed that the law speaks of actions arising out of insurance contracts and their prescription by affluxion of time. Technically speaking, it is not the action which is prescribed after three years—it is the right of action which is so prescribed. If an action is brought within the period of three years, even where, owing to an excusable mistake, it was brought in an incompetent Court, prescription ceases to run (Art. 437). The interruption of the period of prescription by the institution of legal proceedings puts an end to the period which passed before the institution of the proceedings and a new period equal in length to the first period begins to run (Art. 439).

The period of prescription may not be shortened by provision to that effect in the policy. Any stipulation to that effect is declared null and void under Article 991 which has been dealt with before. But it may be prolonged because such prolongation is in the interest of the assured or beneficiary and allowable by the article in question.

B. Insurance Against Fire

Insurance against fire is a contract of indemnity. The insurer thereunder is liable to compensate the beneficiary for the damage caused by the action of fire within the amount covered by the policy of insurance. It has been said previously under the heading: "Obligations of the Insurer" that the insurer shall compensate the beneficiary for the damage caused by the happening of the risk insured against, provided it shall not exceed the amount of insurance (Art. 989). It is not only damages resulting directly from fire which the insurer is to compensate. He is liable for any damage to the insured properties which is an inevitable consequence of fire as well as any damage caused during salvage measures or measures taken to prevent the extension of fire. He is also liable for the loss or disappearance of the things insured during fire unless he proves that the

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loss or disappearance was due to theft (Art. 999). Also, the insurer is liable for any damage to the things insured through fire which was caused fortuitously, by the fault of the beneficiary but not where the fire was caused intentionally or fraudulently (Art. 1000), by the fire which was caused intentionally by the subordinates of the beneficiary (Art. 1000), or by fire caused through defect in the thing insured (Art. 1002). The statutory provisions on the above are contained in Articles 999, 1000 and 1002 of the Civil Code which read:

Article 999: The insurer shall be liable for all damages caused directly by fire as well as for the damages which are an inevitable consequence of fire, and in particular any damage caused to the things insured through salvage measures or through measures to prevent the extension of the fire. He shall also be liable for the loss or disappearance of the things insured during the fire unless he establishes that their loss or disappearance was due to theft.

Article 1000: (1) The insurer shall be liable for the fire which was caused fortuitously or by the fault of the beneficiary but not for the fire which was caused by the beneficiary intentionally or fradulently.

(2) He shall also be liable for the fire caused intentionally by the subordinates of the beneficiary.

Article 1002: The insurer shall be liable to compensate the damages resulting from fire, even where the fire arose out of a defect in the thing insured.

Before proceeding any further it is necessary to make certain observations. The first is in the first paragraph of Article 1000, to the effect that the insurer shall not be liable for any loss or damage by fire caused deliberately or fraudulently by the beneficiary. This provision in the Civil Code of Iraq differs from a similar provision in the Egyptian Civil Code (Art. 768) and in the Syrian Civil Code (Art. 734) in that the last mentioned Codes regard the insurer unanswerable for any loss or damage by fire caused deliberately or fraudulently by the beneficiary unless there is agreement to the contrary. This last expression "unless there is any agreement to the contrary" in the Egyptian and Syrian Civil Codes is omitted from the Iraqi Civil Code. It does not seem that the omission was accidental—it seems to have been deliberate. It would appear at first sight that the expression quoted above from the Egyptian and Syrian Civil Codes conflicts with the provisions in Articles 753 and 719 of the above Codes respectively which are identical with the provisions in Articles 991 of the Iraqi Civil Code, all of which are to the effect that any agreement contrary to the provisions of this chapter (i.e. the chapter dealing with insurance) shall be null and void unless it is in the interest of the assured or beneficiary, and one would be inclined to

conclude that the omission of the aforementioned expression from the Civil Code of Iraq, preserved the effect of Article 991, while, on the other hand, the inclusion of the expression in question in the Egyptian and Syrian Civil Codes annulled the effect of Articles 753 and 719 respectively thereby depriving the beneficiary from the benefit of concluding a policy of insurance under which the insurer holds himself liable for fire occasioned deliberately or fraudulently by the beneficiary. But in point of law, the position under the three Codes is the same and the inclusion of the expression referred to above in the Egyptian and Syrian Civil Codes is merely to emphasize a legal principle prescribed in an earlier part of the Codes under consideration. First of all a deliberate or fraudulent setting of fire to the things insured amounts to arson, a felony punishable under the penal law. If the criminal proceedings result in a conviction that will put an end to the controversy. The criminal prosecution may, however, result in a non-conviction. This in itself does not prove that the fire was not deliberate or fraudulent and it is still open to the insurer to prove the deliberate or fraudulent act. The assured, according to the principle of enrichment without lawful cause, may not validly claim from the insurer, and even if he were paid for the damage which was caused by his deliberate or fraudulent action, he would be liable to return the amount he received, by Article 233 of the Iraqi Civil Code and Articles 179 and 180 of the Egyptian and Syrian Civil Codes respectively. A provision similar to that in the Egyptian and Syrian Civil Codes is contained in Article 966 of the Lebanese Code of Obligations and Contracts. The second paragraph of the article in question stipulates that the insurer shall not be liable for any loss or damage caused by the intentional fault of the assured even where there is agreement to the contrary.

Another point relates to paragraph 2 of Article 1000 of the Iraqi Civil Code. Under this paragraph an insurer is liable for the fire caused by subordinates of the beneficiary even if they were deliberate in so doing. It is difficult to appreciate why there should be a distinction between a deliberate or fraudulent setting of fire by the beneficiary and a deliberate setting of fire by his subordinates, relieving the insurer from liability in the first instance but not in the second. In this respect, the Iraqi Civil Code differs from the Egyptian Civil Code (Art. 769), and from the Syrian Civil Code (Art. 735) and also from the Lebanese Civil Code known as Law of Obligations and Contracts (Art. 967). The Egyptian and Syrian Laws hold the insurer liable for the damages caused by persons for whose acts the assured is responsible whatever the nature or extent of their fault, while the Lebanese Law holds the insurer liable for the loss or damage caused by those for whom the assured is civilly liable whatever the nature and extent of their fault.

Various other matters are not provided for in the law. For instance there is no provision as to the manner of estimating the damage caused

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by fire to the insured articles. The Ottoman Law of Insurance of 1905 prescribes the method of estimation which will, most probably, be followed. Another instance is where the insurer or assured becomes bankrupt or ceases business and the like for which no provision is contained in the Code, but for which there is provision in the Ottoman Law of Insurance (Art. 14). A third instance is where the assured insures part only of the value of the object insured which is regulated by the second paragraph of Article 10 of the Ottoman Law of Insurance, in respect of which there is no provision in the Civil Code. A further instance but not the last is the right granted by the Ottoman Law of Insurance to persons who are responsible for the safe custody of objects under their control or from which they derive benefit, such as depositaries, pledgees, borrowers, and the like. The Civil Code is totally silent on the point whether such persons may insure the objects in their custody or not, and whether they can claim, where there is no agreement to that effect, the premiums paid by them from the depositors, pledgors, or lenders, as the case may be. The Ottoman Law mentioned above regulates those matters and the provisions thereof are applicable so long as there are no provisions in the Civil Code, which conflict with, or override, them.

Subrogation: An insurer who has paid compensation to a beneficiary for any damage to the thing insured caused by the action of fire shall be legally entitled to proceed against the author of the fire to the extent of the amount he paid as compensation. The insurer will be subrogated into the rights of the beneficiary.

Under Article 983 the term "beneficiary" means the person to whom the insurer pays the insurance amount.

Where the assured is the person entitled to the insurance amount he shall be the beneficiary. But if owing to a cause assignable to the beneficiary, the subrogation of the insurer into the rights of the beneficiary becomes impossible, the insurer shall be discharged, in whole or in part, from his liability to make redress for damage caused. It is laid down in Article 1001 as follows:

> The insurer shall, as respects any compensation paid by him by reason of fire, be legally subrogated into the position of the author of the act which caused the damage out of which arose the liability of the insurer, but he shall be discharged from all or some of the compensation to the beneficiary if his subrogation becomes impossible due to a cause assignable to the beneficiary.

The provisions of the article in question do not appear to provide for any exceptions and on comparing them with the corresponding Article 737 of the Syrian Civil Code and Article 771 of the Egyptian Civil Code which prescribe:

> The insurer shall be legally subrogated into the rights of action of the assured against the author of the act out of which arose the liability of the insurer to the amount of compensation he paid in respect of the fire, unless the author of the damage is a relative of, or related by marriage to, the assured who live with him, or a person for whose acts the assured is responsible.

and with Article 972 of the Lebanese Code of Obligations and Contracts which provides:

> The insurer who has paid the insurance compensation shall be legally subrogated for the assured in all rights and suits against the persons who by their act caused the damage which involved the liability of the insurer, but the insurer may be discharged from all or some of his liability to the assured if it becomes impossible for him to subrogate him in those rights and suits owing to an act by the assured, while he may not, contrary to the preceding provisions, sue directly the children, descendants, ascendants, officers, employees, workmen or servants of the assured, and, in general, all persons who ordinarily reside in the assured's house, unless there is fraud committed by any of such persons.

One would notice the variance between the different legal provisions, quoted above, unless the interpretation of paragraph 2 of Article 1000, which holds the insurer liable for the fire caused by the subordinates of the beneficiary, even wilfully, could be stretched to include the persons covered by the above quoted articles of the Syrian, Egyptian and Lebanese Codes respectively, an interpretation which appears to be rather too far fetched.

Pledge and Mortgage of Insured Thing: Where the thing insured is pledged, mortgaged or encumbered with any other real security, the rights flowing from such encumbrances will be transferred to the compensation due to the debtor by virtue of the contract of insurance. If such rights have been notified to the insurer, he shall not pay what is due from him to the assured, except with the consent of the creditors. The same principle applies where the thing insured has been attached. Article 1003 of the Iraqi Civil Code provides:

> (1) If the thing insured is encumbered with a pledge, mortgage, or other real security, these rights shall be transferred to the compensation due to the debtor by virtue of the contract.
>
> (2) If such rights have been notified to the insurer, he shall not pay what is due from him to the assured except with the consent of the creditors.
>
> (3) If the thing insured is seized and the insurer has been notified accordingly, he shall not pay any amount due by him to the assured.

C. Insurance of Responsibility

In insurance against responsibility the obligation of the insurer does not produce any effect unless and until the injured makes a claim against the beneficiary subsequent to the event which gave rise to the responsibility

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(Art. 1004). It is provided in Article 1005 that in insurances against responsibility, the parties may validly agree to relieve the insurer from the insurance amount if the beneficiary, without the consent of the insurer, pays to the injured any compensation, or admits his responsibility to him, but such agreement may not be relied upon—(*a*) where the admission by the beneficiary is confined to a material fact, or (*b*) where it is proved that the beneficiary could not refuse to compensate the injured or admit his right without committing a manifest wrong.

In insurances against liability, the insurer may not pay the insurance amount agreed upon, in whole or in part, to other than the injured, so long as the latter has not been compensated for the injury he sustained, in terms of Article 1006 of the Code. Article 1006 of the Civil Code of Iraq formed a point of reference in a decision by the Civil Court of Appeal in Lebanon No. 703 of 15 December 1955, published in En Nashra El Qadhaiyeh El Lubnanieh (Lebanese Judicial Bulletin), 1956, p. 50, in which the *ratio decidendi* was whether an injured person, other than the assured, can sue directly the insurance company for compensation for the injury he suffered. The Court of Appeal, after referring to French judicial precedents as well as precedents of the Mixed Courts in Egypt, and to the views of learned jurists, proceeded to say that the legislative movement leans towards expansion to protect the injured and to facilitate the ways of judicial action before him, an inclination to which reference is made in Article 1006 of the new Civil Code of Iraq. This decision of the Court of Appeal was followed by decision No. 35 of 10 January 1958, En Nashra El Qadhaiyeh El Lubnanieh (Lebanese Judicial Bulletin), 1958, p. 127. Connected with Article 1006 of the Civil Code of Iraq, is Article 152 which prescribes:

> A person may contract in his own name obligations which he stipulates for the benefit of third parties if he has in the performance of such obligations a personal interest, whether material or moral. As a result of such a stipulation the third party acquires a direct right against the obligor whereby he can require him to perform his undertaking unless it is agreed to the contrary, while the obligor can rely against the third party upon the defences which arise out of the contract. The stipulator may, as well, require the performance of his stipulation in favour of a third party, unless it appears from the contract that the third party alone may require the performance of the stipulation.

The exception stipulated in this article, i.e. depriving the third party from asking for performance of the obligation stipulated in his favour must be read in the light of the provision in Article 991 which declares as void every agreement contrary to the provisions contained in the chapter on insurance unless it is to be of benefit to the assured or beneficiary.

D. Life Insurance

The Civil Code of Iraq, in its Articles 992 to 998 inclusive which deal with insurance on life, does not specify the types of life insurances available to persons who intend to take out a policy of life insurance. It starts by providing in Article 992:

> The insurance of the life of a third person shall be void unless such third party consents, in writing, to the conclusion of the contract, and if such person is under incapacity the contract shall not be valid unless it is consented to by his legal representative.

It will be observed that the article speaks only about the consent, in writing, of the third party or his legal representative where that third party is under incapacity. It does not provide for any subsequent dealings with the contract, such as, for example, assignment, pledge, etc., which exist expressly in the Egyptian Civil Code (Art. 755) and the Syrian Civil Code (Art. 721). It appears that such provision is unnecessary in view of the provisions in Article 90 of the Code to the effect that where the law requires a specific form for a contract, there shall be no contract unless it takes that form, except where there is provision to the contrary, and this form must be fulfilled in respect of any modification to the contract.

Beneficiaries: The beneficiaries under a policy of life insurance may be the assured himself if he is the rightful owner of the insurance amount (Art. 983), or they may be nominate persons, or persons nominated by the assured later on. An insurance is deemed concluded to nominated beneficiaries if the assured mentions in the policy that the insurance is concluded to the benefit of his spouse, children, descendants born and to be born or to his heirs without mentioning them by name. Article 997 of the Code stipulates:

> 1. It may be agreed in an insurance on life that the insurance amount shall be paid either to nominated persons or to persons to be nominated by the assured later on.
>
> 2. An insurance shall be deemed to be concluded for the benefit of nominated beneficiaries if the assured mentions in the policy of insurance that the insurance is concluded for the benefit of his spouse, children, descendants, born and unborn or heirs without mentioning them by name. If the insurance is for the benefit of the heirs without mentioning their names, they shall be entitled to the insurance amount, each in proportion to his share in the inheritance, and such entitlement shall devolve on them even if they renounced the inheritance.
>
> 3. By spouse is meant such person who is proved to possess such status at the time of death of the assured and by children is meant such descendants who are proved to possess at that time the right to inherit.

Such amounts as are stipulated payable at the death of the assured to nominated beneficiaries or to his heirs if they do not form part of his estate and may not be claimed by his creditors in the event of his bankruptcy, insolvency, or interdiction (the Arabic word appearing in the text i.e. *hajz* which means "attachment" is most probably a printing

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error).[1] The creditors are entitled, however, to a refund of the premiums paid if it is established that they were excessive in view of the financial state of the assured. It is prescribed in Article 995:

> The amounts stipulated payable on the death of the assured either to nominated beneficiaries or to his heirs in general shall not be included in his estate. The creditors of the assured shall not be entitled to claim such amounts either in the event of the bankruptcy, insolvency or interdiction of the assured. They shall be entitled, however, to claim a refund of the premiums paid if it is proved that, having regard to the financial state of the assured, they are excessive.

Release of Insurer: An insurer is released of his obligations in any of the following instances:

(*a*) *Suicide:* It is provided in Article 993,

> 1. The insurer shall be released from his obligation if the life assured commits suicide, but the insurer shall pay to those to whom the right has reverted a sum equal to the insurance reserve.
>
> 2. If the cause of suicide is a mental disease which made the patient lose his will, the obligation of the insurer remains in its entirety.

There is no indication of the manner of arriving at the insurance reserve, nor is there any provision, so far as we are aware, in any other law. In a footnote to Article 756 of the English translation of the Egyptian Civil Code by Perrott, Fanner, and Luis Marshall, Lawyers, Cairo, there appears the following:

> The insurance (mathematical) reserve is the amount which, at a given time, constitutes the excess of the amount of premiums paid by all assured persons of a class of insurance in excess of the total amount paid as "sums assured" by an assurance company up to that date. The individual reserve relating to each policy of the class in question is obtained by dividing *pro rata* insurance reserve of the class between the policies still in force at that time.

A further point with regard to this article is that of the burden of proof. Unlike the Egyptian Civil Code (Art. 756) and the Syrian Civil Code (Art. 722), the Iraqi Civil Code does not contain any provision in the above article on the question of proof. In the Egyptian and Syrian Codes, the burden of proving suicide is upon the insurer while the burden of proving that the assured committed suicide as a result of a mental disease which made him lose his will is on the beneficiary. It is submitted that the Iraqi legislator did not consider it necessary to embody such a

[1] Interdiction in Arabic is pronounced *hajr*. In Arabic the letter "r" in *hajr* (interdiction) differs from the letter "z" in *hajz* (attachment) with a mark of one dot above the letter corresponding to z. The error is reinforced by the wording of *alaih* after the existing *hajz*!

provision in view of the Islamic law of evidence[1] to the effect that the proof shall be on the claimant. In the light of this principle, it is for the person alleging suicide to prove it and for the person alleging mental disease to prove that.

(*b*) *Deliberate Death of Assured:* Article 994 provides:

> Where the beneficiary of a life insurance is other than the assured, the insurer shall be released from his obligations if the beneficiary caused deliberately the death of the assured or if the death occurred at his instigation. But where there was only an attempt to cause death the assured shall be entitled to substitute another person for the beneficiary, even where the beneficiary has accepted the insurance stipulated for his benefit.

Subrogation

In life assurances, an insurer who has paid the insurance amount may not be subrogated into the position of the assured or beneficiary against the author of the event insured against or the person responsible for it. It is stipulated in Article 998 as follows:

> In life insurance the insurer who has paid the insurance amount shall not be subrogated into the position of the assured or beneficiary in his rights against the author of the event insured against or against the person responsible for such event.

Release of Assured

Article 996 makes provision for the release of a life assured from payment of future premiums. It lays down:

> A life assured who has undertaken to pay periodical premiums may, at any time, release himself from the contract by written notice sent to the insurer before the expiry of the current period. In such event, he shall be discharged from payment of the subsequent premiums.

The above survey covers all the provisions contained in the Civil Code of Iraq on matters of insurance. The Code in question does not contain any provisions with regard to reduction of the sum insured or surrender of a policy of insurance, nor does it make any provision with regard to the effect of incorrect information or mis-statements as to the age of the life assured, which matters are expressly dealt with in the Egyptian Civil Code (Arts. 760 to 764 inclusive) and in the Syrian Civil Code (Arts. 726 to 730 inclusive).

It would seem that the Iraqi legislator did not consider it necessary to include such provisions in the Code and left the matter to be dealt with in the general conditions or by special agreement between the parties, subject always, with regard to their validity, to the provisions of Article 985 which declares as void certain conditions indicated in it.

[1] *Al-Bayenato ala al-Moda' va al-Yamino ala Man Ankar*. This Islamic maxim is exactly incorporated into Article 448 of the Iraqi Civil Code 1951.

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The first compulsory insurance was introduced in Iraq by the Law of Insurance for Vehicles 1964. This law, consisting of 17 articles, provided that all motor vehicle owners had to take up insurance for death and personal injury to third parties resulting from motor accidents. Most of the provisions of this Law were borrowed from Egyptian law, which in turn was based on the compulsory insurance laws of France and the United Kingdom.

In 1972 another law of compulsory insurance, consisting of 15 articles, was promulgated to provide for damage and losses occasioned by using the inland waters of Iraq. This law was intended to provide compensation against certain national industrial plants which discharged their waste into rivers and polluted them. This Law can also be used against Iraqi and foreign vessels which intentionally or negligently harm Iraqi waters. The operational clause of the Law compels the owners of ships and boats to cover their responsibility. The 1972 law provides a standard form of insurance policy.

5.9. Copyright Law

Copyright in Iraq is protected in accordance with the Copyright Law for Iraqi Authors (Law No. 3 of 1971) which is based on the Berne Convention.

Trade marks are also protected and Registration Agents practising under the provisions of the Registration Agents Law of 1955, as amended, are authorised to act as patents and trade marks agents.

5.10. Tax Law

Compared with Saudi Arabia and the smaller Gulf States, Iraq has a relatively strict tax structure for both personal and corporate tax. The first comprehensive legislation on income tax in Iraq appeared in 1939.[1] This was amended several times and was eventually repealed by the Income Tax Code of 1956.[2]

Corporate Tax

Company taxation in Iraq is very complex and companies are required to submit a tax return to the Iraqi Tax Authority every year submitting detailed supportive audited accounts.

Article 1(5) of the Income Tax Code of 1956 defined a "person" as both natural and juridical person. Article 1(6) further stated that a juridical person is any organisation or institution to which juristic personality is extended by law including companies and associations of all kinds.

Foreign corporations doing business in Iraq may obtain exemption

[1] Law No. 36 of 1939.
[2] *Official Gazette*, Law No. 3828 of 1956.

from corporate (but not personal) tax if a contract is signed under cover of Law 157 on the Major Development Project. It is also sometimes possible to incorporate, with the approval of the Iraqi Government authorities, a specific clause into a contract which provides that the Iraqi party is responsible either for payment of corporate tax in the first instance or for reimbursing the foreign contractor the cost of corporate income taxes. All agreements with sub-contractors should preferably contain an obligation against subcontractors for submitting to contractor sufficient evidence of tax clearance. The agreements may further provide that if the sub-contractor fails to submit the required tax clearance certificate the contractor has the right to withhold 10% of all payments as he may be required to account for this to the Iraqi tax authorities.

Personal Tax

Non-Iraqi nationals are liable to tax if they spend at least either six months in total or four months continuously in Iraq in a single tax (calendar) year.

Non-Iraqis working on industrial projects which qualify under Law 157 granting certain concessions on customs duties and taxes are also subject to personal tax, despite the exemptions which may apply to their company.

Resident non-Iraqis are liable to tax on

(*a*) Any income actually paid in Iraq.

(*b*) The market value of benefits in kind. This includes accommodation, expatriation allowances, etc., but not reasonable local travelling, entertaining and other allowances designed to reimburse expenses.

(*c*) Income paid abroad which will be deemed to arise in Iraq if a deduction is claimed in the employer's corporate computations.

IV. Sources of Iraqi Law

It is sometimes suggested that whatever civilisation and public order exists in Iraq has its origins in British efforts. This is a gross misrepresentation. To understand the modern Iraq more fully one needs to identify and assess the major cultural and historical forces existing in the country. Islam and Arab nationalism are two important forces—not mutually exclusive—which have shaped the foundations of the modern Iraq. Therefore to appreciate the background of the Iraqi legal system it is essential to uncover the traditional source of the Islamic law in force in Iraq. This point is particularly relevant to the Iraqi civil law. The Civil Code of Iraq 1951, in line with those of Egypt (1948) and Syria (1949), instructs judges to fill any gap in the secular law by reference to the principles of traditional Islamic law. The Egyptian laws had been

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borrowed from the French Codes and A. R. Sanhouri, an able Egyptian jurist who headed the Iraqi Law College, 1933–36, argued that Iraqi civil code should copy the same French concepts of law as adopted by Egypt. The Iraqis rejected that idea and eventually Iraq drafted a civil code which maintains very close links with the Islamic traditions. In Iraq the deeply-rooted cultural and traditional values were given precedence over alien concepts imported into the modern Islamic world from the European legal system. In general terms half of the Iraqi Civil Code 1951 have been borrowed from the Ottoman Civil Code (the Majalla) which was, in turn, a codified version of the traditional Islamic law.

The foregoing demonstrates that in identifying the sources of Iraqi substantive private law, the Islamic law stands out as being the basic doctrinal and historical source of law in Iraq. By contrast in areas of substantive criminal law, the only identifiable source of law is municipal legislation deriving its authority directly from the secular state.

Primary sources of Iraqi law, in order of significance, can be described as follows: (1) Islamic law; (2) constitutional law; (3) legislation and statutary provisions. In addition to these primary sources, there are a number of secondary sources of law recognised in the Iraqi legal system such as usage and custom, judicial precedents, and juridical opinion of learned jurists.

1. Islamic Law

According to Section 1 of the Iraqi Civil Code 1951 Islamic law is *inter alia* considered as a "formal source of law". We must, therefore, study Islamic law as the source of the Iraqi general law.

Islamic law or as it is known in the Arabic language "Shari-ah" ("path" or "the right path") is a major world legal system distinct from both the Franco–German Civil law and the Anglo–American common law systems. Unlike other major legal systems, Islamic law is not an independent branch of scholarship, but only one of the facets of the Islamic faith itself. It is on the basis of divine revelations that the Muslim jurists and theologians have pronounced the rules governing the relations among men on the one hand and at the same time between man and God on the other. In this way Islam is essentially a religion of law regulating and directing every aspect of human experience.

Theoretically, Islamic law corresponds to the natural school of law and contains the two concepts of an ethical quality in law and the capacity of human reason to discern it. It should be noted that the basic principles of Islamic law, as contained in the Qur'an and the Sunnah (the Prophet's practice and the traditions of the early Muslims), are pervasive—that is, they exist independently of man.

So far as the treatment of Islamic law is concerned, Iraq has taken the middle path between the two extremes of (*a*) retaining it in its entirety and (*b*) going for radical reform and abandoning Islam. As such the Iraqi legal system seems to be reasonably suited to the needs of the population.

2. Constitutional Law

Since the Iraqi revolution of 1958 five constitutional instruments have appeared in Iraq. The current constitutional law was promulgated as Interim Constitution on 21 September 1968. It is composed in five parts. The first three parts describe the Iraqi State, the fundamental foundations of the society, and civil rights and duties. The provisions of these three parts, contained in Articles 1 to 40 are more general than specific. They provide: that the Iraqi State is a popular democratic republic and the Iraqi people are part of the Arab Nation; that the people are the sole source of power; that social solidarity is the basis of the Iraqi society; that the State guarantees social security services; the equal opportunities are guaranteed to all Iraqis by the State; that the Iraqi economic system aims at the realization of socialism by providing such a social justice as to prevent any form of exploitation; that the national economy shall be planned and the public and private sectors shall cooperate for the economic development of the country through increase of production and fair distribution; that private ownership is protected and the Law regulates its social functions providing that it should not be confiscated except for public use and with equitable compensation according to Law; that the Law fixes the maximum limit of agricultural ownership in a manner which prevents the rise of feudalism and that non-Iraqis are not allowed to own agricultural land except in cases permitted by the Law; that the State encourages cooperative movements within the country; that the Iraqis are equal before the Law in their rights and duties without any discrimination by reason of sex, race, language or religion; that the freedoms of religion and religious practice, opinion, journalism, publication, and society, are all guaranteed and protected by the State according to the Law; that the rights to education, and health care are guaranteed by the State.

Part Four of the Constitution deals with the distribution of authority among the various organs of the State. The most powerful of these organs is the Supreme Revolutionary Command Council[1] whose members are to be named by a special Law. The President of the Republic is the Council's Chairman, and the members of the Council are regarded as Vice-Presidents of the Republic.

In addition, the government is empowered to overrule or amend its own previous decisions, when the government deems this necessary in the public interest.

The general principles applicable to judiciary are provided for in Articles 79–87. A notable provision in this connection is that of Article 87

[1]For details see *supra*, section on "Form of Government", pp. 155–159.

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which ordains the establishment, by a special law, of a "High Constitutional Court" whose function shall be to interpret the provisions of the Constitution, to decide questions of constitutionality of legislation, ordinary and delegated, and to interpret administrative and financial laws.

Part Five of the Constitution contains some seven articles, dealing with questions of publication, coming into force, and application of various constitutional and legislative instruments.

The position of the constitutional law as a source of Iraqi law is very prominent because ordinary legislation may not contradict, nor be repugnant to, the Constitution.

3. Legislation and Statutory Provisions

Since the revolution in 1958, the Iraqi legislature has had a formidable task to promulgate new legislation in response to a desire to establish a new socialist State. As evident from the Iraqi Interim Constitution of 1968 both Islam and socialism constitute the very foundations of Iraqi society. The State has not attempted to reconcile the two and indeed certain aspects of new institutions reflecting socialist ideas do not conform to the strict Islamic legal principles. One example of this is the agrarian law reform (1958 and amended in 1970). Another example concerns a number of limitations imposed on private sector ownership.

Although theoretically Islamic law is a major source of Iraqi law, in practice the main source of Iraqi law is secular legislation as promulgated by the National Assembly and approved by the Revolutionary Command Council; in the name of the people. At least in theory, all Iraqi law is contained in statutes and statutory provisions.

The Iraqi Law No. 55 of 1980[1] set out the procedures and details for the composition, election, and the working of the National Assembly which was envisaged as the formal legislative authority under the existing constitutional arrangement. The Assembly, formed of 250 deputies and elected by general suffrage, is entrusted with the following:

(1) Propose draft Laws in accordance with the provisions of the Constitution.

(2) Enact the Laws in accordance with the provisions of the Constitution.

(3) Approve the General Budget and National Development Plans.

(4) Approve the treaties and international agreements in accordance with the provisions of the Constitution.

(5) Discuss the internal and external general policy of the State.

(6) Summon any member of the Cabinet for clarification or questioning or inquiring same according to the provisions of the Constitution and the Statute of the Assembly.

[1]Article 47 of the 1980 Law.

(7) Propose to relieve any member of the Cabinet from his post in accordance with the provisions of the Constitution and the Statute of the Assembly, and

(8) Accept resignation of its members.

Usually Iraqi statutes are drafted in general and abstract terms, leaving broad possibilities for interpretation in the course of their application to specific cases. In principle, the Iraqi courts restrict themselves to a literal interpretation of the wording of the text of a statute, even although in practice they have to consider the purpose of the statute (i.e. the political tendency of the State) and interpret the law in the light of such legislative attitude and purpose.

In Iraq, legislation is divided into three major divisions: firstly, codes of law, secondly, ordinary statutes, and thirdly, delegated legislation.

3.1. Major Iraqi Codes

The Iraqi codes covering major areas of law contain "general principles of law" setting forth fundamental rules. So far as substantive civil law is concerned there are four main codes in Iraq:

(*a*) The Civil Code 1951. This code which is still in force in Iraq repealed the former Ottoman Civil Code. This code consists of 1383 articles.

(*b*) The Commercial Code 1970. Iraq in 1936 revised the Ottoman Commercial Code to adopt the similar amendments made by Turkey in the Ottoman Code. Later amendments were introduced in 1943 but these were repealed by the Commercial Code of 1970 (Law No. 1490/1970). This Code consists of 795 articles.

(*c*) Company Law 1983. In 1957, Iraq promulgated the Law of Commercial Companies which repealed the British Companies Act 1919. The 1957 law was repealed by the Companies Law No. 36 enacted on 30 March 1983 by the Revolutionary Command Council. This law contains 216 articles.

(*d*) The Ottoman Marine Trade Code of 1863 deals with the registration of ships, judicial sale of ships, responsibilities of the shipowners and masters, rights and obligations of the crew, bottomry, marine insurance, jettison, general and particular overages, bill of lading and charterparty, carriage of goods and passengers and time bar.

So far as the procedural law is concerned, Iraq first continued to enforce the Ottoman Law of Procedure and Evidence of 1879. However, certain aspects of the Iraqi Law of Procedure and Evidence were reformed in 1951 partially by the Civil Procedure Code of 1951 (Law No. 28/1951) and the Civil Code 1951 (Law No. 40/1951). It was, however, only in

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1953 that the Iraqi Ministry of Justice started the preparations and drafting of a new law of civil and commercial procedure. These deliberations resulted in the Civil and Commercial Procedure Code 1956 (Law No. 88 of 1956) which contained a total of 255 articles.

Later in 1969, however, the 1956 Code was replaced by a new Civil Procedure Code 1969 which contains 325 articles. In 1970 Iraq promulgated its own Criminal Procedure Code which replaced the Baghdad Law of Criminal Procedure 1919 which had been originally introduced to Iraq by the British.

Ordinary Legislation

Any resolution which is formally promulgated by the Revolutionary Command Council, whether it is of general application (Public General Statute) or is of limited application being concerned with specific task, person, or area (Private Statute) is an ordinary statute and has the force of law in Iraq. In contrast with major laws contained in Codes of Law, ordinary legislation dealing with specific issues do not provide general principles and as such are very narrowly interpreted.

3.2. Delegated Legislation

Public authorities and government agencies are sometimes permitted to promulgate subordinate legislation providing for the detailed legal procedures and requirements within their own jurisdiction. Delegated legislation in Iraq may take the form of bye-laws or ordinances on the one hand and regulations and directives on the other.

(*a*) *Bye-law or Ordinances*

For the purpose of facilitating the application of a law, the legislation in question provides that bye-laws or ordinances may be enacted to facilitate operation of that law. These bye-laws or ordinances were previously enacted by the council of ministers, i.e. the Cabinet, but nowadays they are promulgated by the President of the State. A bye-law may not contradict, invalidate or amend a piece of legislation enacted by the National Assembly or/and by the Revolutionary Command Council.

(*b*) *Regulations, Directives, Notifications and Rules*

These are promulgated either by the specific minister or by a certain body charged and authorized to execute a law. They are meant to interpret the specific law and ordinance and to deal with the details. To state the obvious neither the minister nor any executive body has the authority to enact laws or to amend a law. Therefore, these regulations, directives, notifications and rules may not contradict nor invalidate any law or bye-law.

4. Judicial Precedent

The most striking difference between the Iraqi legal system, being that of a civil law country, and the Anglo–American legal system is that judicial precedent is not recognised in Iraq as a binding source of law. The doctrine of *stare decisis*, never adopted unconditionally in Iraq, has been given the rank of only secondary source of law in the Iraqi Civil Code 1951. Being a secondary source, judicial precedent is not normally adhered to by Iraqi courts.

Accordingly the role of the courts is limited to the interpretation of the general principles laid down in the Iraqi Codes and statutes and their occasional supplementation by means of analogy. Therefore, decided cases, even when pronounced by the higher courts, are binding only in respect of the case at hand and do not bind the lower courts to follow suit. The lower courts are to decide other cases differently whether they be "distinguished" from the "judicial precedents" or not.

Following the Franco–German traditions in the Iraqi jurisdiction a judge in rendering his decision cannot legislate or make a new law, but simply applies the law. Nevertheless, as judicial precedents are recognised as a secondary source of the Iraqi law, they carry some weight. The Iraqi courts usually take judicial decisions into consideration and regard them as "persuasive". More frequently in more important litigations, parties invoke the relevant judicial precedents in support of their claims, especially when they can cite decisions of a higher court. Thus while precedent does not officially exist, decisions of the higher courts are sometimes cited and, as an informal rule, followed by the lower courts, whether because of their persuasive reasoning or because the lower courts are aware that their decisions are more likely to be upheld on appeal if they conform with previous pronouncements by the higher court. The Courts have an extremely vital role to develop the existing statutory law in order to match the changing social and economic conditions. It is indeed a recognition of the significance of case law in the Iraq jurisdiction that a Technical Bureau has been established in the Court of Cassation to carry out the work of abstracting and classifying the legal principles which are contained in its judgements. Nevertheless, in Iraq judicial decisions can only serve as a guide to the court in the process of the application of law, and not a source from which rules of law could be obtained.

5. Custom and Usage

Custom is recognised as another secondary and informal source of the law in Iraq. The Arabs live mainly according to custom while recognising the more formal provisions of the Islamic norms and State law as the ultimate authority. Usage and custom is not accredited as Iraqi law nor

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has it ever been a part of Muslim law. While Islamic law applies uniformly to the whole community of believers custom and usage is very much linked with the local culture. However, while custom is not part of the Iraqi or Islamic law, this does not mean that law condemns it in any way. People in Iraq in areas of private law are often allowed to arrange their dealings and settle their differences without recourse to strict law. Thus self-help and extra-judicial remedies feature prominently in the Iraqi custom and culture. To state the obvious certain local customs can be "irregular" from the viewpoint of either Islamic or Iraqi law, or both. A great many, however are not, and this is usually the case with those which simply complement Iraqi law in matters not specifically covered by positive law. By way of example, customs dealing with the amount and forms of payment of dowries, those on the use of running water shared by landowners, and a number of commercial usages, are all accepted as complementary to the existing positive law.

V. The Judiciary and Court Structure

The modern Iraqi judicial system is a unified jurisdiction because Iraq does not maintain a dual order of jurisdiction whereby the traditional *Shari'ah* courts can operate independently from the modern State courts. However, internal jurisdictional duality exists within the Iraqi court structure because of the many administrative tribunals with specific jurisdiction (e.g. the Committee of Customs) which operate independently from the judiciary. This argument, however, is not in itself adequate to classify the Iraqi system as a mixed system.

The hierarchy of the courts in Iraq is as follows: (*a*) civil, administrative and criminal courts of first instance, (*b*) courts of appeal, and (*c*) the Court of Cassation for ultimate appeal.

For the sake of lucidity, the machinery for dispute resolution in Iraq can be divided into two separate categories. First, the judiciary and the court system which is supervised by the Ministry of Justice and secondly, other courts and tribunals affiliated to various governmental departments other than the Ministry of Justice.

1. Judiciary

1.1. Courts of First Instance

The Iraqi judicial structure is divided into three main categories: Civil Courts, Administrative Courts and Criminal Courts.

1.1.1. Civil Courts

(*a*) *Court of First Instance*

The Court of First Instance, composed of a single judge, has universal jurisdiction in all commercial and civil cases of first instance, without any limitations as to the amount of the claim, as well as jurisdiction in case of personal status of Christians. Until July 1979 there were two categories of this Court. The first was the Court of First Instance with Limited Jurisdiction which dealt with civil and commercial cases the value of which did not exceed Iraqi Dinar 500 (equivalent to £900 approximately). Judgements of these courts were subject to appeal by way of "case stated" (i.e. review of judgement without hearing) in one stage by a specific Chamber of the Court of Appeal. The second was the Court of First Instance with Unlimited Jurisdiction which handled all civil and commercial cases which had a value of more than ID500. Judgements pronounced by these courts were open to appeal by either the Court of Appeal where fresh hearings could start or at the Court of Cassation by "case stated". It was up to the party desirous of appeal to elect which course of appeal he took against the judgement of a Court of First Instance with Unlimited Jurisdiction.

The Court of First Instance also has jurisdiction to hear all cases of personal status of the Iraqi Christians and all non-Muslim foreigners. By contrast, the personal status of all Muslims whether Iraqi citizens or foreigners is subject to the jurisdiction of the Court of Personal Status which is a totally different forum from the Court of First Instance. Non-Muslims, including the Christians and Jews, are permitted to celebrate marriage in their own church but the marriage ought to be ultimately registered by the Court of First Instance (which in fulfilling such functions acts in the name of the Court of Personal Matters—not to be confused with the Court of Personal Status).

(*b*) *Court of Personal Status*

The Court of Personal Status hears all cases between Muslims (whether Iraqi or foreigner) including the cases of *Sabe'ins* (a small sect in the south of Iraq whose religion can be traced to pre-Islamic era). This Court hears cases of personal status including marriage, divorce, legitimacy, succession, inheritance of all Muslims. The Court also has jurisdiction to hear disputes involving the existence of endowment trust and in particular is concerned with the proper administration of trust by the appointed trustees as well as their removal in cases of maladministration.

Previously there were two branches of Courts of Personal Status—one administering the Shi'ite school of *fiqh* and the other administering the Sunni school.

All cases of divorce between Muslims are heard by the Court of Personal Status. The procedures are that in the first instance the dispute is referred to a communal or family council to endeavour to solve the problem if possible. The tribunal has to, as directed by the Court, make a recommendation within a given time, as to whether the marriage has been irretrievably broken (which results in a decree of divorce) or alternatively recommend appropriate measures for reconcilation.

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The personal status cases of Christians were traditionally heard by the local Spiritual Courts which emerged in 1453 A.D. when Sultan Muhammad the Conqueror of Ottoman Empire gave the Orthodox in his territory (which previously included the Byzantine Roman Empire) certain concessions and guarantees in their administrative, financial and judicial affairs. This included the right of the Christians to be free from the jurisdiction of the Islamic courts in their cases of personal status. The promulgation of the Ottoman Family Law of 1914 put an end to the competence of Spiritual Courts to hear cases of marriage, divorce and maintenance of the wife. However, these institutions were retained in certain Arab territories of the Empire in spite of the fact that the Arab States had been originally exempt from the 1453 Decree which gave judicial recognition to the spiritual courts of the local Christians. Indeed these spiritual courts are still functioning in Syria but in Iraq the personal status of the Christians is subject to the jurisdiction of the Court of First Instance.

1.1.2. Administrative Court

The Law No. 140 of 1977 established an Administrative Court in Baghdad to hear civil and commercial cases between either two parties in the public sector, or between a party in the public sector with the private sector. In terms of Article 2 of the 1977 Statutes, the Administrative Court has the following jurisdictions:

1. (*a*) The civil lawsuits which are raised by the Ministries, the State Organisations and the Socialist sector against each other, whatever the value of the law-suit may be.
   (*b*) The entrance of the private sector with either of the Administration lawsuit parties, shall have no effect upon the competence of Administrative Court.
2. The urgent Judicature and the orders on petitions (Loyalty Judicature) including the attachment in the lawsuit related thereto.[1]

The Administrative Court is regulated, and is run, by the same principles and procedures as the Court of First Instance. It is composed of one judge. In addition to the Administrative Court sitting in Baghdad, new courts can be formed in any Appellate District which the Ministry of Justice finds necessary. The full bench of the Court of Cassation shall adjudicate in the conflict of competence between different Administrative Courts throughout Iraq or between an Administrative Court and any other court.

Appeal against the judgements of the Administrative Courts should be made directly to the Court of Cassation (as opposed to some of the

[1] *Official Gazette* (1977), No. 49

decisions of the Court of First Instance which can first go to the Court of Appeal and then, if allowed, to the Court of Cassation). The appeal will be heard by a special bench of the Court of Cassation—styled the "Administrative Causes Panel".

1.1.3. Criminal Courts

There are five courts with criminal jurisdiction in Iraq:

(*a*) *Court of Enquiry*

This is both in substance and function a Department of Public Prosecution but staffed by legally qualified personnel who are career judges and are independent from the Attorney General's Office. The function of the Court of Enquiry is to gather and evaluate the evidence in each criminal case by instructing the Police and other public investigators. Once the Court of Enquiry decides that there is adequate evidence for prosecution then the file is passed on to the individual criminal court which has jurisdiction to hear the case. If there is no adequate evidence the Court of Enquiry dismisses the case and releases the accused. If the Public Prosecutor or the private complainant is unhappy with the decisions made by the Court of Enquiry he has a right to appeal to the Court of Session.

The Court of Enquiry has also jurisdiction to try cases of contravention of criminal law where the penalty is not greater than ten Iraqi dinars. Such decisions are considered on appeal by the Court of Session.

(*b*) *Magistrate Court*

This court has jurisdiction to hear all cases of violation of the Iraqi penal system except capital crimes (known as Jenaya). The court has jurisdiction to hand out penalties of up to five years imprisonment. Accordingly all criminal offences which have a penalty between a fine of a minimum of ten Iraqi dinars and a maximum of five years imprisonment are heard by the Magistrate Court.

The decisions of the Magistrate Courts are subject to appellant hearing at the Court of Cassation.

(*c*) *Commercial Magistrate Court*

The court hears certain offences committed in contravention of financial, economic and commercial provisions which entail criminal liability. The main bulk of this court's work relates to profiteering and breaching the price control regulations as well as regulations concerning the quality and the measurement of the goods. This court is composed of a single judge and its decisions can be appealed to the Court of Cassation.

(*d*) *Children's Hearing*

This court hears cases against children between the age of seven to

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eighteen years. The hearing panel is composed of a judge, a medical practitioner, and a social worker. The judges preside over the hearing. The decision of this panel is subject to appeal to the Court of Cassation.

(*e*) *Court of Session*

This court hears all crimes which have a penalty of more than five years imprisonment. This court is composed of three judges under the presidency of the President of the Court of Appeal or one of his vice-presidents.

1.2. Courts of Appeal

1.2.1. Court of Appeal

Courts of Appeal hear appeals against the decisions of the Courts of First Instance. In every province, or as it is called "District of Appeal", there is a Court of Appeal which consists of three judges under the presidency of the President of the Court of Appeal or one of his vice-presidents. The Court of Appeal opens new hearings upon which it can affirm or reverse the judgement of the Court of First Instance. All judgements of the Court of Appeal are open to appeal to the Court of Cassation, except those passed on appeal against the judgements of the Court of First Instance where the value of claim is less than 1,000 Iraqi dinar.

1.2.2. Court of Cassation

The Court of Cassation is the highest judicial body in the land. It sits in Baghdad and consists of a number of Chambers each of which specialises in a certain type of case. Each Chamber is composed of three to five senior judges. Supreme to the individual Chambers, is the Full Bench of the Court of Cassation, alternatively called the Extended Chamber, which is the highest judicial authority in the country and its ruling is binding in a given decided case. A lower court which has to hear a case for the second time after its earlier decision has been reversed by one of the chambers of the Court of Cassation can (if the value of claim is more than 1,000 dinar) ignore the ruling of the Chamber and insist on its own judgement. By contrast a lower court which has to decide a case overruled by the Full Bench of the Court of Cassation is bound to comply.

Upon appeal against a judgement of the Court of First Instance, the Administrative Court or the Court of Appeal, the case is referred to one of the Chambers of the Court of Cassation which would duly review the case and pronounce a ruling, either upholding the judgement or reversing it.

Reversal is given when there is an error in the judgement of the lower court with respect to the statement, interpretation or application of the law, and in such a situation the case would be sent back to the lower court which has heard the case. The lower court has to reopen the hearings and follow the course set in the reversal ruling. If the reversal was with respect to procedural error, the lower court has to follow the ruling. But, if the reversal was with respect to the merits of the case the Court of First Instance or the Court of Appeal may persist with its previous decision even on different grounds. Upon reappeal against this persisting judgement of the lower court, the case would be heard by the Full Bench of the Court of Cassation which consists of the President, a number of Vice-Presidents, 15 permanent judges and a number of substitute judges. Theoretically the Full Bench of the Court of Cassation consists of all the judges of the said court, but in practice a bench of between five and fourteen, termed an Extended Chamber, hears reappeals against persisting judgements. The Full Bench or the Extended Chamber hears appeals in the following instances:

(*a*) When the Court of the First Instance or the Court of Appeal persists with its previously reversed judgement.

(*b*) When a dissatisfied party in the case reappeals from a ruling of the Chamber of the Court of Cassation. Such reappeal is limited to only one of two instances:

—When the ruling of the Chambers overlooked one of the legal points argued by the Appellant.

—When the contents of the ruling contradict each other or the ruling contradicts a previous ruling of the Chamber in the same case without change of the parties thereto.

(*c*) When the Chamber finds that the case would involve establishment of a new principle which would be a cited precedent or a change to such precedent.

According to Section 1(3) of the Iraqi Civil Code 1951 decided cases are considered as an informal source of Iraqi law. In principle, throughout the Middle East, including Iraq, the doctrine of *stare decisis* is not accepted. Thus the normal function of the courts is the application of the law as expressed by the legislature or established through other sources of law. Accordingly, unlike the Anglo–American common law system, in Iraq, courts' judgements have no binding force upon the judges sitting in the inferior courts. Indeed the system of the binding force of judicial precedents is not recognised in the overwhelming majority of Islamic jurisdictions. In Iraq a judgement, or a judicial decision, pronounced by a superior court is not binding upon the inferior courts but it can be persuasive.

The judiciary is supervised by the Ministry of Justice and a supreme Judicial Council headed by the President of the Court of Cassation.

2. Specialised Courts and Tribunals

In addition to the courts mentioned above, there are other judicial forums

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in Iraq which exercise exclusive jurisdiction in certain specific areas. By far the most powerful of these is the Revolutionary Court, which deals with cases affecting the security of the State in political, financial, economic and other spheres.

Other selective administrative tribunals and judicial committees are:

(*a*) The Labour Tribunal which hears disputes under the terms of the Labour Law.

(*b*) The Judicial Committee of Customs Administration which hear cases of contravention of import or export regulations.

(*c*) The Agricultural Tribunal is concerned with disputes arising out of agrarian reform in Iraq.

(*d*) The Judicial Committee in the Central Bank of Iraq hears financial disputes within the Bank itself, and also disputes concerning the smuggling of money out of Iraq.

Appeal against the decisions made by these administrative tribunals and committees are heard by the respective High Committees—without any check by the judiciary.

3. Arbitration

As an alternative to litigation, arbitration is recognised in the Iraqi legal system. The relevant provisions are contained in Articles 251 to 276 of the Iraqi Civil Procedure Code of 1969. The Iraqi Chamber of Commerce handles the bulk of commercial arbitrations in Iraq. There are also provisions relative to major project contracts involving foreign contractors whereby a dispute must, in the first place, be referred to the resident engineer who must give a decision. However, if either party is dissatisfied with his decision, they may refer the dispute to arbitration. It is normal for each party to nominate one arbitrator, and for the two arbitrators to jointly nominate a third. In the event of a disagreement, the Iraqi court can be requested to appoint the third member. Arbitration in Iraq is usually conducted under the provisions of the Civil Procedures Code

Clause 45 of the General Conditions of Contract for Electrical, Mechanical and Process Works (1980) provides detailed provisions for the settlement of disputes by arbitration. The resident engineer must act as a decision-maker between the employer or the engineer and the contractor and publish his decision in a matter of 90 days. This decision will be final and binding unless the parties resort to arbitration in Iraq. International arbitration is very rare, but it may be possible if parties have expressly agreed to international arbitration in the text of the contract in question.

VI. The Legal Profession

1. The Bar

The first legislation on the Iraqi Bar was the Law No. 84 of 1960. There were also several items of subordinate legislation (No. 23/19) and a Commentary on the 1960 Law by the Iraqi Court of Cassation No. 2/40 p. 373 which supplemented this legislation.

At present, the legal profession in Iraq is governed by the Advocacy Law No. 73 of 1965 as amended by the Law No. 71 of 1969. Accordingly, to be admitted to the Iraqi Bar, an applicant (*a*) must be either an Iraqi national or a Palestinian naturalised in Iraq, (*b*) must have a law degree from an Iraqi university or its equivalent, (*c*) be a fit and proper person to practice law and, (*d*) not be employed on a permanent basis in the public sector, and (*e*) must complete a two year professional training (apprenticeship with a practising advocate of at least five years standing).

Iraqi advocates can appear in all courts in the country, including the Personal Status Courts which deal exclusively with matters of personal status, such as divorce or inheritance, among Muslims. Lawyers admitted in other Arab jurisdictions can appear in the equivalent Iraqi courts, with the approval of the Minister of Justice and the President of the Iraqi Bar Association. Lawyers from non-Arab states may also appear, in association with Iraqi co-counsel, having obtained the same approval.

Private practice of law is either in the form of sole practice (which is still the prevailing form) or partnership. In these firms there are three classifications of lawyers. First, partners are those lawyers who "own" the firm and, as a result, share responsibility and liability for it. Following the general rule of all partnerships, common arrangements for expense-sharing alone do not create a partnership. Secondly, associates of the firm are lawyer-employees, who do not share in the profits and are paid a salary. Partners are recruited from those successful associates who are asked to join the partnerships. Lastly, there is a hybrid classification which is neither partner nor associate. Such an advocate is designated "of counsel".

Here it is useful to outline the rules governing the remuneration of the Iraqi advocates and the rate of their fees. Article 166 of the Iraqi Civil Procedure Code 1969 (as amended in 1973) is the main Iraqi legislation on legal costs. It states that the court is obliged to order the litigant whom the court finds liable to pay the legal costs (which includes the legal fees), the expert fees, and the expenditure incurred by witnesses. An amendment to this article enacted in 1973 states that the advocates cannot be paid for more than one "legal fee" when they represent more than one claimant or more than one respondant or where there is more than one advocate representing.

The factors which are considered appropriate by the profession to be considered in arriving at the fee are:

1. Time expended and labour performed.
2. Uniqueness or difficulty of the matter.
3. Skill required.

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4. The degree to which work on the matter interferes with the lawyer's flow of other legal matters for which he has been engaged.
5. The customary fee for such work among the local members of the bar.
6. If the matter involves money damages, the amount involved and the result obtained.
7. The length and nature of the relationship between the advocate and his client.
8. The gravity of the responsibility involved.
9. The length of experience, the ability, and the reputation of the lawyer, and
10. Any time limitations imposed upon the attorney by either the client or the circumstances.

In general the Iraqi bar recognizes three bases for establishing compensation: an hourly fee, a total cost fee, and the contingency fee. In the first case, once an Iraqi advocate has determined the nature of the matter to be undertaken for the client, and using the above ten factors, an hourly fee is stated and the time spent on the matter is merely multiplied by the hourly rate. In these cases a retainer is usually extended to the lawyer and time charged against that amount with detailed statements sent to the client periodically. In the second case, the advocate quotes a flat sum as the "total cost" fee. This sum will be the fixed and total cost chargeable. There is a growing tendency to use this basis because frequently a client wishes to take the total legal cost into account, preferably in advance. Thirdly, contingency fees, which by their very nature are conditional on the advocate winning the case, either through settlement or trial. In most cases the contingent fee is a percentage of the amount recovered less ordinary and reasonable expenses. Although such arrangements are prohibited in England they have flourished in Iraq.

Iraqi advocates are free to enter into any mutual agreement with clients for their remuneration so long as it concerns the rate (but not the substance) of their remuneration. In other words, there is no limit to the rate of fees, subject to agreement. The Court of Cassation had settled this rule in its judgement No. 1956-H.2532 dated 13 January 1957. In this case the Ministry of Finance had engaged an advocate and they had agreed upon specific fees. Later the Ministry relying on a particular ministerial order sought to pay the advocate according to their prescribed rate of fees for advocates. The court decided that the advocate was entitled to the agreed fees regardless of the rate of fees prescribed by the Ministry. Such an agreement, however, is binding only between the advocate and his client and cannot bind third parties such as the defendants. The court can send the accounts for "taxation" or appoint an "expert" for the calculation of the legal fees and expenses which are in dispute.

Contingency fee contracts are common in certain areas of work such as:

(*a*) disputes over real property and (*b*) personal injuries. In such cases the would-be plaintiffs usually cannot afford the fees, and as legal aid is confined to certain areas, the problem of financing a litigation is usually solved by way of a contingency contract. What is prohibited is for the advocate to agree to receive part of the property (huquq-e aineyyah) being sued for, as part of his fees. The fees can be only a personal debt against the client but not a portion of the property in dispute.[1] Nor can an advocate buy all or part of the property which he is engaged to recover.

So far as the entitlement of the advocate to his fees from the client is concerned several judgements of the Iraqi Court of Cassation establish beyond doubt that an advocate is entitled to receive remuneration even though he has not at the outset, or in the course of representing the client, entered into a formal agreement for remuneration. By way of example, the court in its decision No. 1955-H.1222 dated 27 June 1955 decided that an agent or advocate who usually charges people for his services is entitled to a "reasonable remuneration" for whatever service he has rendered by reason of the general rule laid down in Article 940 of the Civil Code 1951—even although there is no table of charges for advocates.

The Court of Cassation in its judgement No. 1955-H.2156 dated 30 January 1956 states that any prior contractual provision that the advocate will receive his remuneration after he "receives" the "debt" which he is engaged to recover does not bar the advocate from claiming his remuneration even although the disputed debt had not been recovered, provided that the advocate has performed his duties.

Another case which may be of interest is the entitlement of the advocate to his fees when there is an "out of court settlement". The Court of Cassation in its decision of 1954-H.1008 dated 19 July 1954 decided that the stipulation for the (full) fees of an advocate in a criminal issue in the event of a civil settlement is valid and enforceable.

There are several regulations concerning rates of charges for specific areas of work such as administration of property (1959/4), administration of endowments (1960/1) as amended 1961, and ownership disputes (1960).

The Court of Cassation in its judgement of 1953-H.1397 dated 21 December 1953 decided that these tables are enforceable under Principle 114 of the First Constitution of Iraq. However, that Constitution has now been superceded by the 1968 Interim Constitution. It is quite common in Iraq that the advocates specify that they should receive a certain percentage of the claim as their remuneration. Such an arrangement has been held by the Court of Cassation as acceptable so long as this stipulation is a yardstick for deciding the remuneration rate rather than paying the advocate a share in the actual property involved. The full

[1] For details see, Dr. S. N. al-Khistaini, *Ahkam al-murafiat* (Law of Civil Procedure of Iraq), Baghdad, 2nd ed. 1976, p. 77.

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bench of the Court of Cassation so decided in their judgement of 1953-H.1307 dated 18 January 1954. In this case an advocate had entered into a contract with his client stipulating that he should receive a percentage of the value of the claim (including both movable and corporeal property and personal credit). The Court sanctioned the validity of this contract.

2. Other Branches of the Legal Profession

In addition to the bar there are other branches of the legal profession in Iraq. The most important of these are (*a*) registration agents and (*b*) notaries public.

2.1. Registration Agents

The relevant legislation governing the profession of Registration Agency in Iraq is the Registration Agents Law of 1955. Article 2 of this legislation states that:

(1) No person shall practise the profession of a Registration Agent unless his name is entered in the Register of Agents at the Ministry of Economics.

(2) To have his name entered on the register the applicant must:

(*a*) be Iraqi and resident in Iraq,

(*b*) have full civil qualifications.

(*c*) be of good character and has not been sentenced for any crime derogatory to honour.

(*d*) be a Bachelor at Law and a member of the Iraqi Bar Association.

2.2. Notaries Public

This profession is regulated in Iraq by a number of legislative acts the latest of which is the Regulation No. 29 of 1977. The Notaries Public Department, attached to the Ministry of Justice, has the following sections:

(1) Section of Legal and Administrative Affairs which is entrusted to exercise the following jurisdictions:

(*a*) To give opinions on legal questions and the matters referred to it by the Director General.

(*b*) To represent the department before the courts, legal bodies and committees.

(*c*) To draw up contracts which the department itself is a party to.

(*d*) To organise the affairs of personnel who are working in the headquarters of its divisions in the administrative units.

(*e*) To render any administrative services for ensuring good process of work in the headquarters of the department and its divisions.

(2) Section of Financial Affairs which is entrusted to exercise the following jurisdictions:

(*a*) To carry out a financial and accounting function for the headquarters of the department.

(*b*) To supervise the financial and accounting work of the divisions of the department in the administrative units.

(*c*) To examine the financial and accounting work of the headquarters of the department and its divisions in the administrative units.

(*d*) To prepare the annual budget of the department.

(3) Section of Planning and Statistics, which is entrusted to exercise the following jurisdictions:

(*a*) To study the development of Notaries Public activities, to facilitate the procedures therein and to use scientific means and modern systems in their works in order to improve the standards of work and performance.

(*b*) To co-ordinate the work among the formations of headquarters and their divisions in the administrative units and between them and the other authorities, especially with the various organs of the judiciary.

(*c*) To develop systems of registration and filing and to maintain archives on a scientific and modern basis.

(*d*) To propose the preliminary plans and advise on further expansion of the Notaries Public Department.

(*e*) To organise the statistics concerned with the work of Notaries Public and to extract the results that contribute in developing this.

(*f*) To propose the necessary qualifications required of those who are working in the Notaries Public department and its divisions with the purpose of raising the standard of their performance.

By Article 4 of the 1977 Regulations, the Minister of Justice may issue instructions for the facilitation of execution of the regulation and detailing the tasks entrusted to the divisions set out therein, defining their jurisdictions and their relations, the procedures of work in the Notaries Public Department and its divisions in the administrative units and granting the jurisdictions he deems necessary.

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VII. Legal Education

For a person to become qualified as an advocate, the candidate must be a law graduate. There are three law faculties in Iraq, one in the University of Baghdad, one in the University of Mustansereyyah and one in the University of Mosul. The normal requirement for being admitted to the Iraqi Bar is a Bachelor Degree in Law from an Iraqi university. However, law degrees from foreign universities are accepted as entry qualifications provided the candidate passes an examination in Iraqi law before admission.

The Baghdad College of Law was established in 1908. The University of Baghdad was inaugurated in 1956, to co-ordinate the working of the various existing colleges of higher education in the city, and accordingly the Baghdad College of Law was incorporated into the university as the College of Law and Political Science.

The current course of LL.B. in the University of Baghdad is four years in duration. In the first year the students are taught law of personal status, Islamic law, history of law, constitutional law, political science, foreign language, and methodology and terminology. In the second year they study civil law, administrative law, law of employment and social security, taxation and finance, law of succession, economics, and general principles of criminal law. In the third year they read civil law (specific contracts), public international law, commercial law, forensic medicine, criminal law, agricultural and land reform law, criminal procedure and evidence, and a foreign language. The fourth year students cover civil law, Islamic law, company law, private international law, rules of litigation and enforcement, public international law, criminal psychology, and either French (as a foreign language) or law of insurance taught in the English language.

Law is also taught at the Universities of Mustansereyyah (established in 1963), Basrah (established in 1964) and Mosul (established in 1967). They are run in conformity to the patterns adopted by Baghdad University, but Basrah does not have a separate law faculty; the staff teaching law being part of the Colleges of Administration and Economics in their respective university.

VIII. Bibliography on Iraqi Law

This bibliography is divided into three sections:

(*a*) material on secular Iraqi law,

(*b*) material on Islamic law as relevant to the Iraqi legal traditions, and

(*c*) material in European languages.

A. MATERIAL ON SECULAR IRAQI LAW IN ARABIC

AL-ALLAM, Abd al-Rahman, *Qawa'id al-murafa at al-iraqi*, 2 Vols. Baghdad, 1962.

———, *Al-Mabādī' al-Qadā'iyya*, Baghdad, 1957.

AL-ANI, Muhammad Shafiq, *Usūl al-Murafa'āt wal-Sukūk fil Qadā' al-Shar'ī*, Baghdad, 1965.

AL-BAKRI, Abdul Baqi, *Commentaries on the Iraqi Civil Code*, 3 Vols. Baghdad, 1971.

AL-BARODI, A., *Principles of Maritime Law*, Alexandria, 1975.

BAYAT, Salman, *al-qada al-madan: al-iraqi*, on the Iraqi civil law, 2 Vols., Baghdad, 1962.

HAKIM, 'Abd al-Majid, *Al Mujiz fi Sharh al-Qanun al-Madani*, 1, *Masidir al-Iltizam* (Sources of Obligations in Iraqi Law), Baghdad, 1963.

AL-HASSOUN, Saleh A., *The Rights of Non-Iraqis in the Iraqi Constitution*, University of Baghdad, 1981 (in Arabic).

KASHIF AL-GHATA', Muhammad Husayn, *Tahrir al-Majallah* (a commentary on *the Majallah* according to Shi'ite Law).

AL-KISHTAYNI, Sa'dun N., *A Study in the General Conditions for Iraqi Contracts of Civil Engineering Works* (in Arabic), Baghdad, 1975.

MOSA, T. H., *The Commercial Contracts in the Iraqi Law of Commerce* (in Arabic), 2 Vols. Baghdad, 1973.

AL-NAHI, Salah al-Din, *al-Wasit fi Sharh al-qanun al-ti-jari al-Iiaqi*, 4th edition, 1962.

AL-NAJAFI, *The International Sales*, Baghdad, 1973.

SADDAH Abd al-Mun'im Faraj, *Muhadirat fi al-Qanun al Madani, Nazariyyah al-'Aqd fi Qawanin al-Bilad al-'Arabiyyah*, 3 Vols. Cairo, 1958, 1959, 1960.

AL-SANHOORI, Abdul Razzaq, *Al-Wassit*, 4 Vols. Cairo, 1968.

SULAYMAN, Shu'ayb Ahmad, *Al-Tahkīm Munāza'āt Tanfīdh al-Khutta al-Iqtisādiyya al-'Āmma*, Baghdad, 1982.

TAHA, M. K., *Principles of Maritime Law* (in Arabic), Alexandria, 1952.

AL-WINDAWI, *The Contract of Sale*, Baghdad, 1973.

YOUNIS, A. H., *Principles of Maritime Law*, Cairo, 1967.

YOUNIS, Hamīd, "Shart al-Tahkīm fil Tashrī' al-'Irāqi" in the Iraqi Bar Journal, *Majallat al-Qadā*, **23**, no. 2 (1968), pp. 7–36.

B. MATERIAL ON ISLAMIC LAW (IN ARABIC)

ABD AL-QADIR AL-QURASHI, M. *b.* Abi'l-Wafa, *Javahir al-Mudiyya fi Tahaquat al-Hanafiyya*, 2 Vols. Hadirabad, 1332/1914.

AL-NU'MAN, *b.* M. AL-QADI, *Du'a'im al-Islam*, 2 Vols., edited by A. A. A. Fyzee, Cairo, 1951–1960.

AL-QADI, Munir, *Sharh al-Majallah*, 2 Vols., Baghdad, 1947–1949.

AL-SHANBANI, M., *b.* al-Hussan, *Kitab al-Mukharij fi'Hiyal*, edited by J. Suhacht Leipzig, 1930.

ALLAMAH, al-Hilli (known as), Hassan ibn Yuruf ibn Mutabhar, *Mukhtalaf al-Shi'ah fi Ahkam al-Shari'ah*, edited by Sheikh Ahmad, Tehran, 1325 A.H./1941.

———, *Qava'id al-Ahkam*, edited by Jsma'il Jilani al-Shafati, 1329 A.H./1911.

———, *Tadhkerah al-fuqaha*, offset 2 Vols., Tehran, (no date).

AMILI, Muhammad Javad, *Miftah al-Kiramak fi Sharh Qava'id al-Allamah*, incorporating the text of Qava'id, 32 Vols., Egypt, 1312 A.H./1933.

ANSARI, Murtuda Muhammad Amin al-, *al-Rasa'id al-arba'a*, also known as *fava'id al-usul*, Qum: Mustafavi, 1374 A.H./1954.

———, *Kitab al-Makasib*, lithographed, edited by Mulla Hussein Khonsari, Isfihan, 1305 A.H./1888–89.

———, *La Zarar*, lithographed, edited by Mulla Hussein Khonsari, Isfihan, 1305 A.H./1888–89.

JAZIRI, Abd al-rahman, *al-figh ala'l-madhahib al-arba'a*, 4 Vols., Cairo, c. 1935.

MALIK, *b.* ANIAS, *Al-Muwaffa* (with the commentary of Lurgani), 4 Vols., Cairo, 1310 A.H./1892.

MUFID, Muhammad, *b.* Muhammad, *b.* al-Nu'man al-Baghdadi, (*d.* 413 A.H./1022), *Al-Ifsah fi'l-imama*, Najaf, 1950.

———, *Al-Ikhtisas*, ed. M. M. al-Kharsan, Najaf, 1971.

———, *Al-Irshad*, Najaf, 1382 A.H. (lunar)/1963.

Approved For Release 2011/09/23 : CIA-RDP09T00207R001000100010-3

———, *Al-Tadhkira bi-usal al-fiqh*, (in al-Karajaki's Kanz al-fawa'id, pp. 186–94), Tabriz, 1322 A.H./1904.
MUGHNIYYA, Muhammad Jawad (contemporary Shi'a Arab jurist), *Fiqh al-Imam Ja'far al-Sadiq*, 6 Vols., Beirut, 1978.
———, 'Ilm usul al-fiqh fi thawbih al-jadid, Beirut, 1980.
———, Al-Khumayni wa'l-dawla al-Islamyya, Beirut, 1979.
SARAKHSI, M., *b.* Abi Sahl, *Kitib al-Mubsut*, 30 Vols., Cairo, 1324–1331 A.H./1906–1913.
TABATABA'I, Sayid 'Ali, *Riyad al-Musa'il* (or *Shark al Kabir*), 2 Vols., lithographed edited by Haj Ahmad, 1308 A.H./1891–92, also edited by Aqa Esmacel, 1317 A.H./1900–1901.
TUSI, Shaikh Abu Ja'far Muhammud ibn al-Hasan, *Tahdhib al-ahkam*, 1318 A.H./1901-02.
———, *al-Mubsut*, edited by Muhammud Baqir, 1271 A.H./1855–56.
———, *Musa'il al-Khalif*, 2 Vols. in one, Tehran, 1367–1369 A.H./1949–52.
———, *Khalif fi al-fiqh*, 2 Vols., 2nd edition, Taban Press: Tehran, 1352 A.H./1962.

C. MATERIAL IN EUROPEAN LANGUAGES

ALLAWI, Yassin, *L'Erreur sur les elements necessaires du contrat en droit positif suisse et en droit civil irakian*, (Ph.D. Thesis, Université de Genevé), 1960.
AL-AMERI, Abdul-Hussain, *Local government in Iraq, comparative study with French local system*, New York, New York University, 1961.
ARON, R., "On Defension Clauses of Some Oriental Deeds of Sale and Lease, From Mesopotamia", *Bibliotheca Orientalis*, XV (1958), pp. 15–22.
AMIN, Sayed Hassan, *Remedies for Breach of Contract in Islamic and Iranian Law*, Glasgow, 1984.
———, *Wrongful Appropriation in Islamic Law*, Glasgow, 1983. This book (in Farsi with a section in English) deals with civil liability in general in Islamic law with special reference to the Shi'ite school of Islamic law—referring to both Iraqi and Iranian jurisdictions.
———, *The Iran–Iraq War: Legal Implications*, London, 1982.
ANDERSON, J. N. D., *Islamic Law in the Modern World*, London, 1959. Sir Norman Anderson was the President of the Institute of Advanced Legal Studies, London, until he retired a few years ago. He is still very active in his research work but his most recent works are concerned with the theological and theoretical aspects of Islamic ideology rather than the law.
AL-BAQILANI, Muhammad ibn al-Tayyib, *Kitab al-Tamheed*, edited by R. J. McCarty, University of Baghdad Publication, 1957.
BEDIR, Ali, *Sur administration et politique du development en Irak*, (Ph.D. Thesis. Université de Grenoble), 1965.
AL-DOORY, Adnan Mohammed Amin, *A comparative study of the juvenile court in the United States and in Iraq* (M.A. Thesis. University of Maryland) 1955.
BUCHANAN, Sir George Cunningham, *The Tragedy of Mesopotamia*, ANS. Press: Edinburgh, 1938.
CHEHATA, C., *Essai d'une theorie générale de l'obligation en droit musulman hanefite*, Paris, 1969.
COULSON, N. J., *A History of Islamic Law*, Edinburgh, 1964 (Islamic Surveys 2).
DANN, Uriel, *Iraq Under Quassem: A Political History*, Praeger: New York, 1963.
FOSTER, Henry Albert, *The Making of Modern Iraq*, University of Oklahoma Press: Norman, 1935.
AL-HASSAN, Malik, *De la responsabilité civil extracontractuelle du fait d'autrui en droit francaise et en droit irakien compares* (Ph.D. Thesis. Université de Paris), 2 Vols., 1957.
AL-HASANI, A. R., *Iraq Under the Shadow of Treaties*, Sidon: Lebanon: Al-Irfan Press, 1958.
AL-HASSOUN, Saleh, *The Rights of non-Iraqis in the Iraqi Constitution*, University of Baghdad, 1981.
HOOPER, C. A., *Constitutional Law of Iraq*, Baghdad: Mackenzie. Government Press, 1928.
Iraq, La Constitution interimaire de la Republique d'Irak, 10 Mai 1964, Paris: Documentation Francaise, 1965.
———, Constitution provisoire de la Republique d'Irak (21 September 1968). Paris: Documentation Francaise, 1969.
———, The Interim Constitution and its Amendments, Baghdad: Al-Hurriya Press, 1974, p. 57 (Documentary Series 28).

———, The Interim Constitution and its Amendments, 2nd ed. Baghdad. Ministry of Culture and Guidance, 1968, 32 + 29 p. (text in English and Arabic).
———, Compilation of Proclamations, Laws and Regulations, 1920, Baghdad: Ministry of Justice, 1920.
———, Agrarian Reform Law No. 117 of 1970, Baghdad, 1970.
AL-JASSIM, Hamoudi, *Des modifications a apporter aux dispositions du code penal Irakien sur la fixation de la peine, "etude comparative"* (Ph.D. Thesis. Université de Genevé), 1959.
JWAIDEH, Zuhair Elias, *Foreigners Under the Legal System of Iraq* (Ph.D. Thesis. University of Washington) 1957.
AL-KAISSI, Riath, M. S., *Nationality and Domicile as Connecting Factors in Iraqi and English Private International Laws with Particular Reference to the Law of Marriage* (Thesis. University of London) 1961.
AL-KHATIB, Hassan, *Responsabilité delictuelle et contractuelle*, Basrah, 1968. This book is based on the unpublished doctoral thesis written by the author in 1955 in the University of Paris. The full title of the thesis is *Les domaines respectifs de la responsabilité, delictuelle et de la responsabilité contractuelle en droit francais et en droit Irakien.*
KHIDHAYIR, Mahmoud, *La vie politique et constitutionelle de l'Iraq* (Ph.D. Thesis. University of Paris), 1962.
AL-KISHTAINI, Saadoun Naji, *The Recent Code of Personal Status in Iraq. A Comparative Study* (Master's Thesis, University of London) 1961.
———, *Essential Principles of Insurance Contract*, Baghdad, 1977.
AL-KUBAISY, Amer K., *Theory and Practice of Administrative Development in the New Nations with Reference to the Case of Iraq* (Ph.D. Thesis, University of Texas at Austin), 1971.
MAIN, Ernest, *Iraq from Mandate to Independence*, London: Allen and Unwin, 1935.
MANSOUR, Shab Toma, *La fonction publique en Irak et ses contentieux etude de droit compare* (Ph.D. Thesis, Université de Montpellier), 1959, 204 pp.
MARR, P. "Iraq, leadership dilemma 1948–68," 24 *The Middle East Journal* (1970), pp. 283–301.
AL-NASRAWI, Abbas, "The changing pattern of Iraq's foreign trade," 25 *The Middle East Journal* (1970), pp. 481–490.
EL-OMAR, Youssif, *Du Cheque en droit Irakien* (Ph.D. Thesis, Université de Montpellier), 1954.
PALMER, Monte, "Some political determinants of economic reform: Agrarian reform in Iraq," 6 *Journal of Asian and African Studies* (1971), pp. 169–178.
AL-QAYSI, Riyadh, "Introduction to the historical development of the Iraqi legal system," *Journal of Baghdad College of Law* (1969), pp. 1–30.
AL-SHAIKHELY, Abdul Razzag, *Local Government in Iraq: Operation Trade and Development Role* (M.A. Thesis, University of Beirut), 1969.
AL-SHEIBANI, Talat A., *La Responsabilité des administrateurs et des organes le gestion des societes anonymes, essai d'une etude critique et comparative des droits francais, belge, suisse et Irakien* (Ph.D. Thesis, Université de Genevé), 1964.
The Trade Directory, published in English, contains names and addresses of all the merchants and trading establishments registered with the Iraqi Chamber of Commerce: Baghdad Chamber of Commerce, Mustansir Street, Baghdad, Iraq.
TAYAN, E. "*Iflas et procedure d'execution sur les biens en droit musulman (madhab hanafite)*", SI XXI (1964), 145–166.
———,"Le Notariat et le regime de la preuve par ecrit dans la pretique du droit musulman," *Annales de L'Ecole Francaise de Droit de Bayreuth*, II (1945), pp. 3–99. Also separately printed, Beirut, 1959.
———, *Histoire de L'organisation judiciaire en pays de L'Islam*, 2nd Edition, Leiden, 1960.
YAMULKI, Akram, *The High Court of Iraq and the Supreme Court of the United States—A Comparison Study*. (Ph.D. Thesis, University of Indiana), 1952.
———, "Iraq," *Yearbook of Commercial Arbitration* (1979), Deventer, The Netherlands, pp. 104–14.
AL-YASSIN, Mohammed Ali, *Le project de creation d'un conseil d'etat Irakien*. (Ph.D. Thesis, Université de Paris).
ZAYNI, Abdul Hussayn, *Company laws in Iraq*. (B.A. Thesis, American University of Beirut), 1957.

Approved For Release 2011/09/23 : CIA-RDP09T00207R001000100010-3