From Baton Rouge to Baghdad: A Comparative Overview of the Iraqi Civil Code

Dan E. Stigall
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I. INTRODUCTION

On April 9, 2003, a statue of Saddam Hussein was pulled down by American troops in Baghdad, signaling the end of a dictator's brutal reign and the beginning of a long process of redevelopment and discovery. Redevelopment was necessary because so many Iraqi institutions were destroyed by war, Ba'athist policies, or oppression. There was discovery because the United States, as an occupying force, was suddenly saddled with the responsibility of rebuilding a torn land and, therefore, required to become intimately familiar with a place and culture that the western world had largely ignored.

Today, the legal system of Iraq is still something of a mystery to the western world. Given the resurfacing importance of the region, the paucity of legal literature concerning Iraq is surprising. When it is addressed, far too often it is mischaracterized as a fundamentally Islamic system or presumed to be a system based on principles alien to the western world. Though such presumptions might be warranted in the limited areas of personal status (i.e. family, marriage, and inheritance) a comprehensive analysis reveals something quite different—especially in the realm of Iraq’s civil law.

It is particularly unfortunate that the details of Iraq’s legal culture have remained mired in obscurity. As Professor Khaled Abou El Fadl noted:

Iraq has had a long and rich jurisprudential experience. Before Saddam came to power, the country, along with Egypt, was one of the most influential in the development of the legal institutions and substantive laws of the Arabic speaking world. A high level of education was enjoyed by the Iraqi elite, and

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* CPT Dan E. Stigall is an attorney with the United States Army JAG Corps and served in Iraq as a legal liaison to the Coalition Provisional Authority. He received his J.D. from the Louisiana State University Law Center in 2000 and is a member of the Louisiana State Bar.

1. See e.g., United Nations Development Programme, Programme on Governance in the Arab Region, Iraq: Judiciary, at http://www.undp-pogar.org/countries/iraq/judiciary-pw.html. The report incorrectly states that “[t]he legal system in Iraq can be considered a mixed system and is based on a combination of Shi’a and Sunni legal principles.” Id. This statement does not accurately describe Iraq’s legal system, criminal or civil.
Iraqi legal thought was characterized by a lack of xenophobic nativism.\footnote{Khaled Abou El Fadl, \textit{Rebuilding the Law}, Opinion, Wall St. J., April 21, 2003, at A12.}

One of the great legal triumphs in Iraq's history was its enactment of the Iraqi Civil Code on September 18, 1951. According to its foreword, the Iraqi Code is derived from two main sources: the Islamic Shari'a and the Civil Code of Egypt which derives from the laws of the West and the Islamic Shari'a.\footnote{N. Karim, Foreword to the 1990 English Translation of the Iraqi Civil Code (citing the Reformation of the Legal System Law No. 35 (1977)).} While this statement is technically accurate and likely designed for public consumption, it ignores the rich legal tradition that spawned the Iraqi Civil Code—a tradition that binds it to so many countries and cultures across the globe, linking it legally and historically with a global community of civil law jurisdictions.\footnote{See Mark A. Drumbl, \textit{Amalgam in the Americas: A Law School Curriculum for Free Markets and Open Borders}, 35 San Diego L. Rev. 1053, 1069 (1998) ("Today, the overwhelming majority of the countries in the world have a civil law system."); see also Introduction to Foreign Legal Systems (Richard A. Danner & Marie-Louise H. Bernal eds., 1994) (noting that Belgium, Italy, the Netherlands, Portugal, Spain, countries of Central and South America, and former possessions of Belgium, France, the Netherlands, Portugal, Africa, Asia, as well as Puerto Rico, Louisiana, and Quebec are part of the Romanist-Latin legal group which share a private law based on the French \textit{Code Civil}).}

Commentators recognize that the modern Iraqi Civil Code is primarily based on the \textit{Code Civil} of France.\footnote{See Mahmoud A. El-Gamal, \textit{Interest and the Paradox of Contemporary Islamic Law and Finance}, 27 Fordham Int'l L.J. 108, 112–13 (2003) ("...the actual civil codes in most Muslim countries owe less to Islamic jurisprudence than to European civil codes. Turkey based its civil codes on Swiss law in 1926 while Egypt, Syria, and Iraq implemented predominantly French-based civil codes.").} Professor Abou El Fadl notes that "... Iraqi jurists, working with the assistance of the famous Egyptian jurist Al-Sanhuri, drafted a code that balanced and merged elements of Islamic and French law in one of the most successful attempts to preserve the best of both legal systems."\footnote{Khaled Abou El Fadl, \textit{supra} note 2.}

As a result, Iraq, while retaining its ties to Islamic law, is part of a wider global community of civil law jurisdictions based on the French model—connecting Iraq's judiciary with jurisdictions as diverse as Ukraine and Burkina Faso, Quebec and Portugal, Greece and Louisiana. From Baton Rouge to Baghdad, the civil law heritage is a rich, global legal tradition which binds Iraq to a vast majority of the world's jurisdictions and offers the advantage of centuries of legislative wisdom to assist its developing judiciary and future legislators.
The purpose of this article is to provide a comparative overview of the Iraqi Civil Code to the western jurist. It must be noted at the outset that the entire subject of Iraqi Civil Law is far beyond the scope of a single article (or even several articles). Therefore, the objective of this article is to provide the western jurist with a general introduction and facilitate the ongoing process of discovery in the realm of Iraq's legal culture by offering brief descriptions and comparisons of some identifying characteristics of the civil law: the Code's overall structure, sources of law, theory of obligations, and its concept of property. In conclusion, this article comments on the impact of the new Iraqi constitution and assesses the implications of this civil law heritage as it relates to the problems of Iraq's developing judiciary.

As a frame of reference, this article compares the Iraqi Civil Code to the Louisiana Civil Code. This comparison is useful for several reasons, but primarily because the Louisiana Civil Code represents a traditional civil code in which civilian characteristics have been assiduously preserved while its contents have been selectively improved. Though commonly considered a "mixed" jurisdiction, Louisiana retains such significant ties to the civilian tradition that it doubtlessly remains an appropriate civil law model. Thus, for jurists of all stripes, it provides a modern benchmark by which the Iraqi Civil Code (which has languished for over three decades under the Ba'athist regime) can be compared.

Secondly, this article demonstrates the numerous similarities between the Louisiana Civil Code and the Iraqi Civil Code. The implications of these substantive ties are significant as, though there is little modern Iraqi scholarship on the subject of civil law, a great deal of American and European legal scholarship has been devoted to its history and principles. With regard to the scholarly material addressing the Louisiana Civil Code, it is easily accessible to American jurists and is, for the most part, written in a familiar tongue. Thus, American jurists can easily gain a basic understanding of the principal concepts of Iraqi Civil Law by perusing the scholarly work and jurisprudence regarding Louisiana's civil law system.

7. See Mack E. Barham, Methodology of the Civil Law in Louisiana, 50 Tul. L. Rev. 474 (1976). Barham notes:

Louisiana is truly proud of its civilian heritage, not simply out of a loyalty to our history, but also because of our sincere belief that the civilian tradition serves the people of Louisiana well...[w]e believe that by retaining as much as we possibly can of our civilian tradition, by drawing upon the best reasoning of the jurists and academicians of our common law states, and by responding to the customs of the people of our national community, we in Louisiana offer a unique experiment in the law for the rest of the country.

Id. at 493.
Third, the Louisiana Civil Code is a familiar institution to a number of jurists (particularly those in Louisiana) who may have some interest in studying how the Iraqi counterpart to their cherished document has fared.

Finally, and not least in significance, it is the civil code of the author’s home state and, therefore, the code with which the author is most familiar. To choose any other civil code as a frame of reference would be an act of unforgivable treason.

II. CIVIL LAW, CIVILIANS, AND CIVIL CODES—A BRIEF EXPLANATION

Before entering into a comparative overview of the Iraqi Civil Code, it is important to make clear the meaning of the terms civil law, civilian, and code as they are used in this article. Civil law has been defined as:

...that legal tradition which has its origin in Roman law, as codified in the Corpus Juris Civilis of Justinian, and as subsequently developed in Continental Europe and around the world. Civil law eventually divided into two streams: the codified Roman law (as seen in the French Civil Code of 1804 and its progeny and imitators—Continental Europe, Quebec and Louisiana being examples); and uncoded Roman law (as seen in Scotland and South Africa).

Civil law is highly systematized and structured and relies on declarations of broad, general principles. What distinguishes civil law systems from other legal systems, such as “common law” systems, is their uniquely shared history and a tradition of deeply rooted attitudes about the role of law in society and the polity. Civil law systems share a common belief about the proper organization of a legal system. Those jurists who are a part of that civil law tradition are referred to as civilians.

The civil law is generally subdivided into a German-influenced area and a French-influenced area. However, commentators further distinguish a family of mixed systems: Scotland, Louisiana, Quebec, and South Africa being examples. A mixed legal system is one which contains elements derived from multiple legal traditions. For

9. Id.
instance, the Egyptian legal system combines elements of the civil law tradition with the Islamic legal tradition. Quebec and Louisiana combine elements of civil law with the common law tradition.\(^\text{12}\) Though exceptions may exist on the periphery, mixed systems are generally considered to remain under the broader rubric of civil law systems.\(^\text{13}\)

One of the chief characteristics of a civil law jurisdiction is the existence of a civil code.\(^\text{14}\) However, civil law codification is to be distinguished from the compilations of laws in other jurisdictions that are casually referred to as codes, such as tax codes, commercial codes, criminal codes, and the California Civil Code. These are not codes in the sense civil law jurists use the term. The use of the term code to civilian jurists conveys something specific: it is a tradition, a particular way of thinking about the law and codification.

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.\(^\text{15}\)

III. WHAT DOES IT LOOK LIKE? A STRUCTURAL COMPARISON

Traditionally, civil codes are divided into three separate books and ordered in a logical progression. This tripartite structure dates back to the Roman jurist, Gaius, who posited that all the law belongs to a category of persons, of things, or of actions.\(^\text{16}\) For the Romans, it seemed logical that persons should be considered before things they own or from which persons will benefit. Things would be considered before the modes of acquiring the things. Thus, traditionally, the first book of a civil code addresses the principal classes of persons, the second addresses the law of things, and the third concerns legal actions or procedure.\(^\text{17}\)

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14. Civil law jurisdiction such as Scotland, Belgium, Namibia and South Africa remain uncodified civilian jurisdictions, but exist as exceptions to the general rule of codification.
15. *See* John H. Tucker, Jr., Foreword to the Louisiana Civil Code (West 2004).
Modern codes do not necessarily adhere to the classic tripartite structure. Prior to the adoption of the French Civil Code, jurists were advocating a civil code with four books. The modern Louisiana Civil Code has four books, and neither the French Code Civil nor the Louisiana Civil Code has a book on the matter of actions. Rather, these civil codes have a third book focused on the modes of acquiring the ownership of things. Therefore, it is a fair statement that the tripartite structure is an important influence, though not the most defining feature of a civil code.

Though the idea of a fixed number of books was historically not considered sacrosanct for any compilation of laws, the style and logical ordering of the civil code has remained of paramount importance.

The Civil Code should be simple and clear, like the laws of nature. It must be reduced to a small number of articles that flow logically from general principles of the new democratic society. The individual will know the laws that govern him; he will be delivered from the subtleties and infinite complications that deceivers invent at his expense.

An analysis of the history and structure of the Louisiana Civil Code shows it to be an ideal example of a modern code that adheres to the traditional civil law structure, while adapting to the necessities of its particular situation. Until 1992, the Louisiana Civil Code consisted only of a Preliminary Title followed by three books—the classic tripartite structure. However, that earlier code possessed only two articles to govern the entire regime of conflicts of laws. Those two articles were contained in the Preliminary Title. However, such an anemic conflicts regime was un-

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18. See Herman & Hoskins, supra note 17.

Cambacérès’ projet of 1793 was divided into four books—the status of persons, things, contracts, and actions. Although Cambacérès’ second and third projets followed a tripartite scheme, Jacqueminot’s projet of 1799 did not, demonstrating that on the very eve of the Code’s adoption there was still no consensus about its ultimate shape.

Id. at 993.

19. See Levasseur, supra note 17.


22. See Louisiana Civil Code, Book IV.
satisfactory—particularly for a state situated in a federal system surrounded by forty-nine other separate sovereigns.

Therefore, Louisiana replaced those two articles with approximately thirty new ones. As there was simply no room to put all of the new conflicts articles in the Preliminary Title (without renumbering old articles), mechanical reasons dictated the abandonment of the tripartite structure. In 1991, Book IV (Conflict of Law) was adopted—giving Louisiana's Civil Code one of the more sophisticated conflicts of law regimes in the United States. Thus, a modern code deviated from the tripartite structure, but for the benefit of needed evolution.\(^2\)

Today, the Louisiana Civil Code consists of a Preliminary Title followed by four books. Book I (Of Persons) gives general definitions and legal principles of the civil code regarding natural and juridical persons. This Book contains the law governing status, domicile, marriage, divorce, and interdiction.

Following the traditional civil law structure, Book II of the Louisiana Civil Code (Things and the Different Modifications of Ownership) gives general definitions and legal principles governing things, which include the civil law concept of ownership, servitudes, usufruct, and boundaries.

Book III of the Louisiana Civil Code (Of the Different Modes of Acquiring the Ownership of Things) contains the general law of obligations, nominate contracts, sale, lease, exchange, and security devices. This book also contains the law governing partnerships and business entities.

As discussed earlier, Book IV contains the Conflict of Laws provisions of the Louisiana Civil Code. Though it has adopted an extra book, one still sees in its structure the classic civil code logic and design: persons, followed by things, followed by the modes of acquiring things.

Similarly, the Iraqi Civil Code is also divided into a Preliminary Part followed by four books. However, a distinctive feature of the structure of the Iraqi Code is that its four books are divided into two main parts: rights in personam and rights in rem. Unlike the Louisiana Civil Code, the Iraqi Civil Code has all of the law governing obligations and contracts in its first two books, under the larger rubric of rights in personam, and in its second two books, under the rubric of rights in rem, all the law governing ownership and rights in things.

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In keeping with the civil law's logical tradition, the first main division of the Iraqi Code is called the Preliminary Part and consists of basic, general legal concepts. Chapter One of the Preliminary Part (Application of the Law) contains provisions governing the sources of law, application of the law, and conflict of laws in application. Chapter Two (Persons) contains provisions generally defining and describing the basic legal regime of natural and juridical persons. Chapter Three (Property and Rights) contains, as the name suggests, the basic, general definitions of property and rights.

Part I of the Iraqi Civil Code, entitled Rights in Personam, is divided into two books. Book I (Obligations in General), as its name suggests, formulates the general theory for obligations and addresses the effects and description of obligations (such as conditions, terms, and, assignment of debt.) Book II (Nominate Contracts) addresses nominate contracts, which, according to the Iraqi Civil Code, consist of contracts concerning ownership, contracts concerning benefits, contracts of work and aleatory contracts, and warranty.

Part II of the Iraqi Civil Code concerns Rights in Rem and consists of Books III and IV. Book III (Primary Rights in Rem) addresses the law of ownership as well as the principal rights in rem, including lease, usufruct, and habitation. Book IV (Accessory Rights in Rem/Securities in Rem) addresses security devices, such as authentic mortgages, possessory mortgages, and privileged rights.

Thus, like its sister code, the Iraqi Civil Code begins with general preliminary concepts and progresses into the rules governing persons. However, in contrast to the Louisiana Code, the Iraqi Civil Code places all of the articles governing persons in the Preliminary Part rather than making persons the sole focus of a separate book. This derogation in structure is understandable as the subjects of marriage, divorce, and personal status (the subjects which comprise the bulk of Book I of the Louisiana Civil Code) are not within the jurisdiction of civil courts in Iraq. Rather, under the Iraqi legal system, those subjects are the proper subjects of 'Personal Status Courts'—a separate system of courts that are based on Islamic law. Thus, there would be no reason for the Iraqi civil law system to devote an entire book to the subject of persons, though some general propositions concerning persons are necessary and do find their way into the Preliminary Part of the Iraqi Civil Code.

Though one might argue that the ordering of the Iraqi Civil Code distorts the classic civil law logic (persons, then things, then actions), such a criticism would be superficial. The Iraqi Civil Code's

Preliminary Part first addresses the general application of the law, then general rules regarding persons, and then general rules concerning things—keeping with the classic civil law logical ordering. The subsequent books then address the rights and obligations formed among persons, followed by the rights and obligations concerning things, beginning with the most general concepts and then proceeding to more specific rules.

Thus, a review of the structure of the Iraqi Civil Code reveals that its structure comports with the classical civil law model insofar as it reflects the traditional ordering flowing logically from general principles, as well as the traditional division of books into persons and things.

IV. COMPARING THE SOURCES OF LAW

Perhaps the most distinguishing feature of civil law, to the common law jurist, is the civil law system's hierarchy of legal sources. "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." Thus, the primary basis of law for a civilian is legislation, and not prior decisions of the courts (as in the common law). The effect of this is that the concept of stare decisis is foreign to the civil law.

The articulation of the formal hierarchy of legal sources is to be found within the civil code, and a comparative observation of the

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27. La. Civ. Code art. 1, cmt. (b) (citing A.N. Yiannopoulos, Louisiana Civil Law System §§ 31, 32 (1977)).

Louisiana and Iraqi Civil Codes, in this respect, reveals striking similarities and interesting divergences.

In their first articles, both the Louisiana and Iraqi Codes reflect the classic civil law hierarchy of sources. Article 1 of the Louisiana Civil Code reads: "The sources of law are legislation and custom." When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity.

The Iraqi Code’s initial articles are strikingly similar. The first article of the Iraqi Civil Code states that legislative provisions shall apply to all matters covering these provisions in letter, trend, and content. In the absence of any applicable legislative provisions in the law, the court shall adjudicate according to custom and usage. In the absence of custom and usage, courts shall rule in accordance with the principles of the Islamic Shari’a which are most consistent with the provisions of the Iraqi Civil Code, though courts are not bound by any specific school of thought. Otherwise, the Iraqi Code states that courts are to rule in accordance with the laws of equity.

The principal distinction of the two codes, insofar as their hierarchy of sources is concerned, is the Iraqi Code’s concession to religious influence—allowing that, in the absence of legislation, custom, or usage, courts shall rule in accordance with the principles of the Islamic Shari’a most consistent with the provisions of the Iraqi Civil Code. However, that kind of religious judgment is curtailed by Article 2 of the Iraqi Code, which states that "[w]here there is a provision no independent judgment (ijtihad) is permissible." According to the explanation of this article in the Iraqi Code: "[t]he meaning of this article is that it is not permissible to make an independent judgment in respect of a Shari’a case in respect of which there is a provision (rule) because the making of an independent judgment will be where there is no provision . . . ."

These provisions reflect a decidedly civilian hierarchy of legal sources: government legislation and custom are primary and everything else is secondary. Traditional Islamic systems, in contrast,

30. Id. art. 2.
31. Id. art. 4 ("To decide equitably, resort is made to justice, reason, and prevailing usages.").
33. Id.
34. Id.
35. Id. art. 1(2).
36. Id. art. 2, explanation (N. Karam trans., 1990).
draw their norms directly from the shari‘ah (the sacred law) and the fiqh (Islamic jurisprudence). Though the Iraqi Civil Code makes a cultural bow to these traditional systems by including such principles as secondary sources of legislation, the positive law of the civil code is clearly dominant.

The significance of a religious reference within the civil code, while important, should not be exaggerated. While the idea of resorting to Shari‘a seems anathema to the western legal tradition, the civilian tradition has long permitted, absent positive law, resort to a transcendental referent. As the influential nineteenth Century French jurist, Portalis, stated:

When one is not guided by anything provided or known, when it is a question of an absolutely new case, one has recourse to the principles of natural law. Because if the foresight of the legislator is limited, nature is infinite; it applies to everything which can be of interest to men.

Therefore, though cultural differences have left their signature on the Iraqi Civil Code, both civil codes reflect the traditional civilian sources of law. The implications of this are that Iraqi courts will make judicial decisions in much the same way as Louisiana courts—placing special emphasis on statutory interpretation. Neither court will rely on the principle of stare decisis, but will instead look to consistent opinions of judges to form a persuasive, though not binding, source of law. Both jurisdictions will defer to custom and, in the absence of either, both will apply rules of equity.

V. COMPARING THE FORMATION OF OBLIGATIONS

Another characteristic quality of the traditional civil law system is the manner in which obligations or contracts are formed. In contrast to common law, which envisions a contract as a relationship involving a quid pro quo, traditional civil law regards an obligation as a vinculum juris between two persons, with a right in a thing that can be held against the world. In other words, civilians view a legal obligation, not as an exchange, but as the law enforcing the will of a party.

40. See 1 A.N. Yiannopolous, Property 380 (2nd ed. 1980).
Most historians credit medieval canonists with creating the idea that a bare agreement—an intersection of wills unattended by formalities—constituted the law between the parties. The original definition in Roman law, defining an obligation as a bond, or *viculum*, remains in contemporary civil law systems. In accordance with that definition, an obligation is personal in nature. Parties are bound because the law acts to enforce the will of a party. The implication is that civil law system contracts do not require consideration—only the consent of the parties, an object, and a just cause. Professor Saul Litvinoff writes:

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.

The notion of cause has become a characteristic mark of a civilian system. In civil law systems,

[i]f there is no cause, the obligation is as ineffectual as a Roman *nudum pactum*. In demanding a cause in order to give binding force to an obligation, the law makes certain that persons have a reason to limit their freedom by the bond of obligation. If there is no such reason then there is no bond, and freedom from obligation is restored to the person who thus had bound himself. The will of contracting parties is thereby protected without encroaching upon their freedom, as it must be presumed that reason governs human choices.

41. See Herman, *supra* note 16.
43. See Edith Z. Friedler, *Shakespeare's Contribution to the Teaching of Comparative Law—Some Reflections on The Merchant of Venice*, 60 La. L. Rev. 1087 (2000) (citing C. Civ. art. 1008 (France)).
45. *Id.*
Likewise, the notion of consent in traditional civil law jurisdictions includes the idea that consent can be vitiated by vices of consent.\textsuperscript{46} This concept is derived, not from Roman law, but from the French civilian tradition.

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.\textsuperscript{47}

A review of the Louisiana and Iraqi Civil Codes shows that both retain these civilian characteristics. The modern Louisiana Civil Code defines an obligation as, "... a legal relationship whereby a person, called the obligor, is bound to render a performance in favor of another, called the obligee. Performance may consist of giving, doing, or not doing something."\textsuperscript{48} Obligations can arise from contracts and other declarations of will, or directly from the law, regardless of a declaration of will, in instances such as wrongful acts, the management of the affairs of another, unjust enrichment, and other acts or facts.\textsuperscript{49}

The Louisiana Civil Code reflects the civilian emphasis on consent noting, "a contract is formed by the consent of the parties established through offer and acceptance."\textsuperscript{50} The Louisiana Civil Code also reflects the French notion of vices of consent stating that these vices consist of error, fraud, and duress.\textsuperscript{51}

In order to form a valid contract, the Louisiana Civil Code, like other civil law jurisdictions, does not require consideration. Rather, in keeping with the Romanist tradition, the Louisiana Civil Code requires only that there be the consent of the parties, a lawful object,
and just cause. Under Louisiana law, "[c]ause is the reason why a party obligates himself." The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.

Thus, a brief analysis of the Louisiana Civil Code reveals that it adheres to the civil law tradition's distinct concept of obligations and contracts, incorporating the notion of an obligation as the law enforcing the will of a party and incorporating the French notion of vices of consent.

A review of the Iraqi Civil Code reveals that it also reflects the notion of an obligation as a vinculum juris, defining a contract as "... the unison of an offer made by a contracting party with the acceptance of another party in a manner which establishes the effect thereof in the object of the contract." An Iraqi contract is valid if its object is not forbidden by law or to the prejudice of public order and morals.

The Iraqi Code further states that "the contract shall be null and void if the contracting party has assumed an obligation without a cause or for a cause which is legally prohibited or is in violation of public order and morals." Thus, the Iraqi Civil Code's theory of obligations maintains the civilian concept of cause.

According to the Iraqi Code, "offer and acceptance are ... [words] used customarily for the creation of a contract; whichever expression is made first is an offer and the second is the acceptance." This is the primary method in which parties to an Iraqi contract express their consent. Likewise, the Iraqi code allows that consent may be vitiated by certain "defects of the will." These are articulated as duress, mistake, and "fraudulent misrepresentation

52. See id. arts. 1927, 1966, and 1971.
53. Id. art. 1967.
55. Iraqi Civ. Code art. 73.
56. Id. art. 112.
57. Id. art. 132; see also id. art. 75 ("[a] contract is valid if it is in respect of any other thing the undertaking of which is not forbidden by law or which is not to the prejudice of public order and morals.").
58. Id. art. 77.
59. Id. art. 60-62.
60. Id. art. 112.
61. Id. art. 117.
Thus, like the Louisiana Civil Code, the Iraqi Code retains the French-developed concept of vices of consent.

In addition, the Iraqi Civil Code requires that "[e]very obligation which has resulted from the contract must have [a legal] object attached to it . . . the object may be property be it an object of material value, a debt, a benefit, or any other pecuniary right; it may also be work or abstention from doing work." This last phrase mirrors the Louisiana Civil Code's definition of performance, which allows performance to "consist of giving, doing, or not doing something."

Thus, a review of the Iraqi law of obligations reveals a familiar picture for civilian jurists. Like its Creole cousin, the Iraqi Civil Code requires, for formation of a valid contract, the following basic criteria: mutual consent, object, and just cause. This is a traditional civilian formula that upholds the view of an obligation as a vinculum juris between two persons, with a right in a thing that can be held against the world. There is no requirement for consideration, an exchange, or for a quid pro quo.

VI. COMPARING THE LAW OF PROPERTY—DIVISION OF OWNERSHIP, USUFRUCTS, AND SERVITUDES

The traditional civilian regime of property law is a distinctive and highly stylized system of property ownership. Originating with Roman property concepts, traditional civilian doctrine recognizes different distinctions in kinds of property: public and private; corporeal and incorporeal; movable and immovable. Further, traditional civil law recognizes only one scheme of property division, dividing ownership conceptually into "usus (use), fructus"
(fruits), and abusus (the right to sell or otherwise dispose of property).”

This conception of the proper division of property gives rise to the characteristically civilian property device called usufruct which allows a person to use and enjoy the fruits of a thing without giving that person the ability to dispose of it—the ownership of the usus and the fructus without the abusus.

Another identifying characteristic of civil law property is the concept of servitudes or a benefit for one piece of one estate over another to permit the exercise of some power, including a right of passage. This concept, like the term itself, dates back to ancient Rome. Its origins are derived from the Latin term servus, meaning slave—originally applicable to the relationship between a master and serf. Though the concept has changed to apply only to servient and dominant pieces of land, the term remains.

In keeping with Roman tradition, the Louisiana Civil Code recognizes the traditional civil law divisions of property. Article 477 of the Louisiana Civil Code defines ownership as “the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and conditions established by the law.”

The Louisiana Civil Code allows for someone to convey only the usus of a thing, conferring in favor of a person a specified use of an estate less than full enjoyment (not the abusus or fructus.) This is referred to as the right of use. The Louisiana Civil Code also recognizes a variation on the right of use called the specific right of habitation, which is a nontransferable real right of a natural person to dwell in the house of another.

The civilian concept of usufruct is embodied in Article 535 of the Louisiana Civil Code. “Usufruct is a real right of limited duration on the property of another. The features of the right vary with the nature of the real right and the character of the property.”

Id. at 724, n.178.

68. Herman, supra note 16, at 608.
69. Id. at 610.

In the civil law as in classical Roman law, ownership is understood to comprise three distinct real rights (that is, rights in things), namely, usus (the right to apply the thing to this or that purpose), fructus (the right to take the natural or civil fruits that the thing produces), and abusus (the right to dispose of the thing, both physically and juridically).

Id. at 724, n.178.
72. Id. art. 639.
73. Id. art. 630.
of the things subject to it as consumables or movables.” The person who owns the usufruct, the usufructuary, is entitled to the use and fruits of the thing subject to usufruct. Further, in keeping with the Roman tradition, the Louisiana Civil Code contains the concept of servitudes, defining a servitude as “... a charge on a servient estate for the benefit of a dominant estate.”

The Iraqi Civil Code, while faithful to the civilian tradition, contains an interesting blend of those principles derived from Roman law and Islamic property law. Like its American relative, the Iraqi Civil Code expresses the division of property into the subsets of immovable and movable property. According to the Iraqi Civil Code, immovable property consists of “every thing that is fixed so that it would be impossible to move or convert it without causing damage thereto such as land, buildings, plant(ations), bridges, dams, and mines.” Movable property consists of “anything which can be moved and converted without causing damage thereto and includes currency . . . , commodities . . . , animals, and things that can be measured by volume . . . .”

The Preliminary Part of the Iraqi Civil Code recognizes six principal rights in rem: ownership, disposal, usufruct, use, habitation, servitudes, and leases. However, within Book III of the Iraqi Code, one finds two additional rights in rem: the “surface right,” or musataha, and a specific right termed tasarruf.

Regarding ownership generally, the Iraqi Civil Code notes

[p]erfect ownership vests unto the owner a right to dispose absolutely of that which he owns; through use, enjoyment, and exploitation he shall enjoy (avail himself of) the thing (ayn) owned as well as its fruits, crops, and produce and may dispose of the thing itself by all the allowable means.

Thus, like the Louisiana Code, the Iraqi Civil Code’s article defining property reflects the civil law distinction between usus, fructus, and abusus. This adherence to Roman principles is made express in the Iraqi articles that articulate the civilian concept of usufruct. Article

74. Id. art. 535.
75. Id. art. 550.
76. Id. art. 646.
78. Id.
79. Id.
80. See id. arts. 67–69.
81. See text accompanying infra notes 91-92.
82. See text accompanying infra notes 100-01.
84. See id. arts. 1249–1260. Note that the word in the Iraqi code is not usufruct, but haq al-manfa’a which translates literally into ‘right of benefit’.
1252 notes that “[t]he usufructuary may use the thing the subject matter of the usufruct and its accessories; he may acquire the fruits thereof during the period of enjoyment and the products . . . belonging] to him; he shall replenish anything of the principal thing which has been expended.”

Like the Louisiana Code, the Iraqi Civil Code also contains specific articles allowing the conveyance of the rights of use and habitation. Iraqi Article 1261 expressly states that “[t]he alienation of a benefit which is restricted to enjoyment [use] or habitation is valid.” Neither the right of use nor the right of habitation may be assigned to a third party except pursuant to an express stipulation or a strong justification.

The Iraqi Civil Code maintains the civilian concept of the servitude, stating: “A servitude is a right which limits the enjoyment of an immovable for the benefit of another immovable belonging to another owner.” Though there are no definitional articles expressly on this point, the Iraqi Civil Code clearly envisions this as a charge on a servient estate for the benefit of a dominant estate, with the Iraqi articles specifically referring to dominant and servient immovables.

Thus, both the Louisiana and Iraqi Civil Codes, in adherence to the civilian tradition, contain common concepts regarding important aspects of the law of property. Indeed, one sees that the two codes share the same basic theory. However, the Iraqi property regime, as elsewhere in the Code, incorporates some traditional Islamic principles into its system—the most prominent of which are the concepts of musataha and tasarruf.

A. The Iraqi Codal Provisions Regarding Musataha and Tasarruf

1. Musataha

Islamic Civil Codes frequently make mention of a particular right known as a musataha. A right of musataha is a specific right

However, the 1990 English translation translates haq al-manfa’a as usufruct, and an examination of the concept shows such a translation to be the correct one.

85. Id. art. 1252.
86. See id. arts. 1261–1270.
87. See id. art. 1261.
88. Id. art. 1263.
89. Id. art. 1271.
90. Id. arts. 1276, 1277, and 1278.
91. Note that the English translation of the Iraqi Civil Code contains a translator’s note explaining that this Arabic word is a derivative of the word “Sat’h” which, among other things means “surface.” The musataha, therefore, is a right to
in rem conferring upon the owner thereof the right to build a building or to plant on the land of another. The Iraqi Civil Code devotes a section to the right of musataha—defining it as a right which "... vests unto its holder a right to construct a building or other installations, other than plantations, on the land of another person pursuant to an agreement concluded by him and the owner of the land setting down the rights and obligations of the holder of the right." 

According to the Code,

[b]uildings or other installations (works) carried out by the surfacer (musateh) will be wholly owned by the latter and he may dispose of them together with the surface right by sale, mortgage, and by such other rights of alienation in the Land Registration Department without prejudice to the right of the landowner and the object for which the building or works are destined unless ... there is an agreement otherwise.

This right may not exceed fifty years.

The Iraqi code contains such a provision alongside civil law concepts of use and usufruct. There seems to be the possibility of some overlap in the two concepts. However, there are important distinctions. For instance, according to the Iraqi Code, a usufruct can last as long as the life of the usufructuary, and does not pass to heirs by inheritance. In contrast, musataha is limited in time, but is heritable and can pass to heirs for the rest of the period of fifty years.

More importantly, the right of usufruct is much broader than the narrow right of musataha. Where the usufruct gives the grantee the right to exploit property in any way possible, like planting and reaping or building or erecting trees, the right of musataha is specifically the right to build buildings or constructions on land. The Iraqi Code, in fact, prohibits the use of musataha for the purposes of planting trees or other similar acts.

use the surface of the land.

94. Id. art. 1269.
95. Id. art. 1267.
96. See id. art. 1253.
97. See id. arts. 1267, 1269.
98. See id. art. 1266.
99. Id. (The author must thank Peri Bearman, Associate Director of the Islamic Legal Studies Program at Harvard Law School and Farhat J. Ziadeh, Professor Emeritus, University of Washington Law School, for their assistance in explaining the scope of musataha.).
2. Tasarruf

Islamic law also generally recognizes a specific right referred to as **tasarruf**. This Islamic property device is defined as a form of property ownership in that of state-owned land (amiri), whose possession is given for a period of time.

Article 1233 of the Iraqi Code makes clear the superiority of the state over holders of tasarruf, noting that

> The holder of a tasarruf over an amiri land shall forfeit his right of disposal over it if he has failed to exploit it himself or by lending or renting it out and [leaving] it without growing any crops thereon for three consecutive years without having valid cause for said failure.

The second paragraph of the article states:

> After that the land shall be offered to him: if he claims it will be assigned to him a second time for comparable consideration; but if he has died it will be offered to his [successors] . . . if it is claimed [by his successors] it will be assigned to them against the comparable consideration; if it is not claimed by him or any [successor] it will be assigned to the highest bidder in [an] auction where . . . persons entitled to register in the Land Registration Department are disregarded.

Commentators have routinely compared this right to a usufruct in government property. However, tasarruf is considered to subsume the actual right of usufruct where it is applicable. Thus, there is no such thing in Iraqi law as a usufruct in amiri land—one must resort to the tasarruf.

From a civilian perspective, there is nothing improper in the incorporation of these Islamic concepts in a civil code that exists

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100. See id. art. 77.
103. Id.
104. See Vaughan, supra note 101, at 355; see also George E. Bisharat, *Land, Law, and Legitimacy In Israel and the Occupied Territories*, 43 Am. U.L. Rev. 467, 493, n.98 (1994) ("In miri lands, the fact that the state was vested with absolute ownership did not mean that it could determine the ultimate use of the land; it only meant that the state could receive taxes or labor from people who possessed the land.")
within a predominantly Islamic culture. Just as the Louisiana Civil Code adapted to its needs by adopting a fourth book, so Iraq has incorporated into its civil code those traditional property devices to which the polity was accustomed. Nonetheless, as with its structure and its law of obligations, the Iraqi Civil Code's articles concerning property adhere to the distinctive and highly stylized civilian system of property ownership.

VII. THE EFFECTS OF THE NEW IRAQI CONSTITUTION

Civil codes are statutes that must coexist in the legal realm among a plurality of competing, and sometimes conflicting, statutes—some of which are dominant. Constitutional limits often restrict and shape civil code articles and jurisprudence. A survey of Louisiana jurisprudence reveals numerous examples of United States constitutional developments impacting on substantive provisions of the civil code.¹⁰⁵

On March 8, 2004, the Iraqi Governing Council promulgated the Law of Administration for the State of Iraq for the Transitional Period, often referred to as the Transitional Administrative Law or "TAL."¹⁰⁶ This law was established to govern the affairs of Iraq during the transitional period until the establishment of a duly elected, democratic Iraqi government, operating under a permanent and legitimate constitution.¹⁰⁷ According to the TAL, a permanent constitution is to be implemented no later than January 31, 2005.¹⁰⁸

As L. Paul Bremer noted:

[The TAL] is only the first step on the path to Iraq's democracy. It is an essential part of this journey. Iraq

¹⁰⁵. See, e.g., Talley v. Succession of Stuckey, 614 So. 2d 55 (La. 1993) (striking down civil code article which did not provide for the revocation of a testament by the subsequent birth of an illegitimate child whose filiation to the testator parent had been established in the manner provided by law); Succession of Bartie, 472 So. 2d 578 (La. 1985) (striking down provisions of forced heirship laws which excluded illegitimate children); Jordan v. Cosey, 434 So. 2d 386 (La. 1983) (striking down Civil Code article which limited amount of a donation by a father to an illegitimate child to one-fourth of the father's property if the father was survived by legitimate descendants or siblings); Succession of Brown, 388 So. 2d 1151 (La. 1980), cert. denied sub nom. Brown v. Brown, 450 U.S. 998, 101 S. Ct. 1703 (1981) (striking down Civil Code article which provided that acknowledged illegitimates could not come to intestate successions if the deceased parent was survived by legitimate descendants).


¹⁰⁸. Id. art. 2(B)(2).
needs—and will have—an elected body to write its constitution. But electing that body, and allowing them to write the constitution, will take time. Until that body produces a permanent constitution, there must be some legal framework to govern the country and to provide stability while the constitution is being written. The Transitional Administrative Law provides this structure, but nothing more. It will cease to be in effect once a permanent constitution is in place.¹⁰⁹

Until the future Iraqi government meets to draft and enact the future Iraqi constitution, one can only speculate as to its contents. However, though temporary and designed to be superseded, the current TAL is clearly meant as a blueprint for the next Iraqi constitution and contains many provisions that one might expect to be retained, particularly the fundamental rights afforded Iraqi citizens in chapter two of the Transitional Administrative Law. Those fundamental rights include the right to free expression,¹¹⁰ a right to Iraqi citizenship,¹¹¹ a right to equal treatment before the law,¹¹² and a full and unfettered right to own real property without restriction.¹¹³

Though nothing in the Transitional Administrative Law expressly impacts provisions of the Iraqi Civil Code, these new fundamental rights will impact the way in which codal provisions are implemented, much as the Louisiana Civil Code has been impacted by constitutional developments in the United States. Only time, the future Iraqi government, and the consistent jurisprudence of the Iraqi judiciary, will tell the impact of the Iraqi Constitution on the Iraqi Civil Code.

VIII. IMPLICATIONS FOR A DEVELOPING JUDICIARY

Thus far, this article has offered a general overview of the Iraqi Civil Code and demonstrated that, though markedly influenced by its Islamic environment, the Iraqi Code retains a great deal of the structure and legal principles that comprise a traditional civil law jurisdiction. This global legal tradition binds Iraq to the vast majority of the world’s jurisdictions and offers the advantage of centuries of legislative development. In today’s world, this is of more than trivial or academic significance.

¹¹⁰. Transitional Law, supra note 107, art. 10.
¹¹¹. Id. art. 11.
¹¹². Id. art. 12.
¹¹³. Id. art. 16(C).
For decades, Iraq languished under a dictator that abused and disregarded the law. Legal scholarship and education suffered tremendously. Today, struggling out from the smoldering ruins of a toppled regime, is an underdeveloped judiciary, which is still vulnerable to those destabilizing forces that undermine the rule of law. In an apt comparison, Salah Khadar al-Jubouri, chief judge of the Salah ad Din Provincial Court, compared the current state of the Iraqi judiciary to a recovering patient.

This recovering patient, however, is not without a steadying structure. Iraqi courts may turn for guidance to the vast amount of international scholarship and jurisprudence regarding the concepts contained in its code. As Louisiana jurisprudence shows, such global comparisons are completely appropriate among fellow civil law systems. Therefore, Iraqi judges may rightfully glean from their


  The least dangerous branch of government is, sadly, also the most neglected. Courts are fragile political institutions, and their effectiveness is easily undermined by more resilient political, economic, and cultural forces. Judiciaries are underfunded, undersupported, undertrained, and underprotected. National judicial systems have not been able to keep pace with substantive commitments to democracy, free markets, and globalization. Political and economic interference combined with impartiality and delay in the administration of justice currently undermine the achievement of core objectives in many countries throughout the world. Indeed, an excessively partial or slow process renders fundamental public legal principles ineffectual, eviscerates private legal rights and obligations, cultivates the conditions for corruption, and favors the powerful over the weak. Institutional dysfunction thus undermines equality under the law and corrodes the incentives critical to legal compliance.

Id. at 353–54; see also U.N. Secretary-General Kofi Annan, Address to the United Nations Association of Canada (Dec. 3, 1997), quoted in Carlos Santiso, Promoting Democratic Governance and Preventing the Recurrence of Conflict: The Role of the United Nations Development Programme in Post-Conflict Peace-Building, 34 J. Latin Am. Stud. 555, 555 (2002) ("... without the rule of law, predictable administration, legitimate power, and responsive regulation - no amount of funding, no short-term economic miracle will set the developing world on the path to prosperity.").

117. Tyson, supra note 115.
118. See Illinois Cent. Gulf R.R. Co. v. Int'l Harvester Co., 368 So. 2d 1009 (La. 1979) ("... Nevertheless, the doctrine of abuse of rights has been invoked sparingly in Louisiana and we must look to other civilian jurisdictions for its full articulation."); see also S. Pac. Transp. Co. v. Chabert, 973 F.2d 441, 447 (5th Cir. 1992). The Fifth Circuit, in Southern Pacific, analyzed the Ethiopian Civil Code to support its interpretation of a Louisiana Civil Code article:
Greek counterparts lessons on the application of servitudes or look to French courts to help define the duties of the usufructuary. Such a unique international advantage is built into the Iraqi Civil Code, not only in the fact of its shared roots and tradition, but in its express provisions. The third and final paragraph of Article 1 of the Iraqi Civil Code states that "[t]he court shall in all the foregoing be guided by the adjudication determined by the judiciary and jurisprudence in Iraq and then of the other countries the laws which are proximate to the laws of Iraq." Thus, as it develops and grows, Iraqi courts may rightfully look to other civil law jurisdictions for guidance.

The Iraqi legal system is indeed a recovering patient. That patient, however, need not quiver and stumble as it seeks to establish itself in this new world. It may steady itself on the centuries of development embodied in its civil code—a code which is the accumulated wisdom of numerous civilizations over several centuries.119

IX. CONCLUSION

The civil law tradition is as ancient as it is global. A comparative overview of a few of the Iraqi Civil Code's identifying characteristics, including the code's overall structure, the code's theory of obligations, and its concept of property reveals that the Iraqi Code, while flavored by an Islamic influence, is part of a wider global community of civil law jurisdictions based on the French model.

By incorporating elements of Islamic law (shari'ah as a source of law, and the rights of musataha and tasarruf, among others.) The

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119. Charles E. Fenner, The Civil Code of Louisiana as a Democratic Institution, Proceedings of the Louisiana Bar Association 7–25 (1904); see also Proceedings of the Degree Ceremony: The Honorable John R. Brown, Doctor of Laws, 54 Tul. L. Rev. 263 (1980). Judge John Minor Wisdom is quoted as saying: When the Angles and Saxons were howling savages, painted blue and eking out an existence in the fens of England, we had a civilized system of law based on the Code Justinian. And [today] . . . I am indeed gratified that we have a loyal civilian learned in the civil law . . . to support the position that the Angles and the Saxons would still be in the fens of England, but for the benefits they have derived . . . from exposure to the civil law.

Id. at 267 (quoting Judge John Minor Wisdom).
Iraqi legal system qualifies itself as a "mixed" civil law system. However, viewing the Iraqi Civil Code against the backdrop of the traditional civil law and the modern Louisiana Civil Code, one sees without doubt that Iraq's code has not been so diluted as to remove it from the family of civil law systems. Rather, it retains the civil law's deeply rooted, historically conditioned attitudes about the nature of law, the role of law in society and the polity, the proper organization and operation of a legal system, and the way law is or should be made and applied.

At the time of writing of this article, the legal world is abuzz with institutions and commentators anxious to rewrite or supplant Iraqi law and change the face of the Iraqi legal system. Like so many of its cultural treasures, Iraq's civil code is in danger of being lost in the chaos of this new dawn. However, though eager to erase the memory of a brutal past, Iraq's new legislators and scholars should embrace the good in their history and recognize that, though ruled for decades by an oppressive tyrant, many aspects of Iraqi culture are valuable and worthy of preservation. It is the author's sincere hope that, as Iraq emerges as a sovereign nation, its leaders will recognize the great wealth of its legal tradition and seize upon the advantages offered by the Iraqi Civil Code.

120. See Coalition Provisional Authority Regulation Number 8. The regulation establishes an Iraqi Property Claims Commission (IPCC) with substantive rules that make no reference to the regime of property law contained in the Iraqi Civil Code. \textit{Id.} Article 11(B) of that regulation goes so far as to rule that even property claims filed in civil courts after the filing deadline for the IPCC shall be decided in accordance with the CPA Regulation's substantive provisions, rather than the laws contained in the Iraqi Civil Code. \textit{Id. See also} Chris Lombardi, Rebuilding a Legal System: Iraq Needs a Revised Constitution and Laws to Regulate Commerce, 89 A.B.A.J. 14 (June 2003) ("[o]ther experts suggest the Iraqi Civil Code of 1953, which sought to balance Islamic law with principles from the European civil codes as a possible starting point for a new structure of law." (emphasis added)); Edward Wong, Top Iraqi Shiites Pushing Religion in Constitution, N.Y. Times, Feb. 6, 2005 (noting that more conservative Shiite leaders are insisting that Shari'a be the foundation for all Iraqi legislation).
APPENDIX: STRUCTURAL OUTLINE OF THE IRAQI CIVIL CODE

Part I (Rights in Personam)
Book 1 – Obligations in General
  Title 1 – The Origins of Obligations
  Title 2 (The Effects of Obligations)
  Title 3 (Characteristics/Attributes Amending the Effects of Obligations)
  Title 4 (Assignment of Obligations)
  Title 5 (Lapse/Extinction of the Obligation)
  Title 6 (Establishment of an Obligation)
Book 2 – Nominate Contracts
  Title 1 – Contracts as Regards Ownership
  Title 2 – Contracts Belonging to the Use of a Thing
  Title 3 – Contracts for Hire of Services
  Title 4 – Aleatory Contracts
  Title 5 – Suretyship

Part II (Rights in Rem)
Book 3 – Primary Rights in Rem
  Title 1 – The Right to Ownership
  Title 2 – The Right to Dispose (Tasarruf) and Empryteusis
Book 4 – Accessory Rights in Rem (Securities in Rem)
  Title 1 – Authentic Mortgages
  Title 2 – Possessory Mortgages
  Title 3 – Privileged Rights