

IRAQI CIVIL LAW: ITS SOURCES, SUBSTANCE, AND SUNDERING

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I.	HISTORICAL BACKGROUND.....	4
II.	THE ROAD TO CODIFICATION.....	6
	A. <i>The Mejelle</i>	7
	B. <i>The Egyptian Civil Code</i>	9
	C. <i>Early Attempts at Iraqi Codification</i>	12
III.	THE IRAQI CIVIL CODE.....	14
	A. <i>The Preliminary Part</i>	14
	B. <i>Obligations in General (Contracts)</i>	21
	C. <i>Torts (Delictual and Quasi-Delictual Acts)</i>	42
	D. <i>Conflicts</i>	44
IV.	PERSONAL STATUS COURTS.....	47
	A. <i>Marriage</i>	49
	B. <i>Successions</i>	55
V.	THE NEW IRAQI CONSTITUTION.....	63
	A. <i>Impact on the Iraqi Civil Code</i>	64
	B. <i>Impact of the Iraqi Code of Personal Status</i>	65
	C. <i>Gender Equality and the Changes to be Wrought</i>	67
	D. <i>A Constitutional Quandary</i>	69
VI.	CONCLUSION.....	70

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

Id.

8. *Id.* at 5.

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

Id.

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

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

Id.

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

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

Id.

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

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

I. HISTORICAL BACKGROUND

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

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

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

12. *Id.* at 23.

13. *Id.*

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

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

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

The modern state of Iraq was created by the British between 1914 and 1932.¹⁸ The three provinces which comprised this country were among the first areas of the Ottoman Empire to be invaded by the British at the beginning of the First World War.¹⁹ In

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

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

Id.

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

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

Id.

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

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

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

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

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

II. THE ROAD TO CODIFICATION

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

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

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

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

Id.

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

23. *Id.* at 22.

24. *Id.*

25. *Id.* at 23.

26. *Id.*

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

28. *Id.*

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

A. *The Mejelle*

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

The principal drafter of the *Mejelle* was a jurist named Cavdet Pasha, an Ottoman scholar and statesman³⁵ tasked with producing a compilation of the laws in force in the Ottoman caliphate.³⁶ The preliminary part of his final work is composed of 100 articles containing general principles of law.³⁷ These maxims are designed for courts to use as a basis for its judgments of a variety of issues.³⁸

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

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

31. *Id.* at 130-31.

32. *Id.* at 131.

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

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

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

36. *Id.*

37. *Id.*

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

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

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

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

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

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

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

Id.

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

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

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

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

B. The Egyptian Civil Code

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

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

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

Id.

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

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

Id.

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

46. *Id.*

47. See *id.* at 177.

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

Id.

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

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

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

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

48. KAMRAVA, *supra* note 11, at 24.

49. ZWEIGERT, *supra* note 4, at 110.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Abdullahi Ahmed An-Na'im, *Globalization and Jurisprudence: An Islamic Law Perspective*, 54 EMORY L.J. 25, 47 (2005).

56. Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 729 (2004).

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

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

57. *Id.* at 729-30.

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

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

Id.

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

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

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

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

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

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

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

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

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

C. Early Attempts at Iraqi Codification

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

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

ZWEIGERT, *supra* note 4, at 110.

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

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

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

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

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

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

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

Finally, in 1943, almost a decade after the push for a comprehensive modern code had begun, Al-Sanhūrī was invited back to Iraq by the Iraqi government and asked to complete the work he started.⁷⁵ Working as the chairman of a committee of Iraqi jurists, using the Egyptian Civil Code as a model, he completed a draft of what would become the modern Iraqi Civil Code.⁷⁶ The Iraqi Civil Code was enacted on September 8, 1951 and became effective two years later on September 8, 1953.⁷⁷

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

Id. at 177.

66. *See id.* at 177.

67. *Id.* at 178.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 179.

73. *Id.* at 180.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 176.

III. THE IRAQI CIVIL CODE

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

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

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

A. *The Preliminary Part*

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

78. *Id.* at 179.

79. *Id.*

80. Oussama Arabi, *Al-Sanhūrī's Reconstruction of the Islamic Law of Contract Defects*, 6:2 J. ISLAMIC STUD. 153, 167 (1995) (citing *Al Qānūn al-Madani*, No. 40 (Baghdad: al-'Ānī Press, 1951), 4).

81. Jwaideh, *supra* note 45, at 182.

82. *Id.*

83. *Id.* at 183-84.

84. *Id.* at 184-85.

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

1. Sources of Law

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

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

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

85. IRAQI CIVIL CODE arts. 1-72.

86. *Id.*

87. *Id.*

88. *Id.* arts. 1(1), 2 (noting that where there is a written provision, no independent judgment (*ijtihad*) is possible).

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

90. *Id.*

91. *Id.*

92. *Id.* art. 1(3).

93. See LA. CIV. CODE ANN. art. 1, cmt. (b) (2006) (citing A.N. Yiannopoulos, Louisiana Civil Law System §§ 31, 32 (1977)) ("According to civilian doctrine, legislation and custom are authoritative or primary sources of law. They are contrasted with persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity, that may guide the court in reaching a decision in the absence of legislation and custom.")

94. Jwaideh, *supra* note 45, at 181.

95. IRAQI CIVIL CODE art. 1(2).

96. Jwaideh, *supra* note 45, at 181.

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

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

2. *Persons*

Regarding natural persons, Iraqi civil law considers the personality of a human thing to begin at birth and end with death.¹⁰⁰ Issues related to the unborn are relegated to the separate realm of personal status law¹⁰¹ as are issues related to missing persons.¹⁰² Those who reach the age of majority, enjoy their mental faculties, and have not been interdicted are entitled to full exercise of their civil rights.¹⁰³ Those who are of diminished capacity are not.¹⁰⁴

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

97. Stilt, *supra* note 56, at 747-48.

98. IRAQI CIVIL CODE art. 5 ("The change of provisions (rules) to conform to changing times is not denied.").

99. *Id.* art. 10.

100. *Id.* art. 34.

101. *Id.* art. 34(2).

102. *Id.* art. 36(2).

103. *Id.* art. 46(1).

104. *Id.* art. 46(2).

105. *Id.* art. 38.

106. *Id.* art. 39(1).

107. *Id.*

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

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

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

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

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

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

108. *Id.*

109. *Id.* art. 39(3).

110. *Id.* art. 40(1).

111. *Id.* art. 41.

112. *Id.*

113. *Id.* art. 42.

114. *Id.*

115. *Id.* art. 44.

116. *Id.* art. 45.

117. *Id.* art. 43(1).

118. *Id.* art. 43(2).

119. *Id.* art. 47.

120. *Id.*

121. *Id.* art. 48(1).

122. *Id.* art. 48(2).

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

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

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

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

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

123. *Id.* art. 48(3)-(6).

124. *Id.* art. 48(6).

125. *Id.*

126. *Id.* arts. 50(1), 51.

127. *Id.* art. 50(1).

128. Jwaideh, *supra* note 45, at 182.

129. *Id.* at 182-83.

130. *Id.* at 183.

131. IRAQI CIVIL CODE art. 51.

132. *Id.* art. 52(1).

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

134. Jwaideh, *supra* note 45, at 183.

135. *Id.* (“[A]n example is the *waqf* for the benefit of preachers in mosques or teachers in religious schools. A *waqf* could also be created directly for some charitable work itself, as for combating illiteracy or certain diseases.”).

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

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

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

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

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

136. IRAQI CIVIL CODE art..53(1).

137. *Id.* art. 55(2).

138. *Id.* art. 54.

139. *Id.* art. 56(1).

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

141. *Id.* art. 57(1).

142. *Id.* art. 59.

143. *Id.* art. 59(a)-(c).

144. *Id.* art. 59(d).

145. *Id.* art. 60(1).

146. *Id.* art. 60(2).

3. Things, Property, and Rights

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

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

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

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

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

147. *Id.* art. 61(1).

148. *Id.* art. 65.

149. *Id.* arts. 62, 70-71.

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

151. *Id.*

152. *Id.* art. 61(2).

153. *Id.* art. 63.

154. *Id.* art. 70(1).

155. *Id.* art. 64(1).

156. *Id.* art. 64(2).

157. *Id.* art. 71(1).

158. *Id.* art. 71(2).

159. *Id.* art. 72.

160. *Id.* art. 66.

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

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

B. Obligations in General (Contracts)

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

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

1. The Nature of a Contract

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

161. *Id.* art. 67(1).

162. *Id.* art. 68(1).

163. *Id.* art. 68(2).

164. *Id.* art. 69(1).

165. *Id.* art. 69(2).

166. See Jwaideh, *supra* note 45, at 183.

167. *Id.*

168. IRAQI CIVIL CODE art. 73.

169. *Id.* art. 133(1).

170. *Id.* art. 74.

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

2. *Forming an Iraqi Contract*

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

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

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

171. *Id.* art. 75.

172. *Id.* art. 77(1).

173. *Id.* art. 85.

174. *Id.* art. 86(1).

175. *Id.*

176. *Id.* art. 86(2).

177. *Id.*

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

179. *Id.* art. 185(1); *See also id.* art. 185(2) (noting that where the promisor has not fixed a time limit for performance of the act he may revoke his promise, but is still bound to whomever performed the act within that six month timeframe).

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

181. *Id.* art. 91(2).

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

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

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

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

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

182. *Id.* art. 79.

183. *Id.*

184. *Id.* art. 87(1).

185. *Id.* art. 88.

186. *Id.* art. 87(1).

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

188. *Id.* art. 80(2).

189. *Id.* art. 89.

190. *Id.* art. 81(1).

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

192. *Id.* art. 82.

193. *Id.*

194. *Id.* art. 83.

195. *Id.* art. 84.

196. *Id.* art. 92(1).

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

Comparison with the Mejelle and French Civil Law

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

In spite of that distinction, there are substantive similarities between the *Mejelle* and continental civil law. An example is found in the rules pertaining to offer and acceptance, which are part of both the *Mejelle* and traditional civil law. The *Mejelle* requires an offer and acceptance²⁰¹ and consent of the parties to form a contract.²⁰² Even a gift under the *Mejelle* requires offer and acceptance.²⁰³ The sole exception to this requirement is in the *Mejelle*’s articles governing contracts of suretyship.²⁰⁴ Likewise, continental civil law requires offer and acceptance in order to form a contract and considers that “[u]n contrat est conclu quand l’offre, ferme, non équivoque, précise et complète, émanant d’un contractant est acceptée par l’autre contractant d’une manière explicite, non équivoque et sans réserve.”²⁰⁵ This commonality in civil law

197. *Id.* art. 92(2).

198. *Id.*

199. *Id.*

200. *See* THE MEJELLE, *supra* note 35, art. 103, at 16.

201. *See id.*

202. *See id.* art. 104, at 16.

203. *See id.* art. 837, at 131 (“A gift, by an offer and acceptance, becomes a concluded contract, and by receipt it becomes complete.”).

204. *See id.* art. 621, at 91 (“By the offer of the surety alone, a suretyship becomes a concluded agreement and enforceable . . .”).

205. HESS-FALLON & SIMON, DROIT CIVIL 173 (Editions Dalloz 1999).

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

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

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

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

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

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

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

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

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

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

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

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

3. Defects of the Will

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

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

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

214. IRAQI CIVIL CODE art. 115.

215. *Id.* art. 112(1).

216. *Id.* art. 112(2).

217. *Id.*; *see also id.* art. 114.

218. *Id.* art. 112(3).

219. *Id.*

220. *Id.* art. 113.

221. *Id.* art. 116.

222. *Id.* art. 117(1).

223. *Id.*

224. *Id.* art. 117(2).

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

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

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

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

225. *Id.*

226. *Id.* art. 118(i).

227. *Id.* art. 118(ii).

228. *Id.* art. 119.

229. *Id.* art. 120.

230. *Id.* art. 118.

231. *Id.* art. 123.

232. *Id.*

233. *Id.*

234. *Id.* art. 121(1).

235. *Id.* art. 124(1).

236. *Id.* art. 124(2).

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

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

Comparison with the Mejlle and French Civil Law

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

237. *Id.* art. 124(3).

238. *Id.* art. 122.

239. *Id.* art. 121(1).

240. *Id.* art. 125.

241. *Id.*

242. *See* C. CIV. art. 1109 ("Il n'y a point de consentement valable si le consentement n'a été donné que par erreur ou s'il a été extorqué par violence ou surpris par dol.").

243. *See* Saul Litvinoff, *Vices of Consent: Error, Fraud, Duress, and an Epilogue on Lesion*, 50 LA. L. REV. 1, 8-9 (1989).

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

Id.

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

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

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

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

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

245. See *id.*

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

247. See *id.* arts. 310–12, at 45.

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

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

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

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

4. *Object and Cause*

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

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

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

251. *See id.* at 171–72.

252. IRAQI CIVIL CODE art. 126.

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

254. *Id.* art. 127(2).

255. *Id.* art. 128(1).

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

257. *Id.* art. 128(3).

258. *Id.* art. 129(1).

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

260. *Id.* art. 129(2).

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

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

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

Comparison with the Mejele and French Civil Law

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

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

262. *Id.* art. 131(1).

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

264. *Id.* art. 132(2).

265. *Id.*

266. *Id.* art. 132(3).

267. *Id.* art. 132.

268. THE MEJELLE, *supra* note 35, art. 197, at 27.

269. *See id.* arts. 209-10, at 28 ("The sale of a thing, the delivery of which is not possible, is invalid.") and ("To sell a thing which cannot be accounted as property among men, or to buy property sold, for such a thing, is invalid.").

270. *Id.* art. 200, at 27.

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

272. *Id.* art. 197, at 27.

273. *See* C. CIV. art. 1108.

274. *See* THE MEJELLE, *supra* note 35, art. 211, at 28 ("[The] sale of property . . . which is not [lawful] is invalid.").

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

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

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

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

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

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

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

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

Id.

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

279. ABDUR RAHMAN I. DOI, *SHAR’A: THE ISLAMIC LAW* 359 (TaHa Publishers 1997).

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

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

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

5. *Effects of a Contract*

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

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

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

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

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

283. IRAQI CIVIL CODE art. 145.

284. *Id.* art. 142(1).

285. *Id.* art. 142(2).

286. *Id.* art. 146(1).

287. *Id.* art. 146(2).

288. *Id.* art. 150(1).

289. *Id.* art. 150(2).

290. *Id.* art. 148(1).

291. *Id.*

292. *Id.* art. 148(2).

293. *Id.* art. 149.

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

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

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

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

6. *Valid and Void Contracts*

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

295. *Id.*

296. *Id.* art. 152(1).

297. *Id.* art. 154.

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

299. *Id.*

300. *Id.* art. 152(3).

301. *Id.* art. 153(1).

302. *Id.* art. 153(2).

303. *Id.*

304. *Id.* art. 1.

305. *Id.* art. 137.

306. *Id.* art. 137(3).

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

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

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

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

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

308. *Id.* art. 138(1).

309. *Id.* art. 141.

310. *Id.*

311. *Id.* art. 139.

312. *Id.* art. 138(2).

313. *Id.* art. 138(3).

314. *Id.* art. 144.

315. *Id.* art. 143.

316. *Id.*

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

318. *Id.* art. 134(1).

319. *Id.*

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

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

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

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

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

320. *Id.*

321. *Id.*

322. *Id.* art. 134(2).

323. *Id.*

324. *Id.* art. 135(1).

325. *Id.* art. 135(2).

326. *Id.* art. 135(3).

327. *Id.*

328. *Id.*

329. *Id.* art. 135(3)-(4).

330. *Id.* art. 136(1).

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

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

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

7. *Interpretation of Contracts*

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

331. *Id.* art. 136(2).

332. *Id.*

333. *Id.* art. 136(3).

334. *Id.*

335. *Id.*

336. *Id.* art. 136(1).

337. *Id.*

338. *Id.* art. 155.

339. *Id.* art. 156.

340. *Id.* art. 158.

341. *Id.*

342. *Id.* art. 160.

343. *Id.* art. 166.

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

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

8. *Capacity to Contract*

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

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

344. *Id.* art. 159.

345. *Id.* art. 165.

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

347. *Id.* art. 163 (explanation).

348. *Id.*

349. See Oussama Arabi, *The Regimentation of the Subject: Madness in Islamic and Modern Arab Civil Laws*, in *STANDING TRIAL: LAW AND THE PERSON IN THE MODERN MIDDLE EAST* 264, 282 (Baudouin Dupret ed., I.B. Tauris 2004).

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

Id.

350. IRAQI CIVIL CODE art. 93.

351. *Id.* art. 94.

352. *Id.* art. 95.

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

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

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

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

353. *Id.* art. 104.

354. Arabi, *supra* note 349, at 283.

355. *Id.* at 285-86.

356. IRAQI CIVIL CODE art. 106.

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

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

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

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

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

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

358. *Id.* art. 107.

359. *Id.* art. 108 (noting that a disposition made by a partially insane person during a period in which that person has full perception are treated like dispositions made by a person of sound mind).

360. *Id.* art. 109.

361. *Id.*

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

363. *Id.* art. 109(3).

364. *Id.* art. 110.

365. *Id.* art. 102.

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.* art. 97(1).

371. *Id.*

372. *Id.*

373. *Id.* art. 96.

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

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

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

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

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

374. *Id.* art. 98(1).

375. *Id.*

376. *Id.* art. 99.

377. *Id.* art. 100.

378. *Id.* art. 98(2).

379. *Id.* art. 101(1).

380. *Id.*

381. *Id.* art. 101(2).

382. *Id.* art. 103(1).

383. *Id.* art. 103(2).

384. *Id.* art. 105(1).

385. *Id.*

386. *Id.* art. 105(2).

387. *Id.*

C. Torts (*Delictual and Quasi-Delictual Acts*)

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

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

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

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

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

388. *Id.* art. 202.

389. *Id.* art. 203.

390. *Id.* art. 204.

391. *Id.* art. 205(1).

392. *Id.*

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

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

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

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

397. *Id.* art. 208.

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

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

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

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

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

Comparison with the Mejele and French Civil Law

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

400. *Id.* art. 210.

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

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

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

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

405. *Id.*

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

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

408. See THE MEJELLE, *supra* note 35, art. 92, at 15.

409. See, e.g., LA CIV. CODE ANN. art. 2315 (“Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”).

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

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

D. Conflicts

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

410. THE MEJELLE, *supra* note 35, art. 89, at 14.

411. *Id.* art. 90, at 14.

412. C. CIV. art. 1384.

413. IRAQI CIVIL CODE art. 14.

414. *Id.* art. 28.

415. *Id.* art. 15.

416. *Id.* art. 16.

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

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

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

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

417. *Id.* art. 33(2).

418. *Id.* art. 33(1).

419. *Id.* art. 31(1).

420. *Id.* art. 17(2).

421. *Id.* art. 18(1). *But see id.* art. 18(2) (noting that in cases involving pecuniary transactions, in which the diminished capacity of a foreigner is not apparent, the foreigner will be deemed to be of full capacity).

422. *Id.* art. 19(5).

423. *Id.* art. 19(1).

424. *Id.*

425. *Id.* art. 19(2).

426. *Id.* art. 19(3).

427. *Id.* art. 21.

428. *Id.* art. 22.

429. *Id.* art. 23.

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

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

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

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

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

430. *Id.* art. 22(a).

431. *Id.* art. 23(2).

432. *Id.* art. 24.

433. *Id.* art. 22(b).

434. *Id.* art. 25(1).

435. *Id.*

436. *Id.* art. 26.

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

438. *Id.* art. 25(1).

439. *Id.* art. 27(1).

440. *Id.* art. 27(2).

441. *Id.* art. 49(1).

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

443. *Id.* art. 32.

laws⁴⁴⁴ and which operate under a strict territorial theory for non-Muslims and under a “personality of laws” theory for Muslims.⁴⁴⁵

IV. PERSONAL STATUS COURTS

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

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

The Iraqi Code of Personal Status was originally drafted in 1947.⁴⁵¹ This initial draft contained 177 articles, 91 of which were applicable to all Muslim Iraqis regardless of their particular school

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

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

Id.

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

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

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

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

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

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

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

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

452. *Id.* at 543.

453. *Id.*

454. *Id.* at 542.

455. *Id.* at 547.

456. *Id.* at 544.

457. *Id.*

458. *Id.*

459. *Id.*

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

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

The first article of the code provides “that [t]he legislative provisions of this code shall govern all matters covered by them, whether expressly or by implication”; . . . “[i]f there is no legislative provision which can be applied,” then courts are to apply the principles of Islamic law most suited to the provisions of the code.⁴⁶² The courts shall be guided by legal precedent and Islamic jurisprudence in Iraq and other Muslim countries with legal systems that are similar to that of Iraq.⁴⁶³ This hierarchy of legal sources is directly taken from Article 1 of the Iraqi Civil Code.⁴⁶⁴

A. Marriage

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

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

460. *Id.* at 545.

461. *Id.* at 547.

462. *Id.* at 545.

463. *Id.*

464. *Id.* (“The committee took over the provisions of article 1 from the Civil Code, after remoulding them in a form that corresponds with the principles of the Sharī‘a.”).

465. MAJEED HAMAD AL-NAJJAR, ISLAM JAFARI RULES OF PERSONAL STATUS AND RELATED RULES OF IRAQIAN LAW 62 (A Group of Muslim Brothers 1978) (“The contract of marriage is a civil contract. It is an offer by a party and an acceptance by the other party in the same meeting, provided that they are attaining their puberty . . .”).

466. Anderson, *supra* note 446, art. 6(1)(d), 6(2), at 550.

467. *Id.* art. 6(4), at 550.

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

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

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

1. Polygamy

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

468. See AL-NAJJAR, *supra* note 465, rule 103, at 61.

469. Anderson, *supra* note 446, art. 8, at 551.

470. *Id.* art. 7(1), at 551.

471. *Id.* art. 9, at 551.

472. *Id.*

473. *Id.*

474. *Id.*

475. *Id.* art. 7(2), at 551.

476. *Id.* art. 11, at 552.

477. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Temporary Marriage

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

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

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

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

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

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

Id.

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

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

Id.

486. AL-NAJJAR, *supra* note 465, rule 108, at 66.

487. *Id.* rule 116(1), at 67.

488. *Id.* rule 116(2), at 67.

489. *Id.* rule 114, at 67.

490. *Id.* rule 115, at 67.

491. *Id.* rule 112, at 67.

492. *Id.*

493. *Id.* rule 113, at 67.

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

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

3. Terminating Marriage

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

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

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

495. *Id.*

496. *Id.*

497. *Id.*

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

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

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

501. *Id.*

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

503. *Id.* at 554.

In addition to the *talaq* manner of terminating marriage, Iraqi law also allows for judicial divorce. Article 40 of the Code of Personal Status allows for judicial termination of a marriage by either spouse in situations where one spouse maintains that the other has behaved in such a manner as to make continued marriage impossible.⁵⁰⁴ Adultery and, in certain situations, drug abuse are also grounds for divorce by either spouse.⁵⁰⁵ Notably, either spouse may seek a divorce in situations where the marriage contract was concluded without the agreement of a judge before one of the spouses attained the age of 18.⁵⁰⁶

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

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

4. *The Waiting Period (Idda)*

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

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

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

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

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

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

Id.

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

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

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

511. *Id.* at 556.

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

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

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

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

B. Successions

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

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

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

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

514. *Id.* .

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

516. *Id.*

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

518. *Id.* at 546.

519. *Id.* at 546-47.

sect in order to make a sport of the laws and the principles of Shari'a.⁵²⁰

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

1. *Testate Succession (Wills and Bequests)*

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

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

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

520. *Id.* at 546.

521. *Id.* art. 65(1), at 557.

522. *Id.*

523. *Id.* art. 65(2), at 557.

524. *Id.* art. 68(1), at 557-58.

525. *Id.* art. 70, at 558.

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

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

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

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

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

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

526. See DOI, *supra* note 279, at 328.

527. Anderson, *supra* note 446, art. 70, at 558.

528. *Id.* art. 71, at 558.

529. *Id.* at 558 & n.66 (noting that similar provisions have also been enacted in Egypt and Syria).

530. See *id.* art. 73, at 558.

531. IRAQI CIVIL CODE art. 1108(2); Anderson, *supra* note 448, at 558-59.

532. See DOI, *supra* note 279, at 328.

533. IRAQI CIVIL CODE art. 1109.

534. *Id.*

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

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

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

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

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

535. *Id.* art. 1110.

536. *Id.*

537. *Id.* art. 1111(1).

538. *Id.*

539. *Id.* art. 1111(2).

540. *Id.*

541. *Id.* art. 1112(1).

542. *Id.* art. 1112(2).

2. Intestate Succession

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

i. Intestate Succession of a *Tassaruf*

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

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

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

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

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

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

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

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

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

549. See *id.*

550. See *id.*

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

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

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

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

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

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

552. *See id.* art. 1189(2); *see also* Anderson, *supra* note 446, at 559.

553. *See id.*

554. *See id.* art. 1189(2); *see also* Anderson, *supra* note 446, at 559-60.

555. *See id.* art. 1190(1); *see also* Anderson, *supra* note 446, at 560.

556. *See id.* art. 1190(2); *see also* Anderson, *supra* note 446, at 560.

557. *See id.* art. 1192.

558. *See id.* art. 1193.

559. *See id.*; *see also* Anderson, *supra* note 446, at 560.

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

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

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

The articles of the Iraqi Civil Code governing inheritance of a *tassaruf* also state that where there is a fetus among the heirs (a child *en ventre de sa mere*) the succession is postponed until its birth.⁵⁶⁴ This is in accordance with both traditional Islamic law⁵⁶⁵ and continental civil law.

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

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

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

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

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

564. See IRAQI CIVIL CODE art. 1195.

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

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

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

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

ii. *The 1963 Amendments*

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

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

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

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

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

570. *Id.* at 1029.

571. *Id.*

572. *Id.*

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

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

V. THE NEW IRAQI CONSTITUTION

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

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

574. *Id.* at 1030.

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

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

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

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

Id.

578. See *id.* at 224–25.

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

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

A. *Impact on the Iraqi Civil Code*

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

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

579. *See id.* at 225.

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

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

582. *See id.*

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

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

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

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

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

B. Impact of the Iraqi Code of Personal Status

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

585. *Id.*

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

587. *See* Khawam, *supra* note 580, at 742.

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

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

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

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

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

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

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

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

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

Id.

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

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

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

C. Gender Equality and the Changes to be Wrought

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

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

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

595. *Id.* at 750.

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

597. See Constitution of Iraq, chap. 2.

598. See Constitution of Iraq, art. 14.

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

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

Id. at 570.

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

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

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

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

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

600. See AL-NAJJAR, *supra* note 465, at 109.

601. IRAQI CIVIL CODE art. 102.

602. *Id.*

603. *Id.*

604. *Id.*

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

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

D. A Constitutional Quandary

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

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

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

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

605. See QU'RAN 4:34.

606. See DOI, *supra* note 279, at 136–37.

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

VI. CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

612. See Jwaideh, *supra* note 45, at 178.

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

614. See Anderson, *supra* note 446, at 546-47.

615. See HART, *supra* note 3, at 50.

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

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

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

Id.

**TRANSNATIONAL SHIPMENTS OF NUCLEAR
MATERIALS BY SEA: DO CURRENT SAFEGUARDS
PROVIDE COASTAL STATES A RIGHT TO DENY
INNOCENT PASSAGE?**

DAVID B. DIXON*

I.	INTRODUCTION.....	73
II.	RECENT CONTROVERSIES IN MARITIME SHIPPING OF NUCLEAR MATERIAL.....	74
	<i>A. Prohibition of Innocent Passage.....</i>	76
	<i>B. Legitimate Safety Concerns of Coastal States.....</i>	78
III.	THE “PRECAUTIONARY PRINCIPLE” IN INTERNATIONAL LAW.....	80
	<i>A. Codification of the Precautionary Principle.....</i>	82
IV.	SAFEGUARDS FOR MARITIME SHIPPING OF NUCLEAR MATERIALS.....	86
	<i>A. IAEA Safeguards.....</i>	86
	<i>B. IMO Safeguards.....</i>	90
V.	UNITED NATIONS CONVENTION ON THE LAW OF THE SEA.....	91
	A. INNOCENT PASSAGE.....	92
	<i>B. Protection of the Marine Environment.....</i>	93
VI.	DISCUSSION.....	97
VII.	CONCLUSION.....	99

I. INTRODUCTION

The maritime transport of nuclear materials has created a conflict between two international law regimes: the United Nations International Law of the Sea¹ (UNCLOS), and the developing customary law of the “precautionary principle” in international environmental law. This conflict became apparent in recent years when several coastal states denied passage to ships transporting

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1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S 397 (entered into force Nov. 16, 1994), *available at* http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm [hereinafter UNCLOS].

nuclear materials arguing the shipments posed an environmental threat. This conflict has raised an issue which is currently unresolved: Do coastal states have a right to prohibit innocent passage to ships carrying nuclear materials if these ships fail to fulfill the requirements of the precautionary principle?

This paper will begin by examining the legitimate concerns of both shipping and coastal states by describing several of the recent controversies in the transnational shipment of nuclear materials leading to the current international legal dispute. Part Three will discuss the international legal basis for the precautionary principle and its several manifestations in both hard and soft law documents. The safeguards regime for ocean shipments of nuclear materials will be explored in Part Four. Part Five will explore the provisions of UNCLOS relating to innocent passage and environmental protection to decipher whether coastal States have a right to deny innocent passage to shipments of nuclear materials, and if so when. Lastly, Part Six will discuss several recommendations of how best to resolve this real and doctrinal conflict between states shipping nuclear materials and coastal states denying passage. The paper concludes by finding the current nuclear safeguard regime does not require shipping states to provide notice to or authorization from transit states, therefore coastal states have no legal basis to deny innocent passage. This safeguard regime, however, is evolving and may adopt a precautionary approach in the future.

II. RECENT CONTROVERSIES IN MARITIME SHIPPING OF NUCLEAR MATERIAL

The transnational shipment of nuclear materials by sea has encountered much resistance from coastal states and environmental organizations over the past decade. The controversy began in 1992 when Japan, France and England began conducting secret shipments of large quantities of nuclear material.² Once news of these shipments was leaked to the public, many coastal states along possible shipping routes protested the possibility of nuclear materials passing through their coastal waters without their knowledge or approval. Some states refused these shipments the right of innocent passage through their territorial waters, seemingly in violation of the UNCLOS.³ A few states even prohibited

2. See Jon M. Van Dyke, *Sea Shipment of Japanese Plutonium under International Law*, 24 OCEAN DEV. & INT'L L. 399, 399-400 (1993).

3. See *infra* Part 5.

the passage of these ships through their Exclusive Economic Zones (EEZs), an area extending 200 miles off of their shores.⁴ These coastal states have claimed a right to deny innocent passage because the existing safeguards regime for ocean shipments of nuclear material do not comply with the requirements of the “precautionary principle,” a relatively recent doctrine of international environmental law.⁵

These controversies are not merely the result of the conflicting international law doctrines of innocent passage and the precautionary principle, but are in essence conflicting views of national security of shipping and coastal states. The shipping states have a security interest in maintaining secrecy for shipments of nuclear materials and have codified these concerns in international agreements.⁶ If the itineraries of these shipments were to be publicized, they fear the ships would be more susceptible to terrorist or pirate attack; potentially allowing nuclear materials to get onto the black market and/or be used in making a “dirty bomb,” or that they could be victim to a U.S.S. Cole-type terrorist attack.⁷ On the other hand, coastal states have security interests based on environmental concerns that have also been recognized in international agreements.⁸ An attack, wreck, or sinking of a ship carrying nuclear material in a coastal state’s waters could have catastrophic effects on their coastal environment and industries; potentially

4. See UNCLOS, *supra* note 1, art. 57.

5. See *infra* Part 3.

6. See Convention on the Physical Protection of Nuclear Material, art.6, Oct. 26, 1979, 18 I.L.M. 1419 (entered into force Feb. 8, 1987), available at <http://f40.iaea.org/worldatom/Documents/Infcircs/Others/inf274r1.shtml> [hereinafter Physical Protection Convention]; see also THE PHYSICAL PROTECTION OF NUCLEAR MATERIALS AND NUCLEAR FACILITIES, INFORMATION CIRCULAR, INTERNATIONAL ATOMIC ENERGY AGENCY, §§ 8.1.2(f)-8.1.3, IAEA Doc. INFCIRC/225/Rev.4 (Corrected) (1998), available at http://www.iaea.org/Publications/Documents/Infcircs/1999/infirc225r4c/rev4_content.html [hereinafter IAEA Information Circular 225].

7. See Physical Protection Convention, *supra* note 6, art. 6(2); IAEA Information Circular 225, *supra* note 6, §§ 8.1.1, 8.1.2.

8. See Bamako Convention on the Ban of The Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Jan. 29, 1991, 30 I.L.M. 773 (1991), available at http://www.ecolex.org/ecolex/en/treaties/treaties_fulltext.php?docnr=3025&language=en [hereinafter Bamako Convention]; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, arts. 4(2)(f)&(h), Mar. 22, 1989, UNEP Doc. I G.80/3 (1989), 28 I.L.M. 657 (1989) [hereinafter Basel Convention]; Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes Within the South Pacific Region, Waigani, Sept. 16, 1995, 2001 Austl. T.S. No. 17, available at http://www.ban.org/library/waigani_treaty.html [hereinafter Waigani Convention]; CODE OF PRACTICE ON THE INTERNATIONAL TRANSBOUNDARY MOVEMENT OF RADIOACTIVE WASTE, INFORMATION CIRCULAR, INTERNATIONAL ATOMIC ENERGY AGENCY, sec. 3, IAEA Doc. INFCIRC/386 (1990), available at <http://www.globelaw.com/Nukes/iaeacod.htm>.

devastating their economy, largely based on coastal resources, and crippling the health and welfare of its people.⁹

In order to demonstrate the context of this controversy, this section will provide a summary of some of the most notorious events in the transnational shipments of nuclear material by sea. In particular it will highlight nuclear shipments where coastal states have prohibited innocent passage because of environmental concerns. It will also shed light on incidents where problems in shipping of nuclear materials have given coastal states legitimate reason to have safety concerns.

A. Prohibition of Innocent Passage

In 1992, the voyage of the *Akatsuki Maru* from France to Japan, carrying 1.7 tons of plutonium, was the first large shipment of nuclear materials to meet substantial resistance from coastal states.¹⁰ Despite the fact the route of the voyage was kept secret, many countries on the potential route publicly prohibited the ship from taking a route through their waters, including Argentina, Chile, Portugal, South Africa, and Malaysia.¹¹ Furthermore, soon before the voyage the Caribbean island nations adopted the Declaration on Shipments of Plutonium, banning passage of all shipments of nuclear materials through the Caribbean Sea and making the region a “nuclear-free zone.”¹²

Despite the fact that Japan publicly stated the actions of these countries were contrary to international law, the *Akatsuki Maru* nevertheless stayed outside the EEZs of all protesting states except for a few Pacific island nations.¹³ The environmental organization Greenpeace also organized large demonstrations at both the French and Japanese ports sparking violent clashes between authorities and protesters. A Greenpeace ship also followed the *Akatsuki Maru* for much of its voyage, and was at one point rammed

9. See Jon M. Van Dyke, *The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials*, 33 OCEAN DEV. & INT'L L. 77, 80 (2002) [hereinafter Van Dyke, *Regime*].

10. *Plutonium Shipment Leaves France for Japan*, N.Y. TIMES, Nov. 8, 1992, at 6.

11. *Id.* See also Ruth Youngblood, *Japan Secrecy over Plutonium Shipment Sparks Outcry*, UNITED PRESS INT'L, Sept. 28, 1992; *Lisbon Asks Tokyo to Keep Akatsuki Maru Away*, KYODO NEWS AGENCY, Nov. 10, 1992.

12. See Barbara Kwiatkowska & Alfred Soons, *Plutonium Shipments—A Supplement*, 25 OCEAN DEV. & INT'L L. 419, 424-25 (1994) (citing Press Release, Caribbean Community (CARICOM), Press Release No. 89/1992).

13. See *Plutonium Ship to Pass West of Hawaii*, HONOLULU STAR-BULLETIN, Dec. 7, 1992, at 1, col. 1 [hereinafter *Plutonium Ship*]; Colin Nickerson, *Japan's Plutonium Ship Ends Voyage*, BOSTON GLOBE, Jan. 5, 1993, at 1 [hereinafter Nickerson, *Japan's Plutonium*].

by a Japanese patrol boat.¹⁴ After this voyage, the Japanese announced that they planned to ship at least another thirty tons of plutonium in the coming years.¹⁵

In 1995, the British vessel *Pacific Pintail* met even more dramatic protest before its voyage from France to Japan carrying twenty-eight logs of high-level vitrified nuclear waste in glass blocks.¹⁶ Along with the Caribbean states that had already established a nuclear free-policy, Antigua, Barbuda, Colombia, the Dominican Republic, Puerto Rico and Uruguay refused to allow the shipment through their territorial waters.¹⁷ Furthermore, Brazil, Argentina, Chile, South Africa, Nauru and Kiribati expressly prohibited the ship's passage through their EEZs.¹⁸ Due to the protest of the Latin American and Caribbean states, the *Pacific Pintail* abandoned its preferred route through the Panama Canal and charted a course around Cape Horn to avoid the waters of protesting states.¹⁹

When passing Cape Horn, however, thirty-foot seas and sixty mile-per-hour winds forced the captain to find calmer waters within Chile's EEZ.²⁰ The Chilean Navy and Air Force had been tracking the progress of the *Pacific Pintail*, and once it had entered Chile's EEZ, the Chilean authorities demanded that the ship leave their waters immediately.²¹ A Chilean Navy frigate and aircraft intercepted the ship and threatened it with military action if it did not change course.²² Once it became apparent that armed force

14. *Plutonium Ship*, *supra* note 13, at 1, col. 1; Nickerson, *Japan's Plutonium*, *supra* note 13, at 1. See Andrew Bell, *Greenpeace Vessel Hit by Japanese*, THE GUARDIAN (London), Nov. 9, 1992, at 7.

15. Nickerson, *Japan's Plutonium*, *supra* note 13, at 1.

16. Denholm Barnetson, *Nuclear Waste Shipment Leaves France*, UNITED PRESS INT'L [Paris], Feb. 23, 1995.

17. *Id.*

18. Jon M. Van Dyke, *Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials*, 27 OCEAN DEV. & INT'L L. 379, 380-83 (1996) [hereinafter Van Dyke, *Applying*].

19. *Atomic Ship Breaks Ban, Enters Brazil Waters—Greenpeace*, REUTERS NEWS SERVICE, Mar. 7, 1995; *Plutonium Ship Will Not Go Through Panama Canal*, DEUTSCHE PRESSE-AGENTUR, Mar. 7, 1995.

20. *Nuclear Ship Braves Stormy Seas, Defies Chile Ban*, REUTERS NEWS SERVICE, Mar. 20, 1995.

21. Helen R. MacLeod, *UK Could Be Liable If Chile Takes Warlike Action Vs. Ship*, THE JOURNAL OF COMMERCE, Mar. 21, 1995, at 7A.

22. A. Suva, *Nuclear Ship Chase - Chilean Navy Forces Pintail Out of Waters*, THE HOBART MERCURY, Mar. 22, 1995 [hereinafter A. Suva, *Nuclear Ship Chase*]. The article cites a transcript of the radio exchange between the Chilean frigate and the captain of the *Pacific Pintail*:

Chilean Frigate: *Pacific Pintail*, you could be 'exposed to the use of weapons against you from navy vessels or air [planes] of the Chilean Navy.'

Pacific Pintail: 'I hear your message and with the nature of our cargo I would not think that is a very sensible thing to do, to use arms'

Id.

was not prudent against a vessel carrying nuclear waste, the frigate then threatened to interfere with the ship's navigation by throwing ropes into the water to wrap around its propeller.²³ The captain of the *Pacific Pintail* conceded to the demand and returned to the high seas despite the grave risk posed by the rough waters.²⁴ When addressing the legal principles for its actions against the *Pacific Pintail*, the Chilean Maritime Authority cited the precautionary principle and declared that the duty to protect the marine environment took precedence over the right of innocent passage.²⁵

B. Legitimate Safety Concerns of Coastal States

Despite the fact that the practice of transnational shipment of nuclear materials by sea has never resulted in an accident or incident with radiological consequences causing serious harm to the environment,²⁶ there is evidence that coastal states have legitimate safety concerns from these shipments. Three incidents in particular have put into question the safety of these shipments, including: 1) the lack of response of shipping states to the sinking of a vessel containing nuclear material; 2) the unauthorized boarding of a ship containing nuclear material; and 3) the falsification of safety records of a nuclear material shipment.

1. Responses to Sinking

In 1997, the *MSC Carla*, a twenty-five-year-old Panamanian-flagged cargo vessel on a voyage from France to the United States, broke in two in thirty-foot seas, seventy nautical miles off the coast of the Azores.²⁷ The forepart of the ship sank to a depth of 3000 meters, carrying eleven tons of cesium, having a total radioactivity of 330 terabecquerels.²⁸ As a comparison, the Chernobyl explosion

23. A. Suva, *Nuclear Ship Chase*, *supra* note 22. See *N-Waste Ship Forced Out of Chile's Waters*, THE ADVERTISER, Mar. 22, 1995.

24. Suva, *supra* note 22.

25. Van Dyke, *Applying*, *supra* note 18, at 387 (citing Chilean Maritime Authority Res. 12600/76, General Directory for the Maritime Territory and Merchant Marine (Mar. 16, 1995)).

26. See Raul A. F. Pedrozo, *Transport of Nuclear Cargoes by Sea*, 28 J. MAR. L. & COM. 207, 236 (1997).

27. *Radioactive Materials on Broken Ship in Atlantic*, REUTERS NEWS SERVICE, Nov. 28, 1997.

28. G. Sert, *The Recovery Radioactive Sources after a Shipwreck: The Case of the Mont-Louis Cargo and the Implications of the M.S.C. Carla*, 3-5 (presented at the 42nd Regular Session of the IAEA General Conference in Sept. 1998), available at <http://f40.iaea.org/worldatom/About/GC/GC42/sciprogram/gc42-scifor-8.pdf> [hereinafter Sert]. See IAEA, *Inventory of accidents and losses at sea involving radioactive material* at 20-21, IAEA Doc. TECDOC-

released 4800 terabecquerels of caesium into the atmosphere.²⁹ Neither the French nor the U.S. attempted to salvage these materials because of their depth, and because it was determined the potential for damage from a radiation leak was “negligible.”³⁰ The United Kingdom’s Ministry of the Environment stated that though corrosion of the stainless steel cylinders containing the cesium will gradually wash the radioactive materials into the environment, because of the depth, the contamination would be “horizontal” and should not affect the commercial species of fish.³¹

2. Boarding

In 1998, the British-flagged vessel, *Pacific Swan*, the sister ship to the *Pacific Pintail*, was boarded by members of Greenpeace in the Panama Canal.³² In the darkness of the early morning, activists pulled a boat alongside the vessel and used ropes to climb onto the bow.³³ Once on board, they then hoisted a banner with the words “No Plutonium” from the mast and chained themselves to the ship.³⁴ At the time of the boarding, the ship was carrying thirty tons of Mix-Oxide fuel (MOX), having enough plutonium to make sixty nuclear bombs.³⁵ Greenpeace stated the purpose of this demonstration was to protest the shipment of nuclear materials and to raise awareness of the threat these shipments pose to the people and environment of Panama and Central America.³⁶ Despite its intent, the demonstration has proven that transboundary shipments of nuclear materials by sea are vulnerable to pirate or terrorist attacks.³⁷ One can only imagine the devastation that could have occurred to the region if the boat that pulled alongside

1243 (Sept. 2001), available at http://www-pub.iaea.org/MTCD/publications/PDF/te_1242_prn.pdf; see also Press Release, Nuclear Information Service, Ship Sinks with 11 Tons of Caesium (Dec. 7, 1997), available at http://www.n-base.org.uk/public/briefing/90_99/brief110.htm [hereinafter Nuclear Information Service].

29. Press Release, Greenpeace, Ship Involved in Nuke Accident to be Towed to Spanish Port (Dec. 19, 1997), available at <http://archive.greenpeace.org/majordomo/index-press-releases/1997/msg00514.html>.

30. Sert, *supra* note 28, at 3.

31. Nuclear Information Service, *supra* note 28.

32. Press Release, Greenpeace, Nuclear Waste Shipment Enters Panama Canal Flying Greenpeace Banner—Stop Plutonium! (Feb. 6, 1998), available at <http://archive.greenpeace.org/pressreleases/nucstrans/1998feb62.html> [hereinafter Greenpeace].

33. Kevin G. Hall & Jon Mitchell, *Pana-mayhem*, THE JOURNAL OF COMMERCE, Mar. 6, 1998, at 2B [hereinafter Hall & Mitchell, *Pana-mayhem*].

34. *Id.*

35. See Earl Lane, *Activists: Atomic Waste to be Shipped*, NEWSDAY, Jan. 15, 1998, at A19; see also Robert Whyman, *Nuclear Fuel Arrives in Japan*, THE TIMES (London), Sept. 28, 1999, at 16.

36. Greenpeace, *supra* note 32.

37. Hall & Mitchell, *Pana-mayhem*, *supra* note 33.

the *Pacific Swan* had been controlled by al Qaeda terrorists, such as the boat used to attack the U.S.S. Cole, instead of Greenpeace activists.

3. *Falsified safety inspection record*

In 1999, it was revealed that British Nuclear Fuels (BNFL), the company that owns five nuclear transport ships including the *Pacific Pintail* and *Pacific Swan*, falsified cargo safety inspection records on at least ten lots of MOX containers being shipped to Japan.³⁸ BNFL explained that the records were falsified in order to “save time.”³⁹ After the questionable shipment of MOX arrived in Japan, the Japanese authorities discovered the inconsistencies and demanded the British to take the materials back.⁴⁰ The MOX was then returned to the UK, which agreed to pay Japan 6.4 billion yen (approximately sixty million dollars) for damages incurred due to the falsification.⁴¹ Now that shipping states have demonstrated that nuclear material safety inspection records can be falsified, coastal states could be justified in refusing passage to these shipments for not having adequate assurances that nuclear materials on board have been properly examined and authorized for shipping by competent inspectors.

III. THE “PRECAUTIONARY PRINCIPLE” IN INTERNATIONAL LAW

Several scholars, most notably Jon Van Dyke of the University of Hawaii, claim that customary international law includes a “precautionary principle” which is applicable to shipments of nuclear materials.⁴² The precautionary principle is based on the maxim *sic utere tuo ut alienum non laedas* (“use what is yours so as not to harm what is others”).⁴³ Under the precautionary principle, shipping states have a duty to take several steps before shipments of

38. *Inspectors Sent in as Sellafield Admits to Serious Safety Lapses*, THE INDEPENDENT (London), Sept. 14, 1999, at 1.

39. *BNFL Waited 4 Days Before Telling of MOX Error*, KYODO NEWS SERVICE, Sep. 15, 1999, available at www.lexis.com/research/retrieve?_m=d0495f31ed263fbb7177d5cd854dea4&doc.

40. Alan Cowell, *Nuclear Plant in Britain Admits Sabotage*, N.Y. TIMES, March 27, 2000, at A8.

41. Hideyuki Ba, *Japan's Plutonium Policy and MOX Program Full of Contradictions*, NUKE INFO TOKYO, Sept./Oct. 2000, at 1.

42. See Van Dyke, *Applying*, *supra* note 18. But see Eugene R. Fidell, *Maritime Transportation of Plutonium and Spent Nuclear Fuel*, 31 INT'L LAW 757 (1997) [hereinafter Fidell, *Maritime Transportation*].

43. See Jason L. Gudofsky, *Transboundary Shipments of Hazardous Waste for Recycling and Recovery Operations*, 34 STAN. J. INT'L L. 219, 221 (1998).

nuclear materials may be undertaken. These include, *inter alia*: the duty to prepare an environmental impact assessment; the duty to notify transit states of shipments in order for them to prepare contingency plans in case of an accident or emergency; the duty to consult with transit states to jointly develop such contingency plans; and the duty to mitigate all reasonably foreseeable damages.⁴⁴ This paper will for the most part limit the discussion of the precautionary principle to the duty of notification for nuclear material shipping states and the implied or explicit subsidiary rights of transit states to either give or withhold prior authorization for these shipments after notification.

Van Dyke asserts that the precautionary principle allows transit states to require notification, before such shipments can pass through their territorial seas or EEZs, and that these states can suspend the right of innocent passage to these shipments.⁴⁵ He further asserts that international conventions and declarations, as well as the practice of states, provide evidence that the precautionary principle is currently customary international law.⁴⁶ Several states have incorporated this principle into their laws, either requiring prior notification or prior authorization before passage of ships carrying nuclear materials is permitted, or prohibiting their passage altogether.⁴⁷ Therefore, it is necessary to discuss the development of the precautionary principle in order to understand its status under international law with relation to the right of innocent passage.

A. Codification of the Precautionary Principle

1. Hard Law: International and Regional Conventions

Though the origin of the precautionary principle can be traced to various international agreements,⁴⁸ including UNCLOS,⁴⁹ the

44. Van Dyke, *Applying, supra* note 18, at 381-83.

45. *Id.* at 384-85.

46. *Id.* at 379. *But see* Fidell, *Maritime Transportation, supra* note 42, at 757 et seq.

47. Kari Hakapaa & Erik Jaap Molenaar, *Innocent Passage-Past and Present*, 23 MARINE POLICY 131, 142 (1999). *See also* Laura Pineschi, *The Transit of Ships Carrying Hazardous Wastes through Foreign Coastal Zones*, in INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 299, 312-13 (F. Francioni & Tullio Scovazzi eds., 1991) (Seven countries requiring prior notification: Canada, Djibouti, Libya, Malta, Pakistan, Portugal and the United Arab Emirates; eight countries require prior authorization: Egypt, Guinea, Iran, Malaysia, Oman, Saudi Arabia, Turkey and Yemen; and six countries prohibit passage altogether: Argentina, Haiti, Ivory Coast, Nigeria, The Philippines and Venezuela).

48. *See* David Freestone & Ellen Hey, *Origins and Development of the Precautionary Principle*, in THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION 5 & n. 15 (David Freestone & Ellen Hey eds., 1996) (suggesting that the precautionary principle was first formulated as a concept in 1987 in the Declaration of the

1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) has nevertheless been generally recognized as the first international convention codifying the precautionary principle for the prevention of pollution.⁵⁰ The Basel Convention provides state parties with a basis for denial of passage of hazardous waste shipments if there has not been notification provided by the shipping state and prior authorization for the shipment by transit states.⁵¹ Van Dyke cites the Basel Convention as the primary basis for states to be able to require notification and prior consent of shipments of radioactive materials by sea.⁵²

There is, however, a major flaw in this reasoning. The Basel Convention does not apply to nuclear cargoes covered by other international agreements.⁵³ Therefore, with regard to the shipment of nuclear materials, the Basel Convention is preempted by two international conventions, neither of which have requirements for notification or prior authorization: the International Maritime Organization's (IMO's) 1993 Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes in Flasks on Board Ships⁵⁴ (INF Code), amended to the

Second International North Sea Conference on the Protection of the North Sea (London Convention)); see also James E. Hickey, Jr. & Vern R. Walker, *Refining the Precautionary Principle in International Environmental Law*, 14 VA. ENVTL. L.J. 423 (1995). But see Philippe Sands, *The "Greening" of International Law: Emerging Principles and Rules*, 1 IND. J. GLOBAL LEGAL STUD. 293, 298, 300-02 & n. 17 (1994) (suggesting much earlier origins, dating back to the 1969 Oil Pollution Intervention Convention, and the 1970 commercial whaling moratorium proposals).

49. Van Dyke, *Regime*, *supra* note 9, at 90. Van Dyke argues that UNCLOS article 221(1) is in fact a codification of the precautionary principle. This article authorizes state parties:

to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

Id.

The "acts relating to such a casualty" language has given Van Dyke reason to believe that this language was intended to give states the right to deny passage to ships carrying ultra hazardous materials contrary to the requirements of the precautionary principle. *Id.*

50. See Basel Convention, *supra* note 8.

51. *Id.* art. 4(2)(f) & (h).

52. See Van Dyke, *Applying*, *supra* note 18, at 382. See Van Dyke, *Regime*, *supra* note 9, at note 66.

53. Basel Convention, *supra* note 8, art. 1(3).

54. Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes in Flasks on Board Ships, Res. 748, IMO, 18th Sess. (Nov. 4, 1993), available at <http://www.admiraltylawguide.com/conven/infcode1999.html> [hereinafter INF Code].

International Convention for the Safety of Life at Sea⁵⁵ (SOLAS) in 1999, and; the 1973 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.⁵⁶

The precautionary principle has also been incorporated into two regional conventions: the Organization of African Unity's 1991 Bamako Convention⁵⁷ and the 1995 Waigani Convention⁵⁸ between the Pacific island nations. Like the Basel Convention, both of these regional conventions require an exporting state to get prior written consent from a transit state party before passage of nuclear materials through their waters is deemed legal.⁵⁹ These conventions, however, are different with regard to how they treat the transport of nuclear materials. The Bamako Convention explicitly includes the transport of nuclear materials within its scope of obligations.⁶⁰ The Waigani Convention, however, only addresses radioactive materials with regard to invoking a total ban on their import, export, and dumping within the treaty area.⁶¹ The convention also advises member states to adopt the regulations found in the International Atomic Energy Agency (IAEA) Code of Practice on the International Transboundary Movement of Radioactive Wastes, which will be discussed in the next section.⁶² The acceptance of these treaties by their member states does demonstrate state practice accepted as law. The small number of states involved, however, does not rise to the level of *opinio juris*.⁶³

55. International Convention for the Safety of Life at Sea (SOLAS), Nov. 1, 1974, as amended in 1981 and 1983 with the 1978 SOLAS Protocol, 32 U.S.T. 47, T.I.A.S. 9700, 14 I.L.M. 959 (1975), available at http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647 (the IMO's Marine Science Committee and Marine Environment Protection Committee formally decided to add the INF Code to this treaty in May 1999, taking effect in 2001) [hereinafter SOLAS].

56. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters, Dec. 29, 1972, [1975], 26 U.S.T. 2403, T.I.A.S. No. 8165, reprinted in 11 I.L.M. 1291, 1294.

57. See Bamako Convention, *supra* note 8.

58. See Waigani Convention, *supra* note 8.

59. Bamako Convention, *supra* note 8, art. 6; Waigani Convention, *supra* note 8, art. 6.3.

60. Bamako Convention, *supra* note 8, art. 2.2.

61. Waigani Convention, *supra* note 8, arts. 4.1 & 4.3.

62. Waigani Convention, *supra* note 8, art. 4.5(a).

63. *Id.* As of June 2004, twenty-one countries had become parties to the Bamako Convention through either ratification or accession: Benin, Cameroon, Comoros, Democratic Republic of Congo, Republic of Congo, Côte d'Ivoire, Egypt, Ethiopia, Gambia, Libyan Arab Jamahiriya, Mali, Mauritius, Mozambique, Niger, Senegal, Sudan, United Republic of Tanzania, Togo, Tunisia, Uganda, Zimbabwe. See Basel Convention Regional Centre Pretoria, Status of Ratifications, at <http://www.baselpretoria.org.za/ratifications.htm> (last visited Nov. 11, 2005). As of December 2002, ten parties had ratified the Waigani Convention: Australia, Cook Islands, Federated States of Micronesia, Kirribati, Papua New Guinea, Samoa, Solomon Island and Tuvalu. See Australian Department of Environment and Heritage, International Hazardous Waste Conventions, at <http://www.deh.gov.au/settlements/chemicals/hazardous-waste/conventions.html> (last visited Nov. 10, 2005).

2. *Soft law: resolutions, declarations, agendas, and draft articles*

In 1990, the IAEA drafted a Code of Practice on the International Transboundary Movement of Radioactive Waste that incorporated aspects of the precautionary principle, including notice and prior authorization requirements for shipments of nuclear material.⁶⁴ This code makes bold statements with regard to coastal state's rights to suspend innocent passage, including:

It is the sovereign right of every State to prohibit the movement of radioactive waste into, from or through its territory. Every state should take the appropriate steps necessary to ensure that, subject to the relevant norms of international law, the international transboundary movement of radioactive waste takes place only with the prior notification and consent of the sending, receiving and transit States in accordance with their respective laws and regulations.⁶⁵

This language, however, is qualified earlier in the code where it states that the code is "advisory"⁶⁶ and by a footnote that provides "[n]othing in this Code prejudices or affects in any way the exercise by ships and aircraft of all States of maritime and air navigation . . . in the 1982 United Nations Convention on the Law of the Sea, and under other relevant international legal instruments."⁶⁷

It is important to note the specialized agency that regulates safety of transport of nuclear materials by sea under UNCLOS is the IMO, not the IAEA. In regulating shipments of nuclear materials by sea, the IMO does incorporate IAEA conventions and most of their regulations. The IMO, however, has not incorporated the IAEA Code of Practice on the International Transboundary Movement of Radioactive Waste, but instead follows the INF Code to regulate nuclear shipments by sea.

64. IAEA: General Conference Resolution on Code of Practice on the International Transboundary Movement of Radioactive Waste, Sept. 21, 1990, *reprinted in* 30 I.L.M. 556 (1991), *available at* <http://www.globelaw.com/Nukes/iaecod.htm> (provision numbers omitted).

65. *Id.* at 563.

66. *Id.* at 562.

67. *Id.* n.2.

Many believe that the genesis of the precautionary principle as an international custom began at the 1992 United Nations Conference on Environment and Development held in Rio de Janeiro.⁶⁸ The Rio conference indeed was a groundbreaking event for the advancement of the precautionary principle. There, 172 state participants⁶⁹ unanimously agreed to a Declaration on Environment and Development with an implementation agenda, Agenda 21, to put into action the Declaration's principles.⁷⁰ The Rio Declaration's principles set out a framework for economic development and environmental protection that states are called upon to adopt into their domestic legislation. Principle 15 of the Rio Declaration calls for the use of a "precautionary approach" where there are "threats" to the environment, stating:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.⁷¹

Agenda 21 further provides more specific policy recommendations with regard to taking precautionary approaches to "prevent" degradation of the marine environment:

States, in accordance with the provisions of the United Nations Convention on the Law of the Sea on protection and preservation of the marine environment, commit themselves, in accordance with their policies, priorities and resources, to prevent, reduce and control degradation of the marine environment so as to maintain and improve its life-support and productive capacities. To this end, it is necessary to:

68. United Nations Conference on Environment and Development, G.A. Res. 228, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Dec. 22, 1989).

69. United Nations Earth Summit, UN Conference on Environment and Development (1992), <http://www.un.org/geninfo/bp/enviro.html> (last visited Nov. 11, 2005).

70. United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev. 1 (1992), *reprinted in* 31 I.L.M. 874 (1992), *available at* http://www.unesco.org/education/information/nfsunesco/pdf/RIO_E.PDF [hereinafter Rio Declaration]; United Nations Conference on Environment and Development, Agenda 21, ch. 17.22(a), U.N. Doc. A/CONF.151/PC/100/Add. 1 (1992), *available at* <http://www.unep.org/Documents/Default.asp?DocumentID=52> [hereinafter Agenda 21].

71. Rio Declaration, *supra* note 70, at 879.

. . . [a]pply preventive, precautionary and anticipatory approaches so as to avoid degradation of the marine environment, as well as to reduce the risk of long-term or irreversible adverse effects upon it.⁷²

Furthermore, the International Law Commission (ILC) has included the precautionary principle in its 2001 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities.⁷³ The Draft Articles have requirements for prior authorization,⁷⁴ risk assessments,⁷⁵ notification,⁷⁶ and consultation.⁷⁷ It is important to note, however, that the Draft Articles also have a provision for withholding information for “national security” reasons.⁷⁸ This later provision quite possibly will be an opt-out provision for countries transporting nuclear materials that have steadfastly maintained that their shipments require secrecy for security reasons.⁷⁹ Since one of the ILC’s main duties is to codify customary international law,⁸⁰ the existence of these draft articles reinforces the claim that the precautionary principle is in fact international custom. Due to the relative novelty of the transport of nuclear materials, however, these draft articles most likely are a representation of the ILC’s other mandate: to progressively develop international law.⁸¹

Though the above agreements are a significant step towards the development of an international customary law of precaution, they are not binding international law since they are not in the form of a convention or treaty. Despite the fact that conference declarations, agendas and recommendations are not binding international law, they are “soft-law.” They are agreements made by the conference participants or international organizations that encourage countries to work in good faith towards the implementation of the goals of the agreements.

72. Agenda 21, *supra* note 70, ch. 17.22(a).

73. Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, Report of the Int’l Law Comm., U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10, chp.V.E.1 (Sept. 25, 2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_7_2001.pdf [hereinafter Draft Articles].

74. *Id.* art 6.

75. *Id.* art 7.

76. *Id.* art 8.

77. *Id.* art. 9.

78. *Id.* art. 14.

79. *See supra* text accompanying notes 6 and 7.

80. Statute of the International Law Commission, arts. 1 & 15, G.A. Res. 174(II), 2 U.N. GAOR (Res.) at 296, U.N. Doc. A/519 (Nov. 21, 1947).

81. *Id.*

Countries therefore are at liberty to enact the principles into their domestic laws, thus making them binding within their own jurisdictions. If parties to these agreements ignore their obligations, however, there is no penalty for a breach of a soft-law regime. Furthermore, these agreements by themselves are not evidence of an international custom since they are not legally binding. International customary law can only be found when there is a general practice of states *accepted as law*.⁸² Though the precautionary principle may not currently represent international customary law, it seems to be an area of “developing custom.”⁸³

IV. SAFEGUARDS FOR MARITIME SHIPPING OF NUCLEAR MATERIALS

The current safeguard regime for transporting nuclear materials onboard ships is derived from a matrix of treaties and regulations developed and administered by the IAEA and IMO.

A. IAEA Safeguards

IAEA instruments cover the security of nuclear cargoes and the safety of packages containing nuclear materials.⁸⁴ The origin of the IAEA’s nuclear safeguard regime is found in article 3 of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT).⁸⁵ Article 3 requires each state party “to accept safeguards, as set forth in an agreement to be negotiated and concluded with the . . . [IAEA’s] safeguards system”⁸⁶

Though NPT article 3 generally contemplates bilateral inspection and confirmation agreements, it also requires compliance with multilateral safeguard agreements. The 1979 Convention on Physical Protection of Nuclear Material imposes the duty to safe-

82. North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, para.77 (Feb. 20, 1969); Statute of the International Court of Justice, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, art. 38(1)(b).

83. See generally John M. Macdonald, *Appreciating the Precautionary Principle as an Ethical Evolution in Ocean Management*, 26 OCEAN DEV. & INT’L L. 255, 255-56, 262-263 (1995).

84. Alan E. Boyle, *Nuclear Energy and International Law: An Environmental Perspective*, 30 BRIT. Y.B. INT’L L. 257, 261-66 (1989) (discussing IAEA’s function to ensure health and safety in every aspect of the use of nuclear energy) [hereinafter Boyle, *Nuclear Energy*].

85. Treaty on the Non-Proliferation of Nuclear Weapons, art. 3, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 169 (entered into force Mar. 5, 1970), available at <http://www.un.org/events/npt2005/npttreaty.html>.

86. *Id.* art. 3(1). Though article 3 only explicitly requires non-nuclear-weapon State Parties to submit to safeguard agreements, all five nuclear-weapon State Parties have voluntarily submitted to these agreements. *Id.*

guard radioactive materials loaded on vessels.⁸⁷ Article 3 of the physical protection convention provides:

Each State Party shall take appropriate steps . . . consistent with international law to ensure as far as practicable that, during international nuclear transport . . . on board a ship or aircraft under its jurisdiction insofar as such ship or aircraft is engaged in the transport to or from that State, is protected at the levels described in Annex I.⁸⁸

Annex I provides requirements for physical protection of Category I⁸⁹ nuclear material during transport. These include:

[P]rior arrangements among sender, receiver, and carrier, and prior agreement between natural or legal persons subject to the jurisdiction and regulation of exporting and importing States, specifying time, place and procedures for transferring transport responsibility; . . . [shipment must be] under constant surveillance by escorts and under conditions which assure close communication with appropriate response forces.⁹⁰

The physical protection convention, however, does not require prior notification to or authorization from transit states during their voyage. Article 6 provides that “States Parties shall not be required by this Convention to provide any information which they are not permitted to communicate pursuant to national law or which would jeopardize the security of the State concerned or the physical protection of nuclear material.”⁹¹

Another IAEA convention that touches the issue of safeguards for transport of nuclear materials is the 1997 Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management.⁹² Providing the only guidance on the subject, article 27 of the convention provides: “transboundary

87. Physical Protection Convention, *supra* note 6.

88. *Id.* art. 3.

89. *Id.* Category I nuclear materials are defined as 2 kg or more of Plutonium, 5 kg or more of Uranium-235, or 2 kg or more Uranium-233. *Id.* Annex II.

90. *Id.* Annex I, 2(a), (b).

91. *Id.* art. 6(2).

92. Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, Dec. 24, 1997, *available at* <http://www.iaea.org/Publications/Documents/Infocircs/1997/infocirc546.pdf>.

movement through States of transit shall be subject to those international obligations which are relevant to the particular modes of transport utilized.”⁹³

In addition to the above conventions, the IAEA also provides non-mandatory recommendations for the safeguarding of transboundary shipments of nuclear material. The first of these is the above-mentioned IAEA Code of Practice on the International Transboundary Movement of Radioactive Waste.⁹⁴ Though this code provides that every state has the right to deny passage to shipments of nuclear materials, it later states that the code is subject to the rules of the UNCLOS and customary international law.⁹⁵ As discussed above in Section Three, these two statements are mutually exclusive.

Lastly, IAEA Regulations for the Safe Transport of Radioactive Material provide detailed standards for packaging and shipping requirements in the transportation of radioactive materials.⁹⁶ It establishes a complicated bilateral and multilateral approval system to determine which shipments of nuclear materials require prior authorization from transport states.⁹⁷ Though these regulations do require prior notification and authorization for shipments of fissile material over a specified indexed amount, the standards for ocean shipments are much less strict than land shipments,⁹⁸ and have many exceptions including the common national security exception.⁹⁹

93. *Id.* art. 27(1)(ii).

94. Int'l Atomic Energy Agency Code of Practice on the International Transboundary Movement of Radioactive Waste, IAEA Res. GC(XXXIV)/RES/530 (Nov. 13, 1990), available at <http://www.iaea.org/Publications/Documents/Infcircs/Others/inf386.shtml> (last visited Nov. 22, 2005) [hereinafter IAEA Code of Practice] (providing "[i]t is the sovereign right of every State to prohibit the movement of radioactive waste into from or through its territory." 3. Basic Principles, International Transboundary Movement (1)).

95. *Id.* at n.2.

96. IAEA, REGULATIONS FOR THE SAFE TRANSPORT OF RADIOACTIVE MATERIAL, No. ST-1 (IAEA ed. 1996 ed.), available at http://www-pub.iaea.org/MTCD/publications/PDF/Pub1225_web.pdf.

97. *Id.* at 194-198.

98. *Id.* at 116-17. Paragraph 820(c) states:

Multilateral approval shall be required for: . . . (c) the shipment of packages containing fissile materials . . . Excluded from this requirement shall be shipments by seagoing vessels, if the sum of the critical safety indexes does not exceed 50 for any hold, compartment or defined deck area and the distance of 6 m between groups of packages or overpacks.

Id.

99. *Id.* at 194-98.

B. IMO Safeguards

The IMO regulations that deal with the transport of ultra-hazardous materials on ocean going vessels are found in the International Maritime Dangerous Goods Code (IMDG Code).¹⁰⁰ Within the IMDG Code are regulations that specifically deal with the transport of nuclear materials: the INF Code.¹⁰¹ Both of these codes are now mandatory and are found as amendments to the SOLAS convention.¹⁰²

The INF Code incorporates many of the above IAEA regulations and provides mandatory safety regulations for the shipment of nuclear materials. Its primary concern is the packaging of radioactive materials and the construction, design, and staffing of the ships that transport them. The INF Code does not, however, address notification or approval of coastal states of shipments or emergency response plans, though these topics are being considered for adoption.¹⁰³ Several commentators have expressed concern that the INF Code's reliance on design and packaging safeguards are not sufficient for the dangers these cargos present to coastal states.¹⁰⁴

V. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

With regard to all things related to the ocean, UNCLOS is nearly universally considered the controlling body of law. It is for this reason that the convention is often referred to as "the constitution for the oceans."¹⁰⁵ In this section, however, we will limit scope of the discussion to the laws regulating the right of innocent passage, including those specifically for ships transporting nuclear

100. IMO, INTERNATIONAL MARITIME DANGEROUS GOODS (IMDG) CODE pmb. (2002), (including Amendment 31-02 of May 2002, which makes the IMDG Code mandatory except for certain recommendatory provisions).

101. INF Code, *supra* note 54.

102. SOLAS, *supra* note 55.

103. IMO, *Main Conclusions of the Second Session of the Joint IAEA/IMO/UNEP Working Group on the Safe Carriage of Irradiated Nuclear Fuel (INF) at Sea* (Apr. 26-30, 1993), IMO Secretariat Note to the 62nd Sess. of the Maritime Safety Committee, Doc. MSC 62/16/1 (1993).

104. See Robert Nadelson, *After MOX: The Contemporary Shipment of Radioactive Substances in the Law of the Sea*, 15 INT'L J. MARINE & COASTAL L. 193, 244 (May 2000) [hereinafter Nadelson, *After MOX*]. See also Van Dyke, *Regime*, *supra* note 9, at 77, 84.

105. United Nations Open-ended Informal Consultative Process established by the General Assembly in its resolution 54/33 in order to facilitate the annual review by the Assembly of developments in ocean affairs, third meeting, ¶ 2, (New York, Apr. 8-15, 2002), available at http://www.un.org/Depts/los/consultative_process/3rdMeetingStatements.htm.

materials, and the coastal State's right to protect its marine environment.

To begin with, it is important to note that "innocent passage" is somewhat different than "freedom of navigation" as defined in article 87 (freedom of navigation on the high seas) and article 56 (freedom of navigation in the EEZ - which incorporates the definition of article 87).¹⁰⁶ Freedom of navigation on the high seas is one of the oldest and most fundamental principles of customary international law.¹⁰⁷ Ships on the high seas have exclusive control over their vessel and crew and thus their passage can not be suspended, except in certain limited circumstances where warships have the right to board vessels.¹⁰⁸

The right to freedom of navigation in the EEZ becomes somewhat murky, however, since these ships "shall comply with the laws and regulations adopted by the coastal State . . ." with regard to environmental protection.¹⁰⁹ Therefore, within the EEZ there is somewhat of a jurisdictional conflict between a foreign-flagged vessel's freedom of navigation and a coastal state's environmental concerns. Article 59 states that these conflicts should be resolved through principles of equity.¹¹⁰ Nonetheless, it is without question that the right of ships to exercise freedom of navigation within the EEZ is no less than their right to innocent passage within a coastal state's territorial waters. Thus, it is important to understand the law of innocent passage and circumstances when coastal states can deny this passage.

A. *Innocent Passage*

The right of innocent passage is articulated in article 17, which states, "[s]ubject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage . . ." ¹¹¹ Article 19 defines "innocent passage" by stating that "[p]assage is innocent so long as it is not prejudicial to the peace, good order or

106. UNCLOS, *supra* note 1, arts. 56.1(a), 87.

107. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 191 (5th ed. 1998).

108. UNCLOS, *supra* note 1, arts. 92.1(a), 110.

109. *Id.* art. 58.3.

110. *Id.* art. 59.

111. *Id.* art. 17. Article 17 deals specifically with innocent passage in Territorial Seas. *Id.* Article 45 sets out that the right of innocent passage in international straits, where "[t]here shall be no suspension of innocent passage . . ." *Id.* art. 45(2). Article 52 provides for the right of innocent passage in archipelagic states, but provides that these states can "suspend temporarily in specified areas of its archipelagic waters the innocent passage of foreign ships if such suspension is essential for the protection of its security . . . [but] only after having been duly published." *Id.* art. 52(2).

security of the coastal State.”¹¹² Furthermore, article 24 clearly sets out that coastal states are not to hamper the right of innocent passage, providing coastal states “shall not . . . impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or . . . discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State.”¹¹³

The language in article 24 seems to be unequivocal. Article 25, however, provides that coastal states have the right to take measures to protect their coastline “to prevent passage which is not innocent.”¹¹⁴ Article 19 lays out a list of activities where passage of a foreign ship shall be considered non-innocent, of which the only mention of environmental concern is a provision making passage non-innocent for “any act of willful and serious pollution”¹¹⁵ Seemingly, there is a presumption that peaceful shipping of nuclear materials would be considered an exercise of innocent passage as long as the intent to voyage was not to cause serious pollution.

Under article 25, however, a coastal state may “suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, . . .” and only after such suspension has been “duly published.”¹¹⁶ The qualifying language “in specified areas” in this article seems to contemplate limited zones of special environmental concern, or areas of military concern, and does not seem to provide a blanket right for coastal states to suspend innocent passage from the entire territorial sea as was seen in the controversies in part two of this paper.

Most relevant to the topic of this paper are the articles that specifically deal with ships carrying nuclear materials: articles 22 and 23. Article 22 provides that coastal states may require ships carrying nuclear materials to use “sea lanes and traffic separation schemes” when exercising the right of innocent passage through their territorial seas.¹¹⁷ It does not, however, allow coastal states to suspend innocent passage for these ships. Article 23 states that “ships carrying nuclear . . . substances shall, when exercising the right of innocent passage . . . carry documents and observe *special*

112. *Id.* art 19(1).

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

114. *Id.* art. 25(1).

115. *Id.* art. 19(2)(h).

116. *Id.* art. 25(3).

117. *Id.* art. 22(1).

precautionary measures established for such ships by *international agreements*.”¹¹⁸

Presumptively, under the provisions of article 23, as long as a ship follows the “special precautionary measures” coastal states cannot deny innocent passage. But what are these “special precautionary measures” and which “international agreements” does this article refer to? This language might suggest hope for the advocates of the precautionary principle in that they may contemplate international agreements incorporating it. This, however, is not the case. The language “international agreements” in article 23, is a term of art specifically contemplating IMO agreements, and most importantly the INF Code.¹¹⁹

B. Protection of the Marine Environment

Part XII of UNCLOS deals with the protection of the marine environment. Article 194 provides that states shall take all measures necessary “to prevent, reduce and control pollution of the marine environment from any source”¹²⁰ Paragraph four of this article, however, conditions this right by providing that “States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.”¹²¹

Article 211 addresses the specific issue of measures to prevent pollution from vessels, providing:

States, acting through the competent international organization or general diplomatic conference, shall establish international rules and standards to prevent . . . pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routing systems designed to minimize the threat of accidents which might cause pollution¹²²

118. *Id.* art. 23 (emphasis added).

119. *See* Competent or relevant international organizations under the United Nations Convention on the Law of the Sea, reprinted in 31 LAW SEA BULL. 79, 81 (1996), available at http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletinE31.pdf [hereinafter UNCLOS Competent International Organizations]; INF Code, *supra* note 54.

120. UNCLOS, *supra* note 1, art. 194(1).

121. *Id.* art. 194(4).

122. *Id.* art. 211(1).

In this provision, however, we once again find qualifying language stating that coastal states shall “not hamper innocent passage of foreign vessels.”¹²³ Notice that this article does not provide that coastal states themselves may establish rules regarding prevention of vessel pollution, but instead specifically requires states to act “through the *competent international organization* or diplomatic conference.”¹²⁴ This language is a term of art and specifically contemplates states working multilaterally through the IMO to establish such rules and standards.¹²⁵ Thus, one can presume that any enactment of the precautionary principle in domestic laws, as contemplated in Section Three of this paper, would be suspect under this provision.

Article 221 gives coastal states enforcement mechanisms to avoid pollution arising from maritime casualties. It provides:

Nothing in [Part XII] shall prejudice the right of States, pursuant to international law, *both customary and conventional*, to take and enforce measures *beyond the territorial sea* proportionate to the *actual or threatened damage* to protect their coastline or related interests, including fishing, from pollution or *threat of pollution* following upon a maritime casualty or *acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences*.¹²⁶

This article provides the most concrete example yet of a justification within UNCLOS of a coastal state to use measures to prevent a ship carrying nuclear materials from coming within its territorial waters or EEZ. Notice that authority for state action under this article is justified under both customary and conventional international law. What is meant by customary law here? Some scholars have suggested that this language is in reference to earlier conventions on intervention on the high seas that use similar language as that found in article 221, and have achieved customary status.¹²⁷

123. *Id.* art. 211(4).

124. *Id.* art. 211(5).

125. See UNCLOS Competent International Organizations, *supra* note 119, at 87 (emphasis added).

126. UNCLOS, *supra* note 1, art. 221(1) (emphasis added).

127. See R. R. CHURCHILL & A. V. LOWE, *THE LAW OF THE SEA* 262 (2nd ed., Manchester University Press 1988). See also Nadelson, *After MOX*, *supra* note 104, at 205, n.68.

For example, after the 1969 International Convention Relating to Intervention on the High Seas¹²⁸ was negotiated, a 1973 protocol was adopted relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other than Oil.¹²⁹ Article 1 of this protocol authorizes coastal states to protect coastal marine resources by taking any necessary measures on the high seas to prevent or mitigate “grave and imminent danger to their coastline or related interests from *pollution or threat of pollution* by substances other than oil following upon a maritime casualty *or acts related to such a casualty, which may reasonably be expected to result in harmful consequences.*”¹³⁰

Notice also that article 221 deals with both actual or “threatened damage” by maritime casualty “or acts relating to such a casualty.”¹³¹ Commentators such as Van Dyke have suggested that this article gives coastal states flexibility to prevent ultrahazardous materials from passing through their waters without certain precautions. Van Dyke writes:

Concerned coastal nations might view “acts relating to such a casualty” as including foreseeable risks created by shipments of ultrahazardous cargoes without proper advance consultation, creation of emergency contingency plans, and liability regimes, and hence might view this provision as authorizing intervention to block such shipments. If nations with flag state jurisdiction do not fulfill their obligations to “take adequate steps to control and regulate sources of serious environmental pollution or transboundary harm within their territory or subject to their jurisdiction,” then nations threatened by such lack of protective action will inevitably act to protect their threatened coastal resources.¹³²

Lastly, the discussion in Section Two of this paper described the 1995 controversy of the voyage of the *Pacific Pintail*, in which it was stated that the Chilean Maritime Authority cited the pre-

128. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Nov. 29, 1969, 26 U.S.T. 765, 9 I.L.M. 25.

129. Protocol Relating to Intervention on the High Seas in Cases of Substances Other than Oil, Nov. 2, 1973, 13 I.L.M. 605.

130. *Id.* art. 1(1) (emphasis added).

131. UNCLOS, *supra* note 1, art. 221(1).

132. Boyle, *supra* note 84, at 269. See also Van Dyke, *Regime*, *supra* note 9, at 102; Nadelson, *After MOX*, *supra* note 104, at 206.

cautionary principle as justification for denying the ship passage.¹³³ According to Van Dyke, the Chilean Maritime Authority also cited UNCLOS article 234.¹³⁴ This article states:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.¹³⁵

Article 234 provides strong support for coastal states to deny the right of innocent passage in these ice-covered areas. Thus, this is one of the very few exceptions to the general rule that states cannot deny the right of innocent passage.

In summary, one can glean from the above UNCLOS provisions that despite the fact that coastal states have the right to take measures to protect their marine environment, this right generally does not supersede the right of foreign flag state vessels to exercise innocent passage through coastal state territorial waters or freedom of navigation within their EEZ. This determination is supported by the writings of many scholars of the subject.¹³⁶ The only exceptions to this right would seem to be if the ship's passage was in fact non-innocent by intending to seriously pollute the waters of a coastal state, or if the ship was in violation of IMO regulations with regard to the storage and transport of nuclear materials, or if it posed an environmental threat to an ice-covered area. There is an interesting debate regarding Article 221's customary rights to take measures in the case of maritime "casualty or acts relating to such a casualty."¹³⁷ The language of this article, however, provides that states can only take measures against such ships if they are "reasonably . . . expected to result in major harmful conse-

133. See *supra* text accompanying notes 16 through 25.

134. Van Dyke, *Regime*, *supra* note 9, at 88 & n.134.

135. UNCLOS, *supra* note 1, art. 234.

136. See generally Fidell, *Maritime Transportation*, *supra* note 42 (providing a thorough examination on the thoughts of scholars on this subject). See also Raul A. F. Pedrozo, *Transport of Nuclear Cargoes by Sea*, 28 J. MAR. L. & COM. 207 (1997).

137. UNCLOS, *supra* note 1, art. 221(1).

quences.”¹³⁸ Thus, if a ship has satisfied the inspection regime of the IMO with regard to the transport of nuclear materials it most likely would not be reasonable to “expect” harmful consequences, even though a possibility of such consequences may exist.

VI. DISCUSSION

From the above analysis of the precautionary principle, IAEA and IMO safeguards regime, and the UNCLOS provisions on innocent passage and environmental protection, is it clear that there is a clash of international law doctrines. It would be difficult to argue that at this stage of development of the precautionary principle that its requirements are customary law or that they supersede UNCLOS or IMO regulation on the transport of nuclear materials at sea. Never the less, there is still the problem of state practice. There are more than a handful of states that prohibit the passage of these ships. Therefore, this last section will discuss how this dispute can be equitably resolved.

To begin with, Jon Van Dyke, has provided a wellspring of valid suggestions for the international community to resolve this issue. His most pragmatic solution is for the IMO to adopt precautionary principles in the INF Code.¹³⁹ This solution is consistent with the procedure set out in UNCLOS article 211 where coastal states would work through the IMO (“the competent international organization or general diplomatic conference”) to create new international rules for protecting the marine environment from the harm of ships. The positive aspect of this recommendation is that it is the method for changing the rules recommended by UNCLOS, and if (or when) the requirements of the precautionary principle are incorporated into the INF Code they become mandatory regulations. This would at one time change the rules for everyone in the shipping community, and thus would be a very efficient solution. The drawback of this approach is that change at an international organization is slow. Van Dyke made this recommendation in 1996, nearly 10 years ago, yet little progress has been made at the IMO to incorporate the precautionary principle.

Van Dyke’s second proposal is to create regional regimes to enforce the precautionary principle.¹⁴⁰ This is an interesting option since this is what in fact is taking place as has been seen in the Bamako and Waigani Conventions and from the actions of the Caribbean nations in their declaration of a nuclear-free zone. The

138. *Id.*

139. Van Dyke, *Applying, supra* note 18, at 388.

140. Van Dyke, *Regime, supra* note 9, art. 8, at 106-07.

drawback to this approach is that it creates conflicting bodies of international laws and standards. This conflict would not only be between UNCLOS/IMO and the regional regimes, but would also be between the regional regimes themselves. This can already be seen in the different standards between the Bamako and Waigani Conventions with regard to nuclear materials. Carried to its logical end, this solution would lead to inefficiencies in the shipping community that would have to comply with each of the different regimes' rules as well as the IMO regulations. Furthermore, it is conceivable to suspect that this solution would lead to more legal (or actual) conflict between shipping and coastal states, not less.

Van Dyke also provides a third recommendation: coastal states should bring a case against the states shipping nuclear materials in the International Tribunal for the Law of the Sea (ITLOS).¹⁴¹ This would be the most efficient solution for resolving the currently conflicting laws in that it would bring about the most clarity in the least amount of time. It could also be a double-edged sword for proponents of the precautionary principle. One can imagine the judges ruling in favor of the laws as set out in UNCLOS and the INF Code since they are the more established and clearer standards of international law. On the other hand, ITLOS could use its equity power to require the IMO to adopt the precautionary principle in order to calm the valid security concerns of coastal states and end the controversy once and for all.

Another interesting suggestion is the creation of a "universal sea lane" for the shipment of nuclear materials.¹⁴² This solution would maintain the status quo regarding the lack of clarity in international law, but would also create an interim option to facilitate shipping while allowing coastal states to prohibit passage. Though this is a novel idea, in practice it would seem to be a difficult undertaking to negotiate such an agreement between shipping and coastal states. To begin with, where would this sea lane be located? Coastal states would likely all have the same opinion for such an agreement: we support it as long as the route doesn't pass through our waters. This 'not in my back yard' mentality would likely stall such an agreement indefinitely. Furthermore, shipping states would most likely be wary of such an idea because of their interest in secrecy and unpredictability to protect national security. The use of a single sea lane would conceivably create predict-

141. Van Dyke, *Regime*, *supra* note 9, at 108.

142. Lawrence Marin, *Oceanic Transportation of Radioactive Materials: The Conflict between the Law of the Seas' Right of Innocent Passage and Duty to the Marine Environment*, 13 FLA. J. INT'L L. 361, 375-377 (2001).

able patterns of transport that could be exploited by pirates and/or terrorists groups.

VII. CONCLUSION

In light of the recent controversies in the international shipping of nuclear materials, and upon reviewing the divergent hard and soft international law within this area, it is clear that there is a conflict between the quickly evolving field of international environmental law and the established system surrounding the international law of the sea. How to solve this problem, however, is not clear at present. The existing nuclear safeguards and law of the sea regimes provides binding legal provisions and a system of regulation for the shipment of nuclear materials. Furthermore, it seems apparent that the denial of the right of innocent passage by coastal states to ships carrying nuclear material is, except in limited circumstances, in violation of the existing law of the sea regime.

It also seems apparent, however, that the drafters of UNCLOS may not have foreseen the scale shipments would ultimately take or the potential danger that they pose. The tremendous amount of damage that would occur in the event that a ship like the *Pacific Pintail* were to be involved in a terrorist attack or major accident with radioactive effect is almost beyond imagination. In today's energy starved world, however, these shipments are most likely going to be a permanent part of the landscape of international shipping, and thus will have to be dealt with in a safe and effective manner.

The requirements of the precautionary principle seem to be a sensible way to ensure the safety of nuclear shipments in the future, though opponents would likely argue that they would create inefficiencies. If the precautionary principle is indeed a "developing custom," it is only a matter of time before these requirements will become standard practice. Therefore, it may be in the best interests of shipping states to embrace the requirements of the precautionary principle now and find ways to overcome the inefficiencies. If shipping states wait until being forced to comply with the requirements down the road, it will only come at greater expense.

DECENTRALIZED PROLIFERATION OF INTERNATIONAL JUDICIAL BODIES

SANG WOOK DANIEL HAN*

I.	INTRODUCTION.....	101
II.	THE PEACEFUL DISPUTE SETTLEMENT JUDICIAL BODIES AND THE TREND OF PROLIFERATION.....	102
III.	THE ADVANTAGES OF THE PROLIFERATION.....	103
IV.	THE DISADVANTAGES OF THE PROLIFERATION.....	110
V.	CASE ANALYSIS.....	112
	A. <i>Southern Bluefin Tuna Case</i>	112
	B. <i>Swordfish Dispute</i>	114
	C. <i>MOX Plant Case</i>	115
VI.	RESPONSE AND DISCUSSION.....	117
VII.	THEORETICAL PERSPECTIVES.....	118
VIII.	RECOMMENDATIONS AND CONCLUSION.....	120

I. INTRODUCTION

The International Court of Justice (ICJ),¹ several decades after its establishment, is not only facing a growing number of disputes,² but also a growing number of judicial bodies in international law. Detailed descriptions of the ICJ and other judicial bodies as well as the reasons for the proliferation and decentralization trend³ are outside the scope of this article. Instead, the article will discuss the arguments for and against a decentralized proliferated system of international dispute settlement, especially with regard to the ICJ, the International Tribunal on the Law of the Sea (ITLOS) and the World Trade Organization (WTO) Dispute Settlement Body.

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1. The ICJ is the successor of the Permanent International Court of Justice.

2. See Alan Boyle, *The Proliferation of International Jurisdictions and its Implications for the Court*, in THE INTERNATIONAL COURT OF JUSTICE: PROCESS, PRACTICE AND PROCEDURE 124, 124-25 (Derek Bowett et al. eds., 1997); Richard B. Bilder, *International Dispute Settlement and the Role of International Adjudication*, 1 EMORY J. INT'L DISP. RESOL. 131, 141 (1987) (explaining reasons behind insufficiency of arbitral tribunal as an alternative to international judiciaries).

3. See Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 729-38 (1999) (providing reasons behind occurrence of the proliferation trend).

The discussion will also involve analysis of three famous cases — *Southern Bluefin Tuna*, *Swordfish Dispute*, and *MOX Plant* — including the ECJ decision of May 2006. The article will then offer different theoretical perspectives on the issue and endeavour to make some necessary recommendations.

II. THE PEACEFUL DISPUTE SETTLEMENT JUDICIAL BODIES AND THE TREND OF PROLIFERATION

The fundamental question that underlies the subject of international law is whether the international legal order is a legal system, a loose agglomeration or anarchy. This article proceeds on the basis that it is, and ought to be, viewed as a legal and relatively coherent system.⁴

The Preamble of the United Nations (UN) Charter requires international disputes to be settled by peaceful means under the principles of justice and international law, and Article 279 of the United Nations Convention on the Law of the Sea 1982 (UNCLOS) expressly agrees to these principles.⁵ This fundamental objective ought to be kept in mind during the analysis of the proliferation of judicial bodies whose purpose is to carry out this particular objective.

In the 1990s “alone, nine international judicial tribunals and nine quasi-judicial . . . bodies” were created.⁶ The main incumbent of international judicial bodies is the ICJ, which is the principal judicial organ of the UN under Article 92 of the UN Charter.⁷ Two of the most notable new entrants into the field are the ITLOS, which was established under the framework of the UNCLOS to hear the Law of the Sea disputes concerning the interpretation and application of the UNCLOS and other related treaties, and the WTO Dispute Settlement Body, which deals with disputes in and arising from the WTO and its instruments. In regard to the ITLOS,⁸ being a party to the UNCLOS constitutes acceptance of the

4. It is not within the scope of this article to determine this issue in any great detail.

5. However, there is no legal obligation for states to seek peaceful settlement of disputes. See Richard B. Bilder, *An Overview of International Dispute Settlement*, in INTERNATIONAL DISPUTE SETTLEMENT 3, 9 (Mary Ellen O’Connell ed., 2003) [hereinafter *Overview*]. Whether every dispute is required to be resolved is a mute point. *Id.* at 14. But see ANTONIO CASSESE, INTERNATIONAL LAW 217 (2001).

6. Shane Spelliscy, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 COLUM. J. TRANSNAT’L L. 143, 144 (2001).

7. UN Charter art. 92.

8. See John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT’L L.J. 109, 112 (1998) (explaining possible functions of the ITLOS).

ITLOS's jurisdiction by the state parties.⁹ However, the UNCLOS offers the state parties the choice of four forums to hear disputes, which include the ITLOS and the ICJ.¹⁰ On the other hand, the WTO Dispute Settlement Body adjudicates the disputes primarily in international trade law, placing strong emphasis on the efficiency of the judgments.¹¹

III. THE ADVANTAGES OF THE PROLIFERATION

Article 95 of the UN Charter states: "Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future."¹²

The Charter clearly envisaged and allowed for the proliferation of, or at least the development of, international judicial tribunals. Furthermore, the fact that the state parties and the members of the UNCLOS and the WTO have accepted the establishment and the development of their own tribunals highlights the political support for proliferation rather than unification under the ICJ, or vesting the appellate standing in the ICJ.¹³ It provides empirical evidence of the support behind the proliferation trend among the international community.

There are numerous advantages stemming from the proliferation of international judicial bodies. First, with the increasing availability and operation of international judicial bodies, it is more likely that states will resort to international adjudications,¹⁴ thereby assisting the achievement of the fundamental objective—peaceful dispute settlement.¹⁵ Also, the more frequent usage of the tribunals may mean growing respect for international law and growing deterrence effects of the law, which in turn would strengthen the international legal system as a whole.¹⁶ For example, from the ITLOS's opening in 1996 to 2002, ten of the eleven

9. United Nations Convention on the Law of the Sea, arts. 287, 288, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397, 509-10 [hereinafter UNCLOS].

10. Boyle, *supra* note 2, at 126.

11. See CASSESE, *supra* note 5, at 224-25 (procedure of the WTO Dispute Settlement Body); John Merrills, *The Means of Dispute Settlement*, in INTERNATIONAL LAW 529, 544 (Malcolm D. Evans ed., 2003); Bernhard Jansen, *GATT/WTO Dispute-Settlement Mechanisms: An Introduction*, in REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA, 151, 154 (Malcolm D. Evans ed., 1998).

12. U.N. Charter art. 95.

13. Noyes, *supra* note 8, at 177.

14. Boyle, *supra* note 2, at 129.

15. Valerie Epps, *Resolution of Claims to Self-Determination: The Expansion and Creation of Dispute Settlement Mechanisms*, 10 ILSA J. INT'L & COMP. L. 377, 381-82 (2004).

16. Bilder, *supra* note 2, at 168-69.

cases it adjudicated concerned fisheries, whereas before the introduction of the ITLOS, international law witnessed only three fishery cases—two in arbitration and only one in the ICJ.¹⁷ Some incoherency or uncertainty in international law as a result of the proliferation may be an inevitable cost for the progress towards such a fundamental objective.¹⁸

The proliferation signals the increasing acceptance of international adjudication and international law by states and citizens.¹⁹ Also, more guidelines will be available to states for understanding international law when more tribunals issue more judgments and reports.²⁰ Furthermore, with a correlating increase in its usage, the disputes may be condensed from highly-charged political assertions into factual and legal claims, and may lead to more of an understanding between the parties in political negotiations,²¹ which again would help the international community progress towards the peaceful settlement of disputes.

Second, the proliferation may be beneficial for international law in general, because the incumbent ICJ cannot deal with every international dispute efficiently and effectively. Some developed states are unwilling to utilize the ICJ as exemplified in France,²² and as of 2001 only 63 of 189 states recognized the compulsory jurisdiction of the ICJ.²³ The ICJ is already experiencing a heavy workload²⁴ and it lacks funding to process all adjudications.²⁵ As

17. Ted L. McDorman, *An Overview of International Fisheries Disputes and the International Tribunal for the Law of the Sea*, in THE CANADIAN YEARBOOK OF INTERNATIONAL LAW 119, 120 (D.M. Mcrae et al. eds., 2002).

18. See Boyle, *supra* note 2, at 129; Thomas A. Mensah, *The Place of the International Tribunal for the Law of the Sea in the International System for the Peaceful Settlement of Disputes*, in THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 21 (P. Chandrasekhara Rao et al. eds., 2001); Jonathan I. Charney, *Comment: The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69, 71 (1996); Spelliscy, *supra* note 6, at 150-51.

19. Charney, *supra* note 18, at 74.

20. Bilder, *supra* note 2, at 150.

21. Nsongurua J. Udombana, *An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?*, 28 BROOK. J. INT'L L. 811, 812-13 (2003).

22. Boyle, *supra* note 2, at 129.

23. Udombana, *supra* note 21, at 823.

24. See Rosalyn Higgins, *Remedies and the International Court of Justice: An Introduction*, in REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA 1, 2-5 (Malcolm D. Evans ed., 1998) (describing problems that the ICJ experiences due to heavy workload).

25. Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697, 703 (1999) [hereinafter *Impact*]; Gavan Griffith, *International Dispute Resolution—The Role of the International Court of Justice at the Cusp of the Millennium*, in A CENTURY OF WAR AND PEACE: ASIA-PACIFIC PERSPECTIVES ON THE CENTENARY OF THE 1899 HAGUE PEACE CONFERENCE 59, 74 (Timothy L. H. McCormack et al. eds., 2001).

for the ICJ's procedure, it typically takes two years to file an application, twenty to thirty months for oral hearing and four to five months for judgments to be issued.²⁶ This cumbersome process and heavy workload of the ICJ are obstacles to state parties bringing their disputes before the prime judicial organ of the UN. However, because of the proliferation, recently established bodies present new options for parties and may lessen the heavy workload of the ICJ. For example, the ITLOS can issue a quick provisional measure under paragraphs one to four of Article 290 of the UNCLOS.²⁷ The WTO also provides a variety of options for the parties: the parties themselves can agree on a panel of three, the cases are to be decided in six months, and the standing Appellate Body is available within the Dispute Settlement Body.²⁸ Hence, the proliferation encourages parties who seek a quick resolution to bring their disputes before judicial bodies for a possible peaceful settlement.

Third, the proliferation allows wider access to international judicial bodies for private parties and international organizations. The ICJ deals with neither private parties nor international organizations because it is tied down by the state-centered "Westphalian international legal order."²⁹ Although the ICJ has advisory jurisdiction over an international organization, the ICJ bears a conceptual difficulty in dealing with an individual because it is unclear whether the rights and duties under international law are applicable to an individual.³⁰ In practice, the state parties to the ICJ will not allow an individual to bring a case against states in the ICJ.³¹ However, because the new bodies were established in relatively modern times, they provide for international organizations and individuals to have access to the international dispute settlement regime.³² For example, access to both the ITLOS and the WTO Dispute Settlement Body are not confined only to state

26. Griffith, *supra* note 25, at 73. *See id.* at 78 (suggestions for increasing efficiency in the ICJ internal procedure).

27. *See* McDorman, *supra* note 17, at 146 (efficiency of the ITLOS).

28. Gerhard Liobl, *International Economic Law*, in *INTERNATIONAL LAW* 705-06 (Malcolm D. Evans ed., 2003).

29. *See* Higgins, *supra* note 24, at 1-2. In the "Westphalian international legal order," which emerged from the Peace of Westphalia in 1648 after the end of the Thirty Years War, states are the sole legitimate subjects and actors of international law. A. Claire Cutler, *Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy*, 27 *Rev. of Int'l Studies* 133, 134 (2001). State sovereignty is deemed as the fundamental ordering principle, *id.* at 135 (citing Hedley Bull, *The Anarchical Society: A Study of order in World Politics* (London: Macmillan, 1977)) and "positive acts of sovereign consent, evidenced explicitly in treaty law and implicitly in customary international law" provide a foundation for international law. *Id.* at 135.

30. *See* Higgins, *supra* note 24 at 1.

31. *Id.*

32. Mensah, *supra* note 18, at 30.

parties.³³ The ITLOS goes further and allows some limited access to individuals.³⁴ Even though the limited right of access to the ITLOS faces criticism for its very narrow scope,³⁵ there are other international judicial bodies that grant access to individuals,³⁶ and there is a high chance that a continuing proliferation movement will produce more judicial bodies that will give freer access for non-state parties to the justice system in the international legal context.

Fourth, international law in general may benefit from the proliferation movement because it offers more chances to develop its rules and principles. With more judicial bodies and adjudications available, more international issues and disputes will be resolved by the use of international law. International law will develop as a whole notwithstanding the risk of erosion of uniformity of law.³⁷ The new tribunals and judicial bodies provide ample opportunities to address the matters learnt and improve from the past experience of the ICJ,³⁸ and the experiment and exploration of new areas and ideas in the international legal domain may be more frequent.³⁹ Moreover, the judgments and reports of these tribunals will provide more evidence to find contemporary international law.⁴⁰ A larger number of international judicial adjudications may lead not only to improvement in the quality of judgments and reports as different tribunal decisions can be compared and criticized,⁴¹ but also to the tribunals trying harder to issue better-reasoned judgments and reports.⁴²

Fifth, in response to a claim that the proliferation could lead to a risk of fragmentation of international law, the advocates for the

33. The WTO Dispute Settlement Body allows non-governmental organizations to submit written submissions on the disputes between Member States. See Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, 2-7, WT/DS58/R (Oct. 22, 2001); Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, 9-14, WT/DS135/AB/R (Mar. 12, 2001). See generally Asif H. Qureshi, *Extraterritorial Shrimps, NGOs and the WTO Appellate Body*, 48 INT'L & COMP. L. Q. 199 (1999); Gabrielle Marceau and Matthew Stilwell, *Practical Suggestions for Amicus Curiae Briefs before WTO adjudicating Bodies*, 4 J. INT'L ECON. L. 155 (2001).

34. UNCLOS, *supra* note 9, at Annex VI, art. 20.

35. ITLOS applies only to disputes "arising out of the interpretation or implementation of contractual obligations or acts or omissions of a party to a contract relating to activities in a defined 'Area.'" Romano, *supra* note 3, at 744-45.

36. The European Court of Human Rights is an example.

37. *Impact*, *supra* note 25, at 704.

38. Boyle, *supra* note 2, at 129.

39. Campbell McLachlan, *Reflections from the Practice of International Litigation*, in INTERNATIONAL LAW 15, 20 (Malcolm D. Evans ed., 2003); *Impact*, *supra* note 25, at 700.

40. Charney, *supra* note 18, at 74.

41. Spelliscy, *supra* note 6, at 152.

42. CASSESE, *supra* note 5, at 219-20.

proliferation argue that there will be an implied understanding that the decisions of different tribunals will not be in complete opposition to each other, but rather feed off each other and help international law in general to develop in a coherent way.⁴³ The advocates argue that ICJ opinions are respected by other tribunals.⁴⁴ For example, in the 1998 case on *EC Measures Concerning Meat and Meat Products (Hormones)*,⁴⁵ the Appellate Body of the WTO referred to the recent judgment of the ICJ in the *Gabcikovo-Nagymaros Project Case*⁴⁶ while dealing with the issue of whether the precautionary principle constitutes a part of general international law.⁴⁷ However, there is no guarantee that other tribunals will closely follow ICJ judgments.

It is also argued that because only the ICJ has general jurisdiction, only the ICJ may primarily deal with matters of general international law, which would minimize the risk of issuance of different opinions on such general topics.⁴⁸ This point raises a question about the exact scope of "general international law." It may be true that the ICJ never stood alone but has been standing together with ad-hoc tribunals and arbitrations before the beginning of the proliferation trend. However, the proliferation increased the risks of fragmentation because of the substantially heavier weight the newly established judicial bodies attract compared to the mere ad-hoc tribunals and arbitrations.

Another argument proliferation advocates rely on is that the new bodies have installed mechanisms to ensure some degree of coherency in international law. For example, by virtue of Article 282 of the UNCLOS, existing compulsory procedures under other treaties prevail over the ITLOS⁴⁹ and even when the parties have accepted the jurisdiction of the ITLOS under Article 287, the parties can still seek other tribunals to resolve the dispute.⁵⁰ The ITLOS is also keen on developing cooperation links with other judicial bodies.⁵¹ However, in my opinion, this particular Article

43. Boyle, *supra* note 2, at 130.

44. *Impact*, *supra* note 25, at 699.

45. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter EC Measures].

46. The *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 58-68 (Sept. 25).

47. EC Measures, *supra* note 44, at ¶ 123, n.93 quoted in Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791, 807 (1999).

48. *Impact*, *supra* note 25, at 705-06.

49. Boyle, *supra* note 2, at 126.

50. Mensah, *supra* note 18, at 25.

51. See David Anderson, *The International Tribunal for the Law of the Sea*, in REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA 71, 72-73 (Malcolm D. Evans ed., 1998) (identifying the close relationship between the UN and the ITLOS).

merely offers its parties a choice as to the selection of a tribunal. It still does not vitiate the risk of the ITLOS panel issuing a different view on a relevant legal topic from that of the ICJ or other judicial bodies.

There is a rather naïve belief among the advocates that because all the judicial members hold common views on the nature, role and importance of international law, they will share the standard method of treaty interpretation, resulting in minimal fragmentation.⁵² However, the fact that international lawyers share the same analytical skills and background may not provide sufficient assurance given the importance of the issue at hand. Often rhetoric and reality have a wide gap between them,⁵³ and a weakness of the advocates' belief is illuminated when one considers how a domestic legal community reaches different views and conclusions on many legal issues in the domestic sphere, despite their perceived common views and standard methods of interpreting the law.

Sixth, the proliferation of international judicial bodies is necessary to cope with the increasing trend of decentralization and the growing complexity of an international society. As international society grows more complex, international obligations are becoming more burdensome. The proliferation of international tribunals may help to efficiently control and implement those increasing number of obligations.⁵⁴ In my opinion, the effectiveness of tribunal judgments to spur the state parties to oblige with their duties or deter their breach is unclear, and hence this particular point may not be so strong.

Seventh, the proliferation has positive impacts on international law because new and developing areas in international law need specialized expertise.⁵⁵ For example, trade disputes are often complex as they usually involve diverse economic and political factors.⁵⁶ Also, the frequency and complexity of marine issues are rising, such as conservation and management of living resources, exploration of mineral resources, and pollution. The ITLOS manifests intent to ensure special expertise is utilized in some complex areas, such as compulsory jurisdiction of the ITLOS Seabed Disputes Chamber under the Part XI, Section 5, Article 187 of the UNCLOS.⁵⁷ Some critics argue that the narrow specialization of

52. Noyes, *supra* note 8, at 176.

53. Merrills, *supra* note 11, at 554.

54. Dupuy, *supra* note 46, at 795-96; Spelliscy, *supra* note 6, at 150.

55. Spelliscy, *supra* note 6, at 149.

56. Merrills, *supra* note 11, at 544.

57. UNCLOS, *supra* note 9, at art. 187.

judges may not be beneficial, but an answer is provided in an example of the Law of the Sea issues where judges cannot be narrow specialists because the issues often traverse over a wide area such as torts committed and contracts breached over the sea as well as traditional marine issues.⁵⁸

Lastly, the advocates argue that the proliferation helps establish regional tribunals that can handle regional problems, as exemplified by the Badinter Commission in Europe.⁵⁹ Local tribunals may understand local requirements better than general tribunals.⁶⁰ For example, in the *Asylum case*,⁶¹ the South American states complained “that the local tradition of asylum in an embassy was not properly understood by what was then a predominantly European” ICJ.⁶² However, in my opinion, the argument can go the opposite way, as a local court may be prejudicial and less objective in its approach to the case. For example, in the *Beagle Channel case*,⁶³ the counsel from both sides agreed that no judge or arbitrator should be from Latin America because the subject of the case was well-known locally and had been debated for more than eighty years between Chile and Argentina.⁶⁴

IV. THE DISADVANTAGES OF PROLIFERATION

58. Boyle, *supra* note 2, at 130.

59. Sir Robert Y. Jennings, *The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers*, in INTERNATIONAL DISPUTE SETTLEMENT 441 (Mary Ellen O’Connell ed., 2003).

60. See Udombana, *supra* note 21, at 814-16 (describing proliferation in Africa); Jennings, *supra* note 58, at 442.

61. *Asylum Case (Colom. v. Peru)*, 1950 I.C.J. 266, 277 (Nov. 20).

62. Jennings, *supra* note 58, at 442.

63. See Mark Laudy, *The Vatican Mediation of the Beagle Channel Dispute: Crisis Intervention and Forum Building*, in CARNEGIE COMMISSION ON PREVENTING DEADLY CONFLICT, available at <http://wwics.si.edu/subsites/ccpdc/pubs/words/11.pdf>.

64. Jennings, *supra* note 58, at 442.

The first disadvantage or risk stemming from the proliferation is conflicting jurisdiction. Conflicting jurisdiction is a situation where one party refers a case to one international judicial body and the other party refers the same case to a different international judicial body.⁶⁵ The possibility of overlapping jurisdiction between the ICJ and the ITLOS, or between different judicial bodies, may be significant, as the exact scope of Law of the Sea disputes, which the ITLOS purports to deal with, is ambiguous.⁶⁶ UNCLOS leaves some room for the possibility of conflicting jurisdiction. If the dispute concerns the interpretation or application of an international agreement, and if the agreement confers jurisdiction to the Tribunal with regard to the particular dispute, then the ITLOS can deal with a case that does not require the interpretation or application of the UNCLOS.⁶⁷ For the ITLOS to adjudicate the case, it is sufficient for the dispute to relate to the wide purposes of the UNCLOS under paragraph two of Article 288 of the UNCLOS.⁶⁸ Also, under Article 293 of the UNCLOS, courts “with jurisdiction under the Convention are to apply both its terms ‘and other rules of international law not incompatible with the Convention.’”⁶⁹ Hence, the ITLOS is capable of dealing not only with the Law of the Sea, but also other rules of international law.⁷⁰

The ITLOS provides some safeguards against this concern. “Article 287 of the UNCLOS grants jurisdiction to an arbitral tribunal unless the parties agree on another forum, and Articles 290 and 292 vest the ITLOS with residual compulsory jurisdiction with respect to provisional measures and prompt release cases.”⁷¹

A situation of conflicting jurisdiction creates confusion and uncertainty as to who ought to adjudicate the case, and may further lead to the following two disadvantages: forum shopping and fragmentation. The state parties may indulge in forum shopping between different judicial bodies.⁷² It may lead to excessive adjudications thereby incurring unnecessary waste in terms of time and cost. However, some degree of forum shopping is common in transnational litigation, and it may be reasonably expected that

65. PHILIPPE SANDS & PIERRE KLEIN, *BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS* ¶ 13-203 (2001).

66. Boyle, *supra* note 2, at 127.

67. See UNCLOS, *supra* note 9, at art. 288, ¶ 2.

68. See *id.*

69. Anderson, *supra* note 50, at 75.

70. *Id.*

71. Noyes, *supra* note 8, at 177.

72. Marianne P. Gaertner, *The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea*, 19 SAN DIEGO L. REV. 577, 593 (1982).

the relevant tribunal would refuse to hear the case if the case has already been adjudicated by another tribunal or given significant weight to that particular tribunal's opinions.⁷³ Also, forum shopping in a horizontal system of international law may not necessarily have a negative impact as long as the relevant judicial bodies keep their views on law coherent and intact. Moreover, the flip side of forum shopping may mean more diversity and options available for its users, and the prospect of a series of legal battles in different forums may persuade the relevant parties to seek diplomatic peaceful resolution of a dispute.

The third and most serious disadvantage to international law as a result of the proliferation of judicial bodies is the fragmentation of international law with each judicial body issuing multiple interpretations on the same legal point.⁷⁴ The problem lies in the fact that proliferation has occurred without any structure guiding the relationship between these entities.⁷⁵ Each tribunal exists formally distinct from each other without any hierarchy or form of relationship.⁷⁶ Hence, if each tribunal interprets or enunciates the law differently from each other, the very essence of a normative system of law may be lost. For example, under Article 293 of the UNCLOS, "[i]t seems . . . that . . . the parties could agree to ask [the ILOS] to decide a case on the basis of customary international law,"⁷⁷ and a WTO instrument expressly states that the Dispute Settlement Body is to follow customary international law.⁷⁸ Therefore, there may be a serious risk of other judicial bodies finding and interpreting customary international law differently from that of the ICJ.

There are two cases that support the existence of this particular risk. The first case, *Loizidou v. Turkey*,⁷⁹ deals with a jurisdictional point, where the Strasbourg Court of Human Rights, examining the optional clause in the relevant Convention, which was word for word based on Article 36(2) of the Statute of the ICJ,

73. See Donald R. Rothwell, *Building on the Strengths and Addressing the Challenges: The Role of Law of the Sea Institutions*, 35 OCEAN DEVELOPMENT & INTERNATIONAL LAW, 131, 147 (2004) (suggesting the institution of a international forum non conveniens concept against international forum shopping).

74. See Martti Koskenniemi, Harvard Presentation on Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought, 6-7, (March 5, 2005), available at <http://www.valt.helsinki.fi/blogs/eci/PluralismHarvard.pdf> (discussing three types of fragmentation of international law).

75. Spelliscy, *supra* note 6, at 143.

76. *Id.* at 144-45.

77. Boyle, *supra* note 2, at 127.

78. Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, art. 3.2, Annex 2, MTN/FA II-A2.

79. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) 99 (1995).

reached a conclusion opposite from the ICJ on the issue of the possibility of the severance of a reservation made by the state parties.⁸⁰

The second example case is the *Tadic Case*⁸¹ by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY explicitly held that the ICJ was wrong about the law of state responsibility, which was enunciated by the ICJ in the *Nicaragua Case*.⁸² The ICTY “replaced the standard of ‘effective control’ as the rule governing the accountability of foreign states over [actions] . . . in civil war . . . with the wider standard of ‘overall control’.”⁸³ In doing so, the ICTY sought to increase the chance of high officials of the relevant state being prosecuted and punished for crimes committed by their government during a civil war.⁸⁴ These two cases reveal that some tribunals value improvement in the law as more important than the need for consistency with other tribunals’ views on the law.

V. CASE ANALYSIS

There are three valuable examples—*Southern Bluefin Tuna*, *Swordfish Dispute*, and *MOX Plant*—that portray the risks mentioned above. A brief outline of each case will be followed by its implications for a debate on the proliferation of international judicial bodies.

A. *Southern Bluefin Tuna Case*

*Southern Bluefin Tuna (SBT)*⁸⁵ demonstrates the risk of conflicting jurisdiction. *SBT* pitted jurisdiction of the ITLOS against jurisdiction of a dispute resolution regime under Article 16 of the Convention for the Conservation of Southern Bluefin Tuna (CCSBT).⁸⁶ When Australian and New Zealand brought their fellow CCSBT party, Japan, before the ITLOS seeking a provisional

80. Jennings, *supra* note 58, at 444-45.

81. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 137 (July 15, 1999).

82. *Id.*; Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 172-210 (June 27); Spelliscy, *supra* note 6, at 159-70. See Martti Koskenniemi, *What is International Law For?*, in *INTERNATIONAL LAW* 109 (Malcolm D. Evans ed., 2003).

83. Koskenniemi, *supra* note 73, at 6.

84. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 122 (July 15, 1999); Koskenniemi, *supra* note 73, at 6.

85. Southern Bluefin Tuna Case (Austl. & N.Z. v. Japan), Requests for Provisional Measures, 38 I.L.M. 1624, ITLOS, Case Nos. 3 and 4 (Order of Aug. 27, 1999), available at http://www.itlos.org/start2_en.html.

86. Convention for the Conservation of Southern Bluefin Tuna, May 10, 1993, 1819 U.N.T.S. 360.

measure against Japan, the ITLOS deemed *prima facie* jurisdiction existed.⁸⁷ However, a subsequent UNCLOS Arbitral Tribunal overturned the decision based on a jurisdictional point as it held that Article 16 of the CCSBT implicitly excludes any further dispute resolution procedure outside the CCSBT.⁸⁸ There are several criticisms aimed at the decision of the Tribunal. Boyle criticizes the Tribunal's interpretation of Article 16 of the CCSBT⁸⁹ and Article 281 of the UNCLOS.⁹⁰ Sturtz, who makes a criticism of a broader nature, criticizes the Tribunal's excessive deference to other conventions and treaties.⁹¹

The ITLOS majority's treatment of the precautionary principle deserves some attention. Whether the precautionary principle is a part of customary international law is unclear. Morgan points out that while the minority read the principle into the text of the UNCLOS,⁹² the majority did not clarify whether it adopts the minority's point of view.⁹³ Morgan seems to imply that this creates confusion as to the content of international law. However, in regard to the risks stemming from proliferation, the majority's approach may be beneficial—the majority has succeeded in avoiding the risk of being explicitly divergent from the traditional orthodox view on the status of the principle when it is still an evenly balanced and hotly debated issue. Moreover, confusion over the principle already existed at the time of this decision.

In an unrelated topic, the *SBT* indicates that an occurrence of conflicting jurisdictions between different judicial bodies or dispute resolution regimes as a result of proliferation is not such a threatening risk to international law. It is not a risk because the mere process of going through a dispute resolution regime is helpful for the participating states to achieve the ultimate aim of interna-

87. Southern Bluefin Tuna Case, *supra* note 84, at 15-18.

88. Southern Bluefin Tuna Case (Austl. & N.Z. v. Japan), Award on Jurisdiction and Admissibility, 39 I.L.M. 1359, ITLOS (Aug. 4, 2000), available at <http://www.intfish.net/cases/fisheries/sbt2/award.pdf>. See generally Donald J. Morgan, *Implications of the Proliferation of International Legal Fora: The Example of the Southern Bluefin Tuna Cases*, 43 HARV. INT'L L.J. 541 (2002) (providing a detailed reasoning of the Arbitral Tribunal on a jurisdictional point); Jacqueline Peel, *A Paper Umbrella which Dissolves in the Rain? The Future for Resolving Fisheries Disputes under UNCLOS in the Aftermath of the Southern Bluefin Tuna Arbitration*, 3 MELB. J. INT'L L. 53, 63-66 (2002).

89. Alan Boyle, *Decisions of International Tribunals*, 50 INT'L & COMP. L.Q. 447, 449 (Malcolm D. Evans ed., 2001).

90. *Id.* at 449-50.

91. Leah Sturtz, *Southern Bluefin Tuna Case: Australia and New Zealand v. Japan*, 28 ECOLOGY L.Q. 455, 466 (2001).

92. Southern Bluefin Tuna Cases (Austl. & N.Z. v. Japan), Requests for Provisional Measures, 38 I.L.M. 1624, ITLOS, Case Nos. 3 and 4, ¶¶ 11-20 (Order of Aug. 27, 1999) (separate opinion of Judge Laing), available at http://www.itlos.org/start2_en.html; *Id.* at ¶¶ 8-11 (separate opinion of Judge Treves).

93. Morgan, *supra* note 87, at 547.

tional law—peaceful settlement of disputes. Mansfield, a high ranking official in the New Zealand government during the *SBT* saga, presents several reasons for this argument.⁹⁴ If a dispute is submitted to an international judicial body, it grabs the attention of high level government officials, offers a chance to view issues in a broader context and from another party's point of view, involves the third party as a moderator, and offers a relatively level playing field.⁹⁵

Mansfield further opines that even if the UNCLOS Arbitral Tribunal held that it had jurisdiction, it was unlikely that the case would have gone to a merit hearing and would have simply given impetus to negotiation.⁹⁶ In my opinion, this particular effect of the international dispute resolution regime, supported by Mansfield's observation, highlights the fact that proliferation may not reduce the international dispute resolution regime's beneficial impact in terms of positive diplomatic influence. However, if problems of fragmentation and conflicting jurisdictions escalate, it may damage respect for international law and its judicial bodies, which in turn may reduce the diplomatic and political effectiveness of the dispute resolution regime. Therefore, it is important to be vigilant against the potential risks of proliferation in this regard.

B. *Swordfish Dispute*

The *Swordfish Dispute* was about a potential confrontation between jurisdiction of the ITLOS and jurisdiction of the WTO Dispute Settlement Body.⁹⁷ In April 2000, the EU brought Chile before the WTO Dispute Settlement Body claiming that a Chilean statute, which prevents a ship from docking in Chilean ports when its catches exceed what is allowed under Chilean law, is discriminatory.⁹⁸ In December 2000, Chile brought the EU before the ITLOS claiming that the EU breached the UNCLOS.⁹⁹ The confrontation was avoided when Chile and the EU reached a settlement in January 2001 and both hearings were subsequently cancelled.¹⁰⁰

94. Bill Mansfield, Letter to the Editor, *The Southern Bluefin Tuna Arbitration: Comments on Professor Barbara Kwiatkowska's Article*, 16 INT'L J. MARINE & COASTAL L. 361, 362 (2001).

95. *Id.* at 363-64.

96. *Id.* at 365.

97. John Shamsey, *ITLOS vs. Goliath: The International Tribunal for the Law of the Sea Stands Tall with the Appellate Body in the Chilean-EU Swordfish Dispute*, 12 TRANSNAT'L L. CONTEMP. PROBS. 513, 520 (2002).

98. *Id.* at 519-20.

99. *Id.* at 520.

100. *Id.* at 528.

This type of dispute may be advantageous for international law in the long run. Each judicial body carries or emphasizes a different value or set of values, and a series of clashes between these different values through this type of case or dispute with conflicting jurisdiction would help to present a clearer idea about the form and content of the emerging relationship between the judicial bodies.

C. *MOX Plant Case*

MOX Plant pitted the jurisdiction of the ITLOS against jurisdiction of the European Court of Justice (ECJ).¹⁰¹ In response to the United Kingdom's (UK) plan to build a MOX plant, which may be hazardous to the environment, on a coast adjacent to Ireland, Ireland brought the UK before the ITLOS asking for a provisional measure that would prevent the UK from authorizing the MOX plant.¹⁰² The ITLOS deemed *prima facie* jurisdiction existed.¹⁰³ In a subsequent hearing by the UNCLOS Arbitral Tribunal, the Tribunal confirmed a previous provisional order of the ITLOS but refused to issue any more provisional orders.¹⁰⁴ The Tribunal was concerned about the potential jurisdictional conflict with the ECJ and decided to wait for the ECJ decision on this point.¹⁰⁵

In May 2006, the ECJ held that jurisdiction of the case belongs to the ECJ, not to the ITLOS.¹⁰⁶ The ECJ explained that the EU Council, not individual European states, approved the UNCLOS, and exclusive competence with regard to the UNCLOS provisions on the prevention of marine pollution to the extent to which those provisions affect existing EU rules was transferred from the UNCLOS to the EU at the time of the EU's formal confirmation of the UNCLOS.¹⁰⁷ Hence, the relevant provisions formed a part of the European Community Treaty and legal order.¹⁰⁸ Given that under the EC Treaty only the ECJ is to adjudicate a dispute concerning

101. The MOX Plant case (Ire. v. U.K.), Request for Provisional Measures, 41 I.L.M. 405, ITLOS, Case No. 10, (Order of Dec. 3, 2001) [hereinafter *The MOX Plant case I*]. See The MOX Plant Case (Ire. v. U.K.), Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 42 I.L.M. 1187, ITLOS, (June 24, 2003) [hereinafter *The MOX Plant case II*], available at <http://www.pca-cpa.org/PDF/MOX%20Order%20no3.pdf>; Case No. C-459/03, *Comm'n v. Ireland* (May 30, 2006), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0459EN:HTML> [hereinafter *Comm'n v. Ireland*].

102. *The MOX Plant case I*, 41 I.L.M. at 405-06.

103. *Id.* at 414.

104. *The MOX Plant case II*, 42 I.L.M. at 1199; *Comm'n v. Ireland*, at ¶ 47.

105. *Comm'n v. Ireland*, at ¶ 46. See *The MOX Plant case II*, 42 I.L.M. at 1199.

106. *Comm'n v. Ireland*, at ¶ 121.

107. *Id.* at ¶ 120-21.

108. *Id.*

the interpretation or application of Community law, Ireland breached European Community law by submitting a case to the ITLOS.¹⁰⁹ The ECJ emphasized the importance of “the jurisdictional order laid down in the [EC] Treaties and, consequently, the autonomy of the Community legal system”¹¹⁰

MOX Plant, like *SBT*, again portrays the UNCLOS Arbitral Tribunal’s readiness to defer to the jurisdiction of other dispute resolution regimes or judicial bodies. The Tribunal stated:

In the circumstances, and bearing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, the Tribunal considers that it would be inappropriate for it to proceed further with hearing the Parties on the merits of the dispute in the absence of a resolution of the problems referred to [*i.e.* internal jurisdictional issue of the European Community]. Moreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties.¹¹¹

This is a prime example that supports the view of proliferation advocates that judicial bodies will respect each other’s jurisdiction and legal judgment—although deference to other jurisdictions was made only by a subsequent Arbitral Tribunal, not by an initial ITLOS panel, in both the *MOX Plant* and *SBT* cases. However, whether other judicial bodies like the WTO Dispute Settlement Body, the UN Human Rights Committee, or a national supreme court would yield when they are in the shoes of the Tribunal, or instead would choose to resolve the case as they see fit under their jurisdiction, is a question that remains to be seen.¹¹²

On the other hand, the ECJ’s decision in the *MOX Plant* saga raises some questions about the future of relationship between the ITLOS and other judicial bodies like the ECJ. While the ECJ’s decision seems to contribute to building a relatively clear relationship between the ITLOS and the ECJ, risks of conflicting jurisdiction and fragmented views on law still exist. For example, it re-

109. *Id.* at ¶ 153.

110. *Id.* at ¶ 154.

111. *The MOX Plant case II*, 42 I.L.M. at ¶ 28.

112. Koskenniemi, *supra* note 73, at 2.

mains to be seen whether the view of the ITLOS on the scope of an EU law regarding a particular future issue would coincide with that of the ECJ.

In my view, the significance of the ECJ's decision in the *MOX Plant* saga needs to be carefully assessed because the ECJ is concerned foremost with keeping the EU legal order intact; this ought to have been a special motivating factor behind the ECJ's strong stance against the conflicting ITLOS jurisdiction. One's view as to the suitability of the ECJ's decision may depend on one's view of the EU's constitutional identity and, more importantly, the identity of international law. Although the decision may accord well with a horizontal version of international law, it may be viewed as a blow to the movement to establish a relatively vertical version of the international law regime.

VI. RESPONSE AND DISCUSSION

The advocates of proliferation have endeavored to present numerous arguments in response to the risk of fragmentation of international law as a result of the proliferation of international judicial bodies and their issuance of conflicting judgments. The first argument is that even though the ICJ has already been competing with a growing number of arbitrations, international law is still not fragmented.¹¹³ However, this argument is weak given that the weight of the arbitral decisions and that of the precedents from international judicial bodies are usually quite different.

The second argument made by the advocates is that the divergent views expressed by different tribunals are in practice not so large as to undermine the legitimacy of international law.¹¹⁴ While it is true that there have been only two cases with differing legal views from that of the ICJ on narrow legal issues, the fact that what is sufficiently "large" essentially depends on a subjective viewpoint presents serious doubts on the effectiveness of the second argument by the advocates.

The third argument by the proliferation advocates is that if different tribunals interpret the law or a treaty differently, it may not necessarily be a negative practice, because it would reveal that the law itself lacks precise content and needs improvement.¹¹⁵ However, in my opinion, the revelation of the law's insufficiency is more of an effect of the proliferation rather than its excuse or justification as such insufficiency can be located by non-judicial re-

113. Boyle, *supra* note 2, at 130.

114. Charney, *supra* note 18, at 72.

115. Noyes, *supra* note 8, at 176-77.

search and debate. Also, international law may be better off without deviating judicial opinions and views, which would publicize its uncertainty. The last point is crucial in light of international law's reliance on acceptance by states and citizens for its authority and status.

The fourth argument is the risk of fragmentation already exists because national courts interpret international law as they deem suitable even when international courts have jurisdiction over the relevant issues.¹¹⁶ However, this argument fails to take into account that interpretations of international law by national courts are usually less significant and persuasive than opinions from international judicial bodies, at least from the perspective of the state parties. In my opinion, it is not a matter of the existence or non-existence of the risk of fragmentation, but rather a matter of degree of such risk.

The fifth argument by the advocates points to domestic legal systems that are not organized in a single hierarchy but rather are relatively horizontal, as exemplified by France and the United States. These systems accommodate some fragmentation within a certain structure.¹¹⁷ However, one must bear in mind the important difference between international law and domestic law.

In my opinion, through analyzing five attempted responses by the proliferation advocates, a crucial consideration is revealed: international law survives by recognition and acceptance of state actors. Without a central enforcement mechanism, the international judicial system relies on its perceived legitimacy, and its legitimacy in turn depends on whether it maintains a consistent and coherent body of law.¹¹⁸ Hence, the proliferation and the resulting decentralized fragmentation of international law in general are likely to weaken the attractiveness of options available in the realm of international judicial dispute settlement in the long run.

VII. THEORETICAL PERSPECTIVES

Natural Law theorist John Finnis states that there are seven basic objective values that constitute what is good.¹¹⁹ They are recognized as good and worthy by people because we share a common human nature and morality. People exercise their reason in

116. *Id.* at 177-79.

117. Spelliscy, *supra* note 6, at 154-57.

118. *Id.*

119. The seven values given by Finnis are life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 86-90 (1980).

deciding what law they ought to obey to achieve these values. Even though the values may not be objective in that there is no identifiable initial source of such values, they may be deemed as inter-subjective values—values that cannot be reasonably denied of their worth.¹²⁰ Finnis's theory is strong in explaining what is intrinsic in law and what it offers to people to obey the law. The law offers subjects with something good, so they obey it.

Applying Finnis's Natural Law theory, it may be assumed that international law is in the process of discovering its core values. Because international law is fluid in nature, some divergences in narrow interpretations are acceptable as long as the core values are not disputed. The different tribunals will not express divergent views on core values and *jus cogens* because we share a common nature and morality in respecting those core values in the context of international law. Also, states obey international law because it offers them something good, whatever form it may take for each state. Hence, it may be inferred that some fragmentation and uncertainty resulting from a decentralized and proliferated system may not greatly hurt states' respect for international law.

On the other hand, Positivist theorist Herbert Hart states that in the structure of rules in a legal system there are primary rules of obligation, which are rules of duty or obligation, and secondary power-conferring rules, which consist of the Rules of Recognition (the rules that identify other rules which the society is willing to enforce), the Rules of Change (the rules that empower people to introduce new rules and eliminate old) and the Rules of Adjudication (the rules that decide whether the particular primary rule is broken or not).¹²¹ Hart further claims that when the legal system has primary rules only, it will suffer three defects: uncertainty in determining the legal rules of a society, static character of its legal rules, and inefficiency in determining what constitutes a breach of the rules.¹²²

Applying Hart's Westphalian Positivist theory to an international legal forum without some structural relationship between each of the decentralized tribunals, that is, without knowing how one tribunal's decision and jurisdiction fits in with another, the international legal system may not be able to identify which tribunal's rules the international society is willing to enforce, thereby suffering from the lack of, or insufficiency of, Rules of Recognition. In turn, without such structural relationship, the international legal system will not have clear Rules of Change, that is, it cannot

120. *See generally Id.* at 86-97.

121. HERBERT L. A. HART, *THE CONCEPT OF LAW* (2nd ed. 1994).

122. *See id.*

tell which tribunal has the power to enunciate new rules or eliminate the old rules stated by the ICJ. In such cases, the international legal system will suffer from uncertainty about the correct content of the relevant aspects of international law. The character of its international legal rules will also remain static as a change in the law enunciated by a particular tribunal may not be accepted wholeheartedly by the international society.

VIII. RECOMMENDATIONS AND CONCLUSION

A discussion of advantages and disadvantages, as well as different theoretical perspectives, fails to clearly denote the proliferation as a blessing or curse for international law. In my opinion, given the growing complexity of international society and political reality, which renders the proliferation inevitable, the real problem is not the proliferation itself, but the fact that proliferation has materialized in an environment without any formal relations between the relevant entities.¹²³ Hence, it may be necessary to install some form of structural relationship between the tribunals to avoid the aforementioned problems and protect the legitimacy of international law.

The first option is to vest the ICJ with the standing as the final appellate court.¹²⁴ However, such option is politically impossible. A formal revision of the Statute of the ICJ can be done only under the revision of Articles 108 and 109 of the UN Charter, which requires two-thirds majority of the UN members. Given that some states do not even accept the ICJ jurisdiction, and that one of the reasons for the proliferation was dissatisfaction with the ICJ,¹²⁵ it would be almost impossible to gain such support.¹²⁶ Such an option is also legally problematic because under Article 34(1) of the Statute of the ICJ, only states can bring a case to the ICJ.¹²⁷ Hence, non-state parties before the tribunals that deal with international organizations and private parties will not be able to bring an appeal to the ICJ.¹²⁸ Also, such an option will undermine many advantages stemming from the proliferation.¹²⁹ Moreover, imposing a strict legal hierarchy may be difficult because international

123. Spillesey, *supra* note 6, at 152.

124. See Gaertner, *supra* note 71, at 596.

125. See Koskeniemi, *supra* note 73, at 12.

126. Charney, *supra* note 18, at 74.

127. ICJ Statute art. 34.

128. Jennings, *supra* note 58, at 445.

129. *Impact*, *supra* note 25, at 698.

law is mired with not only legal but also diverse economic, social, and security interests and considerations.¹³⁰

The second option of forming a new supreme court is also politically impossible for the abovementioned reason, and it is not legally attractive because if there arises only one supreme court, the usage of arbitration will grow, thereby impairing the consistent development of law.¹³¹

The third option is installing less formal structural relationships between the proliferating tribunals.¹³² Rather than a strict formal hierarchical structure, a less formal and lateral system would allow international law to be more dynamic and flexible, which accords with the nature of international law. For example, the ITLOS's intended compulsory jurisdictional system faced its limit in *SBT* and *MOX Plant*. Defining the relationship between the tribunals in a lateral rather than a hierarchical way, such as relationships containing exception, preemption, autonomy and complementariness, would ensure that benefits of the proliferation are preserved while the potential risks are minimized.¹³³ At the same time, maintenance of constant dialogue between the tribunals is also a crucial element in preventing conflicting jurisdiction, legal opinions and judgments.

However, establishing and figuring out a relationship between different judicial bodies will be an immensely difficult task because it requires resolution of many tensions—between a general regime and a special regime, universalism and particularism, and general international law rule and special international law rule.¹³⁴ The establishment of a general preference of one body over another may involve the general preference of one set of values over another, which is highly unlikely to be agreed upon by the relevant participants in the foreseeable future.¹³⁵

Hence, the final thought may be reserved for how to generate and establish these relationships. Koskenniemi suggests that international judicial bodies are “platforms” where dynamic struggle for power and influence constantly takes place.¹³⁶ It may be inferred that imposition and establishment of even lateral relationships would be almost impossible. Nevertheless, if the imposition of some form of relationship between different judicial bodies is almost impossible or ineffective in its operation, in my opinion it is

130. See Koskenniemi, *supra* note 73, at 11.

131. See Bilder, *supra* note 2, at 162.

132. See Spelliscy, *supra* note 6, at 150.

133. *Id.* at 173-74.

134. Koskenniemi, *supra* note 73, at 10-11.

135. See *id.* at 17.

136. See *id.* at 21.

still possible for everyone concerned to keep vigilant eyes on the emerging relationships and contribute to evaluating and influencing its course and tendency.

Therefore, it may be better to let the relationships develop through incremental aggregation of case law rather than through the imposition and establishment of a purported compulsory jurisdictional system like the ITLOS. The case law may flow as the values develop and change. The subsequent emerging relationships must be carefully assessed and criticized each time. It may be more difficult to reflect the changing values of international law through the imposition of values through formal means. For example, Peel suggests that the *SBT* saga may spur new regional fisheries agreements to adopt stricter dispute settlement procedures,¹³⁷ which in turn may gradually strengthen fisheries protection and a prima facie position of the ITLOS against other bodies or dispute resolution regimes of individual treaties in regard to this particular aspect of international law.

The efforts to maintain dialogue between each judicial body and establish some form of lateral relationships must continue. Even if the efforts prove to be futile, the least one can do is carefully observe and assess the emerging relationships and their impact on the relevant aspects of international law and the law in general. The emerging relationships ought to be vigilantly encouraged in such a way that the relative consistency and coherency of international law are kept intact. Otherwise, the authority and legitimacy of international law may hang in balance.

137. See Peel, *supra* note 87.

**A COLLECTIVE RIGHTS SOCIETY FOR THE
DIGITAL AGE**

JOHN MALONEY*

I.	THE ADVANTAGES OF AN INTERNATIONAL COLLECTIVE RIGHTS ORGANIZATION.....	124
II.	DISTRIBUTION MODELS.....	128
	<i>A. Tethered downloads</i>	128
	<i>B. Internet Radio</i>	131
	<i>C. Digital Permanent Downloads</i>	134
III.	EFFICIENT POLICING OF LICENSES.....	138
VI.	PROTECTION OF MORAL RIGHTS.....	139
V.	CONCLUSION.....	140

Variations among local laws, and territorially limited rights, impose unnecessary transaction costs for the worldwide transfer of digital entertainment. In order to reduce transaction costs for the distribution of digital music, a uniform method of regulating and licensing digital music is necessary for the internet market, which transcends traditional boundaries.

Because geography is no longer a barrier to expression, decisions regarding the structure of digital entertainment law must be made with international implications in mind. It is of little importance that the United States Copyright Arbitration Panel comes to an agreement that weighs the interests of access and compensation for a particular service, if another country comes to a different conclusion with a different royalty rate. The smart investor can simply choose to form her business(es) in the kinder jurisdiction. Such digital copyright havens, which could potentially charge its businesses a lower royalty rate, could cause global market distortions. Therefore, getting the nations of the world to agree upon a uniform compulsory licensing structure to regulate the distribution of music on the internet is in the interests of rights holders, and the nations that benefit from their Gross Domestic Product (GDP).

However, getting the developing nations of the world to agree on the somewhat arbitrary royalty rates set by the United States and the United Kingdom will be difficult because there is little reason for them to agree to such a demand. In order to induce the nations of the world into entering such a uniform regime, the total

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package should offer the developing nations the ability to participate in the global Intellectual Property market. The ideal solution would be one that allows production companies to set their own price flexibly, allows retailers worldwide to license the products efficiently, and allows consumers to purchase the product at a price that is reasonable considering their economic circumstances. Any solution should also consider the differences between the economic incentive framework of copyright law found in Common Law countries, while respecting the rights of authors found in Civil Law nations, to ensure widespread acceptance among different legal traditions.¹

This article illustrates the need for an international rights organization that is capable of granting publishing and recording rights to musical works throughout the world, and describes how that system could work. The article will first illustrate the advantages of an international collective rights organization over the traditional domestic rights organizations in the context of Internet distribution. After establishing the reasons that such an organization would be superior, the article will explore the internet distribution models currently employed by the music industry and assess their feasibility as a distribution model in an international collective rights organization. The article will then describe how such an organization could adopt distribution models and maintain price discrimination so that people throughout the world can afford access to musical works while balancing the interests of rights holders in an efficient manner.

I. THE ADVANTAGES OF AN INTERNATIONAL COLLECTIVE RIGHTS ORGANIZATION

Blanket licensing of music is currently administered by a handful of collective rights organizations like the Harry Fox Agency, ASCAP, BMI, and their foreign counterparts who have proven capable of reducing transaction costs to multiple subscribers who would otherwise have to negotiate directly with the recording and publishing companies.² These operators have done well for composers in the traditional radio and record markets that are easily confined to national boundaries, but are poorly suited for the challenges of the digital age because they do not have the power to li-

1. *See generally* STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS (2d ed. 1989) (discussing copyright frameworks in both common law and civil law jurisdictions).

2. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 220-21 (Free Press 2003). *See also*, AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 2001 Supplement 135-37 (2d ed. 2001) (listing examples of overseas performance rights societies).

cense music throughout the world. The collective rights organization of the digital age must be international in nature, and must represent both the publishing and recording industries.³ The organization should also be focused solely on internet markets in order to increase their efficiency, provide a one-stop shop for webmasters, and respond to this fundamentally different market.

This collective rights organization, the Possible International Collective Rights Organization (hereinafter "PICRO"), should attempt to fill the demand for licensed content of currently employed methods of digital entertainment distribution to reach businesses and end users throughout the world. It is this author's belief that a central licensing grantor, capable of worldwide licensing after processing a simple application, will: (1) make the entertainment industry more lucrative, (2) give developing countries a reason to protect Intellectual Property, (3) increase efficiency through other business models, (4) take advantage of the decentralized nature of the internet, (5) reduce transaction costs, and (6) provide a reasonable solution for webmasters who do not have or do not want the ability to control which country their user is from, while still providing price discrimination.⁴

By creating a blanket rights organization capable of granting licenses to cover all territories, the PICRO would provide access to music for users throughout the world, especially users within the underserved nations outside of the major market. For example, a Tongan citizen's current ability to meet with music industry executives and strike licensing deals is slim and inefficient both to the Tongan, who may not be able to recover his negotiating expenses, and record company executives, who want to focus their energies on more profitable projects.

Even though these markets are underserved, the countries they represent are charged with protecting these works from in-

3. This is because both the publishing and recording rights are implicated in digital distribution models and the PICRO should take advantage of the economy of scale to minimize costs. See *generally* KOHN ET AL., *supra* note 3, at 410-14 (discussing the distinction between the copyright in a recording and the copyright in a particular song). This collective rights organization should not represent both industries in a lobbying role because of the conflicts between competing publishers and sound recording interests.

4. Currently, a webmaster operating an Internet Radio station receives a performance license only for the territories included in the license, rather than a worldwide license. PHONOGRAPHIC PERFORMANCE LIMITED INTERNATIONAL INFO SHEET (2006), [http://www.ppluk.com/ppl/ppl_cd.nsf/PDFs/\\$file/PPLInfoSheet8international.pdf](http://www.ppluk.com/ppl/ppl_cd.nsf/PDFs/$file/PPLInfoSheet8international.pdf). This result is unfortunate because the website owner cannot truly control who has access to the site. An example of this can be seen at <http://mikesradioworld.com> where you can listen to over 3000 Internet Radio stations broadcasting from all over the world.

fringement through the TRIPS agreement,⁵ the WIPO Copyright Treaty,⁶ and a myriad of other treaties. Whether a lack of digital music delivery services is a result of disinterest in the local market, or a business decision to focus distribution efforts on the major markets, is debatable. What is less debatable, however, is the unfairness of requiring our developing neighbors to incur expenditures to enforce copyright interests in music that is not licensed to them. The PICRO could alleviate this problem with little transactional expense to the record company or the Tongan entrepreneur while opening the entertainment market to millions of distributors and consumers.⁷

An international compulsory licensing scheme that allows non-major market users to distribute digital music can also prevent piracy in the major markets. As Internet use spreads among the non-major market countries, the demand for digital entertainment will grow as well.⁸ If music files are not available to people living in these countries at a reasonable price—which is determined by considering what the local market can bear—users will probably turn to piracy networks to gain access to music files.

An inefficient market for digital music is a problem for both the recording and publishing industries in terms of lost sales due to piracy in both major and non-major markets.⁹ Because of the nature of file sharing networks, piracy in foreign markets, even those markets that have never been a substantial source of revenue, will affect the total revenue the music industry can generate.¹⁰

Peer-to-peer networks work through a series of connections that allow users to copy files on another user's system.¹¹ Current versions of such software allow the user to connect to several, or even hundreds, of other users thereby increasing connection speed

5. Agreement on Trade-Related Aspects of International Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

6. World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997), 828 U.N.T.S. 3.

7. See generally KOHN ET AL., *supra* note 3, at 234-35 (discussing the potential of the internet to expand the music industry).

8. While the author appreciates that many people in the developing countries do not have Internet access, the market is growing. See Internet Usage World Stats—Internet and Population Statistics, <http://www.internetworldstats.com> (last visited Nov. 11, 2006). The problem should be confronted now before it becomes intractable. Additionally, kiosks can be used as a means of reaching users who cannot afford their own computer, but who can afford a digital audio player.

9. See Brad King, *Music Biz Laments: Stealing Hurts*, WIRED, Sep. 26, 2002, <http://wired.com/news/mp3/0,1285,55393,00.html>.

10. See *id.*

11. Kristina Groennings, *Costs and Benefits of the Recording Industry's Litigation Against Individuals*, 20 BERKELEY TECH. L.J. 571, n.1 (2005).

and reducing downloading time.¹² As users from other countries, especially those who are not offered viable entertainment solutions, turn to these networks, the variety in the networks' catalog will increase, and download times will shorten.¹³ This may lead to increased piracy in the major markets, as peer-to-peer network providers close the "convenience gap" between themselves and legitimate suppliers.¹⁴

However, creating a uniform legal and licensing structure alone will not be sufficient to stem the tide of piracy and provide developing countries with manageable enforcement duties. The nations in the WTO and the entertainment industry must provide for a framework that allows people in developing countries to purchase entertainment at affordable prices. Otherwise, piracy will continue to grow in these countries, as will policing and reputation costs.

The need to meet local pricing demands should be evident. After the Napster network demonstrated the high demand for digital music and the ability of pirate networks to undermine sales, the recording industry scrambled to provide consumers with a viable alternative to the pirate networks.¹⁵ Along with creating user-friendly stores that add value to the customer's shopping experience, the recording industry roughly decided that a price of around one dollar per song is what the major markets could bear.¹⁶

While one dollar songs may sell well to the average American and British buyer, it is a higher price, relatively, to the average Indian buyer. Any international licensing policy should take into account the particular license granted and the particular user paying for the license when determining a reasonable sales rate to the end user, all while balancing the interests of the creator or holder of the work.

12. *See id.*

13. *See id.* at 586.

14. *See* Ed Oswald, *Study: iTunes More Popular than P2P*, June 7, 2005, http://www.betanews.com/article/print/Study_iTunes_More_Popular_than_P2P/1118158804. *See generally* Urs Gasser et al., *iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media—A Case Study*, (June 15, 2004), <http://cyber.law.harvard.edu/media/uploads/81/iTunesWhitePaper0604.pdf> (explaining the value of the shopping experience on the iTunes music store, as compared to the experience on P2P networks).

15. PASSMAN, *supra* note 3, at 373-77.

16. *See* Alex Veiga, *Recording Labels, Apple Divided Over Pricing*, Apr. 2, 2006, <http://www.msnbc.msn.com/id/12122837/>. The files are reportedly licensed for roughly seventy cents a piece, with the remainder constituting the service providers transaction costs and profit margin. *Id.*

II. DISTRIBUTION MODELS

In order to address the more important issues in international digital music licensing, and describe how they may be handled by the PICRO, I will address the following distribution models:

1. Tethered download subscription services
2. Non-interactive streaming media or Internet Radio
3. Digital permanent downloads

*A. Tethered downloads*¹⁷

“Tethered downloads” is an industry term that refers to music files that have certain restrictions placed on them as to use and transferability to different mediums.¹⁸ Tethered downloads have made an impact in the “subscription service” model.¹⁹ Users pay a monthly fee for access to a website’s entire repertoire of mp3 files.²⁰ Users are generally allowed to play an unlimited amount of mp3s, but are restricted from transferring the files to portable music devices like CDs.²¹

Users are only allowed to use the file for a specified amount of time, and must renew their lease or lose access to the file.²² The right the consumer has can be adequately characterized as a rental right. This method of distribution is different from the current rental model popularly employed by movie rental stores.²³ The main reason behind this difference in distribution is that when a consumer “rents” an mp3 file, he does not borrow the web distributor’s file, like at the movie rental store, but makes a copy of the

17. See generally, KOHN ET AL., *supra* note 3, at 152-54 (discussing interactive electronic transmissions and distinguishing them from non-interactive, or traditional broadcast, transmissions).

18. Harry Fox Agency, Definitions, <http://www.harryfox.com/public/infoFAQDefinitions.jsp> (last visited Nov. 19, 2006).

19. *Id.*

20. See Michael A. Einhorn and Bill Rosenblatt, *Peer-to-Peer Networking and Digital Rights Management: How Market Tools can Solve Copyright Problems*, Cato Institute Policy Analysis no. 534, 3-7 (2005), available at http://www.cato.org/pub_display.php?pub_id=3670.

21. See *id.*

22. If the user does not pay his or her bill the service may be cancelled by the provider. See, e.g., Napster—Terms and Conditions, <http://www.napster.com/terms.html> (last visited Nov. 19, 2006) (for example, “You agree to pay for all Tracks and Materials that you purchase through the Service and Napster may charge your billing payment method for any such payment(s) . . . [i]f Napster receives a notice alleging that you have engaged in behavior that infringes Napster’s or other’s intellectual property rights or reasonably suspects the same, Napster may suspend or terminate your account without notice to you”).

23. There is currently no first sale exhaustion of the copyright protection of an mp3 file like there is for a DVD; this is because the second sale is likely to be a copy of the first and the product is leased. See David R. Johnstone, *The Pirates are Always With Us: What can and Cannot be Done About Unauthorized use of MP3 Files on the Internet*, 1 BUFF. INTEL. PROP. L.J. 122, 123-24 (2001).

website's "ephemeral" copy,²⁴ clearly implicating the author's copyright interests. Because of this copying, a license must be obtained for both the publishing and the sound recording rights to provide these services.²⁵

Currently, the rights to the sound recording are licensed to the service provider based on negotiations that take into account the size of the site's membership (or forecasted membership), the site's catalogue, the digital rights software employed, and the site's ability to act as a substitute to traditional consumer music ownership.²⁶

If these rights were subject to a compulsory licensing scheme, such a regime could possibly mimic one of the following models, neither of which is satisfactory from a business or a licensing standpoint.

Price-Per-Song in Catalog – In this model, the collective rights society would charge website owners a set amount each term to include a song in their catalogs. The price of inclusion would have to take into account the site's membership to address concerns regarding the amount of people who will forgo purchasing the album or the song because of their access to the subscription service. The price would also have to take into account the size of the website's catalog. A smaller catalog will probably be cheaper to offer, and if it had all the music the user wanted, it may be a more attractive substitute for the consumer.

This "price-per-song" method is not amenable to a compulsory licensing scheme. Songs that are used repeatedly are not rewarded as such because their inclusion is based on a set price. On the other hand, if the webmaster had to pay an amount each time a user accessed a song, the model would be difficult to employ. It would have to take into account forecasted traffic in a market that is quickly evolving each day. Negotiation with the copyright holder over licensing rights, specifically tailored to the provider's and the customer's needs, is preferable in this approach.

24. An ephemeral copy of a musical work is one that is usually copied from a CD and then placed on a computer server that will later be transmitted to the consumer. See KOHN ET AL., *supra* note 3, at 450. It implicates both the rights of the sound recording artist and the composer of the underlying work.

25. The Harry Fox Agency currently administers tethered download licensing, but there is no counterpart license for the sound recording. See Harry Fox Agency, Songfile, <http://www.harryfox.com/public/songfile.jsp> (last visited Nov. 19, 2006); see also SoundExchange, Licensing 101, <http://www.soundexchange.com/licensing101.html#a3> (last visited Nov. 19, 2006) (explaining how to obtain a statutory license to produce ephemeral copies).

26. See generally C. Krishan Bhatia, Richard C. Gay & W. Ross Honey, *Windows Into the Future - How Lessons From Hollywood Will Shape the Music Industry*, 17 *Journal of Interactive Marketing* 70 (2003), available at <http://www.boozallen.com/media/file/76799.pdf>.

Percentage of Revenue – This method of determining a reasonable royalty rate is another possible means of structuring Internet Radio licenses.²⁷ By this approach, a percentage of revenue collected by the service provider is put aside for royalty payments. The amount collected is disbursed to the copyright holders based on the number of times a particular work was accessed by a user. This method has the benefit of taking into account the size of the user’s membership. The more users a site has, the more revenue is increased. This method also takes into account each song that is potentially used as a substitute to purchase. Well-performing songs in the catalog are rewarded as such. If applied to a tethered download subscription service, the model could look like this:

1. A website owner operating under this compulsory license must pay X% of all subscription revenue earned.

2. A website owner operating under this license must provide reports of the songs accessed by users, and the total amount of “spins” their service provided for each song, and the totals for the amount of all songs accessed for that month (or different term).

We can see a problem with this method immediately; if the subscription cost is only a dollar per year, but the Webmaster collects advertising revenue for their profit, the copyright holder is shortchanged. On the other hand, requiring the website owner to give a percentage of revenue from all sources would cut down on innovative businesses that incorporate multiple business models and revenue streams. The only viable alternative would be to require a minimum subscription price for a certain size catalog. This would entail complex business decisions, which should be specialized rather than open to a compulsory licensing scheme.

Furthermore, policing costs for this model are particularly high. If many webmasters were allowed to employ this model, there would be far too many providers who would have to be trusted to report their revenue honestly. If the PICRO were charged with policing their revenue, it would have to take on an additional service, revenue auditing. This would be inefficient with the model proposed for the other forms of digital licensing because it is such a different activity than use monitoring.

Despite the popularity of tethered downloads, this is the method of distribution that is least favorable to a compulsory li-

27. See *Webcasting Determination*, http://www.copyright.gov/carp/webcasting_rates_final.html (last visited Nov. 11, 2006) (discussing how the Librarian of Congress rejected the proposal of using a percentage of revenue model within the internet radio context).

censing scheme. This is predominately because of the complex business decisions that must go into catalog pricing in this particular model. International agreement on a widespread basis needed for this scheme is also problematic because of the complex negotiations involved, which could extend the process indefinitely.

Because of these difficulties, a tethered download model should not be included as one of the PICRO's licensing schemes.

*B. Internet Radio*²⁸

Radio is the most popular means of transmitting audible sound throughout the world. This is partly because the user receives radio transmissions for free, and partly because the technology is mature and can be employed with little infrastructure.²⁹ Traditionally, radio is broadcast through radio waves to consumers within a certain radius of the radio transmitter.

Internet Radio is fundamentally different. The consumer of Internet Radio, unlike traditional radio, can be located anywhere in the world when they access the Internet Radio channel no matter where the broadcaster is located. Because the broadcaster can reach a worldwide audience no matter where they are located, there is a real incentive to conduct forum shopping to find the nation that offers the most attractive licensing system in regard to the technical requirements and the royalty rates the potential host country requires for a compulsory license to broadcast music over the Internet. For example, both the United States and the United Kingdom require the webmaster's internet radio station to meet a number of technical requirements to qualify for a compulsory license. The most important of these is the sound recording performance requirement.³⁰

1. The Sound Recording Performance Requirement

This requirement is placed on webmasters to allay the music industry's fears that the combination of the use of Internet Radio

28. Also called "Non-Interactive Services." See KOHN ET AL., *supra* note 3, at 427.

29. See generally Internews.org, Activity—Media Infrastructure—Building Radio Stations, <http://www.internews.org/activity/infrastructure/radio.shtm> (last visited Nov. 11, 2006) (discussing the ease of setting up radio stations in countries with little infrastructure).

30. Other provisions require a webmaster to use and transmit songs that are protected by digital security software, to take steps to prevent copying, and to give the author of a work proper attribution. These protections are established by article 16 of the WIPO Copyright Treaty and should not be difficult to implement. WIPO Copyright Treaty, *supra* note 7, at art. 16.

capture technology and the predictability of radio station programs will lead to piracy.³¹ The requirement is as follows:

1. The station cannot play more than three songs from any particular album, and cannot play more than two songs from the same album consecutively, during any three-hour period.³²

2. The station cannot play more than four songs by a particular artist, or no more than three songs from a particular artist consecutively, during any three-hour period.³³

While this approach is rationally tailored to the goal of minimizing piracy, it is questionable whether or not each country in the world will agree on the particular numbers employed by the Copyright Arbitration Panel, especially since the threat is somewhat a product of the record company's nightmares.

Radio stations had, for a long time, broadcasted hour-long blocks featuring an artist or an album.³⁴ During this period, songs could easily be duplicated on to cassettes, yet there was no corresponding decline in cassette sales.³⁵ It is questionable, then, that captured radio will serve as a commercially significant market substitute to music purchases. The argument that users will use this combination to commit piracy is further weakened when considering the many options the user has when selecting a file network that can deliver all the pirated music needed within minutes.

The above restrictions can limit the music programs that an internet radio station can broadcast. Many countries may resist placing these restrictions on their webmasters to give them an advantage over their foreign counterparts, or to protect freedom of speech. Of course, to some extent, these minimums must be placed. Otherwise, a webmaster could broadcast the "Bob Marley - Get Up Stand Up Station."³⁶ Therefore, the United States and the United Kingdom have an interest in persuading other nations to acquiesce to this particular scheme, or a variation of it, because of these possible distortions in the market. Perhaps this can be accomplished

31. See KOHN ET AL., *supra* note 3, at 432-33.

32. 17 U.S.C. § 114(j)(13)(A) (2006).

33. *Id.* at § 114(j)(13)(B).

34. For example, Gater 98.7 FM aired a program in South Florida called "Get the Led Out," which was an hour-long block of Led Zeppelin songs.

35. RECORDING INDUSTRY ASSOCIATION OF AMERICA, 2005 YEAR-END STATISTICS (2005), <http://www.riaa.com/News/newsletter/pdf/2005yrEndStats.pdf>.

36 Such a station could serve as a substitute to the tethered download system, if the website had 10,000 other channels like it, and should be prohibited.

through favorable discounts in other compulsory licensing mechanisms, or through trade concessions.

Related to the restrictions placed on internet broadcasters' program formats is a requirement that webcasters refrain from letting their users know their playlist in advance.³⁷ This restriction was also put in place out of fear of the effect of capture technology.³⁸

This point should be easier to implement internationally. While internet radio stations' publication of song lists may be a feature consumers enjoy, the requirement is reasonable, and rational, if not well suited to its goal.³⁹ Furthermore, the lack of arbitrary numbers regarding its implementation also makes it easier for this particular requirement to get uniform acceptance. It is a simple concept to understand, and therefore, is not open to many interpretations. Agreement on this point should not be particularly hard.

The final, and perhaps the most crucial, part of a worldwide blanket license is setting the rate. The rate chosen should be a reasonable royalty rate resembling that to which a willing buyer and seller would agree.

Determining the value of the right to the business is the first step. In order for the business applying for the blanket licensing to determine the value of the copyrighted material, it is important to look at the end user of the product. In the case of internet radio licensing, as opposed to other forms of licensing discussed in this essay, the end user is largely unknown at the time of broadcast. Because the broadcast is free to users and can be accessed by users worldwide, the end user can adequately be described as anyone in the world with an internet connection. The rate set by the PICRO should be uniformly charged to every internet radio owner in the world, regardless of their locale, so that businesses have equal footing in light of the fact that an internet radio station can compete with other stations around the world for the same user.

Of course, this will be no easy task. In order for the PICRO rate to be effective, it must be lower than, or equal to, the statutory rate set by each country. Getting the nations of the world to agree on a set rate will certainly be difficult; getting them to agree on the changes that need to be made every couple of years only compounds the problem. There are two solutions for setting the rate today and in the future. One way would be to set a price-

37. 17 U.S.C. § 114(d)(2)(C)(ii) (2006).

38. The threat being that an internet surfer could know when to begin recording songs from a station, and could find playlists through search engines. Teasers or hints as to what the playlist will be are allowed. *Id.*

39. Such a requirement would be in accordance with the anti-circumvention norms embodied in the WIPO Treaty. WIPO Copyright Treaty, *supra* note 7, at art. 12.

increase formula at the outset. The other way would be to establish an arbitration panel that will hear arguments from the recording, publishing, and broadcasting industries. Based upon their findings, the arbitration panel would set a rate structure. The rate structure could then be adopted by the nations as part of their total adoption of the PICRO system. This arbitration panel could be an ad hoc panel at the WIPO or other international body, or be a panel in a completely new international organization. The arbitration panel should be separate from the PICRO because it cannot represent both the interests of the recording and publishing industries.⁴⁰ Rate changes in the future would be deemed approved, unless there is a consensus of disapproval (similar to the WTO method).

C. Digital Permanent Downloads

Digital permanent downloads (hereinafter “DPD”) are quickly becoming the most popular means of distributing digital music.⁴¹ When a user receives a DPD they have the full ability to transfer the media file to portable media devices like CD’s, MP3 players, and computers without having to pay a subscription fee.⁴²

Currently DPDs are distributed to the major markets through services like Napster, iTunes, and Wal-mart.com. The demand for this product should continue to grow throughout the world because of the flexibility of DPD use.⁴³

While these licenses are popular throughout the world, they are not offered to consumers worldwide. Where the market has failed to offer a legal option to acquire digital music, the pirate networks have delivered and will continue to do so. As these networks gain popularity in areas where legal supply is non-existent and demand remains high, the cost of copyright policing will increase. In order to combat this threat, or at least allow users to have an option to obtain digital music files, nations should enact compulsory licensing laws for the delivery of DPDs. This would

40. The PICRO should not have any role to play in the determination of rates; it should simply implement the decisions that are made.

41. See generally Johnstone, *supra* note 24; Harry Fox Agency, Definitions, *supra* note 19 (defining digital permanent downloads).

42. See Harry Fox Agency, Definitions, *supra* note 18 (defining digital permanent downloads). See generally Musicmatch, Terms of Service for Yahoo Music Musicmatch for Yahoo Music Musicmatch Jukebox 10.1, Term #16, <http://www.musicmatch.com/info/terms/10-1.htm> (last visited Nov. 26, 2006) (Term #16—Permanent Download of Content—provides the terms that govern what a purchaser can do with a DPD music file).

43. See IFPI, DIGITAL MUSIC REPORT (2006), <http://www.ifpi.org/site-content/library/digital-music-report-2006.pdf> (Global music sales triple to U.S. \$1.1 billion in 2005 as new market takes shape).

allow for the proliferation of businesses that offer digital music online.

Without requiring the negotiation of specific licenses with each prospective distributor, the transaction costs and upfront costs of operating a digital music store will be greatly reduced. This reduction in costs will open up the market to increased competition among the various distributors, of whom there is now only a handful. Instead of generic stores, owned by corporations engaging in lengthy negotiations with industry executives in order to appeal to a wide and sterilized market, the small “mom and pop” webmaster can apply for compulsory licenses and establish independent digital music stores. The local operator, run out of business by multinational corporations, can compete in a world where travel to the next store is instantaneous and sales are made based on the value a service adds to the product.

But the record companies should not be forced to give up their right to receive an economic benefit for their work. Therefore, it is essential that the PICRO offer the recording and publishing industries a flexible royalty structure. The simple solution would be to allow the recording industry to set their own price for each item that is licensed, and have them work out their own separate agreements with the publishing companies, as they do with CDs.⁴⁴

The recording company will set the lowest price for which they license the product, with exceptions available for promotional discounts. The wording of these exception provisions should be carefully written so as to avoid monopolistic behavior. The rate will be based on a type of “most-favored-nation-clause” that allows all webmasters to compete on the same footing, regardless of their power in other areas.⁴⁵

It is also necessary to offer digital music to the citizens of the developing nations at an affordable price. If citizens in developing nations are required to pay a higher price for digital music then these users may turn to pirate networks. If users in developing nations begin to turn to pirated digital music, then the leaders of these nations will not be able to receive the benefits needed to compensate for the concessions they make on the internet radio broadcasting rates. If the recording industry were able to set their

44. Publishers should also be forced to accept the pro-rata discounts that will be applied by the PICRO so mechanical royalties do not become uncontrollable. See David Kostiner, *Will Mechanicals Break the Digital Machine?: Determining a Fair Mechanical Royalty Rate for Permanent Digital Phonographic Downloads*, 21 SANTA CLARA COMPUTER & HIGH TECH L.J. 235 (2004) (offering a detailed discussion of the importance of controlling the cost of mechanical royalties in this digital distribution model).

45. See BLACK'S LAW DICTIONARY 1031 (7th ed. 1999) (defining most-favored-nation-clause).

own prices for each country, it is foreseeable that they may not make the kind of reductions necessary to make music affordable to non-major market users. The fact that the recording industry *might* not make the concessions to the non-major market countries will dilute the benefit of the PICRO system, and may weigh against the total adoption of this licensing scheme.

In order for the non-major market countries to be sure that the PICRO will open access to the arts for their people, the discount formula for licensing rates must be part of the overall structure. This discount formula should be one that aims to make music affordable to the majority of a country's citizens, following the pricing plan the music industry employs in the major markets.⁴⁶

One possible way the discount formula could work is that a single country will be chosen as the base market. For the sake of simplicity, the base market country should be the country that had the highest amount of music sales for the previous year.⁴⁷ This market will also be the market the majority of the entertainment industry will base its price on because it is the most important source of revenue for them.

The copyright holder will set a price for the base market as previously discussed. All the other nations of the world will be compared to that base market in terms of the money their average citizen has. Perhaps the comparison should be done by the use of a formula based on the GDP⁴⁸ of a nation, or its purchasing power parity, or both. This system will almost certainly be a point of much debate and negotiation, and this author will not attempt to choose which system will be best for this purpose. For the purpose of illustration, let us say that the base market price is tied to GDP per capita, so that if a non-base country has a GDP per capita of \$20,590, and the base country has a GDP of \$41,000, the non-base market user will only pay (roughly) half as much for the file as the user in the base market. On the other hand, if the non-base country had a higher GDP per capita than the base country, the opposite would hold true, that is, users will pay more.

46. The author realizes not every citizen in the major markets can afford the luxury of purchasing digital music, but it is fair to say the market is not tailored only for wealthy people in these nations. Therefore, the discount rate that applies to a country like India, a non-major market nation, should not only make it affordable to wealthy Indians, but to the average Indian.

47. In years where the base market changes, the formula used the next year must take into account those changes so that the price per point does not change, otherwise users with previously purchased points will have their point values changed.

48. It is probably more realistic to set the discount rate to only a certain portion of the price, so there is a base, or at a less steep formula, but this is again merely for illustration purposes.

This scenario illustrates a potential problem. How do webmasters sell regularly priced music to one user and discount-price music to another user on the same site? One answer to the solution would be to display all the songs as a price in “credits” or “points.” Each point will represent a unit of currency in the base market, or could be otherwise tied to the base currency. The currency conversions and discounting will be done when the user purchases the credits. After the credits are stored in the purchaser’s account, the purchaser may spend them in online music stores without realizing the pricing difference has been hidden from them. Of course, the website owner who wants to deal in currency can always opt to change the points back to currency by reversing the formula.

For example, website owner A, who wants to sell his products to users worldwide, will have a store that shows these prices in the universal “points” price along with the likely addition of a few fractions of a “point,” or a premium for access, for his time, costs and profits. When a United States user buys points in this model, she will be offered no discount, because she lives in the base market. However, when B, a resident of Tonga purchases a song, the software will recognize her location by her billing address, or IP address, as being a nation subject to a discount. It will then perform the proper formula to show the discount and convert the currency. Here is what B’s purchase of a credit would look like if the discount were tied directly to the amount of GDP per capita of a country, and 1 credit equaled \$1 in the base rate:

$$\text{\$1 (Price in base market for a single credit) X (Discount rate) X (exchange rate) = price}$$

In B’s case the price per credit would be: $\text{\$1.00 x (2300/42,000) x 2 = .11 TOP}$

In A’s store, however, all the prices are set to points. The fact that the credits represent a different amount of money to different users is of no importance; the price can be displayed universally. Webmasters no longer need to negotiate the terms of the deal and establish a new site for every country because of the universal pricing structure. They have a universal price that can handle the rights implicated by users who access the site worldwide. The site just has to be translated to all of the major languages, a task that will be accomplished as long as there is interest in it.

III. EFFICIENT POLICING OF LICENSES

Policing the compliance of norms set by the PICRO is another relevant issue. By pooling the costs of the employees who will have to surf the Internet to ensure that Internet Radio and DPD stores are complying with the regulations set by PICRO, costs that are already being expended by the Harry Fox Agency, A.S.C.A.P., B.M.I., SoundExchange, and their foreign counterparts can be saved. The DPD scheme would increase policing costs, but only because it creates a new service. To keep their duties manageable, webmasters must agree to be audited both in their accounting and traffic statements. Website owners must also be required to keep detailed reports of both these items.

However, checking the accounting of even randomly selected sites will be expensive. Therefore, after webmasters select which DPD songs will be included in their catalog, the PICRO software will generate links that will identify the song and relevant license by code. The vendor's code will be included in the link, similar to current affiliate program software. Whether the link will lead to a digital repository of songs managed by the PICRO, act as a buffer, or be a redirect link, will be a matter of debate.

If the generated link is used to access a digital repository, then users anywhere will be able to sell the products in their online stores without having to buy the CDs individually, or pay for an ephemeral license for the music that is placed on their servers. This could reduce the cost of opening an online music store drastically, provide access to music worldwide that may not be available locally, and create uniformity in copyright management software among stores, thus reducing the need to police standards. Therefore, it should seriously be examined as a potential means of distribution, especially since centralizing the servers will reduce server costs.⁴⁹ If this were the case, the PICRO would have to charge either the webmaster or the author for the transfer costs.

If the link acts simply as a buffer link that hits a counter to let the PICRO know how much a particular account had earned, the DPD provider will have to deal with the issues of ephemeral licensing and software security as part of the package.

In either situation, the price charged will be set by the owner of the work in relation to the number of hits an item has. The number of hits will be multiplied by the price to create an amount that is owed to the owner of that work. When all such charges are

49. This is based on the widely accepted theory that economies of scale can reduce the costs of producing a unit, here a unit of bandwidth, by taking advantage of operational efficiencies. See BLACK'S LAW DICTIONARY 531 (7th ed. 1999) (defining economy of scale).

added up and sorted by vendor ID, an accounting method can be employed. Either billing will be sent out to them for the products they sold or checked against reserve accounts from money paid in advance.

In order to come to the correct charge, the PICRO must know which uses came from which countries and so forth. That is why when a user is, in whatever way, directed through the ID link described above, their link will not only represent the information mentioned before, but will also include the country code or discount code that was applied to the sale. This full link will be what is recorded at the PICRO. Based on the country code, proper accounting and billing can be done with a minimal amount of human labor thereby increasing returns to rights holders, and/or lowering prices to distributors and consumers.⁵⁰

IV. PROTECTION OF MORAL RIGHTS

Under the Berne Convention,⁵¹ and the national laws of many “moral rights” based copyright regimes, artistic integrity is protected by operation of law.⁵² The provisions establishing the PICRO should also recognize and address these rights.

Protection for the rights of authors is easier in the Internet Radio context. The provider must use legally obtained music, not bootlegs or unauthorized versions of a work.⁵³ Additionally, the webcaster has to give proper attribution to the artist (e.g. “Angie” by the Rolling Stones”). In addition to these moral rights protections, the webcaster must also take steps to ensure that they do not infringe on the artists’ right to publicity by using a work in a way that suggests endorsement.⁵⁴

The DPD music storeowners could do the same, but there are some additional concerns. For example, an artist might have reservations about having his or her music sold on certain sites, especially those that deal with pornography or hate speech. The decision to revoke the license for these types of sites should be allowed to the artist, who should be able to place reasonable restrictions on the PICRO database, so that website owners in these and other similarly situated categories of content providers could know not to

50. See generally KOHN ET AL., *supra* note 3, at 211-13.

51. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris on July 24, 1971, 1161 U.N.T.S. 30.

52. *Id.* at art. 6bis.

53. 17 U.S.C. § 114(d)(2)(C)(vii) (2006).

54. *Id.* at § 114(d)(2)(C)(iv).

carry the file.⁵⁵ Clear violations by the website owner should be punished by fines.

Artists interested in this system could manage their listings through their PICRO account, which will show them all their products and where they are licensed. While the price should be set by the copyright holder, the right to revoke a site's use of the song should be left to the author. It should also be an inalienable right in order to ensure that the record companies do not use this as a way to direct traffic to companies with which they have ties or which they own.⁵⁶

Along with the right to protect authors from having their work associated with unsavory sites is the need to protect the quality of the work that is distributed. Therefore, along with the information already supplied to the PICRO with each song, the author should be allowed to set a minimum amount of bits per second that a music file of their work can be sold under the license. If the PICRO acted as a central server, there would be no need for these provisions or their policing. Only those files that the artist submits will be offered by the PICRO. If the artist chooses not to submit singles, but only full albums for sale, the PICRO should respect that decision and only allow webmasters to offer the entire album.

Other issues that will need to be addressed include the need of website owners to have images to correspond to their products, and the need of copyright owners to receive protection for the images they create.⁵⁷ The licensing scheme should then contain a provision that would allow website users the right to use an album cover, or cover art associated with a particular song or album. The loss to the music industry would be small, since those images are traditionally exposed as part of the promotion to sell the CD and can be said to fairly represent the work. Furthermore, the cost of creating the image can be factored into the price set at the PICRO.

V. CONCLUSION

The PICRO could establish a new age of digital distribution by removing the barriers to negotiating licenses and the cost of maintaining inventory. By allowing every entrepreneur in the world to open his or her own digital record store, the PICRO could take ad-

55. See Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. L.J. 1, 22 (2001).

56. See, e.g., *id.* at 12-14 (suggesting the adoption of protections for authors that exist under the French model).

57. Images are covered in the scope of protected works under the Berne Convention. See Berne Convention, *supra* note 52, at art. 2(1).

vantage of the decentralized nature of the Internet, and serve as a catalyst for niche market stores specializing in a particular genre, or for the development of innovative business models. Through the proliferation of unique distribution outlets, users will be exposed to and influenced by a variety of expressive creations, and may come across music that they would not normally be exposed to because of the market distortions caused by advertising.

In addition, the PICRO will offer the nations of the world a viable means of obtaining reasonably priced artistic creations, without the need of independently establishing and maintaining their own collective rights societies.

Due to the potential affordability, access, efficiency, and uniformity features that the PICRO would have to offer, it is certainly a solution that should be considered when attempting to tackle the difficult task of digital entertainment distribution.