

Foreword

"The Civil Code of Iraq was enacted on 18 September 1951, and came into operation after two years which commenced running from the date of its promulgation in the Official Gazette: its provisions have been taken from two sources, namely the Islamic Shari'a and the Civil Code of Egypt which copied its provisions from the laws of the West and the Islamic Shari'a." (Excerpt from the Reformation of the Legal System Law No.35 of 1977).

The first source of this Code has been taken from 'Majallat Al Ahkam Al 'Adliyya', which was the Civil Code that was compiled for the Ottoman Empire; it was compiled and arranged by a commission appointed by the then Prime Minister of the Ottoman Empire to whom the Commission submitted its report which inter alia read: "We have arranged a 'Majalla' comprising questions and other juristic matters which are of daily occurrence and thus are needed mostly; these were compiled from reliable sayings of the honourable Hanafi authorities..."

"The first part is made up of maxims. The second part of Al Majalla is made up of the rules compiled by Ibn Noujaim and other jurists who were of the same school of thought as him... The Shari'a judges may not render judgments on the strength of any of these rules except when they can find an express provision; nevertheless these rules have overall benefits to control matters: he who has access to them will decide according to the proofs adduced...by adopting these rules a person is enabled to apply his transactions such as is conformant to the honourable Shari'a, at least in an approximate manner."

This code was written in Turkish and then translated into the Arabic language. The first part comprised general maxims, some of which have been copied in the Civil Code of Iraq, and the second part contains provisions governing sales, leases, companies, drafts, courts, oaths, etc...

As these maxims and provisions have been taken as stated above from the sayings (opinions) of famous jurists and the Shari'a and due to ambiguities it was therefore considered necessary to have them explained by quoting the relevant opinions of noted jurists. Hence came "Sharh Majallat Al Ahkam Al Adliyya", by Salim Rustum Baz (the Lebanese) from which I have quoted in certain instances relevant explanations.

In order for this book to be as accurate as possible I had to do exhaustive research work; I resorted to the Library of Congress in Washington, D.C., where the staff of the Middle East Legal Department afforded me assistance; I mention in particular Dr. Yurguey Hakim whose assistance and painstaking efforts were invaluable in assisting me to achieve the relative excellence I think I have achieved in this work.

I do not omit to mention my wife whose forbearance and tolerance enabled me to spend nights on end in quest of perfection and correction of misquotations.

It was deemed useful to append to this foreword a few Articles of Al Majalla which give an explanation of certain words as used in the text.

The large number of parentheses in the translation is the result of the necessity to clarify stylistic changes. These parentheses have been used in order to indicate to the reader that in these passages the translator has added something that is not literally found in the Arabic text. They may be disregarded and the text enclosed therein should be considered an integral part of the context. In a few cases, however, the words in parentheses serve another purpose, namely that of explaining the preceding words.

N. Karam 1990

**Excerpts from "Majallat Al Ahkam Al Adliyya"
(The Civil Code of the Ottoman Empire)**

Article 103. - (Al 'Aqd) Contract is the undertaking of an obligation by the contracting parties to perform a certain specified matter; it is the tying of the offer with the acceptance.

Article 104. - (Al In'iqaad) Clinching is the mutual confirmation of the offer and the acceptance in a lawful manner the effect of which appears in their object (cause).

Explanation: That which relates to offer and acceptance in a sale is the thing sold, the price and the effect which appears in them is the legal consequence of sale, i.e. establishing ownership of the thing sold to the purchaser and of the price to the vendor.

Article 108. (Bay' Sahih) Valid sale is one which is permitted and it is the sale which is lawful as to its identity and attributes.

Article 109. - (Al Bay'a Al Fased) Voidable sale is that which is lawful as to its cause and not to attributes, meaning that it is concluded as to its identity and unlawful in regard to some of its external attributes.

Explanation: What is meant by the legitimacy of the cause is that it is property which is permitted to be enjoyed (property which is acquired) and the external attributes are those which are outside the element of sale which is the offer and acceptance and its object is the thing sold: a voidable sale is that which insofar as regards its cause is lawful (legitimate) but not insofar as regards its attributes, such as where the sale concerned an acquired (permitted to be enjoyed) property where the price has not been named; the sale of an acquired (permitted to be

IRAQ 1 & 2/1990: THE CIVIL CODE

enjoyed) property is valid but because an element voiding it has occurred which is the ignorance of the price the sale is voided...this kind of sale implies ownership by receipt except in mortgages that will be laid down in Article 371 of Al Majalla.

Article 110. - (Al Bay'a Al Battel) A void sale is that which is not originally (initially) valid, i.e. it is not legitimate (lawful) ab initio.

Article 113. - (Al Bay'a Al Nafethe) Effectual (enforceable) sale is one to which the right of a third party is not related; it is either binding or not binding.

Article 114. - (Al Bay'a Al Lazem) Binding sale is the sale which is effectual and devoid of any options.

Article 115. - (Al Bay'a Al Ghayr Lazem) Unbinding sale is the effectual sale which contains (to which is attached) an option.

Article 116. - (Al Khayar) Option is where either contracting party has an option as will be detailed in the ad hoc chapter.

Article 117. - (Al Bay'a Al Muttlaq) Definite sale is the conclusive sale.

Article 119. - (Bay'a Al Istighlal) Exploitation sale is the sale of property with a right of redemption provided the vendor will have it leased to him.

Article 123. - (Bay'a As Salam) Is a sale of a thing to be delivered on a future date against immediate payment of the price.

Explanation: i.e. payment of the price immediately and

enjoyed) property is valid but because an element voiding it has occurred which is the ignorance of the price the sale is voided...this kind of sale implies ownership by receipt except in mortgages that will be laid down in Article 371 of Al Majalla.

Article 110. - (Al Bay'a Al Battel) A void sale is that which is not originally (initially) valid, i.e. it is not legitimate (lawful) ab initio.

Article 113. - (Al Bay'a Al Nafethe) Effectual (enforceable) sale is one to which the right of a third party is not related; it is either binding or not binding.

Article 114. - (Al Bay'a Al Lazem) Binding sale is the sale which is effectual and devoid of any options.

Article 115. - (Al Bay'a Al Ghayr Lazem) Unbinding sale is the effectual sale which contains (to which is attached) an option.

Article 116. - (Al Khayar) Option is where either contracting party has an option as will be detailed in the ad hoc chapter.

Article 117. - (Al Bay'a Al Muttlag) Definite sale is the conclusive sale.

Article 119. - (Bay'a Al Istighlal) Exploitation sale is the sale of property with a right of redemption provided the vendor will have it leased to him.

Article 123. - (Bay'a As Salam) Is a sale of a thing to be delivered on a future date against immediate payment of the price.

Explanation: i.e. payment of the price immediately and

taking (receiving) the thing sold after a certain specified time.

Article 124. - (Al Istisna'a) Is a contract with a craftsman (professional) to manufacture (do) something: the worker is the manufacturer and the purchaser is the hirer (mustasni') and the thing is the product.

Article 125. - (Al Mulkiyya) Ownership is that which is owned by a person be it commodities or benefits.

Explanation: Commodities such as things, immovables, and animals and benefits such as dwelling (habitation). Benefits were ranked as ownership and not as property because the ownership is that which a person can dispose of in a specified manner and property is that which is saved (stored) to be enjoyed when the need arises (Radd Muhtar) that is benefits are commodities which expire (are consumed) and cannot be stored.

Article 126. - (Al Mal) Property is that which human nature tends to have and may be saved (stored) until it is needed, regardless of whether it is a movable or an immovable.

Explanation: The difference between ownership and property is specific and general: every property is an ownership and not every ownership is property because benefits are owned as we have already said and are not property as they cannot be stored until needed.

Article 127. - (Al Mal Al Mutaqawwim) Is used to mean two things: the first being: all that which it is allowable to be enjoyed; and the second as meaning the acquired property: fish in the sea is not property acquired (Mal Mutaqawwim) but when it is caught it becomes mutaqawwim by acquisition.

Article 128. - (Al Manqool) A movable is the thing which may be moved from one place to another and covers (nuqud) money, commodities, animals, things that are measured by volume or by weight (as well as buildings and trees if they are accessories of the land).

Article 130: - (Nuqud) money, is the plural of (naqd) which is gold and silver, regardless of whether they are minted or not.

Article 131. - (Al 'Arudh) Commodities is the plural of ('ardh) and are other than (nuqud) - gold and silver -, animals, things that are measured by volume or weight, such as effects and cloth.

Article 132. - (Al Muqaddarat) Quantitatives are things the quantities of which are measured by volume, weight, unit, or dra' (a measure of length equal to 67 centimetres) and includes things measured by volume, weight, unit and dra's.

Article 138. - (Masha'a) Joint ownership is that which contains unparcelled (common) shares.

Article 139. - (Hissa Sha'i'a) Is the share which is applied to every part of a jointly owned property.

Article 140. - (Al Jins) Kind/specie is the thing the units of which do not contain excessive difference as regards the purpose for which it is intended.

Article 141. - (Al Jizaf) En masse (in bulk) is the sale of a total (of things without estimation, or specifying the quantity, volume or count).

Article 145. - (Mal Mithli) Fungibles are that which have a comparable thing in the market with no significant disparity.

Article 146. - (Al Queemy) Things measured by value are things the comparable of which does not exist in the Market or the comparable of which exists in the market with a significant disparity in value.

Article 147. - (Al Ma'dudat Al Mutaqariba) Are countables among the individuals and units of which there is no disparity in value; all of them are fungibles such as nuts and eggs.

Article 148. - (Al Madudat Al Mutaafawita) Countables with a disparity are countables the individuals and units of which differ in value; all are non-fungibles, such as water melons and cantaloupes.

Article 149. - (Rukn Al Bay'a) The element of sale means its nature (essence) meaning exchange of property with property and it is used also to denote offer and acceptance because they imply exchange.

Article 153. - (Ath thaman Al Musamma) The price named is the price which is quoted mutually by the contracting parties at the time of the sale regardless of whether it corresponds to its real value or it is less or more than the real value.

Article 154. - (Al Qima) The value is the real price of a thing.

Article 159. - (Al 'Ayn) Is the thing designated and identified, such as a house, a horse, a chair, a basket, a bushel of wheat which are present (at the session of sale); all of them are ('A'yan).

Article 164. - (Taghreer) Cheating is defrauding, such as where the purchaser told the vendor: "Your commodity is not

worth one thousand, sell it to me for one thousand, you will be the winner."

Article 165. - (Al Ghobn Al Fahesh) Excessive fraud is the defrauding amounting to one half of one tenth, in (Al 'Arudh) commodities, and one tenth, in animals, and one fifth or more in immovables.

Article 166. - (Al Qadeem) Ancient/old is where there is no one who knows its beginning.

Article 170. - (Mahal Al Bay'a) The object of a sale is the thing sold.

Article 407. - (Ijara Mungeaza) Present lease, is a (contract) of lease which takes effect as of the time of the contract.

Article 408. - (Ijara Mudhafa) Future lease, is a contract of lease which takes effect as of a certain specified future time.

Article 412. - (Al Musta'gear Fihi) Is the property delivered to a wage-earner (craftsman) for doing the work undertaken by him pursuant to a contract of lease, such as where cloth was delivered to a tailor to tailor it and a load that was given to a porter to move it.

Article 416. - (Adh Dhaman) The warranty is the giving of a comparable thing of a fungible and the value of a non-fungible.

Article 417. - (Mu'ad Lilistighlal) Designed to be exploited, is the thing designated and identified to be leased, such as inns, houses, baths and shops or immovables that have been built or purchased for being hired.

Article 616. - (Kafala Bid Darak) Is the warranty of the price if the thing sold is replevined or the warranty of the thing sold against defects (Majma' Al Anhur).

Article 943. - (As Sagheer ghayr Al Mumayyiz) Irrational minor is he who does not comprehend the sale and purchase, i.e. he who does not know that "the sale" deprives one of ownership and "purchase" is an acquisition of ownership; he does not differentiate between apparent excessive fraud (such as deception amounting to 50 per cent) and insignificant fraud. A minor who differentiates the foregoing is called a rational minor (Sagheer Mumayyiz).

Article 1270. - (Al Ardh Al Mawat) (mawat land) Is that which is not owned by any person nor is it pasture-land nor an area from which the villagers or townspeople obtain their firewood) and it is the land which is furthest from the outermost house of the village, i.e. where the echo of a loud voiced man cannot be heard when he shouts from the outermost house lying at the periphery of that village or town.

Article 946. - (As Safeeh) Imprudent is he who improperly spends his property, or squanders and loses and destroys his property through excessive improper spending; those who are careless in taking and giving (trading) and are not aware of the method of trading and their enjoyment due to their stupidity and light heartedness are also deemed to be 'imprudent'.

Explanation: The author of "Al Hindiyya" said that an imprudent person is he who acts contrary to the incumbencies of the Shari'a and lets loose his desires, squanders in spending, and behaves with no apparent object or an object which is not considered by reasonable people to conform to religion, such as paying singers...a person

who spends all his property for building places of worship and similar other things is deemed to be 'imprudent'.

According to "Ad Durr Al Mukhtar" the squandering of property is contrary to the norms of the Shari'a and so is good reasoning even when it is spent for charitable purposes such as where it is spent for building places of worship and similar things; in such cases an interdiction will be imposed on him.

Article 1678. - (Al Mulkiyya Al Mutlaqa) Absolute ownership is that which has not been confined to any of the causes of ownership, such as inheritance and purchase; ownership which is confined to one of these reasons is termed "causal ownership".

Article 1683. - (Tahkeem Al hal) Making the present state (of affairs) a legal consequence: (starting from the present state of a court's finding, meaning making the present actuality (as opposed to future) (finding) a legal consequence: it is a kind of (Istishab).

(Istishab) Association as explained in At Tahreer is: "The legal consequence of the permanence of a thing certain the non-existence of which is not presumed; it has the meaning of leaving that which existed as it existed."

There was a difference regarding the force of its proof: some said that it was an absolute proof and some others denied its strength of proof absolutely; the three giants, Abu Zayd, Shams Al A'imma and Fakhr Al Islam, agreed that it is proof for rebutting not for replevin; this is the famous interpretation which has been adopted by the jurists.

Article 1746. - The oath will not be tendered except when it is called for by the adversary; the judge may however tender the oath without a request from the former in four cases: where a man has claimed and proved a right against a succession the judge will tender the oath to him to confirm

that he has not received this right himself nor through any one from the deceased nor did the decedent release his liability thereon nor did he draw a draft on a third party and that no one has performed this right and that the decedent did not have a mortgage against this right: this is called the oath of Revelation (Istizhar).

**REFORMATION OF THE LEGAL SYSTEM LAW NO.35 OF 1977
EXCERPT FROM THE REFORMATION WORK PAPER**

Chapter 2 - The Civil Legislation

The civil legislation in Iraq includes a combination of rules taken from various sources differing in spirit and trend. All of them, however, although of different scopes, must rest on the basis and must endeavour to achieve comparable objectives.

To get in line with the philosophy and objectives of the July Revolution of 1968 the object of the civil legislation must be the support of socialist understandings and assertion of the socialist moral values in enforcing and interpreting legal ties. All this necessitates the laying down of legal rules and provisions which will secure the gradual transformation of the legal relations within the framework of individuals to the 'socialist framework'. The formulation of such rules and provisions necessitates careful consideration of the existing civil legislation which unveils many weaknesses engulfing our legal 'civil' life insofar as regards the objectives and contents of this legislation.

Due to the multilateral aspects of the legal 'civil' life the legislation governing it varies according to its varied aspects: some of it regulates the rights in rem and in personam, within the framework of the Civil Code, and

others lay down the procedures of legislation.

In the following we shall cover in succession the Civil Law and the Civil Procedure:

Clause 1 - The Civil Code

The Civil Code of Iraq was enacted on 18 September 1951, and came into operation after two years from the date of its promulgation in the Official Gazette: its provisions have been taken from two sources namely the Islamic Shari'a and the Civil Code of Egypt which copied its provisions from the laws of the West and the Islamic Shari'a.

The legislator was not successful in many cases in merging harmoniously the provisions taken from the aforesaid two sources or in selecting the best of them; also its incapacity to keep abreast of the requisites of the present state is quite evident.

Reformation of the Civil Code necessitates the introduction of radical changes to rules which must respond to the progress and philosophy of the economic and social revolution and satisfy the requirements of development and the building up of the socialist society.

Whereas the rules of this Law are contained in two sections, namely the rights in personam (obligations) and the rights in rem, it is therefore appropriate to deal in the first place with the rights in personam and then with the rights in rem where it is desired to reform the Civil legal life.

(1) Rights in Personam

The rights in personam which are contained in the first part of the Civil Code of Iraq contain two subjects, namely the theory of obligations and the nominate contracts; in order to support socialist understanding and to keep in line with the economic and social development in the country it would be necessary to introduce radical

amendments to the provisions of obligations and nominate contracts based on the following:

- The interests of society which are represented in the State must be given priority over those of individuals who are represented in the principle of sovereignty of the will in enforcing and interpreting the legal relationships and consequently reducing the differences between the relations of the public law and those of the private (specific) laws which find their roots in liberal capitalist thought.

- Viewing obligations as being relations between two parties does not bar the change of either or both of them and will respond to the prerequisites of the economic and social development and satisfy the National Development Plan.

- Laying down the rules which regulate the contracts of execution of the National Development Plan and the extent of the obligations and the rights resulting therefrom.

- Simplifying the form to such extent that will secure public interest but does not neglect (overlook) the origin of rights; this is needed because the formalities of executing contracts result in the neglect of the private rights provided that non-adoption thereof does not cause prejudice to public interest.

- In drawing up contracts attention must be concentrated on balancing the rights and obligations resulting therefrom and voiding that which violates them and on the permissibility of amending the contract by the judiciary as would achieve this balancing and bar the disposal of disputed rights in order to render justice, avoid domination, and curb the thorn of the sovereignty of will within the framework of contractual relationships where it has become a source for exploitation.

- In order to protect the weak party in a contractual relation, believing that the State has a duty to exercise control over legal relations and in order to remedy the

inadequacy of the contractual responsibility in guaranteeing (securing) the rights of the insured party the legal relation must prevail over the contractual relation.

- Extension of the cases of nullity as a penalty within the scope of the defects of consent with a possibility of coupling the judgment with another penalty such as damages, if justifiable; this should be done to prevent exploitation by the strong party of the contract of the weak party and to do away with the causes and appearances of exercising pressure in executing contracts.

- Accepting that nullity may not be the only just (fair) penalty where the contract has violated a rule of public law related to the content of the contract, the judiciary must be enabled to review this content and add to or delete therefrom in such manner which renders the contract subject to public law one of the basic rules of which is giving predominance to the interest of the public sector and the prerequisites of the national development over other interests.

- Reviewing the rules governing nominate contracts and laying down rules which will secure that the provisions thereof are comparable with the requisites of the era because some contracts of which detailed provisions have been laid down have been frozen as a result of the change of the economic and social conditions for which specific provisions have been enacted which conflict with the provisions of the Civil Code such as the contract of lease; and because the provisions governing some of the contracts which were compatible one quarter of a century ago with the social and economic conditions of Iraq and have come into prominence at present and are playing a significant role in the economic development and the development plan, the treating of their provisions requires close attention and precise detailing which will make them conform to the requisites of the development such as insurance policies and craftsman's contracts.

- Regulating the contracts of public works, the

undertaking of public utilities and the contracts of supply and craftsmanship in a manner which includes such provisions of form and positivity as will conform to their significance in execution of the National Development Plans.

- Non-contractual responsibility in the field of production and the production services and in case of damage resulting from things which due to their nature are dangerous - such as mechanical machinery and electric and hydraulic power - must rest on the element of injury alone and the element of fault must be excluded from the bases of responsibility, i.e. on the basis of bearing the consequences.

- Responsibility for a third party's action must be based on the element of damage based on the idea of liability so that the master will be responsible for the damage caused by his followers (employees) and will be vested with the right of recourse against his follower if the damage was caused wilfully or through his gross fault; every person who is bound legally or by agreement to exercise control over someone who is in need of being controlled due to his incapacity or his physical or mental condition will be responsible to pay damages for the injury which such person has caused to a third party; if however the injury was caused by a person who needs to be controlled or if it was impossible to obtain damages from the person responsible the court may order the person who has caused the injury to pay fair compensation with due observation of the situation of the litigants.

- Protection of persons who suffer injuries as the provisions of non-contractual responsibility are inadequate to remedy the damage suffered by them through social securities which thing confirms the duty of the State to care for and remedy the grievances of the citizens.

- Include in the Civil Code special provisions for protection of the copyright of literature, arts, and science; the rights of discoveries and inventions; for the

regulation of good exploitation thereof in a manner which secures the moral and material interests of the author, discoverer, and the inventor and achieves the objectives of society in building up socialism.

- To use specimen contracts as a means to exercise control over the administration and to protect the rights of the citizens.

- Enact a special law laying down the rules of proof which embraces form and positivity.

(2) Rights in Rem

The part of the Civil Code of Iraq dealing with the primary rights in rem rested on glorifying private ownership as it considered the right of ownership to be preventive, comprehensive, and permanent which allows the owner absolute disposal of that which he owns in specie benefit and exploitation; this right is not restricted except as regards that which causes excessive harm to the neighbour or involves an impermissible use of the right but did not concentrate on that which relates to public interest in this respect.

Special care was given to the protection and confirmation of the vast ownerships and the semi-feudal system and failed to restrict the volume of ownership in any way.

In the part dealing with secondary rights in rem the overall provisions originated from a clear trend which favoured the interest of the credit over that of the debtor and gave preference to capital over labour.

All the foregoing however does not conform any more to the policy and objectives of the Revolution; based on the economic social and political development in Iraq it is imperative to define the basic rules in the part of the Code dealing with rights in rem and then define the objectiveness which it is desired to achieve.

(a) The basic rules

Whereas the authority of the Revolution has rejected the semi-feudal capitalist system and adopted the social system the rights in rem must be based on the following basic rules:

- The socialist system aims to eradicate the exploitation of man by man and the conflict of the interests of the individual and of society; and whereas the relationships resulting from ownership are reflected on the relations of production in all fields it is therefore imperative to achieve and consolidate the equality of rights and obligations among the interested parties as regards rights in rem and to establish the principle of co-operation and mutual help as a significant basis of the rules and provisions concerning ownership which must be included in the Civil Code.

- When exercising the rights of ownership citizens must observe public interest and that exercising the same for an object which is to the prejudice of the society and individuals will be deemed impermissible and the result obtained thereby does not vest a right unto the defaulter to enjoy such result.

- The development of the economy in the socialist system depends on advance planning which is practised by the State in the various sectors; this will consequently be prejudicial to the relationship of ownership and the resulting personal relations which are regulated in the Civil Code; based on the foregoing the realisation of the plans and objectives of the National Development Plan is considered to be a basis for the legal regulation of the rights and duties resulting from ownership; the planning decisions will therefore be paramount among the justifications of the arising of these rights and duties; the proprietors (owners) shall also achieve the requisites

for the National Plan and co-ordinate their activities with its objectives.

- Ownership is an economic notion (concept); therefore the content and character of the right of ownership will be determined and will change in accordance with the development of the economic relations of society and the development plans and may consequently take different forms and the use and disposal thereof will take forms and contents which will be different from those which existed or that which results therefrom.

(b) The general objectives

According to the new perspective of the Socialist Revolution the general objective of the Civil Code will change such as it will become an effective tool in the development and the building of the new society; this will reflect on ownership and the other rights in rem as follows:

- Ownership is a social function: the Civil Code must therefore specify the social function of every kind of private ownership of the means of production and the violation of the conditions laid down in the law for exercising this social function will result in reconsidering the right of the owner thereof by the State and determining transference thereof to whoever is capable to perform this social function.

- In case of conflict regarding ownership or the enjoyment thereof public interest will prevail over private interest.

- The ownership of the State must be considered as being the leading form of public ownership on the road to building socialism where private ownership must conform to the prerequisites of the stages of building socialism.

- Widening the scope of public ownership to include and protect the property of the State, the co-operatives and the social institutions; this will entail determining

the scope of private ownership of the means of production, the regulation of the use of the means of production which the law allows to be owned by individuals, and the restriction of the disposal by individuals of the property which as far as society is concerned has a historic significance.

- Set down the rules which regulate immovable and movable property, the products of the public co-operative and mixed sectors and of the projects of the private sector which are included in the National Development Plan.

- Regulation of the investment of the property of waqfs (dedications) within the comprehensive framework of planning in accordance with the most modern scientific systems in order to transform it into an effective tool in the National Development Operation.

- The rights of private ownership of the means of production do not vest a right in the owner thereof to destroy them or change their characteristics for other than the purpose for which intended except within the limits set down in the law.

- Permissibility of converting private ownership into public or co-operative ownership against compensation and the impermissibility of the reverse action except in accordance with the rules which regulate the immovable and movable property and products.

- Banning the appropriation of public property through acquisitions or time limitations; banning the appropriation by individuals of the sources of power such as the sources of water and irrigation works.

- Banning the arising of private ownership of immovables through contiguousness.

- Revision and regulation of the rights of servitude such as sinking drainage and passage as will conform to the capacity of ownership as a social function.

- Confine pre-emption to cases of absolute joint ownership other than in the agricultural lands.

- Restrict the right of ownership to full ownership

concerning agricultural lands and making it closer to the right of disposal of Amiri lands because the ownership as a social function of the agricultural lands is represented in using them for agricultural purposes and no other and when they forfeit their capacities as agricultural lands due to a cause beyond the control of the owner thereof ownership thereof reverts to the State where the owner will be compensated either in specie or in cash as may be necessary; failure to cultivate the land irrespective of its kind not due to a force majeure or violation of the rules and requisites of the Development Plan will be deemed to be disruption of the social function which necessitates reviewing the title of its ownership after the pattern of the rules of exhaustion (disintegration) of the Amiri lands.

- Setting down the conditions for conveyance of the ownership of agricultural lands by mutual consent or by the rule of the law which must concentrate on the ability of the assignee to perform the social function of that which devolves upon him within the limits of his capacity to exploit and in accordance with the requisites of building socialism.

- Set down a maximum holding of a family tied with the carrying on of the profession of farming.

- Liquidation of the ownership and right of disposal of "absent" owners who are not professional farmers or those who do not do work as actual farmers.

- Reduce the many kinds of land which have been copied in the civil law from previous laws some of which have been inherited from the Ottoman era and co-ordinate their provisions such as will bestow the right of enjoyment as a significant means of production in the agricultural sector.

- Cancel the rectification of the kind of agricultural Amiri lands and liquidation of the right of emphyteusis in all the agricultural lands.

- The ineffectuality of any disposal which gives rise to rights over an agricultural land which may lead to

forfeiture thereof by the actual farmer or disrupt its farming.

- Set a limit to the susceptibility of partitioning of the jointly owned agricultural land which coincides with the requisites of each kind of the Development Plan in the various areas.

- Cancel the right of precedence in Amiri lands.

- Enact a legislation pertaining to the ownership disposal and enjoyment of the agricultural lands which will codify its provisions which are still scattered in several laws.

- Collect and co-ordinate the provisions concerning agricultural laws such as will be in harmony with projects of the other sectors which are connected with the National Development Plans in order to secure expediency.

- Cancel the possessory mortgage over movable property because of the adequacy of the authentic mortgage in the progress of the socialist transformation in the rural areas.

PREAMBLE

(1) Iraq has achieved its renaissance at the beginning of this century which resulted in increased feelings of the necessity to update many laws in order to keep abreast of the growing movement of dealings and to adjust to the new situations within its scope; it was thus incumbent to include in such amendments the rules of financial dealings of the Civil Code which is a constitution for special dealings and a cover for the general rules falling within its scope.

(2) It was for the foregoing reasons that a consensus was reached in the past 15 years to the effect that the said law must be updated. Relentless efforts were made in this direction; the first serious endeavour resulted in the establishment of a commission in 1933 which was followed by the constitution of another commission in 1936; the latter commission's work was restricted to preparing a preliminary bill concerning the rules governing sale contracts; the moving in that direction had to stop but the idea behind it did not relent and the thought of continuing this work was not interrupted. In 1943 the present commission was set up under the chairmanship of H.E. Dr. Abder Razzaq Ahamd As Sanhuri; it took the commission three years to complete the work.

(3) In preparing this bill, the commission hoped in particular to collect and codify the scattered rules which are in force for the time being and do away with the inconsistencies of the sources from which these rules had been taken.

It will, on the one hand, be noted that the rules of the Civil Code of Iraq are not coherent and organised in one comprehensive code, because they were scattered in different areas: some of the overall rules governing contracts have been taken from Al Majalla and the provisions governing ownership and other rights in rem were taken from Al Majalla and the Land Law; the rules of

securities were taken partly from Al Majalla and a number of specific legislations; what is more important is that the rules which are deemed as basic to the Civil Code such as the rules concerning interest, compensation (damages), cases of acquisition of possession and the privileged rights, have been included with the rules of execution taken from the Civil Procedure Law and the Execution and Magistrates' Courts Laws; Islamic jurisprudence is the direct source of the rules concerning waqfs and personal status matters.

(4) It goes without saying that the dispersal of the rules of the Civil Code in this manner is prejudicial to the consistency, co-ordination and continuity of these rules. The effect of the foregoing is not restricted to the many difficulties which a researcher encounters in quest of legal rules but extends beyond that to complicating these rules and closing the doors of their many aspects which thing is prejudicial to the stability of the rights and transactions.

(5) It is noted on the other hand that the aforementioned rules have been taken from various sources: some of them were taken from the Islamic jurisprudence and some were taken from the Islamic jurisprudence as legislated in Al Majalla and still other parts have been taken from the old Ottoman laws. These laws in turn have been derived in particular from the French laws and the local usage. In keeping with developments it was necessary to enact a great number of the specific legislations concerning certain matters of the Civil Code which have been taken from these and other sources. Having been taken from various sources these rules have not been co-ordinated with the matters which are closely related and regulate these rules.

(6) The foregoing resulted in two things: the first is the impossibility of deriving general rules which will dominate the whole of the Civil Code, such as the general theory of obligations; these rules have their significance

not only as being a reference for a judge who is unable to adjudicate a matter, but also as being a guide for the legislator to help him set down the specific legislations; the other matter is that the rules of the Civil Code of Iraq are devoid of the meaning of homogeneity which meaning cannot be made available by way of a comprehensive co-ordination which will keep the general principles stuck together and polish the detailed provisions as will tighten their interconnections and place them in the appropriate place within these origins. This co-ordination cannot be achieved so long as the activity of the legislation remains dispersed and protracted without being restricted to aspects or branches thereof.

(7) The legislator has paid special attention to these two aspects: he made sure that the scattered provisions of the Civil Code are codified together whereby most of the rules scattered here and there were placed in their proper place. The most salient example in this regard is placing the provisions of the Land Law and those concerning securities in rem at one level with the other provisions concerning ownership and rights in rem; the legislator also made efforts to co-ordinate the provisions contained therein harmonising the provisions that have been derived from the Islamic jurisprudence and those derived from other sources and in doing these two objects have been realised, namely first, making way for overall provisions in which are concentrated general theories, and secondly, which is the more significant, paving the way for the Arab Civil Code.

(8) The countries of the Arab East are divided in two groups: one group which still relies mainly on the provisions of "Majallat Al Ahkam Al Adliyya" such as Iraq, Palestine and Transjordan; and the other group which has adopted the modern legislation which countries enacted legislations and quoted from the laws of the West particularly the laws of France, such as Egypt, Syria, Lebanon, Tunisia and Morocco. Each one of these two groups

clings to its procedure where the former retains the old and connects it with the causes of life and advancement and the latter denies its past and does not take benefit of the wealth of the Islamic jurisprudence. It was considered convenient to make the legislation an example of the civil legislation which must prevail in the Arab countries; it was thus made a homogeneous thing which brings together rules which have been copied from the Islamic Shari'a and rules which have been copied from the West; constituting it in this manner will strengthen the co-ordination of these two sources: it will have enough scope to face modern civilisation situations and will spur the efforts to make a comparative study of the Islamic jurisprudence which rejuvenates and enables it to keep abreast of these situations.

(9) When the Islamic jurisprudence has been revived as aforesaid it will pave the way for "The Arab Civil Code"; there is no doubt that this jurisprudence will become a source full of life and movement and will be worthy of being a basis on which will rest a most modern civil legislation. Although such legislation is at present a mere wish it will nevertheless pave the way for achieving this wish through the best and most effective means.

(10) The provisions contained in this legislation have been taken from the Egyptian legislation, which is in its totality a selected number of rules which settled in the most developed legislations of the Western World, and from the Islamic Shari'a. The majority of these provisions do not fall within the perimeter of any specific school of Islamic thought; the legislator spared no effort in co-ordinating the provisions which have been taken from its two basic sources - the Islamic Shari'a and the laws of the Western World - all of which have been merged together as one integral unit concealing the duplicity and disparity of the sources: in the coercion in exercising a right and other theories the legislator brought together harmoniously the Islamic and Western jurisprudences which thing made

possible the merging of many applications from Majallat Al Ahkam Al Adliyya and the works of the moslem jurists in general terms as well as the Western legislations; thus the esteem of the Islamic jurisprudence retains itself and the causes remain connecting the past, the present and the future.

(11) As to the arrangement and classification the legislation has adopted the pattern of the Egyptian legislation and opened up with a preliminary title composed of two sections, namely: one section given to the personal rights and another section devoted for the rights in rem.

(1) The Preliminary Part

(12) This Part has been arranged on the pattern of comparable modern legislations showing the origins of Iraqi Law and determining the rule pertaining to the conflict of laws as regards time and place. After that it covered the two basic elements of the right, i.e. personal and property. It did not overlook determining the theory of the exercise of a right as a general theory covering all the aspects of the law - material and personal; this general situation was preferred rather than leaving it as a mere application of the theory of unlawful acts.

The sources of the law are the legislation, then usage, then the Islamic jurisprudence without being restricted to one specific school of thought, and lastly the rules of equity; these are the formal sources which are assisted by two sources of interpretation, namely the Islamic jurisprudence and the judiciary of Iraq and of the foreign countries the laws of which are comparable to the laws of Iraq.

(13) The conflict of laws as regards time was determined that the effect of the legislation does not rest on the past as this is an essential rule which has been adopted by all laws; separate rules were laid down for the conflict of laws as regard place which has become known as

"The Private International Law"; these rules contained solutions for disputes arising from personal status, obligations, contracts, rights in rem and the procedure; these rules have been copied from the most modern Western legislation; there is no doubt that the regulation of the conflict of laws - in its two aspects - fills a great gap in the present law.

(14) The Preliminary Part also covered natural and juristic persons; as regards the former the law dealt with its four basic elements - nationality, the family, the domicile and the name - and as regards the latter the law enumerated both public and private juristic persons and moved therefrom to deal with society for which it laid a definition and left the matter of the constitution and method of winding them up to the specific legislation which regulates them; then the legislator moved to deal with foundations and laid down the rules needed for the establishment thereof as well as the rules governing their winding up and control thereof: the foundations is a new regulation introduced in the legislation and in many cases it substitutes waqf and is more preferable in serving the objects for which they are established to achieve.

(15) The Preliminary Part divided things and property into the known divisions; special attention was paid to the division of a right into rights in personam and rights in rem which division is basic in a country which in addition to the Islamic jurisprudence adopts the laws of the West.

Section (i) Rights in Personam

Obligations and nominate contracts

(16) In Book I of this section the legislation formulated a general theory for obligations which theory does not exist in Al Majalla although it occupies the top place in all the modern legislations. This theory was taken from the provisions of Al Majalla and from the

Islamic jurisprudence in general and to a great extent from the Egyptian legislation. These provisions treated the origins of obligations which are the contract, the individual will, unlawful acts, gain without cause and the law. In treating these sources co-ordination was made between the Islamic jurisprudence and the laws of the West in such manner which made the Islamic jurisprudence to match these laws to a great extent.

(17) The legislation then dealt with the effects and description of obligations, such as conditions, term, joint liability and indivisibility; it adopted alongside the joint liability determined in the laws of the West the theory of the joint debt, the latter theory being taken from the Islamic Shari'a; it then dealt with assignment of obligations and covered the assignment of debts, which is taken from the Islamic jurisprudence, the assignment of rights which has been copied from the laws of the West thus making the integration of the two assignments complete; then it dealt with the provisions concerning the lapse (extinguishment) of the obligation regardless of whether the extinguishment was by discharge or by that which is equivalent to discharge such as revival, set off or merger of liability or by release of liability, impossibility of enforcement or prescription; in all the foregoing it was possible for the Islamic Shari'a to match the laws of the West.

(18) The legislation then moved to establishing obligations and followed in doing so the suit of the laws of the West and provided that the writing is the origin (fundamental) and not the evidence; part of the provisions of the Majalla was adopted which render the matter of establishing something automatic where the judge has no hand in it and there is no control over him; there is no doubt that the legislation has realised extensive reforms in this Part that was badly needed by justice.

(19) In Book II, the legislation treated the nominate contracts dividing them into five categories, namely:

contracts concerning ownership, contracts concerning benefits, contracts of work and aleatory contracts; guarantee (warranty) is specific to the latter kind of contracts; Islamic jurisprudence matched perfectly with the laws of the West insofar as regards nominate contracts; it is well known that this jurisprudence sets down the relevant provisions with great simplicity and allocates special care for it. Thus the legislation was able without much effort to find abundant materials in the Islamic jurisprudence from which these contracts have been formulated without deviating from the general rules of obligations and without conflicting with the principles of the laws of the West, regardless of whether the contract concerned ownership, such as sales, donations, partnerships, loans and compositions, or benefits such as leases and loaning without consideration or work, such as work contracts, agency and deposit; the legislation did not introduce many provisions to the warranty contract but generally abided by the rules of the Islamic jurisprudence; it however introduced new provisions in life annuities and insurance policies.

Section (ii) Rights in Rem: Ownership and Securities

(20) Part III contains two books: one dealing with ownership and the principal (primary) rights in rem and the other with securities which are the rights in rem.

(21) The provisions concerning ownership were laid down in detail marking its scope and restrictions and expressed its kinds; joint ownership was dealt with at length in particular; the causes of acquiring ownership were then provided for: it could be acquired by acquisition ab initio and by reason of death, by inheritance and by wills; it could be acquired among living persons by contiguity, pursuant to contracts, by pre-emption and possession; pre-emption was given special attention by laying down the provisions governing it, its procedure, and

the time limits concerning it such as will secure the stability of dealings and avoid the evils of surprises; it also laid down a detailed theory concerning possession, its elements and conditions and the effects resulting therefrom. In all the foregoing the legislation coordinated the provisions of the Islamic jurisprudence and the principles of the laws of the West and copied a great deal from the Egyptian Law.

(22) Regarding the rights in rem which are derived from ownership and legislation discussed the rights of disposal, emphyteusis and usufructs, as well as the right of user of habitation and of surfacing (musataha) which is a right in rem which is acquired by the lessee pursuant to a long contract of lease, the rights of servitudes for which a general theory was laid down and copied from the Egyptian Law.

(23) The last Book of the legislation covered the securities in rem, i.e. authentic and possessory mortgages and privileged rights.

The authentic mortgage was so formulated as to coordinate the provisions of the local (national) law and the provisions of the Egyptian Law and thus introduced many amendments in favour of the real estate trusts in Iraq; as regards the possessory mortgage the legislation coordinated the provisions of Al Majalla and those of the Egyptian Law; as to privileged rights renovation is more apparent where the Iraqi legislation followed the suit of the Egyptian Law.

The simplification of the provisions of the securities in rem the real estate trust in Iraq has become guaranteed in a manner which conforms to the requirements of modern civilisation and compares with the laws of the West.

**LAW NO.40 OF 1951
THE CIVIL CODE**

We hereby order the promulgation of the following law which has been passed by Parliament:

PRELIMINARY PART

Chapter 1 - Application of the Law

Article 1. - (1) The legislative provisions shall apply to all matters covering these provisions in letter trend and content.

(2) In the absence of any applicable legislative provisions in the law the court shall adjudicate according to custom and usage; in the absence of custom and usage in accordance with the principles of the Islamic Shari'a which are most consistent with the provisions of this Law but without being bound by any specific school of thought; and otherwise in accordance with the laws of equity.

(3) The court shall in all the foregoing be guided by the adjudication determined by the judiciary and jurisprudence in Iraq and then of the other countries the laws of which are proximate to the laws of Iraq.

Article 2. - Where there is a provision no independent judgment (ijtihad) is permissible.

Explanation according to Majallat Al Ahkam Al Adliyya, by Salim Rustom Baz: "Linguistically 'ijtihad' (independent judgment in a legal or theological question, based on the interpretation and application of the four 'Usul' (elements) as opposed to the 'taqleed' (tradition)) is the making of an effort to obtain that which is intended (Hindiyye); according to the Shari'a 'ijtihad' is the

making of an effort by a jurist to obtain a Shari'a rule, its basis being Islam, reason, maturity and the jurist being highly apprehensive by natural disposition and learned in the Arabic language knowing and having a comprehensive mind of the Book of God as regards the rules and thoroughly familiar with Al Hadith (prophetic tradition) - be it text ascription, abrogated to supersede another tradition and abrogated - and thoroughly familiar with analogy (qiyass): all these qualifications will render a legist absolute i.e. giving independent judgments on all rules; but a legist of one rule to the exclusion of another rule must know all that which relates to that rule only (Radd Muhtar).

"The meaning of this Article is that it is not permissible to make an independent judgment in respect of a Shari'a case in respect of which there is a provision (rule) because the making of an independent judgment will be where there is no provision in respect thereof, for example there is a provision (in the Book) prohibiting injustice (oppression) and gambling where it is not permissible to allow them..."

Article 3. - That which has been established contrary to analogy cannot be used as analogy for other matters.

Explanation according to Majallat Al Ahkam Al Adliyya by Salim Rustom Baz: "The sale of that which does not exist is not permissible therefore forward buying leases and fabricated contracts are not permissible according to analogy because the object thereof is something non-existent at the time of concluding the contract but owing to exigencies forward buying and leases were permitted by provision by application of legal discretion in a legal decision and the transaction of fabrication through dealings and consensus; where a person has sold a thing pretending it is his own property in the presence of one of his relations who kept silent the case which was brought

thereafter by the latter (claiming the thing) will not be heard; as this is contrary to analogy it will not be used as analogy."

Article 4. - (1) In case of conflict the impediment shall have precedence over that which is requisite.

Explanation according to Baz: "For this reason no person may dispose of his property if a third party's right is related thereto or if it will cause apparent damage to his neighbour: e.g. in the former case if the mortgagor has sold the mortgaged property without permission of the mortgagee such sale will be subject to being authorised (allowed) by the mortgagee because the mortgage is the property of the mortgagor which renders the sale effectual, but the mortgagee's right is related to the mortgage and is thus a bar (an impediment) to the sale taking immediate effect thus the impediment is taking precedence; the same thing applies where the lessor has sold the rented property without taking leave from the lessee; an example of the second case is where the upper level belongs to one person and the lower level belongs to another person and neither of them may demolish or do anything (carry out any works) to his property which will cause damage to the other without his permission; there is however an exception to this rule: where a co-owner of a jointly owned house is absent the other co-owner who is present may dwell therein as in this case the residence of one partner is the requisite thing and the impediment from residence is the share of the absent partner: therefore the requisite thing has been given precedence over the impediment."

(2) If the impediment has ceased that which had been prohibited will be re-established (revived) but that which has lapsed shall not be revived.

Explanation of Majallat Al Ahkam Al Adliyya by Salim Rustom

Baz: Matters which branch from this maxim are that where the grantee has added something to the thing granted the grantor is barred from revoking the grant; but if the said increase has ceased the grantor will be re-eligible to revoke (the grant) (Durar); also where a person has discovered an old defect in the thing he had purchased he may reconstitute it to the vendor but if a defect has occurred while the thing purchased was in the possession of the purchaser restitution on account of the occurring defect is barred; but if the defect that has occurred has ceased to exist the right of restitution is regained by the purchaser, because if the impediment has ceased that which has been prohibited is revived; also if a woman has married and forfeited her right to nursing (bringing up) a child; but if she is separated (by divorce) her right is revived because of the cessation of the impediment (i.e. marriage) (Tahtawi); also where a person has purchased an imperfect thing and then mortgaged and delivered it to the mortgagee the right to rescind the sale is barred by reason of the imperfect condition of the thing sold as the mortgagee's right is connected with the thing sold but if the purchaser has paid the vendor's debt and lifted (purged) the mortgage the right to revoke the sale is revived (as in Majma' al Anhur) because when the impediment has ceased, which is the mortgage, that which has been prohibited has been revived, i.e. the right of revocation; also if the evidence of a blind person has been rejected because of the blindness and the minor for being of minor age and if later on the blind regained his sight and the minor attained majority and gave evidence once more such evidence will be admitted.

Article 5. - The change of provisions (rules) to conform to changing times is not denied.

What is intended here is that the rules which have their bases in custom and usage and not in texts and proofs will

change with the change of customs and usages on which they had been based. The ancient jurists judged that if a person has purchased a house and viewed one of its rooms his option to viewing has lapsed because the rooms of houses during their epoch used to be built on the same pattern; when the times changed and houses began to be built in different patterns and sizes it became necessary that all the rooms must be viewed so that the option of viewing will lapse; it was considered that the usurper must not be liable on the benefits of the thing usurped but when the jurists noticed the greed of the people to acquire the property of waqfs and orphanages they made independent judgments (fatwa) that such persons would be liable on the profits of such properties so that the property of waqfs and orphans will be safeguarded (protected).

Article 6. - The lawful permissibility negates liability: he who exercises his right lawfully shall not be liable on the damages resulting therefrom.

Explanation of Majallat Al Ahkam Al Adliyya by Salim Rustom Baz: "If a man has sunk a well in his property wherein the animal of another person has fallen and perished the person who sunk the well shall not be liable for anything.

"Similarly if an agent (authorised to sell) has concluded a mortgage for the price of the property which he had sold on credit and the property mortgaged perished the agent shall not be liable; also where a person has rented a house and sank a well in the leased property where a third party suffered injury; if the sinking was with permission of the landlord no liability will accrue which thing would be as though the landlord had sunk the well himself; but if the sinking was not with the permission of the landlord, the lessee will be liable, etc..."

Article 7. - (1) He who impermissibly exercises his right shall be liable.

(2) The exercise of a right becomes impermissible in the following cases:

- (a) where such exercise is intended to cause injury to a third party;
- (b) where the benefits sought from such exercise are insignificant such as it will not at all be proportionate to the injury caused thereby to a third party;
- (c) where the benefits to be obtained are unlawful.

Article 8. The warding off (prevention) of evil is more deserving (meritorious) than yielding benefits.

Where an evil and an interest (benefit) are in conflict, warding off the evil will have precedence because the legislator gives more attention to the prohibitions than to the commandments (Ashbah). The following stems from this rule: a man will be barred from disposing of his property if such disposal causes great injury to his neighbour because warding off the evil from his neighbour has priority over yielding benefits for himself.

Article 9. - In the absence of a provision in the law otherwise the time limits will be calculated according to the Gregorian Calendar.

Section (1) - Conflict of laws in application

(1) Conflict as to time

Article 10. - The law shall not be operative except from the time when it becomes effective: it shall not be applied to previous facts except where there is a provision in the new law to the contrary or where the new law relates to

public order or morality.

Article 11. - (1) The new provisions (legislation) concerning (legal) capacity shall apply to all persons who fulfil (satisfy) the conditions prescribed in said provisions.

(2) Where a person who had the (legal) capacity in accordance with former provisions becomes of diminished capacity pursuant to new provisions the change of capacity shall not have effect on his previous disposals.

Article 12. - (1) The new legislation concerning time limitations (prescription) shall operate from the time of operation thereof in respect of every unexpired prescription; the former provisions shall however apply in respect of matters concerning the commencement of running, cessation, and interruption of the prescription in respect of the period which preceded the coming into effect of the new provisions.

(2) Where the new provisions prescribe a shorter period of prescription than that of the former provision the new time limitation shall operate as of the time of operation of the new provision even where the former time limitation had begun to run prior to that; where however the remaining period of the time limitation provided for in the former provision is shorter than that prescribed in the new law the prescription will end by the lapse of the said remaining period.

Article 13. - The proof which has been established in advance shall be subject to the provisions which had been operative at the time of establishing such proof or at the time when it was possible or incumbent to establish such proof.

(2) Conflict as to Place

(a) International conflict as to the judicial jurisdiction

Article 14. - An Iraqi national shall be tried before the courts of Iraq in respect of the rights owing from him even those which have been created abroad.

Article 15. - The foreigner shall be tried before the courts of Iraq in the following cases:

- (a) when he is in Iraq;
- (b) where the litigation is in respect of a right concerning a real estate existing in Iraq or a movable which existed in Iraq at the time of commencement of the proceedings;
- (c) where the subject of the adjudication is a contract which has been executed in or must be executed in Iraq or where the litigation concerns an event which took place in Iraq.

Article 16. - Judgments rendered by foreign courts shall not be executory in Iraq unless they have been deemed to be enforceable in accordance with the rules laid down in the law enacted in this respect.

(b) International conflict as to legislative jurisdiction

Article 17. - (1) The laws of Iraq shall be the authority which regulates the relationships when it will be required to regulate such relationships in a case concerning the conflict of laws in order to determine the law which must be applied.

(2) The law which however determines whether the thing is an immovable or a movable is the law of the state

wherein such thing lies.

Article 18. - (1) Capacity shall be governed by the law of the state of which the person (individual) is a national.

(2) In cases of pecuniary transactions and the effects of which will be due in Iraq where one of the parties is a foreigner of diminished capacity due to a cause which is not apparent and cannot easily be detected by the other party, the foreigner shall however be deemed as far as concerns such transaction to be of full capacity.

Article 19. - (1) Regarding the positive (fundamental) conditions of validity of the marriage reference shall be made to the (national) law of each of the spouses; but the marriage of two foreigners or a foreigner and an Iraqi national shall be deemed to be valid as to form if it had been effected in accordance with the form which is prescribed in the law of the country wherein it had been effected or where the forms prescribed in the national law of each of the spouses has been observed.

(2) The law of the state to which belongs the husband at the time of concluding the marriage (contract) shall apply to the effects resulting therefrom inclusive of the effect concerning property.

(3) In cases of divorce, separation, and repudiation the national law of the husband at the time of the divorce or at the commencement of the proceedings shall apply.

(4) The law of the father shall apply to matters concerning Shari'a adoption and natural guardianship and all the duties between fathers and children.

(5) The law of Iraq shall only be applied in the cases provided for in this Article where either spouse is an Iraqi (national) at the time of concluding the marriage (contract).

Article 20. - Matters concerning selected guardianship, and other regulations laid down for the protection of persons

having no legal capacity or are of diminished capacity and those absent shall be subject to the law (of the country) to which such persons belong.

Article 21. - The law of the person from whom the alimony is due shall be binding on him.

Article 22. - The matters of inheritance shall be governed by the national law of the de cujus at the time of his death subject to the following:

(a) the difference of the nationality does not bar the inheritance of movable and immovable property; an Iraqi (national) will not be inherited except by a foreigner the law of whose country provides for inheritance by an Iraqi (national) from such foreigner;

(b) the property of a foreigner who has no successor which lies in Iraq will pass to the State of Iraq even where the law of such foreigner provides otherwise.

Article 23. - (1) The (national) law of the de cujus at the time of his death will apply to wills (testaments).

(2) The laws of Iraq shall apply as regards the validity of a will concerning immovable property lying in Iraq which is owned by a deceased foreigner and to the mode of conveyancing such property.

Article 24. - Matters concerning ownership, possession, and other rights in rem and in particular the method of conveyancing such rights by virtue of a contract through inheritance (succession) in pursuance of a will and otherwise shall be governed by the law of the location wherein lies such movable property at the time of occurrence of the event which gave rise to the acquisition

or loss of the right shall apply.

Article 25. - (1) The contractual obligations shall be governed by the law of the state wherein lies the domicile of the contracting parties if they have a common domicile; where they have different domiciles the law of the state within which the contract was concluded will be applied unless the contracting parties have agreed (otherwise) or where it would be revealed from the circumstances that another law was intended to be applied.

(2) The law of the site of the immovable shall be applied in respect of contracts which have been concluded in respect thereof.

Article 26. - The form of contracts shall conform to the law of the state wherein they have been concluded.

Article 27. - (1) Non-contractual obligations will be governed by the law of the state wherein the act giving rise to the obligation took place.

(2) The provisions of the preceding paragraph shall not however apply in regard to obligations arising from an unlawful act (tort) to events which take place abroad and are lawful in Iraq even when they are considered as unlawful in the country wherein they had occurred.

Article 28. - The rules of competence (of courts) and all questions of procedure shall be governed by the law of the state wherein a suit is initiated or the proceedings have been commenced.

Article 29. - The provisions of the preceding Articles shall not be applied where there is a provision otherwise in a specific law or in an international convention which is in force in Iraq.

Article 30. - In the absence of a provision in the

preceding Articles concerning cases of conflict of laws the principles of the private international law which are most commonly known (prevalent) shall be applied.

Article 31. - (1) Where it has been determined to apply a foreign law the positive laws thereof shall be applied to the exclusion of the provisions relating to private international law.

(2) Where this foreign law is one of a state having several legal systems the law of such state will determine which of these systems must be applied.

Article 32. - The provisions of a foreign law as prescribed in the preceding provisions may not be applied if they are inconsistent with the public order and morals of Iraq.

Article 33. - (1) The court shall determine the law which must be applied in the case of a person of unknown nationality or persons who are proved to be multinationals (having plural nationalities).

(2) The law of Iraq shall however be applied in respect of persons who are deemed in Iraq to be of the Iraqi nationality and are at the same time deemed by one or more foreign countries to be nationals of such foreign country(ies).

Chapter 2 - Persons

Section (i) - Natural persons

(1) Commencement and Termination of a Personality

Article 34. - (1) The personality of a human being commences at birth and ends with his death.

(2) The rights of pregnancy (a child en ventre de sa mere) shall however be determined in the Law of Personal Status.

Article 35. - Births and deaths shall be established by the ad hoc formal registers; in the absence of such proof or where it has been revealed that the particulars appearing in the registers are incorrect any other way may be used to establish the same.

Article 36. - (1) He who is absent and it is not known whether he is alive or dead will be adjudged upon application being filed by an interested party to be missing.

(2) The rules pertaining to a missing person shall be subject to the Law of Personal Status.

(2) Characteristics of the Personality

Article 37. - The Iraqi nationality will be regulated by a specific law.

Article 38. - The family of a person is made up of his relatives; those who are united by a common ancestry will be deemed to be relatives.

Article 39. - (1) Direct lineal relationship is the connection between the ancestors and the descendants (branches); collateral relationship is the link (bond) among persons who are of a common ancestry where none of them is the descendant (branch) of the other.

(2) When computing the degree of direct relationship each branch of the family will in ascendancy be deemed to be one degree excluding the ancestor; when calculating the degree of the relation of collaterals the degrees will be counted in ascendancy order from the branch to the common ancestor and then in descendancy order to the other branch and every branch will be deemed a degree excluding the common ancestor.

(3) The relatives of either spouse will be deemed to

be relatives of the other spouse in the same line and of the same degree.

Article 40. - (1) Every person shall have a name and a surname; the surname of a person will devolve by the rule of the law upon his children.

(2) A special legislation shall regulate the method of acquisition and of change of surnames.

Article 41. - Every person whose right to use his name was contested without justification by a third party as well as every person whose surname was unlawfully assumed by a third party may demand cessation of this violation and may claim compensation where he has suffered injury as a result thereof.

Article 42. - A domicile is the place wherein a person normally takes permanent or temporary residence; a person may have more than one domicile.

Article 43. - (1) The domicile of a missing minor and of other interdicted persons is the domicile of those acting for them.

(2) The minor who has been permitted to carry on commerce may however have a specific domicile in respect of the business and transactions which the law considers him qualified to carry out.

Article 44. - The place wherein a person carries on a trade or craft is deemed to be his domicile concerning the business related to said trade or craft.

Article 45. - (1) An elected domicile may be taken for performance of a certain specified legal act.

(2) A domicile elected for implementation of a legal act will be the domicile with regard to all that which relates to this act including the proceedings of execution

(forcible enforcement) save express provision confining this domicile to certain business to the exclusion of other businesses.

(3) An elected domicile may not be established except in writing.

Article 46. - (1) Every person who has attained the age of majority, enjoys his mental faculties, and has not been interdicted shall have full capacity to exercise his civil rights.

(2) Persons who lack or are of diminished capacity shall be subject to the provisions concerning guardianship and curatorship in accordance with the conditions and rules laid down in the law.

Section (ii) - Juristic persons

(1) General Provisions

Article 47. - Juristic persons are:

- (a) The State.
- (b) The administrations and the public institutions which by virtue of the law are granted a juristic personality independent of the State's personality in accordance with the conditions laid down herein.
- (c) The districts, municipalities, and villages which are granted by the law a juristic personality in accordance with the conditions laid down therein.
- (d) Religious sects (denominations) which the law grants a juristic personality in accordance with the conditions laid down therein.

- (e) Dedications (waqfs).
- (f) Commercial and civil companies except those of which have been excluded by a provision in the law.
- (g) Societies which have been incorporated in accordance with the provisions of the law.
- (h) Every group of persons or combination of property which is granted a juristic personality by the law.

Article 48. - (1) Every juristic person shall have a representative to express its wish.

(2) A juristic person shall enjoy all rights other than those inherent in the nature of the natural person to the extent determined in the law.

(3) A juristic person has its own patrimonium.

(4) A juristic person has the capacity of payment within the limits set down in its deed of incorporation and which are prescribed in the law.

(5) A juristic person has the right of litigation.

(6) A juristic person has a domicile which is deemed to be in the place wherein lies its head office (administrative centre); the companies which have their head offices abroad and have business in Iraq their head office in regard to the bylaws will be deemed to be the place wherein lies its business management in Iraq.

Article 49. - (1) The legal regulation of foreign juristic persons - companies, societies, or otherwise - shall be governed by the law of the state within which lies their actual head office.

(2) Where a foreign juristic person has however commenced its main activity in Iraq the Iraqi law shall apply thereto.

(2) Societies

Article 50. - (1) A society is a group having a permanent capacity and is formed of several natural or juristic persons for other than yielding profit.

(2) The specific legislation will regulate the method of creating and winding up societies.

(3) Foundations

Article 51. - The foundation is a juristic person which is created by allocating property for in indefinite term for a philanthropic, religious, scientific, technical, or sports activity without the intent of deriving material gain therefrom.

Article 52. - (1) The creation of a foundation shall be by an authenticated deed or by will.

(2) This deed or will shall be deemed to be the constitution of the foundation and must contain the following particulars:

- (a) the purpose for which the foundation has been created;
- (b) the name of the foundation and its seat which must be in Iraq;
- (c) an exact and detailed description of the funds allocated to the foundation;
- (d) a scheme for the management of the foundation.

Article 53. - (1) The creation of a foundation shall in regard to the founder's creditors and heirs be deemed to be a grant or will (testament).

(2) Where the foundation has been created to the detriment of their creditors' heirs rights (interests) they may commence the proceedings which are determined in the law concerning grants and wills.

Article 54. - Where the foundation has been created by an authenticated deed the person who has created it may revoke the creation thereof by another authenticated deed up to the time of completion of its registration in the Court of First Instance.

Article 55. - (1) The registration of a foundation shall be effected upon application being filed by the founder, the first manager or the authority concerned with the Control of Foundations.

(2) The authority concerned with Control of Foundations shall take action as may be necessary for the registration to be effected as soon as it has become aware of founding the foundation.

Article 56. - (1) Foundations which are intended for realisation of public interest may upon filing an application be deemed to be a public interest by a Royal Wish (Irada) approving the bylaws (constitution) thereof.

(2) The Royal Irada may provide that the foundation be excluded (exempt) from the restrictions of capacity.

(3) The Royal Irada may also impose the taking of measures concerning control, such as the appointment of one or more managers from the government authority or the taking of any other action as will be deemed necessary.

Article 57. - (1) The State is vested with a right of exercising control over foundations.

(2) The authority which will exercise control over the foundation will be named in the Royal Irada.

Article 58. - The foundation managers shall as and when

they receive a request from the authority concerned with exercising control provide it with the budget and annual accounts of the foundation together with all the supporting documents within one month from the date of liquidation of the accounts of the year.

Article 59. - The Court of First Instance within the jurisdiction of which lies the seat of the foundation may order that the following proceedings be taken if the Control Authority has filed an application to that effect in the form of an action:

- (a) dismissal of the managers who have been proved to be negligent or who have failed (to perform their duties) and who have failed to perform the obligations imposed by the law or by the constitution of the foundation as well as those who utilise the assets of the foundation in matters which are incompatible with the objects (purposes) or intentions of the founder of the foundation and those who have in the performance of their duties committed a gross fault;
- (b) amend the management system of the foundation or reduce or cancel or change the stipulations prescribed in the incorporation deed of the foundation where it is necessary to safeguard the assets of the foundation or to achieve the object for which the foundation has been created;
- (c) abolition of the foundation if it has reached such a state as it would be impossible to achieve the object for which it has been created or where the realisation of such object has become impossible or incompatible with the law or the public order and morality;

- (d) cancellation of the business performed by the managers beyond their powers (ultra vires) or in violation of the law or of the constitution of the foundation; in such case the proceedings for cancellation will be commenced within two years from the date of the action being contested; the action of cancellation may not be brought against a bona fide party who has acquired rights on the basis of such act.

Article 60. - (1) Having rendered judgment cancelling the foundation the court shall appoint liquidators and determine the fate of the assets which remain after the liquidation in accordance with the provisions of the constitution of the foundation.

(2) Where it is impossible to transfer the assets to the party to whom they should pass or where such party has not been designated (named) in the constitution of the foundation the court will determine the fate of the assets which shall as much as is possible be nearest to the object stipulated in the constitution deed of the foundation.

Chapter 3 - Things, Property, and Rights

Section (i) - Things

Article 61. - (1) Everything which by its nature or in pursuance of the law is not excluded from dealings may be the object of pecuniary rights.

(2) Things which by their nature fall outside the ambit of dealings are those which no one may claim sole possession thereof; things which in pursuance of the law are excluded from the ambit of dealings are those which may not be the object of pecuniary rights under the law.

Article 62. - (1) The immovable (realty) is every thing which is fixed so that it would be impossible to move or

convert it without causing damage thereto such as land, buildings, plant(at)ions), bridges, dams, mines, and other real estate things.

(2) A movable is anything which can be moved and converted without causing damage thereto and includes currency (nuqud), commodities ('arudh)*, animals, and things that can be measured by volume or weight and other movable things.

Article 63. - A movable which is placed by its owner in an immovable owned by him with intent to serve or exploit such immovable is deemed to be an immovable.

Article 64. - (1) Fungibles are things which may be substituted one for the other when making a payment; they are normally (customarily) assessed in dealings among people by number, measure, volume, or weight.

(2) All other things are non-fungibles.

Section (ii) - Property and rights

Article 65. - Property is every right having a material value.

Article 66. - Pecuniary rights are either in rem or in personam.

Article 67. - (1) A right in rem is a direct power over a specified thing vested by the law in a certain specified person.

(2) A right in rem is either primary or secondary (accessory).

Article 68. - (1) The primary rights in rem are: the right of ownership of disposal usufruct user residence

* "Arudh": see the Foreword for an explanation of this word.

'Musataha'* servitude constituting waqfs and long term leases.

(2) Secondary (accessory) rights in rem are: the right of authentic mortgages, possessory mortgages and privileged rights.

Article 69. - (1) The right in personam is a legal bond between two persons: a debtor and a creditor, where the latter claims from the former to transfer a right in rem or to carry out or abstain from carrying out an act.

(2) An obligation to convey property whatever may be its object - cash fungibles or non-fungibles - is deemed to be a right in personam; an obligation to deliver a certain specified thing is also deemed to be a right in personam.

(3) The expressions "obligation" and "debt" will have the same meaning as the expression "right in personam".

Article 70. - (1) Intangible property is that which relates to a non-material thing such as copyright - the rights of inventors and artists.

(2) The provisions of specific laws shall apply in respect of the rights of authors (copyright), inventors, and artists and of trade marks and other intangible property.

Article 71. - (1) The immovables and movables of the State and of the public juristic persons which are in fact or pursuant to the law allocated for a public utility are deemed to be public property.

(2) This property is not alienable, attachable, nor may be appropriated by time limitation.

Article 72. - Public property will forfeit its status by termination of its allocation for public benefit (utility);

* This is the right to establish buildings constructions or trees on the land which belongs to another person (surfacing).

the allocation is determined in pursuance of the law de facto or by termination of the object for which it had been allocated for public benefit (utility).

PART I - RIGHTS IN PERSONAM (OBLIGATIONS)

BOOK 1 - OBLIGATIONS IN GENERAL

Title 1 - The Origins of Obligations

Chapter 1 - Contracts

Article 73. - A contract is the unison of an offer made by a contracting party with the acceptance of another party in a manner which establishes the effect thereof in the object of the contract.

Article 74. - A contract is valid where it is in respect of:

- (1) commodities - movables or immovables - for appropriation by sale against a consideration or without consideration (gifts) to be kept as deposit or for consumption by utilisation (loans);
- (2) the benefits of commodities for utilisation against a consideration (rent) or without consideration (on loan);
- (3) a certain specified act or service.

Article 75. A contract is valid if it is in respect of any other thing the undertaking of which is not forbidden by law or which is not to the prejudice of public order and morals.

Article 76. - (1) Contracts - nominate or otherwise - shall be governed by the general rules comprised in this chapter.

(2) The rules peculiar to some civil contracts will be

determined by the provisions laid down in the relevant chapters; the laws of commerce will determine the rules pertaining to commercial contracts.

Section (i) - The elements of a contract

(1) Mutual Consent

First: The Existence of Consent (Form of Contract)

Article 77. - (1) Offer and acceptance are every two expressions (words) used customarily for the creation of a contract; whichever expression is made first is an offer and the second is the acceptance.

(2) Offer and acceptance will be in the past tense and may be in the future tense and may be in the form of an order where immediate execution (performance) is intended.

Article 78. - A contract will be concluded by a future tense (form) which has the meaning of only a promise and will be considered binding where the same was the intention of the contracting parties.

Article 79. - As the offer and acceptance may be oral they may be by correspondence and by a sign which is in common usage even when it is not from a dumb person as well as by actual exchange denoting mutual acceptance and by any other method (way) the circumstances of which leave no doubt as to indicate mutual acceptance.

Article 80. - (1) The display of goods with a price shown on them is deemed to be an offer.

(2) Publishing, advertising, and listing prices of current dealings as well as every other statement concerning offers or calls addressed to the public or to individuals shall not be deemed in case of doubt to be an offer but will be deemed an invitation to negotiate.

Article 81. - (1) No statement will be attributed to a silent person but silence in the course of need for expression will be deemed to be an acceptance.

(2) Silence is deemed in particular to be an acceptance where there are previous dealings between the contracting parties and the offer was related to said dealings or where the offer proved to be to the benefit (advantage) of the person to whom it was addressed; similarly the silence of a purchaser after having received (taken delivery of) the goods purchased will be an acceptance of the conditions set down in the list of prices.

Article 82. - The contracting parties have an option after the offer until the end of the session; where the offeror has withdrawn his offer before the acceptance has been expressed or where either contracting party utters a saying (statement) or makes an act (gesture) which indicates rejection the offer will be void and any acceptance uttered thereafter shall be disregarded.

Article 83. - Repetition of the offer before the acceptance nullifies the first (offer) and the second offer will have effect.

Article 84. - The offeror who has set a time limit for his offer will be bound by his offer until such time limit expires.

Article 85. - For a contract to be concluded the acceptance by the other party must conform to the offer made.

Article 86. - (1) The acceptance conforms to the offer where both parties have agreed on the essential matters in respect of which they had negotiated; but an agreement on some of such matters will not be sufficient (adequate) to

bind both parties even where such agreement has been reduced into writing.

(2) Where both parties have agreed on all the essential matters of the contract and reserved detailed matters to be agreed upon later on but had not stipulated that the contract will not be concluded in case where an agreement in respect of said matters is not reached the contract will be deemed as having been completed (concluded); if a dispute shall arise in respect of the matters which had not been agreed upon the court will decide them in accordance with the nature of the subject and with the provisions of the law usage and equity.

Article 87. - (1) Save express or implied agreement or a legal provision otherwise contracting between absent persons will be deemed to have taken place in the place where and at the time when the offeror becomes aware of the acceptance.

(2) It will be assumed that the offeror had become aware of the acceptance in the place and at the time of his arrival thereto.

Article 88. - Contracting by telephone or by any other similar way will be deemed as having taken place between two persons present insofar as relates to time and between two absent persons inasmuch as relates to place.

Article 89. - A contract will not be concluded in auctions except by the award (of the contract); a bid is vitiated by a higher bid even when the latter is void or by closing the bidding (auction) before it has been awarded to any person without in all of the foregoing prejudice to the provisions of the other laws.

Article 90. - (1) Save provision otherwise, where the law has imposed a certain form for the contract it will not be concluded until such form has been satisfied.

(2) Any amendments to the contract must also satisfy such form.

Article 91. - (1) A preliminary agreement pursuant to which both parties or either party undertake(s) to execute in future a certain specified contract shall not be valid unless the essential matters of and the time limit for execution of the contract to be executed have been stipulated.

(2) Where the law has prescribed a certain form for the contract such form shall also be observed in the preliminary agreement which contains a promise to execute this contract.

Article 92. - (1) Save where the agreement has stipulated otherwise the earnest money is deemed to be proof that the contract has become final and may not be repudiated.

(2) Where both parties have agreed that the earnest money is a penalty for repudiation of the contract each party is vested with a right of repudiation: the payer who repudiates will forfeit the earnest money and the receiver who repudiates will pay double the amount thereof:

Second: Validity of the Mutual Consent

Significance of the contract

Article 93. - Every person has the (legal) capacity to conclude a contract unless the law has determined his incompetence or restricted it.

Article 94. - A minor, insane person, or mentally retarded person are interdicted ipso facto.

Article 95. - The court shall interdict a rash (imprudent) and retarded person; the interdiction will be promulgated (declared) in the prescribed ways.

Article 96. - The disposals of an irrational minor are null and void even when they have been sanctioned by his guardian.

Article 97. - (1) Disposals by a rational (prudent) minor will be deemed to be valid if they are totally to his benefit even where his guardian has not permitted or allowed the disposals; a minor's disposals will not be valid when they are not wholly to his benefit even when the disposals have been permitted or allowed by his guardian; disposals which are at the same time beneficial and detrimental will be concluded subject to allowance by the guardian within the limits which are ab initio permissible for such disposals.

(2) The age of rationality (prudence) is seven full years.

Article 98. - (1) The guardian may pursuant to leave from the court hand over to a rational minor who has completed 15 years of age a sum (quantity) of his (the minor's) money (property) and give him permission to use it in trading in order to test (his ability to trade); such permission will be either limited or unlimited.

(2) Where the guardian who has given permission to the minor has died or been discharged (from guardianship) his permission will not be invalidated (voided).

Article 99. - A minor who has been granted permission (to dispose) will as much as regards the disposals falling within the scope of the permission have the same status as that of a person who has attained the age of majority.

Article 100. - The guardian may interdict a minor who has been given permission and revoke the permit where the interdiction must be made in the same manner as that for granting the permission.

Article 101. - (1) Where the guardian has refrained from granting permission (to the minor) the court may grant the rational minor permission and the guardian may not thereafter interdict (the minor).

(2) After having granted permission the court may reimpose the interdiction on the minor.

Article 102. - The natural guardian of a minor is his father then his father's guardian, his sane (of sound mind) grandfather, the grandfather's guardian, the court, or the selected guardian appointed by the court.

Article 103. - (1) Where the father and grandfather have disposed of the minor's property for the comparable value or a little less (insignificant fraud)* the contract will be valid and will be performed.

(2) But if they are known for their misbehaviour (maladministration) the judge may restrict or cancel their guardianship.

Article 104. - In the case of a deaf and dumb, blind and deaf, or blind and dumb person who by reason of his infirmity is unable to express his intention the court may appoint for him and fix the dispositions of a selected guardian.

Article 105. - (1) Management contracts of a minor's property which are concluded (issued) by the guardian are valid and effectual (performable) even when they contain little (insignificant) lesion (unfairness); management contracts are in particular the leases for a term not exceeding three years, the work of safekeeping and

* "Ghobn Yasseer" is that which in commodities ('arudh) does not amount to one half of one tenth, in animals less than one tenth and in immovables less than one fifth. (Majallat Al Ahkam Al 'Adliyya.)

maintenance, the collection of rights, the discharge of debts, the sale of agricultural crops, the sale of perishable movables and spending on the minor.

(2) As to such other disposals which do not fall within the limits of management such as the sale of other than the aforementioned, loans, mortgages, composition, partition of jointly owned property and investment of money will not be valid except pursuant to and in the manner set down in a permit issued by the court.

Article 106. - The age of majority is eighteen years completed.

Article 107. - A mentally retarded person has the same status as that of a rational minor.

Article 108. - A completely insane person has the status of an irrational minor; disposals by a partially insane person made while he was in a state of full perception are like the disposals made by a sane (of sound mind) person.

Article 109. - An interdicted imprudent* person is as far as dealings are concerned like a rational minor; the guardian of an imprudent person is the court or its appointed guardian only and his father, grandfather, and their appointed guardians are not vested with a right of guardianship over him; the disposals of an imprudent person which took place prior to imposition of the interdiction are like the disposals of a person who is not interdicted save where the disposal was through cheating by way of collusion with the person with whom the disposal was made (assignee) in anticipation of the interdiction.

* "As Safeeh" (imprudent) is one who squanders and spends his property contrary to the requisites of the Shari'a and good judgment even when this is done for acts of benevolence such as building places of worship and comparable things where an interdiction will be imposed on him. (Ad Durr Al Mukhtar)

(2) The wills of an imprudent person (safeeh)* devising one third of his property is valid.

(3) Where the imprudent has become prudent (rational) the court will revoke the order of his interdiction.

Article 110. - A mentally retarded person has the same status as that of an imprudent person.

Article 111. - The laws and regulations shall set down the procedure to be followed in matters of interdiction, management, exploitation, and disposal of the property of interdicted persons as well as matters concerning the guardianship - natural or selected - and curatorship.

Defects of the will (intention)

Duress

Article 112. - (1) Duress is the illegal forcing of a person to do an act against his free will.

(2) Duress is coercive if it is a threat of an impending great danger such as the annihilation of a life, or the affliction of injury on a member (of the body), or violent beating, or causing grave damage to property; it will not be coercive where it is a threat to causing lesser danger than the aforementioned such as imprisonment and beating depending on the circumstances (conditions surrounding) persons.

(3) The threat to cause injury to the parents, the spouse, or an unmarried relative on the maternal side as well as the threat of inflicting injury to honour will be

* "As Safeeh" (imprudent) is one who squanders and spends his property contrary to the requisites of the Shari'a and good judgment even when this is done for acts of benevolence such as building places of worship and comparable things where an interdiction will be imposed on him. (Ad Durr Al Mukhtar)

deemed to be duress which depending on the circumstances of the case will be either coercive or non-coercive.

Article 113. - In order to adduce duress the person making the threat must be capable of executing his threat and the coeree must fear the execution of the threat such that he is led to believe that the object of the threat will be executed if he has failed to the act the subject matter of the threat.

Article 114. - Duress differs according to the different conditions of age, weakness, office held, social standing of the person, and the degree - significant, insignificant, severity and weakness - of influence on and sufferance by the person from imprisonment and beating.

Article 115. - A contract is not performable which is executed under any kind of a valid duress.

Article 116. - A husband has influence on his wife: if he coerced (forced) her by beating, for example, or by forbidding her from visiting her parents in order to abandon her dowry which she did such abandonment shall not be performed nor his liability thereon will be released.

Mistake

Article 117. - (1) Where there is a mistake in a contract concerning the object which has been named and indicated (described) the contract will where the kind differed to be related to the object named and will be voided because of the non-existence thereof; where the kind corresponded (is the same) but the description differed the contract will if the latter is the desired (object) relate to that which has been indicated (described) and will be concluded because the object is existing but will be subject to the approval of the contracting party.

(2) If this stone has been sold as being emerald but turned out to be glass the sale is void; but where said stone was sold at night and described as being red emerald but the colour turned out to be yellow, or where a cow was sold as being milky and it turned out to be otherwise the sale will be subject to the approval (allowance) of the purchaser.

Article 118. - * An assumption the falsity of which is apparent is of no (legal) consequence; a contract will not be performed if:

- (i) there is a mistake as to the quality (the description) of the thing which in the view of the contracting parties is or must be considered essential due to the circumstances in which the contract had been concluded and to the good faith that must be expressed in dealings;
- (ii) there is a mistake as to the identity or any of the capacities of a party which thing was the sole or main cause (object) for the contracting.

Article 119. - A party to a contract who has committed a mistake may not invoke it except where the other party had committed the same mistake or had knowledge thereof or could have easily detected (discovered) the mistake.

Article 120. - A mere mistake of calculation or a material (clerical) mistake will not affect the effectuality of the contract in which case the mistake must be rectified.

* If a person assumed that he has a debt to pay and did actually pay it but later it transpired that he is not indebted (to the payee) he will recover that which he had paid. Also where a surety has paid the sum of the debt (assuming it to be still due) which had already been paid or waived by the principal; the payer will claim the sum he had paid. (Sharh Majallat Al Ahkam al Adliyya)

Fraudulent Misrepresentation with Lesion

Article 121. - (1) Where a contracting party has made false representations to the other party and it was established that the contract contained grievous damage the contract will be subject to the approval of (be allowed by) the aggrieved party; where the party who exercised the gross deceit has died the case of fraudulent misrepresentation will pass to (be brought against) his heirs.

(2) Fraudulent misrepresentation is deemed to be the failure to elucidate (state clearly) in the contracts of the trust where caution must be exercised against ambiguity by elucidation such as cheating in contracts of resale with profit, at cost-sharing and at a discount or loss.

Article 122. - Where the fraudulent misrepresentation was by other than the contracting parties the contract will not be suspended except where it has been established to the aggrieved party that the other contracting party was at the time of execution of the contract aware or it was easy for him to be aware of this misrepresentation.

Article 123. - A contracting party who has been the subject of fraudulent misrepresentation may claim damages if he has only suffered little (insignificant) injury (lesion) or if he suffered a grievous injury (lesion) where the misrepresentation (deceit) was unknown to the other party and it was not easy for the latter to know it or where the thing had been consumed prior to becoming aware of the injury or had perished or suffered a defect or undergone an essential change where in all cases the contract will be effectual.

Article 124. - (1) Mere injury does not bar enforcement of the contract insofar as the injury was not coupled with deceit.

(2) The contract shall be null and void if however the injury was grievous and the injured party had been interdicted or where the injury was sustained by the property of the State or waqf.

(3) Injury (lesion) may not be adduced in respect of a contract which was concluded by way of a public auction.

Article 125. - Where advantage was taken of the need, rashness, or urge (craving), inexperience, or weak perception (apprehension) of a contracting party where the contract has resulted in grievous injury to him he may within one year from the time of the contract demand reduction of the injury to a reasonable degree; if the disposal made by him was gratuitous he may during said time limit revoke it.

(2) Object and Cause

Article 126. - Every obligation which has resulted from the contract must have an object attached to it which is susceptible of (acknowledges) its legal consequence; the object may be property be it an object of material value, a debt, a benefit, or any other pecuniary right; it may also be work (to be done) or abstention from doing work.

Article 127. - (1) If the object of the obligation is an absolute impossibility (something in itself impossible) the contract is void.

(2) If the obligation is impossible for (as much as concerns) the debtor which impossibility in itself is not absolute the contract is valid and the debtor is obligated to pay damages because he has failed to perform his undertaking.

Article 128. (1) The object of the obligation must be designated in a manner which negates excessive ignorance regardless of whether the designation was by pointing out

the object or its specific place if it is present (available) at the time of the contract or by stating its distinctive features and quantity if it is quantitative* or in such other way which negates excessive ignorance; mentioning the kind rather than the quantity and description will not be adequate.

(2) It would however be adequate if the object is known to the contracting parties where the need does not arise for describing and identifying it in another manner.

(3) Where the object has not been designated in the aforementioned manner the contract is null and void.

Article 129. - (1) The object of the obligation may be non-existent at the time of contracting if it is obtainable in future and has been designated (described) in such a manner negating excessive ignorance and fraud.

(2) An agreement with regard to the succession (estate) of a living person is void.

Article 130. - (1) The object of the obligation must not be legally banned nor must it be to the prejudice of public order and morals as otherwise it would be null and void.

(2) The following are particularly deemed to be inter alia of public order: the provisions concerning personal status such as capacity and inheritance as well as the provisions concerning conveyances and the proceedings (procedure) needed for disposing of waqfs (dedications), of immovables and of the property of interdicted persons of waqfs and of the State and the laws of mandatory pricing and the other laws which are in exceptional circumstances enacted (to satisfy) the needs of consumers.

Article 131. - (1) The contract may be linked (coupled) with a stipulation which confirms or is compatible with its

* Quantitatives are things the quantities of which are measured by volume weight unit (count) or dra' (measure of linear length equal to 67 cms).

object or is in consonance with custom and usage.

(2) The contract may also be linked (coupled) with a stipulation which is beneficial to either contracting party or to a third party provided it is not legally prohibited or prejudicial to the public order and morals as otherwise the stipulation will be revoked and the contract will be valid save where the stipulation was the motive for the contracting in which case the contract will also be void.

Article 132. - (1) The contract shall be null and void if the contracting party has assumed an obligation without a cause or for a cause which is legally prohibited or is in violation of public order and morals.

(2) It will be presumed that every obligation has a lawful cause even where the cause has not been mentioned in the contract unless proof is established otherwise.

(3) Until the contrary has been established the cause mentioned in the contract is deemed to be the real cause.

(3) Valid and Void Contracts

Article 133. - (1) A valid contract is a lawful contract in essence and attributes which is concluded by parties of full capacities and has an object susceptible of its legal consequence and a lawful cause and its attributes are valid (proper) free of any defects.

(2) If the valid contract is not suspended (has a suspensive condition) it will be due for immediate performance.

Article 134. - (1) Where a conditional* (suspended) contract is concluded due to an interdiction, duress,

* A conditional contract is an executory contract the performance of which depends upon a condition. It is not simply an executory contract, since the latter may be an absolute agreement to do or not to do something but it is a contract whose very existence and performance depend upon a contingency. (Black's Law Dictionary, 1979 edition.)

mistake, or fraud the contracting party may revoke the contract after cessation of the interdiction of the duress of revelation of the mistake or of unveiling the deception; he may also validate (allow) the contract; if the contract is revoked he may revoke the disposals of the transferee and have restituted to him the commodity wherever he may find it even where it has changed hands; where the commodity (thing) has perished while in possession of the transferee the latter shall be liable on the value thereof.

(2) The contracting or the deceived party has the option if he so wishes to claim from the other party or from the person who exercised the duress or the deception; if either of the latter two had paid the claim he may claim that which he had been paid from the other contracting party; there is no liability on a contracting party who has been the subject of duress or misrepresentation if he had under duress or deception received the consideration which perished while in his possession without encroachment on his part.

Article 135. - (1) He who has disposed of the property of another without his permission, his disposal is concluded subject to validation by the owner.

(2) The validation by the owner will be tantamount to a procuration (power of attorney) and the consideration will be claimed from the uncommissioned agent if he had received it from the other contracting party.

(3) The disposal of the uncommissioned agent will be null and void if the owner has not validated it; if the other contracting party had paid the consideration to the uncommissioned agent he may claim from him; if the consideration has perished while in possession of the uncommissioned agent without encroachment on his part and if the other contracting party has paid the consideration knowing him to be uncommissioned no recourse may be had against him for anything thereof.

(4) Where the uncommissioned agent had delivered the

object of the contract to the person with whom he had concluded the contract and it perished while in his possession without encroachment on his part the owner may claim the value thereof from whomever of them he wishes to claim; if he has opted to claim from either of them his right to claim from the other will prescribe (lapse).

Article 136. - (1) Validation of a suspended (conditional) contract is either express or implied and is based on (attributed to) the time of concluding the contract; it is a condition that the person who has the power of validation (of the contract) must be present at the time of issuance of (concluding) the contract; it will not be a condition that the contracting parties or the original owner or the object of the contract be present (exist) at the time of the validation.

(2) The option of validation or revocation must be exercised within three months and if during this time limit no sign has been made to indicate the wish to revoke the contract it will be deemed effectual.

(3) If the cause of suspension was due to diminished capacity the said time limit begins from the time of cessation of this cause or from the time when the guardian becomes aware of issuance (origination) of the contract; where the cause for the suspension was because of duress, mistake, or deception (fraud) the time limit begins to run from the time when the duress has ceased, or the mistake has been revealed, or the deception unveiled; where the cause of the suspension was due to absence of authority over the object of the contract the time limit begins from the day on which the owner becomes aware of the issuance (origination) of the contract.

Article 137. - (1) A void contract is that which due to its cause (origin) is not valid as to its essence or as to its attributes regarding some of its external features.

(2) A contract will be void if there is a defect in

its constituent elements such as where the offer and acceptance have been exchanged by parties who are not legally competent to conclude contracts or where the object is not performable (susceptible of its legal consequences) or where the cause is unlawful.

(3) The contract will also be void if some of its features (attributes) are defective such as when the object of the contract is of excessive ignorance or where the contract does not conform to the form imposed by the law.

Article 138. - (1) A void contract will not clinch nor will it be performable (connote legal consequences) ab initio.

(2) If the contract is voided the parties will be reinstated in the positions which existed prior to the contract; and if such reinstatement is impossible damages equivalent to the loss may be awarded.

(3) A person of diminished capacity shall not however be bound where the contract has been voided on grounds of his incapacity to repay except such benefit which he had obtained by reason of performance of the contract.

Article 139. - Where a part of the contract is void that part only will be void and the remaining part of the contract will remain valid and be considered as an independent (separate) contract unless it is revealed that the contract would not have been concluded without the part which has been voided.

Article 140. - Where a void contract contains the elements of another contract it will be valid and be considered to be the contract the elements of which have been fulfilled if it is revealed that the contracting parties had the intention to execute this contract.

Article 141. - Where a contract is void every interested party may invoke nullity and the court may of its own accord adjudge nullity and the nullity will not be revoked

(annulled) by validation.

Section (ii) - The effects of a contract

(1) The Binding Effect between the Contracting Parties

Article 142. - (1) The effects of a contract shall apply to the contracting parties and to their universal successors without prejudice to the rules of succession (inheritance) save when it is revealed from the contract or the nature of dealings or from the provisions of the law that this effect will not be transferred to the universal successors.

(2) Where the contract has created obligations and rights in rem related to a thing which thereafter was transferred to a singular successor such obligations and rights will be transferred to this successor at the same time as that of transference of the thing where said obligations and rights are of the prerequisites thereof and the singular successor was aware of the same at the time when the thing passed to him.

Article 143. - It is a requisite in commutative contracts that the parties establish their respective titles to the things (commodities) being exchanged and it is an obligation on each party to deliver his own property the object of the exchange to the other party.

Article 144. - A commutative contract concerning the benefits of things (commodities) creates an obligation on the alienator (the person who holds the right of disposal over the thing) to deliver it to the beneficiary who is also under an obligation to deliver the consideration of the benefit to the owner of the thing.

Article 145. - A contracting party is under an obligation to perform his obligation (under the contract) whatever may be the object of the contract.

Article 146. - (1) Where a contract has been performed it is legally binding and neither party may revoke or amend it except pursuant to a provision in the law or by mutual consent.

(2) Where however as a result of exceptional and unpredictable events of a general nature the performance of the contractual obligation has not become impossible but onerous on the debtor such as will threaten him with exorbitant loss the court after balancing the interests of the parties may if it would be equitable reduce the onerous obligation to a reasonable limit; every agreement otherwise shall be null and void.

Article 147. - (1) Where a fictitious (imaginary) contract has been executed the creditors of the contracting parties as well as the singular successors who are bona fide may invoke the fictitious contract and may also establish the fictitious nature of the contract which injured them and may invoke the veiled contract.

(2) If the interests of the parties are in conflict where some invoked the overt (fictitious) contract and the others invoked the veiled (covert) contract the former will have priority.

Article 148. - (1) A covert (veiled) contract is effective between the contracting parties and the universal successors; the overt (fictitious) contract shall not have any effect among them.

(2) Where the contracting parties have veiled a real contract by an overt contract the real contract will be valid if it has fulfilled the conditions of its validity.

Article 149. - The fictitious nature of disposals (alienations) made on a real property may not be contested after they have been entered in the registers of the Real Estate Registration Department.

Article 150. - (1) The contract must be performed according to its contents and in a manner which conforms to the norms (requirements) of good faith.

(2) The contract does not bind the contracting party as regards its express conditions only but also as regards those which are in accordance with the law, custom, and equity deemed to be requisites thereof depending on the nature of the obligation.

Article 151. - (1) A person who has promised to procure a third party to perform an obligation will not in so doing bind such third party but binds himself and must compensate the person with whom he had concluded the contract if the third party has refused to bind himself; he may thereafter relieve himself of the compensation by himself performing the obligation which he had promised if he is capable of performance without injuring the creditor.

(2) But where the third party has approved the promise his approval will not produce its effects except from the time of expressing it unless it would be revealed that he intended impliedly or expressly that the approval will take effect from the day on which the promise had been made.

Article 152. - (1) A person may undertake by contract in his own name to perform obligations which he stipulates for the interest (benefit) of a third party if in performing these obligations he has a personal, moral, or material interest.

(2) Save where otherwise agreed this stipulation vests unto the third party a direct right against the obligee and may claim performance thereof; the obligee may invoke (adduce) against the third party the defences which arise from the contract.

(3) The person who made the undertaking may also claim performance of the stipulations he had made in favour of the third party unless it would appear from the contract

that the third party is the only person who may claim the performance of such stipulation.

Article 153. - (1) The stipulator but not his creditor or heir may revoke the stipulation before the beneficiary declares his wish to the stipulator or the undertaker (obligee) to have the benefit of the stipulation save where the revocation is not contrary to the obligations contained in the contract.

(2) In the absence of an express or implied agreement to the contrary the revocation shall not relieve the obligee's liabilities vis-a-vis the stipulator; the stipulator may subrogate the first beneficiary by another beneficiary and may also reserve for himself the benefit of the stipulation.

Article 154. - Where there is a stipulation for the benefit of a third party the beneficiary may be a future person or party (institution) and may also be a person or party who has not been designated (identified) at the time of the contract provided such person or party is identifiable at the time when the contract produces its effects.

(2) Interpretation of the Contract

Article 155. - (1) In contracts, intentions and meanings must be implied and words and forms (constructions) must be disregarded.

(2) Basically words imply the reality; but if the truth is impossible they will imply the metaphor.

Explanation as appearing in Majallat Al Ahkam Al Adliyya:
Paragraph (1) means that the contracts which are based on objects and intentions and not on words, such as sales, leases, and drafts will be interpreted according to the intentions (of the parties) and the meanings and the words will be disregarded: that is why redemption sales are

considered to be mortgages in spite of the fact that they are concluded by uttering the word "sale" where the intention is not to convey to the purchaser the title of the object of the sale as the intention is to secure the debt. The following branch from this rule: where a man said: "I donate this house against this suit of yours"; it has been considered by consensus that it is a sale because the significance here is for the meaning and not the words (Durr Montaga). Also a guarantee stipulating discharge of the debtor's liability is a draft and the draft stipulating non-discharge of the debtor's liability is a security (guarantee); a grant with a stipulation to pay a consideration is a sale which is susceptible of the pre-emption right; lending for a specified term against a certain fee (rent) is a lease (Ashbah); a guardianship during the life of the constituent is an agency and the appointment of an agent after the death of the constituent is a guardianship (Bzaziyyeh). There are however exceptions to this rule such as where a man who intended to donate his property said: "I have sold you this property without a price": the word "sold" in this case is not voided and is not taken to be a gift even where the person who made the statement intended it to be a gift (Ashbah).

Paragraph (2): Verity (truth) reality is the antithesis of metaphor and the use of the word to denote the meaning which it conveys such as "lion" is used to denote a beast of prey and "hand" is meant to be that part of the human body known as such. A metaphor is used to denote other than the true meaning of a word if there is a context to indicate that the true meaning is not intended. Thus words imply verity (truth) reality, i.e. a word must not imply a metaphor if it can be interpreted into its true meaning: if a person bequeathed to X's son the grandson will not be included in the bequest if X has a son of his own but if he does not have his offspring the bequest passes to the son's son; the opinion differed as regards a daughter's son. What branches from this rule is where a

person said: "This house is for X"; this would be an admission of title to the house to X even where that person has claimed that it is his dwelling place his claim will not be admitted (Ashbah).

Article 156. - The truth is left out (disregarded) where custom indicates otherwise.

Explanation according to Majallat Al Ahkam Al Adliyya: "For example: a man who asked his servant to fire the lamp did not mean to burn the lamp; what he actually meant was to light a candle which is within the lamp; the usage being in that area to say fire the lamp; so the true meaning of fire is left out (disregarded) because usage indicates that fire means sparking the light of the candle within the lamp."

Article 157. Implication is disregarded vis-a-vis a declaration.

Explanation according to Majallat Al Ahkam Al Adliyya: "That is if implication conflicts with a declaration (express utterance) the latter will be considered and the former disregarded: where A made an offer granting B a thing; if B takes delivery of the thing in the session of the grant he would have acted validly even where the donor did not permit him to take delivery of the thing as taking delivery is implied from the offer of the donor; but if the donor forbade B from taking delivery and B took delivery of the thing his action will be void because the donor uttered express words (declared) forbidding B from taking delivery of the thing: thus a declaration voids implication. Also if A and B claimed having purchased a thing from C but did not give the date of the purchase or gave the same date who of the two has possession of the thing will be deemed to be the purchaser because possession is proof (by implication) of the purchase; but if B for instance gave an

earlier date of purchase than that of A his proof will be admitted because the precedence of the date proves expressly his title. Where however action has been taken in pursuance of implication such as when A heard that an uncommissioned agent has sold his property he claimed the price from him: this claim is deemed to be an implied validation of the sale (Durr Mukhtar); if he thereafter revoked expressly the sale made by the uncommissioned agent the revocation shall have no effect."

Article 158. - It is more appropriate to construe rather than discard words; but where this is impossible they will be disregarded.

Explanation as appearing in Majallat Al Ahkam Al Adliyya: "This means that so long as the words uttered by a person of sound mind can be construed into their real or metaphoric meanings they will not be disregarded e.g. where A who has no children of his own (but has grandchildren) constituted a waqf of his property in favour of his children: as A has no children of his own the metaphoric meaning of the word 'children' will be construed, i.e. his grandchildren; this is better than disregarding the words constituting the waqf (Ashbah)."

"The second part of the text complements the first section thereof: where A has admitted to his wife who is older than him and comes from another well-known family that she is his daughter; his admission cannot in this case be construed into its real meaning because the wife is older than him and comes from a well-known family nor can his admission be construed into a metaphor (i.e. being a will) because she is his heir and a will made in favour of an heir is invalid; his admission will therefore be disregarded."

Article 159. - Naming some of that which is indivisible is like naming the whole (of the thing).

Explanation according to Majallat Al Ahkam Al Adliyya: "A pardon accorded to the murderer of the de cujus by one of his heirs or a composition made with him against a consideration will extinguish the punishment where the right of the other heirs will pass to the Diyya (blood money) out of which the debts of the victim will be paid and his will executed (Al Qurawi from Tatarkhana); according to "Al Qinya" if the heir of a murdered person dropped one half of the punishment the entire punishment will be dropped because the punishment is indivisible; but where A and B killed C and the heirs of C pardoned one of the killers they can still kill the other; also where A killed B and C and the heir of B pardoned A the heir of C can still kill A (khaniyyeh). The right of pre-emption lapses by delivery of the entirety of the thing sold; the right of pre-emption will also be voided by delivery of part of the thing sold: where the pre-emptor has abandoned his right of pre-emption to one half of a house and claimed exercising pre-emption on the other half his claim will become void because in waiving his right on one half of it he has forfeited that right: the right of pre-emption is indivisible de facto as the pre-emptor is invested with the entire right of pre-emption which has passed to the purchaser - through the purchase - who has become the owner of the entirety of the thing sold because the transaction of sale cannot be divisible (Majma' Al Anhur). But naming some of a divisible thing is not like naming the whole thing, e.g. A who stood surety for half of the debt of B will not be deemed as having stood surety for the entire sum of the debt because a debt is divisible; similarly if a creditor relieved his debtor of one half of the debt the debtor's liability has been discharged in respect of one half of the debt only."

Article 160. - That which is general will operate according to its generality (without restrictions) save where

implied or express proof is established.

Explanation according to Majallat Al Ahkam Al Adliyya: "An agent (attorney) who is authorised to sell pursuant to a general power of attorney may sell the property of his principal for the price - large or small- he deems appropriate; but where the principal has fixed for the agent a certain price (for sale) the latter may not sell at a lesser price because the restriction is stipulated (in the power of attorney) and thus may not be violated; similarly where a man appointed an agent to buy for him a certain specific thing without mentioning (fixing) a price the agent may buy such thing for a comparable price or at a slightly higher price but not for an excessively higher price and if he did he will be deemed as having made the transaction for his own account; the reason being that in spite of the fact that the power vested in him is general it is impliedly restricted to not buying at an excessive price."

Article 161. - Describing that which is present is null (ineffectual) and that which is absent (not present at the session) is effectual.

Explanation according to Al Majalla: "It is to be noted that knowing the consideration is a condition in contracts which represents an exchange of properties such as sales and leases, the consideration (of the exchange) will be known by pointing it out by a sign to a thing present or in case of an absent thing by naming and describing it in such manner which distinguishes it from other things: the identification of things of the same kind by a sign (indication) is more expressive than describing and naming it; but as to things of different kinds the matter is reversed i.e. identification of the consideration through describing and naming is more expressive than by identifying by a sign. Where the sign is coupled with

naming of the same consideration which is of the same kind as the thing named but differs as to description only the latter will be void and the sign (indication) is valid.

"For example: if the vendor who wishes to sell a white horse present in the session said: 'I have sold to you this brown horse' and pointed at it and the purchaser accepted the sale the transaction will be valid and the description will be null and void. But where the thing indicated (pointed out) is not of the same kind as the thing named (designated) but of a different kind the thing named (designated) will be considered and the indication is null and void in which case the sale will be void. If a man pointed at a precious stone as being emerald but it turned out to be glass the sale is null because of the difference in kind (Ashbah (abridged)); in Ad Durr Al Muntaqua it is stated in case of difference as to the kind (of the thing) the thing named (designated) will be considered if the parties did not know that the thing which was pointed out is not of the same kind as that of the thing named (designated); but if they had been aware of this fact the thing indicated will be considered: if a man said: 'I have sold to you this donkey' and pointed out to a slave standing between them the sale has been concluded in respect of the slave. If the thing sold has not been pointed out but was identified by naming and description only the description will be considered such as when a man has sold a mare not present (at the session) and described it as being white but in fact it was brown the sale will not be concluded, but the correct thing is that the sale has been concluded but is not executory; also where a sale took place at night of a precious stone as being red emerald and later appeared to be yellow emerald the sale is valid and the purchaser will have an option."

Article 162. - An affirmative answer is deemed to have contained the facts stated in the question.

Explanation according to Al Majalla: "For example if the judge asked the defendant saying: 'The plaintiff claims from you 1,000 dinars being so and so; what do you say?' If he said 'Yes' he would have admitted his indebtedness of 1,000 dinars; similarly if the judge asked the defendant saying: 'Don't you owe the amount claimed by the plaintiff?' A 'yes' answer will be deemed as having 'Yes I owe the amount claimed' (Durr Mukhtar)."

Article 163. - (1) That which is current as custom and usage is like that which is stipulated; that which is implied by usage is like that which is stipulated.

(2) What is current among traders is like that which has been stipulated among them.

(3) What is impossible customarily (in common practice) is like that which is truly (de facto) impossible.

Explanation according to Al Majalla: "Section (1) of this Article is divided into two sections: (i) 'That which is current as custom and usage is like that which is stipulated.' Example: where a person sent his son to a weaver to be trained in weaving but neither party stipulated a fee; when the boy learned the trade the master claimed the training fees from the father and the latter claimed wages for his son; reference in such case will be made to custom and usage in the village and will be applied: if it is in favour of the master he will receive his fees but the father will receive wages for his son if this is the custom. Section (ii) of this paragraph reads: 'That which is implied by usage is like that which is stipulated'. Example: A person who has rented a room in a house in pursuance of an open end (unrestricted) contract pursuant to which the lessee can put his luggage and dwell therein and may not use the room contrary to the prevailing custom; if he was a smith he cannot carry on his trade in that room because 'what is implied by custom is like that

which is implied by stipulation.' Similarly an agent who was constituted to sell pursuant to a general procuration may not sell upon credit for a long unfamiliar (not current) term in spite of the fact that the principal has not cautioned him to sell in said manner.

"Section (2) of Article 163 provides: 'That which is common knowledge (current) among traders is like that which is stipulated among them'.

"For example where a person has purchased a thing from the market place for a certain specific price where no date for payment of the price or the postponed payment has been fixed, the current custom among them will apply in such case as for instance where it is the custom to pay all or part of the price every Friday it will have to be observed.

"Section (3) of Article 163 provides: 'What is impossible customarily (in common practice) is like that which is truly (de facto) impossible.' Impossibility is either real or customary; the first is the impossibility of a thing through necessity because it is unreasonable, e.g. where a man admits to an older person that he is his son; impossibility is customary if the thing is impossible through custom only both of which are the same. Where a man who is known to be poor claims huge sums from a third party alleging that he had loaned them to him in one payment at a time when he did not inherit or gained by any other way money his claim will not be heard because such thing is customarily impossible and is therefore like that which is impossible in actual fact (de facto) (Durr Mukhtar)."

Article 164. - (1) Custom be it universal or specific is a rule (to establish a shari'a rule).

(2) The usage common among people is proof which must be observed (admitted).

Explanation according to Al Majalla: "(1) Custom means reasonable matters that recur among people of sound mind

and are established in the minds of people: the origin of this rule is the saying of the Prophet: 'That which Moslems consider to be good is good with God (Ashbah)'. The following branch from this rule: in the case of sale of an ass without stating at the time of the sale whether or not the saddle was included reference will be made to custom and usage in that respect to determine whether or not the saddle is included in the sale. It is to be noted however that in the absence of a stipulation custom is made a rule but where a provision exists custom will be disregarded.

"(2) This section is a branch of the preceding section: A person who seeks help from a third party to sell his goods will have to pay the fees for such help to the third party if it is customary in dealings of the market people that such action is remunerable (Azziyyeh). Also constitution of a waqf in respect of a movable is valid if this is the usage in that place (area) (Ghorar) such as constitution of a waqf in respect of books and money."

Article 165. - Custom will be considered (to be effectual) if it is in continuous practice or predominantly widespread; that which is predominantly widespread and not scarce will be considered (effectual) (taken into consideration).

Explanation according to Al Majalla: This Article is divided into two sections. The first: according to usage a tailor who is hired (to make a suit) will supply the needle and the threads, a scribe (writer) when hired will have to supply the pen and the ink, and the fodder of an animal will have to be provided by the lessor even where the lessee had not offered to it food which led to its starvation: the latter shall not be liable; if both parties agreed that the fodder of the animal is to be provided by the lessee the contract of lease is void but the contrary is true where a wet nurse is hired with an undertaking to provide her with food and clothing where the contract is

valid on grounds of usage (ashbah). Both clauses of this Article rest on the conditions of custom which is made into a rule to establish a shari'a rule: one of its conditions is that it must be predominant, continuous and widespread; that was why the jurists estimated the age of maturity at 15 years when children mostly attain maturity; the exception to this rule is scarce and not regarded; that was why they estimated the age of nursing at seven years for a male minor and nine for a female minor because they allowed a male minor to stay with his mother until he would be able to do without her, i.e. when he would be able to eat and drink without needing help and the female minor to be entrusted to the care of her mother until she becomes attractive; whereas this state is not consistent as much as regards children, time, and place the jurists have fixed an age which is applicable in most cases, i.e. seven years for a minor male and nine for a minor female as aforesaid; this must be considered to be the legal opinion as stated in Majma' Al Anhur and other books because these are predominant ages at which children are able to part from their mothers; exceptions to this rule are rare and thus are disregarded. There is however another condition which must be satisfied, i.e. the custom; one other condition must also be satisfied that custom was current prior to occurrence of the event; the usage prevalent thereafter will not be regarded (Ashbah).

Article 166. - Doubt will be construed to the benefit of the debtor.

Article 167. - (1) In contracts of adhesion the acceptance will be confined to the mere submission to a draft (pre) contract (avant contrat) formulated by the offeror in a specific form beforehand which is not negotiable inasmuch as the offer is concerned.

(2) With a contract of adhesion which has been concluded which contained arbitrary conditions the court

may amend or relieve the adhering party of the obligation to perform these conditions in accordance with the principles of equity; every agreement otherwise will be null and void.

(3) The ambiguous terms of a contract of adhesion may not be interpreted (construed) to the prejudice of the interest of the adhering party even where he is the creditor.

(3) Contractual Responsibility (Warranty of the Contract)

Article 168. - If it is impossible for the obligee of a contract to perform his obligation specifically he will be adjudged to pay damages for non-performance of his obligation unless he establishes that the impossibility of the performance was due to a cause beyond his control; the adjudication will be the same if the obligee has delayed (was late in) the performance of his obligation.

Article 169. - (1) If the compensation (damages) has not been estimated in the contract or in a provision of the law it will be assessed by the court.

(2) The damages shall be in respect of every obligation which arises from the contract be it an obligation of conveyance of property, a benefit or any other right in rem, or an obligation to do or to abstain from doing an action and includes the loss of and the lost profit suffered by the creditor on account of loss of or delay in receiving the right provided that this was a natural result of the failure of or delay by the debtor to perform the obligation.

(3) Where the debtor had not committed cheating (fraud) or a grievous fault the compensation may not exceed the loss suffered or the amount of the lost profit which had been normally anticipated at the time of the contracting.

Article 170. - (1) The contracting parties may fix in advance the value of the damages (compensation) by a stipulation in the contract or in a rider (subsequent agreement) in which case the provisions of Articles 168, 256, 257 and 258 must be observed.

(2) The contractual damages will not accrue (be due) if the debtor has established that the creditor did not suffer any damage; the (value of the) compensation may be reduced if the debtor has established that the assessment was excessive or that part of the original obligation has been performed; any agreement which is contrary to this paragraph shall be null and void.

(3) Where the damage has exceeded the sum of the compensation agreed (contractual damages) the creditor may not claim more than said value unless he has established that the debtor has committed deception or a grievous fault.

Article 171. - Where the object of the obligation is a sum of money which was known at the time the obligation arose and the debtor delayed the payment thereof he shall be obligated to pay to the creditor by way of damages for the delay a legal interest at the rate of four per cent in regard to civil matters and five per cent in respect of commercial matters; this interest will commence from the date of filing a judicial claim in respect thereof if the agreement or the commercial usage has not fixed a different date for the running of the interest save in all cases where the law has provided otherwise.

Article 172. - (1) The contracting parties may agree on another rate of interest (other than those mentioned in the preceding Article) provided it shall not exceed seven per cent; where the parties had agreed on a higher rate (of interest) it shall be reduced to seven per cent and the surplus which has been paid must be refunded.

(2) Every commission or benefit (advantage) of whatever kind stipulated by the creditor such as when it is added to the agreed interest will exceed the aforementioned maximum rate will be deemed to be covert interest and is reducible if it has been established that said commission or benefit had no consideration represented by an actual service which the creditor would have rendered nor by a lawful benefit.

Article 173. - (1) In order for the interest - legal or contractual - to fall due the creditor will not be required to establish that he has suffered injury as a result of the delay.

(2) The creditor may claim a complementary compensation to be added to the legal or contractual interests if he has established that the damage which exceeds the interests was due to cheating or gross fault committed by the debtor.

(3) But where the creditor when claiming his right has caused the lengthening of the duration of the dispute through his fault the court may reduce the interests - legal or contractual - or will not adjudge the payment thereof at all in respect of the period of the lengthening of the dispute without justification.

Article 174. - Interest may not be charged on the outstanding interest and in no case may the total of the interest received by the creditor be more than the principal sum without in all cases prejudice to the commercial rules of custom and usage.

Article 175. - The legal rate of the commercial interest charged on current accounts will vary according to fluctuations of the local market applicable; capitalisation (the method of computing compound interest) is effected on current accounts according to the commercial usage.

Article 176. - The Gregorian Calendar will be adopted when computing interest.

Section (iii) - Dissolution of the contract

(1) Rescission

Article 177. - (1) In bilateral contracts binding both parties if either party has failed to perform his obligations under the contract the other party may after service of notice (formal summons) demand rescission of the contract and where necessary claim damages; the court may however accord the debtor a further time limit (to pay) and may also reject the application for rescission if that which has not been performed by the debtor is trivial in terms of the total obligation.

(2) Where the tenant has abstained from paying the rent due for payment under the contract of lease the lessor may rescind (the contract of) lease; where the hirer (employer) has abstained from payment of the wage due for payment pursuant to a contract of work the wage-earner may demand rescission of the contract; the vendor or the purchaser may demand rescission of the contract of sale if the other party has failed to pay that which is due from him under the contract; the right of rescission of a contract may also be established on the basis of a defect without the need for a stipulation in the contract.

Article 178. - It may be agreed that the contract will be deemed rescinded ipso facto without need for a judicial judgment in case of non-performance of the obligation arising therefrom; this agreement shall not waive the service of notice (formal summons) except where the contracting parties had agreed expressly that the notice would not be necessary.

Article 179. - (1) Where the object of a commutative

contract has perished while it was still in the possession of its owner the contract is rescinded regardless of whether the perishing as due to his act or to a force majeure where it would be incumbent on him to reconstitute the substitute of that which he had received to its owner.

(2) Where the thing sold perishes while still in possession of the vendor before it has been received by the purchaser it will be the property of the vendor and the purchaser is not liable on anything.

Article 180. - If a commutative contract concerning financial (pecuniary) things is rescinded or repudiated the obligation resulting therefrom will lapse in which case it would not be necessary to deliver the exchange substitute stipulated in the contract and if it had been delivered it must be restituted; where the restitution is impossible he will be condemned to pay compensation.

(2) Rescission by Mutual Consent

Article 181. - After having concluded a contract the contracting parties may rescind it by mutual consent.

Article 182. - (1) The thing the subject matter (object) of the contract must at the time of rescission by mutual consent be existing and in the possession of the contracting party.

(2) In case of a sale the thing sold must be existing and in possession of the purchaser even where some of the thing sold has perished rescission by mutual consent of the remainder will be valid to the extent of its share of the price; but the perishing of the price shall not constitute an impediment to the validity of the rescission by mutual consent.

Article 183. - Rescission by mutual consent as regards the contracting parties is tantamount to repudiation and as

regards a third party it is tantamount to a fresh contract.

Chapter 2 - Unilateral Will

Article 184. - (1) A unilateral will does not bind its initiator except in the cases where the law provides to that effect.

(2) The provisions applicable to a contract shall apply to a unilateral will except those of which relate to the necessity of the existence of two concordant wills to create an obligation.

Article 185. - (1) He who has promised a consideration (wage/fee/remuneration) to whoever performs a certain specified act will be obligated to give the consideration to any person who has performed said act even where he had performed it without having regard to a promise.

(2) Where the promisor has not fixed a time limit for performance of the act he may revoke his promise provided that such revocation shall not have any effect on the right of whoever has performed the act before revocation of the promise.

(3) The claim of the consideration shall lapse if proceedings have not been commenced within six months from the date of proclaiming (declaring) the revocation.

Chapter 3 - Unlawful Acts

Section (i) - Responsibility for personal acts

(1) Unlawful Acts against Property

Damage (Harm/Injury)

Article 186. - (1) A person who wilfully or by trespassing has directly or indirectly caused damage to or decreased

the value of the property of another person shall be liable.

(2) Where two persons - a perpetrator and an abettor - are involved (in committing the damage) the one who acted wilfully or by encroachment shall be liable; where both are liable the liability will be joint and several.

Article 187. - (1) A person who without (lawful) right has demolished an immovable belonging to another person the latter is vested with an option: either to leave the rubble to the former and claim from him the value thereof standing (built up) as well as reparations for the other injuries; or deduct the value of the rubble from the value of the immovable standing (built up) and in the latter case take the rubble and claim from him the balance (difference in value) and reparations for the other injuries.

(2) But where the perpetrator (destroyer) has reinstated the immovable to its original state which existed before the demolition and paid reparations for the other injuries his liability will be discharged.

Article 188. - A person who without lawful cause has cut a tree in the garden of another person the owner (of the tree) has an option: either to claim the value of the tree standing and reparations for the other injuries and leave (give) the tree cut to the perpetrator; or to deduct the value of the cut tree from its value when standing and take the cut tree and claim the remaining balance and reparations for the other injuries.

Article 189. - A person who has cheated another person shall be liable on the damage (injury): if a person told the market people, "This minor is my son sell him goods as I have permitted him to deal in trading" and it later transpired that the boy is the son of another person, the market people may claim from him the price of the goods sold to that boy and damages for the other injuries.

Article 190. - (1) A person who has damaged the property of another person alleging that it is his own property shall be liable on that which he has damaged.

(2) If however the damage was permitted by the owner the perpetrator will not be liable.

Article 191. - (1) A minor - rational or irrational - or any one having his status who has damaged the property of a third party will be liable from his own funds (property).

(2) Where it was impossible to obtain the reparations from the assets of he who has done the damage (the perpetrator) - be he an imprudent (irrational) minor or insane - the court may order the natural guardian the curator or the selected guardian to pay the sum of the reparations who may have recourse for the sum paid against he who has committed the injury (perpetrator).

(3) In assessing the fair reparations for the damage the court must take into consideration the situations of the litigants.

Usurpation

Article 192. - The property usurped must be restituted in kind to its owner at the place wherein it was usurped if it is existing; if the owner of the property has casually met the usurper who had with him the usurped property at a different place he may if he so wishes have the property restituted in that place, but if he demands restitution at the place of usurpation the expense of moving it and the costs of providing for its restitution will be borne by the usurper which thing will be without prejudice to reparations for the other injuries.

Article 193. - The usurper will be liable if he has expended, destroyed, or lost the property usurped or where it has perished totally or partially without encroachment

on his part.

Article 194. - (1) If the thing usurped has changed while in possession of the usurper the usurpee may if he so wishes recover the thing usurped in kind and claim reparations for the other damages or leave (abandon) the thing usurped and claim reparations from the usurper.

(2) The usurper who has changed the thing usurped in such a manner which changed its name (nomenclature) will be liable and will keep the thing; he who has usurped the wheat of a third party and sowed it in his land will be liable for the wheat and will keep the crop.

(3) Where the usurper has changed some description of the thing usurped by adding to it something from his own property the usurpee will have the option if he so wishes to give the usurper the value of the addition and take back the thing usurped in kind and claim the other reparations or to abandon the thing and claim from the usurper.

Article 195. - If after the usurpation the value of the thing usurped has diminished (depreciated) the usurpee has no alternative but to accept it in its existing state without prejudice to his right to reparations for the other injuries; the usurper shall however be liable if through his act or use the thing usurped has depreciated.

Article 196. - The accessories of the thing usurped are deemed to be usurped like it and the usurper shall be liable if they have perished even without encroachment on his part.

Article 197. - Where the thing usurped is an immovable the usurper is under an obligation to restitute it to the owner together with the comparable (true) rent; the usurper shall be liable if the immovable has suffered damage or has depreciated even without encroachment on his part.