NEAR EAST UNIVERSITY
GRADUATE SCHOOL OF SOCIAL SCIENCES
MASTER OF LAWS IN INTERNATIONAL LAW PROGRAMME (LL.M)

MASTER'S THESIS

COMPARISON OF REAL PROPERTY UNDER ENGLISH AND IRAQI LAW

EZZULDDIN TAHA OTHMAN

NICOSIA
2016

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Comparison of Real Property Under English And Iraqi Law

We certify the thesis is satisfactory for the award of degree of Master of INTERNATIONAL LAW

Prepared by

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ABSTRACT

Conventionally, the term real property can liken to land and everything that is permanent in nature including structures and minerals. Real property is not only about the ownership of property and buildings but it comprises of different legal relationships between owners of real estate, which is the meaning of contract formation of real property. The sales, rent, use, possession of real property or real estates under English law in comparison with the that of Iraqi law is the main motive behind writing this dissertation. Generally, the basic difference between English common law system and Iraqi civil law is that while Iraqi civil law is codified (written), -the-common law is not. The problem found is even within the states practicing common law system, it is practiced differently. Though, there are few distinguishing features of real property under English common law system, but in the formation of real property contract, there are similar concepts, terms, conditions found both in the common law system and civil law.

The dissertation is divided into five parts and each part is designed to comprehensively shed light to different issues relating to real property in both English common law and Iraqi civil law in order to find out its distinguishing features of both systems of law. The third and last chapter briefly examines ground lease and ownership of land in Iraqi civil code. The fourth chapter basically focuses on the topic of this dissertation where real property in Iraqi civil code was explained and comparison between the real property in English and Iraqi law was explain--rd. Additionally comparison is made in the last chapter between real property under common law and the continental civil law system. The thesis concludes that there is little difference of formulating real property under English common law and Iraqi civil law system. This means that components of real property in Iraqi civil code shared many similarities with English common law system.

Keywordsr Real Pı:operty, Servitudes, Real Estates, Mortgages, Condominium, Overreaching, Civil Law and Common Law.

ÖZ

Geleneksel olarak gayrimenkul mülkiyeti terimi, yapılar ve mineraller dahil olmak üzere doğada kalıcı olarak bulunan arazi ve her şeyle benzetilebilir. Gayrimenkul mülkiyeti sadece mülkiyet ve binaların mülkiyeti olmamakla birlikte ayni zamanda gayrimenkul sözleşme oluşumu anlamına gelen gayrimenkul mülkiyetinin farklı hukuki ilişkilerini de oluşturmaktadır. Gayrimenkul mülkiyetinin İngiliz hukuku altında satışı, kirası, kullanımı ve bulundurulmasının Irak hukukuyla karşılaştırılması bu tezin yazılmasındaki temel amaçtır. Genellikle İngiliz ortak hukuk sistemi ve Irak medeni hukuku arasındaki temel fark Irak medeni hukukunun kodlanmış (yazılı) olması, ortak hukukun ise yazılı olmamasıdır. Bulunan-sorun, ortak hukuk-sistemini uygulayan devletlerin bile bunu farklı şekilde uygulamasıdır. Yine de İngiliz ortak hukuk sisteminde birkaç ayırt edici gayrimenkul mülkiyeti özellik bulunmakta ama gayrimenkul mülkiyeti sözleşmesi oluşumunda benzer kavramlar, terimler ve koşullar hem ortak hukuk sisteminde hem de medeni hukukta bulunmaktadır.

Tez beş bölümden oluşmaktadır ve her bölüm her iki hukuk sistemin de ayırt edici özelliklerini bulmak için İngiliz ortak hukuku ve Irak medeni hukukunda gayrimenkul ile ilgili farklı konulara ışık tutacak şekilde tasarlanmıştır. Üçüncü ve son bölüm kısaca Irak Medeni Kanununda arazi kiralama ve arazi mülkiyetini inceler. Dördüncü bölürw'.bu tezin konusu olan Irak medeni kanununda gayrimenkul mülkiyetinin açıklaması ve İngiliz ve Irak hukukunda gayrimenkul mülkiyetinin karşılaştırılması üzerine odaklanmaktadır. Buna ek olarak, son bölümde ortak hukuk ve kıtasal medeni kanun sistemi altında gayrimenkul mülkiyeti karşılaştırılmıştır. Tez, gayrimenkul mülkiyetinin İngiliz ortak hukuku ve Irak medeni hukuk sistemi altında çok az bir farkı olduğu sonucuna ulaşmaktadır. Bu da gayrimenkul mülkiyeti bileşenlerinin Irak medeni hukukunda ve İngiliz ortak hukuk sisteminde birçok benzerliği bulunduğu anlamına gelmektedir.

Anahtar Kelimeler: Gayrimenkul, İrtifak hakları, Emlaklar, İpotekler, Kat mülkiyeti, Mükellefiyetsizlik, Medeni Hukuk ve Genel Hukuk.

DEDICATION

This thesis is dedicated firstly to almighty Allah who has helped me to successfully complete my masters' degree and I also dedicate to my beloved father Taha Haji Othman and to the loving memory of my mother Sabriyah kekhwa Hussein. You have successfully made me the person I am becoming you will always be remembered, I am dedicating it to my wonderful family; my lovely wife and my children.

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Special thanks and appreciation to my supervisor, **Asst.Prof.Dr.ReşatVolkanGünel,** head of the International Law Programme for all his contribution, support, and invaluable comments.

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CHAPTER ONE

INTRODUCTION

1.1 INTRODUCTION AND HISTORICAL BACKGROUND OF THE STUDY

The terms real property and real estate are interwoven and they cannot be separated from each other. Real property can be regarded as a legal term comprises of real estate (permanent, immovable property) and the interest of its ownership. Real estate can be defined generally as space delineated by man, relative to a fixed geography, intended to contain an activity for a specific period of time. To the three dimensions of space (length, width, and height), then, real estate has a fourth dimension time fir possession and benefit.[1] In a universal sense, the term real property can liken to land and everything that is permanent in nature including structures and minerals. The antonym of real property or real estate is personal property. In respect to modem legal system, the process of classifying property to be real or personal is dependent on the jurisdictions, according to purpose and the way at which the property could be taxed. Real property is not only about the ownership of property and buildings but it comprises of different legal relationships between owners of real estate. There are different ways at which real property can be held depending on the nature of the jurisdiction. In some jurisdiction~it is held absolutely, which is free of superior ownership interests and under English common law, it is maybe held by the Crown. These distinctions.are significant to decide on who would inherit the real property upon the death of the owner.[2]

One of the main significant of real property law is the aspect of various conceptualizations of estates in land. Generally, in the law of virtually every country, the state is always the direct owner of all land within its territory because the state is supreme and sovereign with law-making body (legislature) over the issue of land. Lands

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[1] James A. Graaskamp (1981). Fundamentals of Real Estate Development. Development Component Series, p.l

[2] Translegal (2009). Real Property Law, www.translegal.com/lets/real-property-law-3. p.1

are not directly owned by individuals but what is practicable is known as "estates" in the land, which is known as equitable interest and it means that the right to use land is transferable to certain individual officially without any interference from others. In defining estate law anq ownership interests, there are different types of ownership interests in real property within the law which are called estates. The two distinctive features of estates in land are known as duration and transferability. There are some important types of estates in land which arer[3]

Free simple: It is the most popular estate with the longest duration and easily transferable. It is also known as fee simple absolute or free tail and it states that the land owner enjoys the right to dispose the property in accordance to his/her interest and in this type of estate, the duration of the ownership is indefinite and sometimes transferable as freehold estates.

Life Estate: this is another type of freehold estate that explains that individual retains the ownership of the land within the duration of his/her life. It is possible to sell it but the sold of it does not change its duration, which means the validity of the ownership is the life of the original owner. Whenever he/she dies, the grantor takes back the property.

Leasehold: This is an estate with a limited duration. For example, an apartment-dweller with a year lease has a leasehold estate in his apartment. The tenants of leasehold must regularly pay rent. There are different terms for distinguishing different forms of leasehold estates which are, tenancy for years, tenancy at will, and tenancy at sufferance.[4]

Reversion: This case takes place when a tenant grants an estate of lesser maximum duration than his own. In this respect, the original tenant takes possession of the land when the grantee's estate expires. This means that the future interest of the original owner is a reversion.

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[3] TommiRalli (2005). Real Property Law and Procedure in the European Union, National report, Doctoral candidate, European University Institute, p.5

[4] Trarıslegal (2009). Real Property Law, www.translegal.com/lets/real-property-law-3. p.3

Remainder: this case happens when a tenant with a fee decides to give grant a life estate to someone and identifies the right of a third party that has the possessions of the land whenever the life estates end. In this respect, the third party has a remainder.

Concurrent Estates: thls takes place when two or more people owned a property. Estates may be held jointly as joint tenants with rights of survivorship or as tenants. What differentiates this type of estates in land from others is its nature of inheritability. In joint tenancy, which is also known as tenancy of the entirety s the tenants are married to each other, explains that the surviving tenant takes the full possession of the estate after the death of other partner and nobody from the deceased can inherit or be heir as tenant. This is why it is regarded as survivorship and in some jurisdiction, the tenancy will assumed to be tenants in common and they will have an inheritable portion of the estate in an equal proportion. Real property can be jointly owned through the use of condominium or cooperative. A condominium simply means as apartment house, office building the units of which are individually owned, each owner receiving a recordable deed to the individual unit purchased, including the right to sell, mortgage, or even lease that unit and sharing in joint ownership of any common grounds or passageways. While a cooperative simply means a building that is owned and managed by a corporation whereby shares are sold, with right of the shareholders to occupy individual units in"lfie building.

In defining real estate transaction, it should be noted that professional organizations also have some legal rights to make guidelines in many countries.Tor example, in the U.S, prohibition is made on real estate transaction on the account of race, color, sex, national origin and religion by the Federal Fair Housing Act. The general agreement between the buyer and seller of real estate is regarded to be purchase agreement and it is commonly governed by general principles of contract law. Another requirement found to be common in real estate contracts is that the title of the property sold must be marketable. This is a requirement that the seller have proof concerning all the property that he/she intend to sell and that there is no hidden interests in title on the part of the third party. A buyer finds it necessary in this respect to employ title insurance companies to investigate

on the whether the title is marketable or not. The most common method of financing real estate transactions is through a mortgage or arrangements by individuals and businesses willing to make large value purchases of real estate without paying the entire value of the purchase up front. Jn this respect, the borrower is obligated to pay back the amount borrowed to the lender along with a predetermined set of payments. [5]

Historically, real property is famously used to translate civilian concept of immoveable property and this term has been entrenched in the USA for example but the conception is different in modern England where modern property lawyers generally regard the concept to be land.[6] Real property law or commonly used as land law has developed in Europe from the use of tribal/feudal law on one hand and Roman law on the other hand. In the history of the world, the origin of feudal system can be traced at the aftermath of the massive migrations of the 6th to 8th century A.C and it gained prominence in Britain after the Norman Conquest in 1066. This system is premised on the fact that all lands should be solely owned by a King or noble man and he can give it out as a kind of loan (Feu) to ordinary individual and who in turn was meant to pay back with the fruits of the land or pay back from personal services such as military service. The feudal system was really a success in terms of practice on the continent and flourished all over the Middle Ages and it ended at period that marked the starting-point of the modem age wffii; the advent of philosophy of enlightenment and grand revolutions of the 18th century. The revolution led to the annihilation of the privileges of the aristocracy and officialized the new social paradigm of free and equal citizens.[7]

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[5] James A. Graaskamp (1981). Fundamentals of Real Estate Development. Development Component Series, p.2

[6] Sparkes Peter Report (2003). Real Property Law and Procedure in the European Union Annotated Draft Questionnaire, Eureopean University Institute, p.1

[7] Habil; Christoph U.S (2005).Real Property Law and Procedure in the European Union. European Private Law Forum European University Institute, p.11

In British administration, there was a gradual declination on the practicability of the feudal system as well but formally effective in England where all lands were still under the control of the crown whereas it was officially put an end to in Scotland in the recent legislation of 2004. Roman law, most in particular the Justinian Corpus IurisCivilis (529-535 a.C.) was still active even after the fall of Roman empire but it experienced renaissance with the reception of Roman law in Europe from 12th century onwards, which as a result brought about great codifications of the 19th and 20th century. This reception is said to have a significant influence in Scotland as well but limited influence in England. it should be noted that most of the significant concepts of continental real property law were regarded to invented by the..Roman law ranging from ownership over possession of land to limited interest in land such as servitudes whereas the root of mortgages could be found in Roman and tribal law. The systematization of private law was made possible by the Roman law as well as the integration of real property law into that system, which later developed in codifications.[8]

There is prominence of a contemporary real property law over the continental codification and English common law which can be considered as most vivid example in the present case law. Additionally, the 1925 Birkenhead legislation in England and major reform that took place recently, which led to the abolition of feudal system in Scotland, appeared to have played more influencing role than in other fields of private law. The main items of real property law, which are apartment ownership, registration system and building contract, have now been dealt with in special.statutes aside from the codifications available in the case law. There is uniformity in the contemporary real property law in the whole country in most cases but there are Subnational differences mostly in the UK with the practice of three different systems (England and Wales,

[8]Kevin G & Susan F.G (1998).The Idea of property in Land. In Susan Bright and John K Dewar (eds), Land Law: Themes and Perspectives Oxford University Press, p.3

Scotland and Northern Ireland). Also in Spain, there is subnational differences and to some limited extents in federal states like Belgium, Austria and Germany.9

Another point to examine is that all great codifications came as a result of liberalism, which advocates for the practice of individual property and the principal freedom to use it at one's will. This reflected in the modem English land law and Eastern European countries. The fall of communism led these countries to go back to their traditional liberal ideas. This main philosophical orientation was practicable in the relationship that existed between law and positive constitutional law. In all European system and oral British constitutional law, constitutional law seeks for protection of individual property and made provision for the case of expropriation in public interest only. On a contrary, the influence of supranational constitutional law on land law has been limited up until now. For example, it was found out that only in some specific occasions that the European Court of Human Rights in Strasbourg has been consulted on land law issues and in specific cases such as the 1967 English enfranchisement legislation. There are limited way at which the European Court of Justice in Luxembourg, the chief judicial institution of the European Union has been able to deal with land law. The most important land law cases that have been brought before the court so far were about limitations of EU Member States on the free acquisition and transfer of ownership rights. This shows the different developments that have taken place so far in the history, how feudal system was declined and how supra-national constitutional law has been limited.'?

From the historical analysis made so far, it was found out that there is a technical meaning of real property, which was derived from the old law of succession but became outdated and obsolete in England in 1925. Real property comprises of freehold land and excluded leasehold land, which made it possible to treat the two reforms in a different way. Since 1925, all property (moveable and immoveable) has been subject to a single

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'\rozarikova M (.(2010Land Registration inEngland and Slovakia: A Comparative Study. University of Birmingham Research Archive, p.16

ı:Habil; Christoph U.S (2005), p.13

assimilated law of succession. In United Kingdom, there is a wide diversity of property law has discussed in the history. It .must be clarified that any attempt to talk about English law directly focus on the law in force in England and Wales due to the fact that the land law in Wale seems to be most similar to that of England apart from the use of Welsh language for forms and documents. Scots law is quite different in structure and terminology due to its distinctive mix of common law and civil law concepts. There is high rate of priority given to land law in Scotland due to the need to practice feudal system and available of legislative body in Scottish parliament. Though Irish land law is in the common law tradition but it failed to receive the 1925 reforms and it became an old fashion of English law.[11]

1.1.1 The 1925 Property Legislation

Any attempt to discuss real property law under English law without talking about 1925 property legislation would literally be considered un-completed. The property legislation of 1925[12], which is named to be the Birkenhead legislation after their Parliamentary promoter the Earl of Birkenhead, then Lord Chancellor has laid down the key foundation, which remains the backbone of the modem law most in particular, the reform made to legal and equitable interests in land, the creation of an "absolute" ownership interest and the requirement that a division of ownership by time shöITltl be by way of a trust.[13] The reason why this reform post-dates the political secession of Ireland was to give room for its applicability in neither Republic of Ireland nor in Northern Ireland, in order to make Irish law synonymous to old historical version of English law. Furthermore, it was not possible to equate this legislation to the continental codes because it was not in alignment with the comprehensive statement of land law but it gives merit to be built on case law principles leaving some fields to be matters of case law alone, most in particular, the question of what is ownership. The statute base of the

[11] Sparkes Peter Report (2003). Real Property Law and Procedure in the European Union Annotated Draft Questionnaire, Eureopean University Institute, p.2

[12] It consisted of six Acts, in particular the Law of Property Act 1925 ("LPA"), all operating from January 1st 1926; hence "before 1926" and "after 1925"

[13] LPA 1925 ss 1-2

land law was more solid and effective than other fields such as equity and the law of obligations. There is consolidation of virtually all the earlier statute law on the subject in 1925 by the parliament. It was found out that this differs in different stature such as in some it was a straight consolidation, in some it was amendment first before consolidation and in others, it was a direct introduction of statements of case law principles. [14]

Furthermore, findings reviewed the fact that the Law of Property Act 1925 has been considered to be the most enduring element when it comes to the Birkenhead legislation of 1925. It directly explains the issues of trusts, contracts and conveyances, estates, co-ownership of land, leases and tenancies in outline, formalities and burdens such as easements and covenants, mortgages and some significant definitions. The Administration of Estates Act 1925 gave comprehensive definitions for the procedure for handling deceased estates and laid down the system of intestate succession in the following ways; The Trustee Act 1925, which was strongly amended in year 2000, gave regulations concerning the power and duties of trustees. The Settled Land Act 1925 that directly deals with landed estates is considered to be obsolete. In 1925, registration was placed on a firmer footing along with the Land Charges Act 1925, which was re-enacted in 1972 placing regulations on the registration of burdens against titles that are considered not be registered and the Land Registration Act 1925 providing for registration of titles to land itself. It should be noted that the last point was comprehensively restated in the 2002 Land Registration Act. Conclusively, it can be seen that the two key texts are the Law of Property Act 1925 and the Land Registration Act 2002.[15]

1.1.2 Case Law

For this dissertation, the case law is common law system, which is the name of English law. The prevailing confusion in common law is found in the dual use of its phrase

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[14] Francis R. Crane (1961). The Law of Real Property in England and the United States: Some Comparisons" Indiana Law Journal: Vol.36: Iss. 3, Article 2, p.286

[15] LRA, 2002.

"common law" which means common law system in contrast to the civilian systems as well as the fact that law gives recognition to the common law system when it is in contrast with equitable principles. This aspect of dual distinction is the main feature of English property law -inherent with both flexibility and complexity. Historically, the origin of common law system emanated from the reign of King Henry II (1154-1189) onwards as a result of the decision made by the Royal courts which was binding over all the people in the community. This is a common feature of a strong Plantagenent kings administering his Royal control over the people and limiting the effectiveness of the local custom. During the early and creative period of common law courts, land was considered to be the main asset and major source of medieval litigation and this made the courts to be in charge of virtually all decisions concerning land, the courts furnishing the basic rules for estate in land. Other areas inherent in the common law comprises of formalities, contracts, limitation and prescription.[16]

In addition with some aspects of mortgage laws and easements, the established common law may not be considered to be sharply different from the French customary law before the Code Napoleon but it was uniformly practiced all over the kingdom. There is a distinctive feature of English primary law due to the intervention of equity which is defined as a discretionary system of jurisprudence that could supplement and ;ô'rt~cted the common law. This was developed in 16th Century by successive Lord Chancellors sitting in the Court of Chancery. The contributions of equity that are regarded most important are; the formal recognition of informal interests, respects for the rights of borrowers under mortgages and restrictive covenants. Equity has enjoyed a renaissance. It is now practicable in the Chancery Division of the High Court and its flexible features has made it to be the vehicle for modem case-law developments in property law, notably proprietary estoppel, which is a way recognizing informal interests in land and

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"Sparkes Peter Report (2003). Real Property Law and Procedure in the European Union Annotated Draft Questionnaire, Eureopean University Institute, p.3.

constructive trusts, which is a way of acknowledging informal contribution to the acquisition ofland. [17]

1.1.3 **Property and** Estates

Doctrine of estate is regarded to be the most distinctive feature of the common law. In a simple term, an estate can be defined as ownership interest in land for a particular duration of time. The main type of estate in modem English law is known as estate in fee simple, which is generally called a freehold estate or "freehold" and it can be referred to as an interest in land in perpetuity (forever). In English law, the concept of ownership is considered to be estate in fee simple supreme in possession. A fee is defined as an interest which passes by inheritance on the death of the owner. The one that can pass by will or to the next of kin of an intestate is known as a fee simple. A fee simple is in possession in case the interest arises at the moment and not in the future whether as a result of death or attainment of a given age. This means that transferring of land under fee simple is the same as giving it forever or in perpetuity. A fee simple is considered unlimited and absolute in case there are no situations whereby it can be cut short. In this respect, the fee simple starts now, it continues until sold, passes by succession on death and continues indefinitely without the possibility of termination. This interest is just the same as absolute ownership interest of continental-system exempting national holding from the crown.[18]

In the continental systems, there is only one prevailing ownership right. Though ownership right can be jointly held but it cannot be divided into different-ownership rights.[19] Under English law, there is a possibility of estates existing side by side in the same land. This can be illustrated like this, if party A grants a lease of land to party B,

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[17] Francis R. Crane (1961). The Law of Real Property in England and the United States: Some Comparisons" Indiana Law Journal: Vol.36: lss. 3, Article 2, p.287

[18]Jesper M. Paasch (2011). Classification of Real property rights: A comparative study of real property rights in Germany, Ireland, the Netherlands and Sweden KTH Architecture and The Built Environment

[19]Habil; Christoph U.S (2005).Real Property Law and Procedure in the European Union. European Private Law Forum European University Institute, p.12.

Party A will have freehold estate together with the leasehold estate of Party B, and the estate of party B is enough to gran~ another sublease to party C which in this respect, it would leave the three estates side by side. In the history, the basic feature of the common law was the possibility of division of the land by time which is still a prevailing feature in Ireland and some other common law jurisdictions but the case is not the same in English law due to serious reform that took place in 1925. There is still possibility for division of land by years under a lease but division by lives is no longer allowed in another word it now requires the use of trust or settlement. It is now impossible for freehold estate to be divided after 1925 reforms.[20]

1.1.4 Trusts, settlements and overreaching

Trust is one of the most important tools or probably the most important instrument of Common Law is trust along with many duties in land holding and transactions. There are three parties found in trust, which; a trustor, trustee and beneficiary. A trustor is who transfers an estate to a trustee to the benefit of a beneficiary. The trustee becomes owner at law as well as beneficiary in equity. In a technical sense, the trustees take the possession and management control of the land where as the beneficiaries are meant to enjoy the benefits of the land maybe via receiving a rent, or to receive interests from investment. Trust can be used in the following ways; as a statutory instrument to,".itl~nage co-ownership; in the form of (usually statutory) management trusts following death, minority or for managing charitable land, as a settlement on successive generations. Furthermore, Trust of land has come to replace the former tool of settling family in order to make split the ownership of land by time, which could be between successive limited owners and of strict settlements. In addition, it should be noted that there are obligations placed on the trustees in order to prevent them from abusive use of powers. For example, in case the trustee attempt to occupy the land by him, there is a legal opportunity for the beneficiaries to take action for breach of trust, and fiduciary duties are placed on trustees in order to enable them to act in the interests of the beneficiary and not from personal

[20] Sparkes Peter Report (2003). Real Property Law and Procedure in the European Union Annotated Draft Questionnaire, Eureopean University Institute, p.9.

self-interest. In Modem law, there has been a shift in balance of power within the trust whereby the beneficiary is given more power for example the interest of the beneficiary must be consulted before trustees can exercise any legal power. Another aspect of trust is defined to be trust Q.f land. The Trusts of Land and Appointment of Trustees Act 1996 established a singular way of holding land in trust. It became a replacement for the system of trusts for sale used between 1925 and 1996. In this respect, trust has not become simple trusts that do not require any special convincing device but only a power of sale.

Overreaching is the main doctrine that provides a better understanding of why trusts use such a flexible management tool. In France, if a proprietor dies, the reserve share would be passed to the heirs except it has to be divided by agreement or judicial apportionment. In England, legal title would be passed to personal representatives who have the powers of trustees of land and will be found responsible for the management as well as sale of the land. people can just name in the will under the rules of intestacy but in case there are or dependants left not provided for, they may have a claim to the value of the estate also but in order to manage the land, they are supposed to resolve in the beneficial entitlements, and certainly not necessary to obtain the permission of the beneficiaries. The only thing that is required to sell the land is just to identify the't'orrect trustees and to make sure that the sale complies with the overreaching machinery. Overreaching is the different ways at which interests are separated from the land on a sale and be converted to a.corresponding interest in the proceeds of sale.[21]

Settlements: this simply means an arrangement whereby a landowner can possibly split ownership of land by time between successive limited owners, the object usually being to pass land to successive generations of a single family. Due to the limitation placed on every successive owner that it is not possible for him to sell the inheritance, the freehold that is already pre-destined to pass upcoming generations. In terms of the organization of family affairs, there is possibility of strong flexibility but the price was mostly as a result

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[21] Nolan, Richard (2002) Vandervell v I.R.C.A case of Overreaching.The Cambridge Law Journal. p.172. ISSX 1469-2139

of bankrupt generation that are not able to maintain their estates clinging on grimly until there is another generation that takes control of land, which means the whole system has enable the land to insufficient for the use of commerce for development of proper fanning system. In the present era, the flexibility of family organization is in alignment with available solution to the problem of estates that cannot be sole but the settlor has already lost the assurance that the intended heir will eventually inherent the estate. This explains that the law has made it made possible to guarantee a trust vehicle to ensure saleability. It has now apparent that most former estates in land have now taken effect as beneficiary interest under trusts. Another aspect of settlement is defined as strict settlement which explains that how-settlements were broken by the Settled Land Acts, in Ireland the 1882 Act, though it was later updated in 1925 in England and Wales. This aspect has damaged the system of family settlement and it was found out that there are still few aspect of strict settlement in England and Wales and most of the remaining ones have been prohibited in 1997 though up until now, it can be easy to create a settlement by mistake. The basic meaning of strict settlement means that the life tenants had the treatments of a quasi-trustee who has the ability to sell the land and convert the trust for the sake money that would be obtained from the sale and leave the beneficial interests out of this satisfaction.[22]

Superficies solo cedit: This rule simply explains that the ownership of a piece of land is also extended to be the ownership of all buildings erected on the land as well as to all components/objects structurally inserted into those, buildings and this is applicable in all European legal. It is regarded to be the Roman law maxim superficies solo cedit in European legal system while it is known as accession in the French legal family systems. It is a general rule with some exceptions and its vertical scope extends to the earth below and the sky above the land. The exceptions in this law can be explained as follow; firstly, exception is found in Roman law principles that states that if there is a small part of a building that is erected unintentionally on foreign land, it will still be given as a

[22]Sparkes Peter Report (2003). Real Property Law and Procedure in the European Union Annotated Draft Questionnaire, European University Institute, p.10

property of the owner of the main art of the building. The second exception is found in most legal system, whereby major exceptions exist in building leases and apartment ownership. Further exceptions can be found in the form of separate ownership of buildings in the Reform States of Middle and Eastern Europe because the previous communist regimes paid less attention to proper registration of title. There are many cases at which buildings were built by someone who is not the formal owner of the land, whereby the ownership is just like a formality. However, the fall of communism couple with the re-privatization of land, there was a new system that abolishes this kind of ownership rights.[23]

1.2 RESEARCH QUESTIONS

The following questions are expected to be fully answered at the completion of this dissertation:

(1) What are the distinguishing features that make the formation of real property and real estate contract under English common law system different from the Iraqi civil law system?

(2) What are the relevant of ground lease to both lessee and lessor?

(3) What constitutes the ownership of real properties under Iraqi Civil Code al}~- it the same with that English common law system?

=1fabil; Christoph U.S (2005).Real Property Law and Procedure in the European Union.European Private Law Forum European University Institute, p.14-15.

CHAPTER TWO

REAL RIGHTS IN LAND AND LAND REGISTRATION

2.1 REAL RIGHTS IN LAND

Numerusclausus of Real Rights in land is mostly applicable virtually in all European countries. Its applicability is rigid and not changeable in countries like France, Greece, Italy, Portugal and Germany because in these countries real rights in land are officially defined by law and it is not possible for parties to create a new one or try to do modification to the existing one. In its flexible and easy application, the applicability of the rules can be found in Scotland, Finland and the Netherlands due to the fact that there still in existence a statutory cap on real property rights but the parties have the right to define the content of real rights in accordance to their interests. In England where there is a common law system, there is no universal definition of real rights and the principles of *numerusclausus* are not officially recognized. Despite the fact that there imposition of a statutory cap in 1925, it is found out that this is not practicable and the courts have ignored it. The courts have now introduced a new proprietary interest known as proprietary estoppel, which means that if anyone rely on the expectation about the creation of right by another person, he/she would be directly entitled to that right as well as a right to rectify the document in order to make it conform to be in line with the agreement among the parties.[24]

Theoretically, the rule of *numerusclausus* is not applicable at all in Spain and there are no official rights for parties to create new rights in rem. And practically, this is not a

[24] More, as a curiosity, that an English court held that an owner cannot prevent this land from being photographed from an airplane (Berstein v. Skyviews, (1978]) QB 479, Griffiths J.

usual occurrence due to the fact that there are high standards of creating new rights in rem. This automatically explains that Spain put into practice the system of *numerusclausus* de facto. Furthermore, the motive behind the practice of *numerusclaususrule* is simple which explains that since there is enforceable *ergaomnes* of real rights, it necessitates the rights to be clearly defined in such a way that the limitation of the ownership would be comprehensively defined to the third parties, they easily know and understand this. This ratio is also practicable in those European countries whereby there is creation of new rights by jurisprudence. However, it must be noted that this motive behind this distinction is not basically to state whether the rule of numerusclausus is applicable or not but to specify whether the nature of existing real rights is flexible enough to function under different situations and in time of new needs. In this kind of situation, it is generally found out that real rights to use servitudes and easements would do more in giving contractual freedom to the contracting parties than the use of mortgages.[25]

In explaining the system of real rights in land, it is found out that in Europe, there is no universal classification of real property rights. Under *rationemateriae,* it possible for anyone to easily differentiate between the full ownership rights and limited (subordinate) rights on the land of another person such as rights to use habitation rights, servitudes, trust life rents in England and Scotland, and different kinds of easements, security rights interests such as mortgages, liens, charges and rent charges as well as pre-emption rights created by contract that is pre-emption rights in favor of local governments. In England, the distinction between the use of common law and equity has led to emergence of different situations that is not found only in full ownership, freehold and common hold estates but also found in the limited rights that include absolute possession such as leaseholds and equitable beneficial interests under trusts that are regarded as (time-limited) ownership rights.[26]

:5 Paisley R (2005). Real Rights: Political Problems and Democratic Rigidity. EdinLRVol 8, p.267-268

:sJesper M. Paasch (2011). Classification ofreal property rights: A comparative study of real property rights in Germany, Ireland, the Netherlands and Sweden KTH Architecture and The Built Environment

2.1.1 Right of Use (prohibitiousus)

Another point that needs to be discussed under real rights in land is the rights of use known as *usus or prohibitiousus.* Rights to use property or. land can be divided into extensive rights of use•.giving full possession and secondly is the limited rights of use also known as proprietary burdens. Registration is required concerning the use of most of these rights in order to be opposable *ergaomnes* in most systems. In virtually all the countries in exception of England alone, the first category of right to use land is known as usufruct right, which is the right to use a land and enjoy its benefits that is all the various earnings from the land with the inclusion of rent payments. In the general sense, the right of usufruct is not limited to land alone but also covers movables and rights. But in Western Europe, the p~actice of usufruct is basically applicable to farming land under the former Communist system in Poland which is unique form of usufruct known as perpetual usufruct and this is still use for granting of land to people for a long period of time while it is still under the formal control and ownership of state. [27]

Some basic concepts that can be found in usufruct are firstly usus (practicable in Spain and Portugal) which entitles to the use and to the benefits of the land but limited to the interest of the owner and his/her family alone. Secondly, the *emphyteusis* or long lease (right recognized in the French legal family) which entitles to the long use ·of.~_and against a fee and along with the obligation to improve it. Because of the absence of numerusclausus in England, it possible to find rights of use sui generis such as spouse neglecting spouse's occupation right of the matrimonial home. Other important rights of use are rights of superficie respectively building leases which have to do with the transferable and inheritable right to erect and own a building above or below the surface of a foreign piece of land. Additional right of use but less significant are remaining feudal and customary rights of use such as the Spanish census, which a right of use that is similar to usufruct but advocating a direct and a beneficial owner in accordance with the feudal model. There is also a crofting right that is recognized in Northern Scottish countries which means a long-term lease, most commonly of small farming land that

[27] Segal I & Michael D.W (2010)Property Rights .http://web.stanford.edu/-isegal/prights.pdf •p.2-3

comprises of security of tenure and a buying option. Another real property righlls known as *sui generis,* which is recognized in many European countries harmonized in EC directive 94/47/EEC is the timesharing right.[28]

2.1.2 Easement or Servitudes

Another point to discuss under real rights in land is easements or servitudes. This is defined as one of the most significant category limited rights of use. Easements entitle the possibility of using neighboring land in different ways, which could also include a right way for vehicles and pedestrians, provision with light or a certain view (in exception of England) and the distance between buildings and the construction of water and sewer tubes, of dividing constructions. However, it must be noted that there is no provision for extending duties of positive action of the owner of the neighboring land in easement but in exception of the Scottish real burdens. Concerning issue of their holder, easements can be divided into two types which are firstly; easements in appurtenance, which means the fruits of the owner of neighboring land. Under this type, there can be two classifications of tenement, which are a dominant tenement (piece of land) and a servient tenement. And the second type of easement is known as easements in gross, which means the personal benefit of another person. With the use of Spanish example, an easement in gross could the right to the family to watch a bull fight from a5iilcony pertaining to the neighboring house. While easements in gross are officially recognized to be real rights in many European countries, they are only considered to be obligational status in some countries such as Portugal, the Netherlands England and Scotland.[29]

Additionally in England and Scotland, concerning both the positive and negative easements, there are restrictive covenants respectively real burdens that is formal restrictions placed on the use of neighboring land but commonly found today in apartment flat schemes and common holds. Contrary to easements that could be created by division or long adverse possession *(usucapio),* restrictive covenants takes a different

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:z Segal I & Michael D.W (2010), p.3

[29]Sparkes Peter Report (2003). Real Property Law and Procedure in the European Union Annotated Draft Questionnaire, Eureopean University Institute, p.17

ways whereby it can be created by expressly by a deed of covenant. In addition, there is limitation on the rights of use of feudal or customary origin, which are still effective in some continental countries and have almost the same effect with servitudes but without registration and this might still be a practical problems. The final group of limited rights of use that is similar to easements by allowing their holders to be partakers of the benefits and produce of the land. This group belongs to the English profits à prendre such as the right to have cows graze the grass or the right to extract gravel. The antichresis is still effective in Italy, the German Reallasten and the extractive rights (such as gravel and soil) as well as the right to take timber as reported in case of Finland.

2.1.3 Security right in Mortgages and Rent Charges

Another point under real rights in land is security right most in particular in mortgages and rent charges. Security right has to do with the use of land as guarantee in rem for the repayment of a debt. On a general sense, this requires the creation of deed or notarial act and registration in a land register. Once a mortgage is created (typically to a bank), the owner still has the full possession of the property but in case there is a default of the debtor concerning the payment, the property has to be sold in auction or via the use of any forced sale but it must be done under the authorization of court. It is only possible under the traditional English concept of a mortgage, which is similar tcr{hfstorical Germanic law concept of Totpfand) that the lender can become the owner of the land or enjoy a long lease, whereas there is no possibility for such in the present continental system. The most common forms of security rights in rem now exist in the following ways; the parties to a credit contract now created mortgages both in form of accessory or non-accessory in order to secure the debt. Secondly, statute now imposes liens because of particular factual situations most especially in the situation whereby the seller of the land has not been paid. Thirdly, there is a use of rent charges as a periodical payment on land mostly for the maintenance of family members. This type of security is commonly found in countries like Germany.[30]

;.:Dechert LLP (2015). The Essential Guide to mortgages and charges over land. https://www.dechert.com/fıles/Publication/a- 15.pdf, p.4

There are other less significant forms of securities existing in some countries; like in Belgium, there may be mortgage promises instead of full mortgages aside from a pledge on immovable no longer used, which seem to be commonly used for the purpose of avoiding the duties of high registrations. Furthermore, the basic difference that exist between mortgages under various European system can be found in the feature of accessoriness that is the relationship that exists between mortgage and the debt to be secured along with the side-effect that the mortgage declines as the debt is paid gradually and finally expire when the debt is no longer existing. The version of accessory is found to be dominant in both English and French legal family whereas the non-accessory version is dominant in German legal family. Beyond that, it prevails in Sweden and Finland as well as in some Eastern European reform states. While the accessory version makes use of a maximum of security to the debtor, the non-accessory version advocates for the repeated use of a mortgage and its transferability among borrowers and lenders. Additionally in some countries that practice the accessory mortgages version only, there is a possibility that accessoriness may be quite relaxed (Sweden) or exceptions may be recognized in some certain non-accessory. Thus, in Spain, there is possibility that a mortgage could secure the final balance if liquidation of a current account on a specific date. This is a similar case in Italy as well w~~by a future, conditional or merely possible debt is sufficient for a mortgage to be created.[31]

Other real rights in land can be discussed as distinctions made between full ownership rights and limited (subordinate) rights and this category also include sub-classification which is rights of use, security interests and pre-emption rights. This made it possible to be able to accommodate almost all available rights in rem within European systems today. In cross-examination of real property rights, it is possible to find some similar rights that not enjoying full proprietary status but they have functions analogous to those of property rights. In this group, the first concept to discuss is lease contracts most especially in agricultural, residential and commercial ground leases. Under the rule of

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[31] Francis R. Crane (1961). The Law of Real Property in England and the United States: Some Comparisons," Indiana Law Journal: Vol.36: Iss. 3, Article 2, p.298

"emptio non tollitlocatum" (meaning that the sale of premises does not affect existing lease contracts}, the right of the tenant is found to be strong in Swedish law whereby there can be registration of leases and in this situation, it can prevail over mortgages even in executionary sales. Another similar instrument to ownership rights is known as corporation law constructs. In this type, there is no possibility of people owning houses but they can only partner with companies that are formally registered owners. This type is commonly found in ex-Communist systems like Poland (though they have been replaced by ownership gradually) and old tradition of Scandinavia.[32]

2.1.4 Apartment Ownership (Condominiums)

Apartment ownership is known mostly to be real right in all European states and it is recognized separately. It explains the different means of splitting deed to regulate various property rights and their demarcation among the owners. Its legal construction *differs depending* on the *jurisdiction* of *the* country but there are four basic types at which it can be generally classified. Firstly, there will be joint ownership of the land and the whole building whereby every co-owner is entitled to exclusive right to use some parts of the apartment. This mostly recognized in Netherlands. Secondly, there will be separation of apartment ownership from that of land ownership, which means that there is nothing like joint ownership between the apartment owner and the land owner.·ffil)is is mostly recognized in Scotland. Thirdly, the ownership of apartment would be constructed in accordance with the corporate law, which states that there will be corporation in the ownership of the land and the building and owners will be shareholders and every owner will have the right to exclusive use of a specific apartment. This is recognized mostly in Finland and Sweden (Scandinavia). Fourthly, the ownership of apartment includes the separate ownership of the apartment and joint ownership of the land and the common structures of the building. This is applicable to all other countries. [33]

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r: Francis R. Crane (1961), p.290

rı Van der Merwe C (2004). The Distribution of Ownership in an Apartment Ownership or Condominium Scheme. 2002 Georgia Journal oflntemational and Comparative Law, pp. 1-2

Furthermore, aside these four main classifications, there are other alternative models existing in various some states. In England, together with the established common hold schemes in 2002 legislation, leasehold schemes can also be found in the country. This could be a disadvantage to the lessee considering the fact that the land owner might charge for high rents and there might be a problem of wastage of value at the end of the lease. In Germany, there is a particular apartment owner known as *Gebäudeeigentum* on the territory of the German Democratic Republic. It should be noted that irrespective of their differences and specific legal nature, all the rights of apartment owner are normally capable of registration as well as transferable, mortgagable without the consent of the other apartment owners. Additionally, there are common attributes of the various models of apartment owners. The first commonality exists in the creation of apartment ownership, which requires splitting deed everywhere. This performs the duty of regulating the various property rights and their demarcation among the owners as well as dealing with fundamental issues such as allocation of costs for utilities.[34]

2.2 LAND REGISTRATION

Land registration is found relevant in this dissertation because it constitutes .th~~asic meaning of real property and real estate contract formation. The idea of land registration was firstly introduced in 1862 but it gained prominence after 1897 during the period at which there was a compulsory registration of sale in central London. The basic principles behind it was found in Registration Act 1925 and mandatory registration was grad:ually extended in way that by 1990 the entire country (England and Wales) would be a compulsory area. Land Registration Act 2002 replaced the long existing land reaistraiion act of 1925 in year 2003. The extent of the registration Acts are is ~ural[illegible] was controversial in nature as well as the extent they state separate principles for registered titles, but these were adequately taken care of under 2002 registration Act. Land charges registration has a separate scheme, which could be a burden to registering

~[illegible] Peter Report (2003). Real Property Law and Procedure in the European Union Annotated Draft Questionnaire, Eureopean University Institute, p.19

individual such as mortgages, estate contracts and restrictive covenants. Land registration is conducted by the Land Registry, which is an independent body set up under the LRA 2002. It comprises of the title and mapping angles. The Head quarter is located at Lincoln's Inn Fields in London. But the main work is carried out at District Land Registries and it is absolutely relevant to deal with the correct office, which can be located from the land registry' web-site.[35]

Land registration is not done only in English common law system. Generally in Europe, there are normally five legal families which are; common law, civil law of the Code Napoleon countries, civil law of the German/Central European countries, and civil law of the former communist countries and lastly law of the Nordic countries. All European States have some competent national authority for registering ownership of and charges on land. Under the old system in England, registration was not really compulsory but it required only for third parties effect. But under the new law, registration is required. But in England it has come into force only in 2002 and it needs a trigger for mandatory registration. However, there are still many unregistered land titles in the country. In Ireland, there are co-existences of the both systems. Only in Scotland, where registration has been compulsory for each transfer of ownership since 1617, almost all land has been registered. Technically in England, it is not basically registration of the land bô:t~- registration of the estate in the land due to the fact that absolute owner is the Crown but in a practical sense, this does not necessarily matter.[36]

There are two main types of land registers generally in Europe which could be either real right in land are registered or documents are registered. The registration of titles enjoys a slight majority by states and by population. The first type of registration of land is recognized in the Central European land book, which is called land register in the new

[35]JaapZevenbergen (2002). Systems of Land Registration: Aspects and Effects. NederlandseCommissievoorGeodesie Netherlands Geodetic Commission, p. 2-3

[36]Introduction to the Basic Features of Central European Land Registry Law and Apartment Ownership, Notarius International (1997). Compare also Böhringer, Comparison of the Land Registry System in Central Europe with Other Forms of Property Law, p.166

British Isles, it is the Nordic system and in the Hispanic subgroup of the mortgage register. It found in countries such as Austria, Denmark, England, Finland, Germany, the Netherlands, Poland, Portugal, Scotland, Spain, Sweden and Switzerland. The second type is mere registration of documents is used in the "mortgage register" of the French type and in the old common law "register of deeds. It is recognized in countries such as Belgium, France, Greece, Italy and Luxembourg. Additionally, there are two main formats for registration. The first one is registration of rights that is carried out in form of real folium, which means it is ordered by the land registered and the second format is registration of documents is done in form of a personal folium, which means it is ordered under the name of the respective owner.[37]

In England and Wales, there are 22 million titles in estimation and some 19 million are now registered. There is room for voluntary registration despite the fact that registration is always under compulsion. This process goes by designation of administrative areas where compulsion was introduced. The fundamental of registration in England and Wales is that it is a register of title (that is legal title), which is basically channeled towards conveyancing, it reflects the proprietorship of a parcel of land, or in a more accurate sense of an estate in land, it also shows its physical strength and benefiting and burdening rights, as well as the current state of play. Under land registration act 2002~- there is a system of land registration and registered land is considered to be preferable shorthand. Lands are registered directly with a single register to record details of each particular physical piece of land but the decision to register either the landlord or the tenant of lease-hold land is found difficult to make. Then in order to avoid the whole problem, the title to an estate in land is registered. Registration is applicable to each estate independently of any others in the same physical land, so it possible for one estate to be registered and others remain unregistered. The freehold estate represents ownership of the land in perpetuity, which means forever. There can be registration of leasehold estate under the condition that there is more than seven years of the term

[37]JaapZevenbergen (2002). Systems of Land Registration: Aspects and Effects. NederlandseCommissievoorGeodesie Netherlands Geodetic Commission, p. 4

outstanding at the time of registration so if a freeholder grants a lease to a tenant for 90 years, there will be two registers running together on the same land and this division process can continue with the creation of sub-lease, a sub-under-lease, without any limit. This makes it possible that a piece of land could be represented many numbers of titles. [38]

Registrations imply the collection of all relevant details concerning the land ownership that are found and present them as a coherent snapshot. The property register explains the estate that is registered by using the words "freehold" or "leasehold" with the addition of a short description of the main terms of the lease, the parties, its date and its length. The other aspect of the property register is found in land description with the use of updated description and plan is provided. Urban land description is mostly done in brief, which consists of the postal address, supplemented by a title plan that is drawn from the large scale Ordnance Survey plan. In addition, benefitting rights like benefit of a right of way to have access to the land are as well recorded to be an appurtenance to the land benefitted. The proprietorship register on the other hand means the owner of a registered estate is named in the proprietorship register and described as the "registered proprietor". It is possible in this sense that ownership will coincide with proprietorship in a situation whereby the person recorded on the register is entitled to the land for" füs~: personal benefit. It is as well possible that proprietors might trustees or personal representatives, and in this respect, the register will have to show the legal title and not the beneficiaries. It is always like the person on the register is entitled to full ownership power except there is a limitation (such as when a single trustee cannot sell the land) which would be reflected to the outside world by entry of a restriction on the register. The last point is the charges register which lists the burdens or adverse interests affecting the land, such as mortgages or restrictive covenants. In case there is a complexity in the land ownership, it will make it possible that a parcel of land will be subject to a number of adverse interests and in this situation, the registrar would collect

[38]Kevin G & Susan F.G (1998).The Idea of property in Land. In Susan Bright and John K Dewar (eds), Land Law: Themes and Perspectives Oxford University Press, p.4-5.

all the adverse interests together and make list of them according to entitlement in order to determine priority and validity.[39]

2.2.1 Basic Types of Land Register in Europe

There are five basic types of land register in Europe from right to left, from top to bottom that can be discussed:

- The British Isles have a fairly uniform system: Basically common law system was known to be mere registration of deeds. But this has been replaced or in Ireland added by a new system that is found similar to Torrens system. In this system, registration creates or transfers the right without considering whether there has been a valid causa or a valid conveyance. In this respect, the land registry reserved the register independently of governmental body.
- The classical Central European land register: In this system, we can talk about Grundbuch in the Austrian, German and Swiss terminology that can be translated with "land book." It can be defined as a constitutive system where by the local court reserves the registration of rights and protection of good faith and consider it as a part of non-contentious jurisdiction. This is found to be main idea behind Torrens system but just that in Torren, the requirement of a transfer of owner ş}:ıj~~- is taken away and registration is considered to be absolute.
- Nordic register can be found in the in between the Central European land book and the French mortgage register. There is only declaratory effect of registration and good faith in the registration is adequately protected. This is also a registration of rights.
- The next main type is known to be the French "mortgage register." This is to register the required documents of the third party effect in the absence of bona fides protection. It exists in Belgium, France and Luxembourg. Public official keeps the register under the supervision of the Finance Minister.

[39]Habil; Christoph U.S (2005).Real Property Law and Procedure in the European Union. European Private Law Forum European University Institute, p.17

- The British Isles can be found on the both sides of the spectre: emphasis on registration is placed on their new system than any other system. The old common law system of registration of deeds places less recognition to registration than the other systems."[40]

By doing a general comparism about all the five basic types, it can be found out that there can be a correlation between the different types of land register and different legal families. From the five main types discussed, two of these belong to the common law countries (Both old and new) and there is no one for the former communist countries that can only be found under sub-group or hybrid versions between the.land book-and the mortgage register. In this respect, there many sub-groups or hybrid forms that can be discussed in the following ways:

- There are three countries found in sub-group of the Central European land register, which are Czech Republic, Hungary, and Slovakia whereby the land book has the effect with classical central European system but just that it has different organizations because it is basically kept by the cadaster.
- Greece is known to be a hybrid of the Central European land book with the mortgage register: the organization of Central European is kept by the courts an~: it has constitutive effect. The form of registration is derived from the mortgage register and it lacks the protection of good faith.
- Poland is also considered to be a form of hybrid systems: as discussed before, the organization of Central European is kept by the courts, the form of registration and bona tides protection.
- Italy is not directly using the French mortgage system but the country shares the constitutive effect of the registration of mortgages and other contractual encumbrances with the Central European model.

[40]Sparkes Peter Report (2003). Real Property Law and Procedure in the European Union Annotated Draft Questionnaire, Eureopean University Institute, p.33-35

- Portugal and Spain have been listed as a separate "Hispanic" sub-group of the mortgage register: The use of the mortgage register French type makes them to share the same effect of registration. With the use of land register as well, the two countries share the same organization and form of registration including the same bona fides protection.

There are dual registration systems in France, Greece and Italy that also demand special attention due to the fact that they the different nature of registration system. In Italy, the legal system of the Code Napoleon can function with both mortgage register system and a land book system. The French system might not be a good example due to the fact that the Alsace-Moselle derived from the previous German land book basically only the registration system or registrations rights has been kept; it has abolished the constitutive effect and bona fides protection. The motive behind Italy and France keeping the land book system is not really clear probably for convenience or because of the benefits of land book system.

CHAPTER THREE

GROUND LEASE AND LEASE UNDER IRAQI CIVIL CODE

3.1 The Concept of Ground Lease

The basic meaning of a ground lease is a situation whereby the owner of the land (ground lessor) leases or gives the right of use of land to a tenant (ground lessee) for a long-period of time (usually more than 40 years) to develop the land with the agreement that both of them would share the benefits that come out of the land. In a conventional commercial real estate loan transaction, the fee simple owner of a land is the borrower and the one who agrees to lend money to the borrower is the lender. These are the two structures that are complicating a mortgage loan. One of these structures is ground lease and understanding the various ways at which a ground lease could influence a loan would help borrowers to achieve better way of financing their goals. It is important to understand lease-hold issues generally for different reasons. At first, it could influence the decision of investor to buy due to the fact that an investor is expected to be aware of the length of the remaining lease term, the nature of improvements at the end of the l;a;e~: term, and how increases in the ground lease payments are determined. These are the expected facts that investors would want to be aware of before deciding to buy.[41]

A lease-hold can also affect the ability of investors to obtain financing on the property. Provisions under lease comprises of future rent increases and the expiration date of the lease would literally impact the interest of a lender to finance the proposed acquisition or may affect the terms of loan. In a general sense, lenders would prefer those leases that provide certainty concerning how the future lease payments will be. Loan terms such as amortization period are as well found in the ground lease as there is a need for a loan to

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[41] Tony Petosa, Nick Bertino, and Creighton Weber, Wells Fargo Multifamily Capital (2014). Understanding Ground Leases. Available at https://com/assets/pdfi'commerciaVfinancing/real-estate/ground_leases.pdf, p.1

be amortized before lease termination. Provisions under lease such as lender notification and rights to cure on default are paramount to loan underwriters. Lease term will also affect the ability of the investor to resell the property in the future considering the fact that sale capitalization rates could rise when the lease-hold property is close to its period of termination. In an attempt to overcome lease issues, investors would need to investigate the method of obtaining a shorter-term fully amortizing loan to pay the loan off prior to the lease expiration date. Investor can as well investigate whether the ground lessor is interested in extending the term of the lease. Investor can as well investigate the possibility of purchasing the fee interest and merge the lease-hold interest in a single transaction.[42]

A ground lease is a different form of lease whereby the tenant leases the land instead of the building. It is typically a long-term lease of unimproved land or previously developed property that requires the tenant to construct new improvements. The tenant is found responsible for the ownership of improvement during the term of the lease as well as the obligation to pay for all the expenses concerning the property except the mortgage on the landlord's fee interest and income taxes owed by the landlord.[43] Airports, ports and harbors, universities, states and the federal government can possibly engage into a long term leases of real properties. In some cases, these entities find it difficult to sell particular real property probably because of statutory or regulatory restrictions. In this respect, in order to obtain revenue from these properties and use them for economic purposes, they might decide to enter into long term leases with private tenants. These long term leases are typically called "ground leases" or "ground rents" and mostly involve the availability of a vacant land, upon which the right is given to a tenant to build improvements such as structures/buildings, parking lots, landscaping etc. [44]

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[42] Tony Petosa, Nick Bertino, and Creighton Weber, Wells Fargo Multifamily Capital (2014), p.1-2

[43] Florence P. Mayne (2002). Ground Leases: Basic Legal Issues, available at http://www.utsystem.edu/reo/articles/ground%20leases_basic%20legal%20issues.pdf.

[44] David E. Woolley (2010). Ground Leases/Leasehold Estates and the Surveyor. LSACTS White Paper 2010-004, p.3

The beautiful improvements built on real property that is obtained through ground leases are often held under separate ownership by tenants, while the land itself is owned by the landlord. For example, a piece of land at the airport may belong to a governmental entity, this entity might decide to lease the land to a private company and this private company may build a structure on that land and begins to use the building, or the private company might decide to lease the building to another private company. The long term lease for the land is the basic meaning of ground lease. The lease for the building or any structure on the land is regarded to be a separate lease, which is not a ground lease. The terms of the ground lease must be more than 30 years due to the fact that anything less than this year would make the financing of the- improvements in practical.[45] The provisions under ground lease will argue that upon the expiration or termination of the ground lease, all improvements become the property of the landlord without payment, free and clear of all liens, and in good condition. The distinguishing feature of ground lease among other leases is that it involves property that is either not improved initially, minimally improved or require a re-building.

Furthermore, due to the fact that the tenant is normally responsible for the payment for improvement or renovation of the existing land, ground lease explains that the tenant demands certain ownership rights in the structures built or renovated by the tenan6- However, the improvement would become the property of the ground owner at the termination of the lease unless the landlord demands for the removal of the building.[46] The concept of the ground lease is relevant for real estate development community. Developers enjoy the benefits of ground leases by taking advantages of tax benefits and financing options. Tenants find ground lease useful for avoiding the need to obtain upfront capital needed to purchase real property. Landlords also enjoy the ground lease by not being responsible for the responsibilities and improvement of the ground arrangement. Never the less, it should be noted that there are certain cost associated with

[45] Friedman, Garcia &Hagarty (2009). California Practice Guides: Landlord Tenant 2009 § 7.1.

[46] Auerbach V. Assessment Appeals Bd. No. 1 For County Of Los Angeles (2006) 39 Cal. 4th 153, 162-163, 45 Cal. Rptr. 774, p.779-780

ground leases. Tenants that would enter into ground lease are expected to pay for the hard cost of improvement (professional architectural design fees and construction costs) as well as soft costs (permits, entitlements, title insurance and professional fees for surveyors, engineers, and lawyers). The long term nature of the ground lease would enable the ground lessee to amortize his/her investment costs for improvement and this makes the arrangement of good benefits to both the landlord and tenants.[47]

3.1.1 Creation of Leases

The most common or general way of creating the relationship between the landlord and the tenant is by entering into an agreement concerning the terms of the lease.[48] No amount of words would be considered relevant for the creation of a lease except the there is an agreement showing the intention of the landlord to evacuate from the property and grant the tenant the right to enter and possess the designated premises in subordination to the title of the landlord, for a fixed period of time.[49] Another way to create a relationship between a landlord and a tenant is by operation of the law even without enforceable written agreement between the parties. Examples of this can be found in the occupations of land pursuant to (1) an invalid oral agreement under statute of frauds (2) a proposed lease that has never been done before by both parties (3) an agreement to convey or ineffective conveyance (4) permission given by the owner, without any reservation of rent. Under the lease creation, the landlord's obligations in a ground lease transaction are straightforward; he pays any mortgage against its fee interest and the property taxes relative to the land. And the tenant's obligation is responsible for all aspects of the building, which include insuring the building against

[47] David E. Woolley (2010). Ground Leases/Leasehold Estates and the Surveyor. LSACTS White Paper 2010-004, p.4

[48] Matthew Bender, (2008) California Real Estate Law and Practice, § 151.01, p. 151-3

[49] Timm v. Brown (1947) 78 Cal. App. 2d 609,616.

fire and casualty loss, keeping the construction of the building free from liens, maintaining and repairing the property, and the like.[50]

In explaining the stature of frauds about leases, it is stated that under the legal concept of the "statute of frauds, any agreement to lease real property for more than a year is considered to be invalid except the agreement is written and signed by the contracting parties. In order to deal with the statute of frauds, there are expected essentials that must be included in the memorandum of agreement for a lease, which are: proper description of the property to be leased, a definite term, including designation of when the term begins and A definite amount of rent and the time and manner of its payment."[51]

To explain ground leases as financing instrument, it is found out that ground leases include both leases and financing instruments. It is basically different from other types of commercial leases due to the long-term nature of ground leases and its financial provision. Tenants who enter into ground lease agreement mostly do it to construct improvements on the premises and organize their business. It is a financing instrument for both tenant and landlord.[52]

To examine the authority of the parties entering ground leases, it should be known that before a ground lease is finalized, the contracting parties must confirm that they-b~t~- have the authority to enter into the agreement. If the available property to be leased is owned by entity, it is expected of the tenant to ascertain the formation and organization documents of the landowners and confirm that they have the authority to go ahead with the agreement. A tenant is also expected to obtain a preliminary title report from a title company in order to confirm record fee-title ownership of the premises. The tenant should as well obtain a leasehold policy of title insurance to protect against title matters that could divest the tenant of their leasehold.

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[50] David E. Woolley (2010). Ground Leases/Leasehold Estates and the Surveyor. LSACTS White Paper 2010-004, p.5

[51] Id. at§ 151.02, pg. 151-4 (citing Cal. Civil Code§ 1624(c).

[52] David E. Woolley (2010). Ground Leases/Leasehold Estates and the Surveyor. LSACTS White Paper 2010-004, p.6

3.1.2 Advantages and Disadvantages of Ground Leases for Landowners

There are four advantages of the landlord' interest to enter into a ground instead of selling the property. These can be stated as follow

- Ground lease would help the landlord to escape the payment of a substantial income or capital gains tax if the land is sold directly.
- The property owner is able to retain the ownership of the property for long-term and still put the property into economic and productive use. Additionally, there are some properties that owners are legally prohibited from selling them and there might not be legal-constraints for-them to engage into a long-term ground lease.
- A ground lease and a successful project on the leased land would definitely lead to uninterrupted, passive income stream to the landlord.
- Under ground lease, there is a possibility for the landlord to have an effective mechanism to exert control over the development of the premises of the ground lease. [53]

The disadvantages of the ground lease to the landlord can be stated as follows;

- The inherent economic benefits in the ground lease are directly dependent ~n'-i~- success of the constructed project on the premises. The problem arises if the project is not successful
- The rent that·the landlord is receiving from the ground lease is ordinary income for federal and state income tax purposes.
- The execution of ground lease and the construction of the building requires a lot of money from the tenant and in this respect, the land lord receive a small cash payment.
- The long-term nature of the ground lease places the risk of losing the leased property or sometimes requires the satisfaction of the loan obligation if the

[53] David E. Woolley (2010), p.7-8

ground lease demands the landlord to the landlord's fee interest for the tenant's financing.

- Because the landlord is the fee owner of the property, he may be held responsible for governmental agencies for tenant actions that violate applicable laws and to third parties for hazardous substances causes by the tenant.

3.1.3 Advantages and Disadvantages of Ground Leases for Tenants

Basically, ground lease is used by the tenant as an instrument of achieving the same-rate of a financed acquisition of fee ownership. In situation whereby the buyer cannot obtain reasonable institutional or third party financing, a ground lease can be found useful of providing the means to acquire a long-term interest including the right to improve the land to the tenant. A tenant in a ground lease often seek to have the largest right to use the premises that might include the right to pursue zoning changes, entitlements, permits, approvals, and other long-term development goals which is equivalent to the right of a fee owner. In most cases, tenants always request for a proper time to evaluate the land and its potentials and restrictions before executing a lease. Additionally, three main advantages of ground leases to tenants would be explained as follows;

- In a ground lease, there is elimination of initial acquisition costs of the land, which include purchase price and closing costs. There can as well be a delay in the rent of the ground lease up until the project is fully ready for business.
- There is income tax advantages for the tenants in the ground lease due to the fact that ground rent is deductible, whereas only the interest portion of loan payments is deductible.
- A ground lease can as well be used to affect certain borrowing techniques such as sale leaseback arrangement. [54]

The disadvantages of the ground lease for the tenant can be stated as follows;

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[54] David Dale-Johnson (2000). Long Term Ground Leases, the Redevelopment Option and Contract Incentives.

https://lusk.usc.edu/sites/default/files/working_paper_115.pdf, p.2

- In most cases, the nature of the long-term lease cost in ground lease exceeds the real cost of purchasing the property..
- There is a limited rate of freedom for tenants because of particular terms of the lease such as initial construction of improvements, permitted uses, subletting and alterations.
- In situation, whereby the constructed project is not successful, the landlord may find other alternatives for financial arrangement but there would not be any way out for the lender.
- The nature of the ground lease requires the building to be part of the landlord property at the termination of the contract. In this respect, the project of the land would start depreciating in value and ultimately becomes unsalable and financing may later be impossible to obtain.
- There might be a situation whereby the tenant would face with financial difficulty in a ground lease whereby the main financing is "leasehold improvement financing."[55]

3.2 Concept of Property under Iraqi Civil code

Islamic law influences and informs secular Iraqi civil law and property is defined from three distinct rubrics, which are public property, state property, and private property.Tree, these categories, property becomes subject to certain land tenure arrangement, such as *mulk* (private full ownership), *miri* (state ownership), *waqf* (endowment), and *metruke* (common land). Though it is a general idea in the country that God is the owner of-everything but in spite of this idea, private ownership of property is officially recognized. This means that private ownership might be deprived in some cases most especially when there is a compelling societal need. The provisions of the Iraqi Civil Code recognize every right to have a material value and consider it as property. The Iraqi Code explains everything to be subject of pecuniary rights except those things that cannot be subjected by the virtue of their nature or things that are exempted by the law from being subject to pecuniary rights. Immovable property comprises of fixed things

[55] David Dale-Johnson (2000), p.3

that cannot be moved or converted without damaging them such as buildings, lands, mines, dams etc. On the contrary, movable property are things that can be moved or converted without causing any damage on them such as animals, money and things that can be measured by volume.[56]

Furthermore, there are three other categories of property under Iraqi Civil Code, which are fungible property, intangible property, and public property. Fungible stuffs are those that can be used as substitution for each other when making a payment. They are normally measured by number, measure, weight or volume. Intangible property comprises of non-material things like copyrights. Public property consists of both immovable and movable property of the state or other public entities. This type of property cannot be encumbered, or appropriated through any sort of time limitation. On the hand, this status of this property as public property can be lost via the abolition of its public use. Though, there is no corollary opposites of these categories of property under Iraqi Code (such as (non-fungible property, tangible property, and pri~ate property) but the definitions given to them are clear from a *contrariosensureading* of the codal language. [57]

In explaining the concept of ownership of property under Iraqi Code, it is found out that the Code recognizes the right to complete private ownership of property. The Iraqi C~~~- grants the perfect ownership to the owner along with the right to dispose the property through use, enjoyment, and exploitation of the thing owned its fruits, crops, and anything the property produces.[58] In addition, the owner of the property is recognized to be the owner of any other thing that could be considered as essential element of the property. In the country, individual ownership and joint ownership are recognized. Joint ownership occurs when two or more persons own a thing and in this situation, their

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[56] Peter Van der (2007). Property Restitution in Iraq. Presentation at the Symposium on Post-Conflict Property Restitution Hosted by the United States Department of State Bureau of Population, Refugees, and Migration; Bureau oflntelligence and Research, p.4

[57] IRAQI CIV. CODE art. 65 (Nicola H. Karam trans., 1990), p.64, 70-72

[58] IRAQI CIV. CODE art.65, p.1048.

shares are presumed equal absent proof to the contrary and each co-owner could avail himself the entire jointly owned property. In joint ownership, Iraqi Civil Code recognizes the primacy of ownership by stating that every co-owner is the absolute owner of his or her share and may exploit it in anyway he/she wants as far as it does not affect the other co-owners. The owner may also lease, sell, mortgage, or dispose of his own share without the permission of the other co-owners. [59]

Additionally, it should be noted that it might not be possible for any co-owner to dispose the share of another co-owner and may not be able to alienate or encumber any part of the jointly owned property if the property is not divided officially yet between them. Furthermore, all co-owners must jointly manage the affairs of a jointly owned property. On a normal base, the decisions of the majority of the co-owners will be binding over all the co-owners under management though it is possible for a co-owner to petition a court for review for a decision made or take some necessary actions in case there is no majority decision. In this respect, the court may appoint someone to manage the property jointly and delineate the extent of his powers. If any of the co-owner decides to manage the property without the consent of the other co-owners, the person would be considered to be the agent acting on behalf of all owners.[60]

3.3 Leases under Iraqi Civil Code

A property law known as *!jar* is recognized under Ottoman law and this is synonymous in meaning with the right to lease.[61] The name *Mejelle* covers different provisions governing this type of contract. Under Ottoman law, there were four classifications of lease, which are the lease of merchandise, the lease of immovable property, the lease of animals, and the lease of work.[62] The subject matter of the contract determines the rules guiding each type of lease. The reason for explaining Ottoman law is because Iraqi Civil

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[59] Dan E. Stigall (2008). A Closer Look at Iraqi Property and Tort Law. Louisiana Law Review, Volume 68, Number 3, p.10

[60] Dan E. Stigall (2008), p.10

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

[62] Ibid, p.421

Code is greatly influenced by Ottoman concept of lease (and other property rights), but in the general theory of lease, Iraqi Code has abandoned the main features of *!jar.* It has redefined itself to be more of modem, civilian theory of lease, which is defined as a broad light of lease that is guiding various kinds of property. Under Iraqi Civil Code, lease is defined as the alienation of certain advantages in return of a specified consideration for a defined period of time that the lessor will be bound to enable the lessee the right to enjoy the leased property. This definition is the same in meaning with that continental civil law and Ottoman law. [63]

The tenant under Iraqi law is responsible for repairing and restoring any damage caused to the leased property that would cause interference with its intended use. If the lessor refuses to do this, the lessee has the right to either rescind the contract or, with a court's permission, carry out the repairs and restoration and claim the expenses from the lessor. For some reasons, if the property is imputable to the lessee, the property would not fit its intended use or if such use is appreciably diminished, the lessor must restore the land to its original condition. In case the lessor refuses to do this, the lessee may reduce the rent or rescind the contract. If the leased property perishes in its entirety during the lease, the contract is considered rescinded. The Lessee has the right to claim for the cost of repairs done under the permission of the lessor if they have agreement to jointly repair th~- property. The lessee would be held responsible for minor repairs associated with the usage of the property. This provision is synonymous with that of *Mejelle,* which states that; if the lessee does any repair with the leave of the lessor, if these repairs have to do with improvement of the house such as the tiles of the roof or with the preservation of it from danger, if there is no stated conditions of paying the expense by the lessor, the lessee still has to take the expense from the lessor.[64]

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[63] Peter Van der (2007). Property Restitution in Iraq. Presentation at the Symposium on Post-Conflict Property Restitution Hosted by the United States Department of State Bureau of Population, Refugees, and Migration; Bureau oflntelligence and Research, p.5

[64] Peter Van der (2007), p.24

The leased property is regarded to be trust in the hand of the lessee and if there is any use of the property that is contrary to the specified use in the contract, this is defined to be an encroachment and the lessee will be responsible for any damage that might take place as a result of this.[65] Just like other contracts in Iraqi Civil Code, a contract of lease may contain stipulations such as an option to rescind the lease within a certain period of time. And in case this option is binding over both the lessee and lessor, the lease will be abolished if any party rescinds the conditions stated in the contract within the specified time limit. There is an automatic option available to every lessee who has leased a thing without inspecting it, allowing him or her to accept or rescind the lease upon inspection. Additionally, Under Iraqi Civil Code, there is separation of contracts-of-hire or employment from its provisions on lease and rules each contract is stated differently under different sections in Iraqi law.[66]

3.4 Ownership of Property under Iraqi Civil Code

Generally, the traditional civil law systems define "ownership" to be the conjunction of three rights: the right to use a thing (usus), the right to enjoy the fruits of a thing (fructus), and the right to dispose of the thing (abusus).[67] All these rights are transferable by the owner in different combinations. Under the rights of owner to transfer his/her ownership is known as "dismemberments" of ownership, which could take place in th~- following ways;(l) the predial servitude (part of usus), (2) usufruct (usus and fructus), (3) use (part of usus), and (4) habitation (also part of usus). These traditional civil law principles are found effective in Iraqi civil law system. Though the general meaning of these concepts have been explained in the first part of this dissertation but attempt shall be made to explain with the use oflraqi Civil Code system. [68]

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[65] IRAQI CIV. CODE art.764 (Nicola H. Karam trans., 1990).

[66] Dan E. Stigall (2008). A Closer Look at Iraqi Property and Tort Law. Louisiana Law Review, Volume 68, Number 3, p.24

[67] HESS-FALLON & SIMON, supra note 43, at 138.

[68] Dan E. Stigall (2008). A Closer Look at Iraqi Property and Tort Law. Louisiana Law Review, Volume 68, Number 3, p.25

3.4.1 Servitudes

Iraqi Civil Code defines "servitude" as "a right which limits the enjoyment of an immovable for the benefit of another immovable belonging to another owner."[69] In the Iraqi law, servitudes are obtainable through a contract, by inheritance or by will. It can be formed with time limitation so that it can expire automatically after certain period of time. The stated rules in the document that create them govern their usage by customary usage, and by the statutory rules that govern servitudes.[70] The *Mejelle* comprises of different articles that can be used to address property rights and limitations on the exercise of property ownership that correspond to servitudes, but fails to contain any provisions laying out a general theory of servitudes or defining anything as a servitude. The idea of rights that place limitation on the enjoyment of an immovable for the benefit of another immovable belonging to another owner" as it exists in Iraqi law and Roman law is not found in the *Mejelle*.[71]

3.4.2 Usufruct

As it has been explained in the first chapter of this dissertation, the basic meaning of usufruct takes place When the owner of a thing transfers the ability to use and enjoy the fruits of a thing (the usus and the fructus) to another, which means he/she is transferring the right of usufruct to the another party. Iraqi Civil Code allows that the right to use and enjoy the fruits of a thing can be owned apart from the bare title.[72] The usufructuary may use the property encumbered by the usufruct and its accessories under Iraqi law. It is also stated in the law that the principal portion can as well be expended enjoyment of these rights, but must be replenished by the usufructuary. Usufructs under Iraqi law are acquired by contract or through a testament and without agreement to the contrary, it may be disposed with or without consideration. In matter of inheritance, Iraqi civil law recognizes usufruct to be created by will alone and for an Iraqi usufruct is extinguished

[69] Alan Watson (1991). Roman Law And Comparative Law 49 (1991).

[70] IRAQI CIV. CODE art.1271 (Nicola H. Karam trans., 1990).

[71] Dan E. Stigall (2008). A Closer Look at Iraqi Property and Tort Law. Louisiana Law Review, Volume 68, Number 3, p.27

[72] IRAQI CIV. CODE art.764 (Nicola H. Karam trans., 1990).

by the death of the person to whom it was originally granted. Despite the fact that it usufruct is transferable but its life is inextricably bound to the life of the original owner and in case the usufructuary outlasts any stated time period for the right, it is extinguished by his or her death. This is in accordance with the traditional civilian rules governing usufructs, which hold that the usufruct terminates upon the death of the original usufructuary rather than upon the death of the purchaser of the usufruct.[73]

3.4.3 Use and Habitation

Under Iraqi Civil Code, it stated that an owner can grant the rights of use and habitation to another person.[74] These two rights in rem are basic characteristics of modem civil codes and they found relevant with the theory of a tripartite dismemberment of ownership rights. Under the traditional civil law doctrine, they are considered to be personal rights that are not transferrable to third parties.[75] The Iraqi Code strongly emphasized these features that these rights cannot be transferred except there is an express agreement allowing it or if there is some "strong justification" that would justify deviating from the general rule.[76] Iraqi Code states some rules guiding the rights of use and habitation and states that if the house granted for habitation needs repair, the holder of the right shall be liable for this and any new buildings constructed by the person with the right of habitation shall belong to him and shall be transferable to his heirs. In cas'e~- the holder of the right refuses to do this, the court shall lease the house to another person and deduct the cost of the repairs from the rent.[77] On the expiration of the term of the lease, the house belongs to the holder of the right habitation. On the other hand, it is evident that the rights of use and habitation are largely governed by the same rules that govern usufruct. Iraqi law requires the holder of a right of habitation to make repairs but

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[73] Dan E. Stigall (2008). A Closer Look at Iraqi Property and Tort Law. Louisiana Law Review, Volume 68, Number 3, p.28

[74] IRAQI CIV. CODE art.65 (Nicola H. Karam trans., 1990).

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

[76] IRAQI CIV. CODE art. 1263.

[77] Id. art.1264(1).

allows the holder of a right of habitation to acquire ownership of new buildings built on the immovable subject to his or her right of habitation.[78] This is different from provisions of the Mejelle which has a specific article that allows for a gratuitous loan of a house.

3.4.4 Security Devices

There are two different types of mortgage in Iraqi Civil Code, which are authentic mortgage in immovable property and a possessory mortgage in any kind of property that could be the subject of commerce. Under Ottoman Law, there was provision for kind of possessory mortgage known as *rahn* whereby a person could give movable or immovable property to be held as collateral for a debt. But there was no provision for a nonpossessory device under Ottoman law whereby property was registered as sold to the lender but with the right of resumption by the debtor upon payment of the full debt. The Iraqi Code on the other hand makes provisions for both an authentic mortgage and a non-possessory mortgage, which maximizes the sorts of security devices available under Iraqi law. An authentic mortgage is a contract whereby a right is given to a creditor in rem over an immovable in which he/she prefers over ordinary creditors and creditors who are subordinate in rank for purposes of repayment. This right is as well found in the civil law device of mortgage, which is non-possessory right in property to secure the performance of an obligation. An authentic mortgage under Iraqi Civil Code comprises of accessories of the thing mortgaged that are deemed to be constituent parts of the immovable. Most in particular, it includes the trees and buildings that exist at the time of the mortgage. It also includes all servitudes, improvements, and installations made on the immovable after the mortgage. The Iraqi Civil Code explains that every part of the mortgaged immovable is a security for the entire debt and every part of the debt is secured by the whole of the mortgaged immovable.[79]

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[78] Id. art. 1265.

[79] Dan E. Stigall (2008). A Closer Look at Iraqi Property and Tort *Law.Louisiana Law Review,* Volume 68, Number 3, p.107-108

A possessory mortgage on the other hand is defined as a type of contract whereby the mortgagor gives property to be held in possession of a mortgagee or against a debt that the mortgagee may collect.[80] Its object comprises of anything that can be used for commerce ranging from movable, immovable or a debt.[81] In order to officially complete a possessory mortgage and become binding upon the mortgagor, the mortgagee must have received the mortgaged thing.[82] The concept of a possessory mortgage is derived from the *Mejelle's* provisions on *rahn.* This is found under Ottoman law that property could be given to another person as collateral for a debt.[83] In addition, Iraqi Code states that any form of property could be used as a *rahn* as long as it possible to sell the property. It should be noted that in a general civil law system, this kind of contract is known as contract of pledge rather than mortgage as it is called in Iraqi Civil Code. Civil law systems generally recognize a mortgage to be a nonpossessory right in immovable and adopted similar devices to allow security interests in movable property. In analyzing Iraqi law, it is found out that in the aspect of security devices, the Iraqi Civil Code takes from both modem civil law and Ottoman law. When it comes to the aspect of authentic mortgage, Iraqi law borrows more from the civil law and its notion of 1'hypothque. And in the area of possessory mortgage or pledge, the Iraqi Code derives its legal scheme from the Ottoman Mejelle and the legal device cif rahn.[84]

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[80] IRAQI CIV. CODE art.764 (NicolaH. Karam trans., 1990).

[81] Id. art. 1328.

[82] Id. art. 1322

[83] MEJELLE art.705 (C.R. Tyser et al. trans., 1980) (Isr.).

[84] Dan E. Stigall (2008). A Closer Look at Iraqi Property and Tort Law. Louisiana Law Review, Volume 68, Number 3, p.33

CHAPTER FOUR

COMPARISON BETWEEN REAL PROPERTY BETWEEN ENGLISH COMMON LAW AND IRAQI CIVIL LAW

4.1 History of Real Property under Iraqi Civil Law

In order to make a good comparison between real property under British common law and Iraqi civil law, there is a need to examine the nature of real property under Iraqi civil code considering the fact that the concept of real property under English law and continental civil code has been examined in the first and second chapter of this dissertation. Historically, there is deep root of land registration is Iraq. Far back as at 2700 BC, there has been evidence of the sale of private properties from the city-states of Ur and Uruk. During the Sumeran period, there were vivid different classes of property and Under Hammurabi (1792-1750 BC), land classification expanded and is referred to in the Hammurabic code. In another word, it has be ages since land registration had occurred in Iraq and also the country can be considered as the founder of the concept of private property of land.[85]

In tracing the land ownership in Iraq during the period of Ottoman Empire, it started in 1534, where by land ownership was simply defined as system whereby all land directly belong to the state. There is no need for the state to prove the ownership with any legal document. There was also a possibility for ownership of land by Communities (collective ownership), individuals, and corporate bodies but this ownership must be registered under the authority of the state. In the period of Ottoman regime, most of the

[85] John P. Powelson (1988), The Story of Land: A History of Land Tenure and Agrarian Reform, The Lincoln Institute of Land Policy, 26 Towbridge Street, Cambridge, MA 02138 is the reference for Ur, Uruk, and the Hammurabic period.

ownership of land belongs to groups of people as the Rawa and Aana in the northwest of Iraq. During this period, reformation of land was created in three different types, which are, privately held, Ameriya lands (owned by the state) and Endowed lands. The registration of large areas such as cities, and complete villages were considered as just one plot of land and this was the prevailing standard for a long period of time. The people of one community were considered the legal owners/partners of the city, town, or village with a single title deed.[86]

When the regime of Ottoman came to an end, there was huge change in the perception of land ownership due to the idea of the family (bayt) as the most significant element in the society. The end of ottoman occupation led to the advent of anarchical era, whereby the governmental authority and the control that the social and tribal groups enjoyed wipe away. This period ushered in the system of feudalism in Iraq. Lack of state or local controls gave the opportunity to powerful families to seize enormous plots of land with the use of any available mean to maximize their land holdings. Their prevailing influence over governmental authority enables families to register large plots of land under their name. The collapse of the strength of the Ottoman Empire made it difficult for the empire to pay its high-ranking officials. The alternative way out to this problem was by registering plots of lands in these officials' names and giving them the legal title-·~: deeds. These types of land allocations were registered as privately held land outside the TAPU system and therefore were held in perpetuity.[87]

Furthermore, the state has no other options that transferring the ownership of real property from the control of large communal tribal holdings to the smaller family units in order to satisfy its requirement of rewarding top civil servants and to weaken the influence of the tribal groups. Under the civil law system, the owner was entitled to buy, sell, rent, and mortgage privately held land. On a practical realm, most of these lands were held in adverse possession by the Iraqi tribes, and the Ottoman government could

[86] RTI Intemational(2005). Land Registration and Property Rights in Iraq. USAID Iraq Local Governance Program, p.7

[87] Tripp Charles (2000). A History oflraq. School of Oriental and African Studies, University of London.

not prevent this. Additionally, large areas of the Arneriya lands were allocated to powerful officials and individuals. Another prevailing issue was forgery; it was evident in TAPU registry. This is found out in a situation whereby on the registry, any name could be deleted and replaced by a new name. Moreover, documentation was poor and inefficient, thus making it vulnerable to fraud and graft. Ottoman government attempted different reforms to rectify this situation by issuing new law in order to confirm the identity and registration of real property but there was advent of the First World War which led to the total collapse of the Ottoman Empire.[88]

4.1.1 Real Property in Iraq under British Mandate

Britain declared Iraq as its protectorate officially in 1917 and just a year after this, the commanding general announced in his Declaration No. 15 (given December 18, 1918) that the people who have title. deeds for their possessions of Ameriya lands are considered to be tenants for these lands. There were established institutions to evaluate those title deeds. And also the British authority gave lands to some tribal leaders and feudalists who supported its occupation. Under the mandate, the British government discovered the significance of clarified real estate registration and this led to the issuance of Declaration No. 24 (1920). Under this declaration, two directorates for real estate registration were formed in Diyala and Babil govemorates. The Iraqi uprising of 1920 led to the reason why British stopped their mission. At the aftermath of this uprising, the Iraqi government had the privilege to play a role in this process. An attempt was made by the TAPU department to engage in the application of Ottoman law; issuing an Arabic translation of the law in the annex of the Iraqi Gazette (No. 727) dated January 28, 1929.[89]

Furthermore, it was immediately after this that the Iraqi government aimed to reform the general land policy before the application of the law. In respect to this, there was appointment of Sir AmestDawsen, the British advisor of lands. He submitted a report in

[88] Tripp Charles (2000), p.9

[89] FarookSleglet and Peter Sleglet."Changes in Land-Ownership and Social Structure in Middle and Southern Iraq for the period 1858-1870." International Middle East Journal No. 15, 1983, pp. 491-505

January 1931 that comprises of his suggested recommendations for reform. According to this report, the Iraqi government issued the Land Rights Conciliation Law No. 50 (1932), which was then replaced by Law No. 29 (1938). It also issued Alezma Law No. 51 in 1932, which was later replaced by the amended law of Alezma rights in Ameriya lands No. 153, year 1959. There was creation of a new type of land right along with the Land Rights Reconciliation Law of 1932. And this was able to come to effect via Alezma rights (adverse possession) to Ameriya lands. And now, there are three recognized type of rights to Ameriya lands which are TAPU authorization/allocation of Ameriya land to selected individuals, rights gained through Alezma, and pure Ameriya lands (or public land).[90]

4.1.2 Real Property during the Independence of Iraq

The newly independent state could not survive without the legacy of the Ottoman occupation which had been the primary method of real property and real estates in Iraq. Though, there was a great attempt made by the British to improve the administration of the real property law but they could not improve the adverse distribution of land. After the independence, Feudalism continued unchecked, benefiting the wealthy landowners, who paid little or no attention to the poorer peasant classes. During this period, political development was a matter of Arab nationalism and socialism. The main opposition t~~: central power emerged from the Ba'athists and the communists who opposed the excesses of monarchy and vested interests of the wealthy landowners. They were hard life for the peasants with poor conditions of living and they had no education, they faced with different diseases. This later became the point of target for the reformers. There was rapid growth of the Opposition to the parliamentary monarchy in the 1958 revolution (July Revolution). This led to different Promises made for social reform, development, and economic prosperity. In line with socialist ideology, the July Revolution sought to transform the economy from rudimentary free enterprise into collectivism. The system gave chance for many landlords to "hold lands that they

[90] RTI Intemational(2005). Land Registration and Property Rights in Iraq. USAID Iraq Local Governance Program, p.9

secured from the state on easy terms and forcefully subjected many peasants to work for remuneration so small that it left them barely. on a subsistence level. The intervention of state failed to help the living conditions of the peasants. After the revolution that took place in July, there was a demand for the abortion of feudal system and need for agricultural reforms. There was strong support given to this and it led to the declaration of Agrarian Reform Law on December 30, 1958. The law empowered the government to take away lands from the large landowners. [91] It can should be noted that prior to the Agrarian Reform Law, the private sector, which constituted relatively few landowners were able to control 80 percent of the land in the country. But the law reduced the large land holdings and expanded small- and medium-sized holdings. In addition, the law-also created a complex situation in the countryside. As a kind of compensation, the feudalists were granted the right to select the land that they could hold and to subdivide it into smaller units for their family members. The law also considered the distribution of the lands transferred to farmers so that each farmer would possess private land ownership.[92]

In the year 1970, there was an issuance of a new Agrarian Reform Law that incorporated and abrogated the old reform law. Among the new articles, Number 38 stated that "Communal Reform Associations are to be established for the people who were granted plots of land according to Articles 18 and 19 of this new law, including farmers who have rented plots of lands from the Ministry of Agriculture. These plots of land should not exceed the high limits of lands distribution. Communal farms are to be established incorporating people who share work or work and machines and other tools on the basis of a communal possession for those machines and tools. They should work together and share the benefits equally." Thus, communal farms were established more or less along Soviet lines. However, during the socialist period, attention was given to cooperative and communal ownership. Under Iraq Civil Law (Articles 1098-1105), there was opportunity granted to the cooperative unions whereby they could acquire property from

[91] MajidKhadduri (1978), Socialist Iraq: A Study in Iraqi Politics Since 1968, The Middle East Institute, Washington, DC, p. 117

[92] MajidKhadduri (1978), p.118

the state under cooperative ownership. The basic reason for this was the need to build housing for members of the cooperative unions. The cooperative union was a legal entity (a legal "person") and could accept independent financial liability. The Revolutionary Command Council (RCC) encouraged and obliged the cooperatives to build housing for their members. RCC resolution 1153 (1977) permitted the Iraqi Real Estate Bank to give loans to the private sector to help solve the housing problem. In 1978, the law of the Cooperative Housing Union was promulgated, establishing a department of cooperative housing in the Ministry of Housing and Reconstruction.[93]

4.2 _ Land.Registration.System in Iraq

The official name given to ownership document was the Permanent Title Deed right from the period of Ottoman Empire up until 1974. It was a hand-written copy of the original registration document of the property ownership held by the TAPU. By 1974, there was public official announcement of Real Estate Registration Law, which was designed as a replacement for the old Ottoman Permanent Title Deed with a new Title Deed document. The new title document that is held by the owner is also a hand-written copy of the original, official record-book document. It is the only proof of ownership. The RERD holds the original in its registry. The Title Deed document comprises of the following information: (1) The complete name of the owner(s); (2) The category of the property, plot of land, residential, arable, commercial, or industrial; (3) The type of the property (three types).[94]

4.2.1 Transfer of the-Ownership of Real Estate Property

There are two types of ownership transfers in Iraq, which comprises of (1) transfer between individuals and (2) transfer between individuals and a governmental body or between two governmental bodies. In explaining these two types, the first one, which is Transferring ownership between individuals comprises of features which are (a) Sell-

[93] RTI Intemational(2005). Land Registration and Property Rights in Iraq. USAID Iraq Local Governance Program, p.10

[94] John P. Powelson (1988), The Story of Land: A History of Land Tenure and Agrarian Reform, The Lincoln Institute of Land Policy, (the reference for Ur, Uruk, and the Hammurabic period) p.11

Buy Process: This process (described in a later section) is long and rather a complex , procedure that takes place at the RERD. The process is intentionally complex so that everything from checking ID cards to issuing the Title Deed can be examined accurately. (b) Exchanging Properties: In this process, no money is exchanged. Instead, owners agree to exchange properties, and the new ownerships are registered at the RERD. (c) Living Inheritance: The landowner has the right to register only one-third of his property to whomever he would like. This should be registered at the RERD during his lifetime. (d) Donation: this is a process of transferring a property ownership through donation to someone else, whether or not they are a relative. It is a metaphoric sale of property where no money changes hands. (e) Al Takharuj: This is a transfer of one's share of an inheritance to any of the other inheritors. This process usually takes place at a special court and in front of the judge. Then the property can be registered at the (RERD).95

The second method of transferring ownership is known as Transferring ownership involving a governmental body and it comprises of Judicial Expropriation and Administrative Expropriation. The Judicial Expropriation states that it is possible for any estate department to become the owner of a privately owned plot of land or a property via a Civil Court Decision. To expropriate a specific plot of land or property, the court iÇ"~- legally responsible for proving that no objection to the transfer exists. It should also have a stamped sketch of this property from the RERD with the names of the owners and their addresses. And secondly Administrative Expropriation explains that real estate ownership is transferred from one governmental body to another. The amount of money exchanged is agreed upon either through the ministers, or sometimes through the prime minister if the transfer is between two different ministries.

4.3 Buying Real Estate (the Sell-Buy Process)

Iraqi procedures for buying real estate are not really different from all governorates. The seller and the buyer go together to the RERD. The seller presents the Title Deed as the only official document offering proof of his legal ownership. The office issues the

[95] John P. Powelson (1988), p.12

permanent Title Deed, which is referred to as Document Sample 25 (DS-25). This document will be issued after a cross evaluation of the real estate file and its registration in order to confirm that the official ownership of property belongs to the seller. It is not possible for the sell-buy process to take place if the real estate is mortgaged or sequestered, or certification that the current owner has unencumbered authority to dispose of the property is not possible. There must be a clear title for the real estate before a sale can take place. After the DS-25 is issued, a selling application form is given to the seller to be completed by all concerned parties. It is submitted to the RERD to be examined by the specialized deputy for the related real estate location. Baghdad has 10 real estate locations. If all of the above information is verified to be correct, the process continues.[96]

After this is done, then the next to take is that the RERD would forward the application to the Civil Affairs Department, which is the governmental department that is in charge of identification card (ID) of Iraqi citizens, which verifies the identities. The ID card contains all personal information, including the name of the person, eye color, complexion, hair color, any identifying mark, father's and mother's names, last name, place and date of birth, marital status, and a photo of the person. The name of the husband or the wife must be included. Any change in marital status is registered in the ID card (i.e., married, divorced, or widowed). After this, then the Monitoring Committee would confirm the real estate's category (land, house, building, etc.) and land use type (residential, industrial, etc.). Afterward, the real estate would be evaluated. This evaluation is needed in case the transaction is between a willing buyer and seller. In this respect, the value will be based on the terms of their personal agreement. But in the case whereby the real estate is placed under any legal restriction, then there would be a need

[96] RTI International (2005). Land Registration and Property Rights in Iraq. USAID Iraq Local Governance Program.p.15.

for an evaluation by the committee. This committee consists of a judge from the Civil Court and a specialist who is typically not an employee of the RERD.[97]

Furthermore; it is compulsory that both the buyer and seller sign the selling application form, after listing all personal official information as shown in the ID cards (Iraqi nationality paper, civil affairs ID card). All official papers and signatures are to be checked against the ones given previously by the specialized deputy of the RERD. In the case whereby the worth of the real property is more than 20 million Iraqi's dinars, then there will be a need for all documents associated with the process to be sent for approval to the General Taxes Department in the region where the real estate is located. Approval will only be given when there are no outstanding tax liens on the property. After this evaluation, there is a need for Real Estate Taxes Department to stamp the application in order to confirm that there are no unpaid taxes. And the final step has to do with the Municipal Directorate in the region where the real estate is located. This body is also responsible for validating the procedure. In another words, these three official bodies must ratify the transfer.[98]

On the other hand, in case the real estate is valued to be less than 20 million Iraqi dinars, then there would not be any need for General Taxes Departmept. At the Real Estate Registration Office, the procedure is completed by paying the tax on "Transferring an~, Immovable Property Possession. After this, both the seller and buyer will sign the selling form along with the specialized deputy and the employee in charge of registration are also to sign. The application is registered at the Permanent Real Estate Registry, where the seller and buyer also must sign. Then there will be Monitoring Committee, which comprises of engineers and surveyors that would determine whether everything is done officially without any committed blunder. After the given decision from this committee, a new permanent Title Deed (DS-25) can be issued with the buyer's name, certifying that the buyer has become the legal owner of this real estate. A photocopy of this

[97] Tripp Charles (2000). A History oflraq. School of Oriental and African Studies, University of London. p.16

[98] Tripp Charles (2000), p.17

registration is sent back to the Monitoring Committee to be examined, confirming that the registration is correct and legal. This committee also stamps the application and its registry and sends these documents to the General Real Estate Registry to be covered as a second copy of the originalı.one. If the Monitoring Committee finds any error or deficiency in these papers, it sends them back to the branch concerned to be corrected. A third copy of this registration will be issued to a new branch in the General Real Estate Registration Directorate as a document file in a new computerized filing system.[99]

4.4 Comparison between Real Property in English Law and Iraqi Civil Code

4.4.1 Similarities

The basic meaning of real property both under English common law and Iraqi civil code remain the same. It generally defined as property, which consist of land and the buildings on it, it also includes natural resources such as crops, minerals or water; immovable property of this nature. The basic issues and concepts of real property remain the same under both laws as well. These include; interest in real estate, the business of real estate, the profession of buying, selling, or renting land, buildings or housing. All these components are found both under English common law and Iraqi civil law system.

Another similarity that can be found between them is the historical development of real':-·~: property both in Iraq and in England. In the history, the ownership of land has once been centralized under the control of state and feudal system. It was found out in Britain after the Norman Conquest in 1066, the feudal system is premised on the fact that all lands should be solely owned by a King or noble man and he can give it out as a kind of loan (Feu) to ordinary individual and who in turn was meant to pay back with the fruits of the land or pay back from personal services such as military service. In Iraq during the period of Ottoman Empire that started in 1534, where by land ownership was defined as system whereby all land directly belong to the state and there is no need for the state to prove the ownership with any legal document.

[99]Paisley R (2005). Real Rights: Political Problems and Democratic Rigidity. *EdinLRVo1* 8, p.18.

Furthermore, after the decline of the Ottoman occupation, the rich few family took over the control of lands as well at the detriment of the peasants. In this respect, Both Iraq and Britain share similar experience of the ownership of real property in the history. Furthermore, both Britain and Iraq destroyed the practice of feudal system. The 1925 Birkenhead legislation in England and major reform that took place led to the abolition of feudal system in Scotland appeared to have played more influencing role than in other fields of private law. And also In Iraq after the revolution that took place in July 1958, there was a demand for the abortion of feudal system and need for agricultural reforms. There was strong support given to this and it led to the declaration of Agrarian Reform Law on December 30, -1958 which ended feudal system in the country.

Land registration is another meeting point between the real property in Iraq and English law. The both system of law require compulsory land registration though the procedures for the registration are different but they both mandate every land in their countries to be officially registered. There are two types of registration. The first type of registration of land is called land register in the new British Isles and it found in countries such as Austria, Denmark, England, Finland, Germany, the Netherlands, Poland, Portugal, Scotland, Spain, Sweden and Switzerland. The full concept of land registration is explained in the chapter two.

Ownership and the use of real property is another similarity between the two systems of law. Concepts such as servitudes, usufruct, use and habitation, and security rights are both available for the two system of law, with the same basic meaning but the application is lightly different. In English law, the concept of ownership is considered to be estate in fee simple supreme in possession, which is generally called a freehold estate or "freehold" and it can be referred to as an interest in land in perpetuity (forever).

Another similarity between the two systems of law is that Iraq was declared as a British protectorate in 1914 and the country was ruled under the British kingship system. In this respect, Britain has historically managed the affairs of real property in Iraq before though British system did not survive for long as a result oflraqi uprising in 1920.

4.4.2 Difference

The difference between the real property in Iraqi law and English common law is directly related with the general difference between civil law and common law system. But this thesis would only focus on the nature of difference that exists between them in real property law alone. It is a basic fact that while the civil law system is codified and written, the common law system is oral and base on trust. And despite the fact that the real property law comprises of the same components both under common law system and civil law, it has been explained in the first chapter how the practicability of these components different from the two system of law. Such as concept of trust, settlement and overreaching. These concepts have deep roots, strong meaning and more efficacious in the English common law than the 'general civil code system as it has been explained in the first chapter of this dissertation.

Another difference is that Under Iraqi civil code and continental code, there is written and rigid documents applicable for the ownership of estate and real rights of land. While In England where there is a common law system, there is no universal definition of real rights in land. Though, there was despite imposition of a statutory cap in 1925, but it is found out that this is not practicable and the courts have ignored it. The courts have now introduced a new proprietary interest known as proprietary estoppel. In this respect, while it is a real right under Iraqi civil code, it is known as proprietary estoppel under English common law. There are different types of real rights in Iraqi civil code, which includes Tassaruf, Musataha, Mugharassa, Al Musaqat, Al Muzara'a, .and Shuf a (Preemption). The other available real rights in land in the universal civil law system has been discussed in the second part of this dissertation such as easement or servitudes, Right of Use (prohibitiousus), and Apartment Ownership (Condominiums).

Another difference between the two systems of law is based on the fact that in the universal civil code system (where Iraqi law belongs), there is only one prevailing ownership right though ownership right can be jointly held but it cannot be divided into different ownership rights. Under English law, there is a possibility of estates existing

side by side in the same land. This was fully explained in the first chapter of this dissertation.

CHAPTER FIVE

COMPARISON BETWEEN REAL PROPERTY UNDER CIVIL LAW AND COMMON LAW SYSTEM

5.1 Real Property under Civil Law

Technically, comparison of real property law ideas under the approaches of common law and civil law faced with many challenges to the extent that we .can say-there is nothing - like "Civil Law." This explains the fact that the laws of those countries are that based on Roman law are inherently different from each other in this present time. But in another word, there are certain basic features that could be found and emphasized among them. In an attempt to go into more details, the law of Germany would be considered most favorite not only because it is a system that is likely to be most familiar but basically because it contains and reflects one of the most elaboration of European codes. The pattern and nature of these could be used as the basic difference between common law and civil law. In all the countries that are practicing civil law system, it can be found out that codification reflects a fresh start, a great house-cleaning, where historical rules and institutions were itemized. New consistent rules were well defined and worked out, unhampered by ideas developed in and adapted to the needs of past ages. In applying this to the real-property law, it is found to be more radical than any other fields. Codifications mark the great difference between English law and Common law system.[100]

To buttress more on this point, the process of destruction and rebuilding was practically guided by two policies, which are; the need to undermine the political power of the landed aristocracy and secondly, the main idea behind economic liberalism, which

[100] Justus W H (1930). The standard work on the nineteenth century continental reforms of the land laws. Die Fortschritte des Zivilrechtsimig. Jahrhundert 2 vols. 1918,1930.

explains that the best way to serve common good is the use of greatest possible marketability of the land and the expected result of this idea is that every piece of land would always be in the ablest and fittest hands. There are two principal legal means that can be used to give effect to t~ese policies which are; Restraints on alienation were reduced or almost undermined completely and secondly there was an established system of conveyancing, which aims not to simply the formalities of land transactions and at the same time aimed to guarantee maximum security for bona fide purchasers and mortgagees. In explaining the first point, it was not only intended to result to landed classes but also serve the purpose of providing maximum security to land transaction. And this has been made known right from the early date that in the absence of a radical simplification of the substantive law of real property, there cannot be conveyancing reform that would be sufficient enough to achieve the expected result.[101]

Restraints on alienation can be found effective in the countries with civil law system but not to the extent in England. They were found in the traditional old forms of community property of the family or the village; partly, their foundation lay, as in England, in feudal ideas and institutions.[102] But almost everything about this principle has been removed in the reforms of the nineteenth century. Additionally, there is another form of restraint on alienations that can be found in common law system that is one which is created by a legal transaction of an individual who are interested in fixing the legal fate of a certain piece of property for a more or less distant future. In this respect, the technical means of achieving this kind of desire is the future interest. Under civil law on the other hand, an institution was created, which is known as *fideicommissary* substitution. This institution becomes an instrument at which every individual can fix the future fate of his/her estate as a whole and not of anybody else' fate. On the contrary to common law, this same process can only be done by an instrument of a testamentary nature. In civil law system,

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[101] Rheinstein, Max (1936) "Some Fundamental Differences in Real Property Ideas of the "Civil Law" and the Common Law Systems," University of Chicago Law Review: Vol. 3: Iss. 4, Article 4, p.2-3

[102] Rudolf Huebner (1918). History of Germanic Private Law, 4 Continental Legal History Series 3ig ff., 395 if., 758 ff.

the use of *fı.deicommissumuniversale* explains that an individual has the right to provide that when he/she dies, the heir of his heir should be obliged to submit the entire estate to some other person, *thefideicommissary.*[103]

Furthermore, it was found out that local development most in particular, Germany has changed this institution to "Nacherbfolge," (reversionary heirship), under which the owner of the property may provide that upon his death, his entire estate should be given to party A, and upon party A's death, it should be given to party B and same to party C.[104] This provision might not be made particular for a piece of land. This can be illustrated in the following way; if X dies and leave his estate to A for life and then to B, the party A would so free to become the unrestricted owner of the entire estate. He has the right to alienate everything. On the other hand, upon his death as well or some other event, he is bound to submit the estate to party B. If he makes any attempt to sell anything that belongs to the estate, whatever he buys with them will be used as part of the property. He is not allowed to make gifts out of the estates except with the consent and approval of the Party B and any gift made out of the estate without such consent is invalid. This means that he is allowed to sell the piece of land that belongs to the estate and any sale of land made by a primary heir out of the estate without the consent of the secondary heir or heirs is invalid in so far as it impairs the rights of the latter.[105]

Furthermore, the primary heir is officially considered to be the possessor and owner of the land and registered as such in the Land Register. In order to protect the interest of the third party, Land Registry is required to enter on the Land Register with clear statement that the person entered as owner is merely a primary heir and unless this statement is

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[103]Rheinstein, Max (1936) "Some Fundamental Differences in Real Property Ideas of the "Civil Law" and the Common Law Systems," University of Chicago Law Review: Vol. 3: Iss. 4, Article 4, p.3-4

[104]Germ. Civ. Code 2100-46; Swiss Civ. Code arts. 488-92; Austrian Civ. Code §§ 604 el seq. (Cf. 2 Ehrenzweig, System des bsterreichischenallgemeinenPrivatrechts, 11,432 (6th ed.1924).

[105]Rheinstein, Max (1936) "Some Fundamental Differences in Real Property Ideas of the "Civil Law" and the Common Law Systems," University of Chicago Law Review: Vol. 3: Iss. 4, Article 4, p.4

clearly made, bona fide purchasers and mortgagees will need to get a good title from the primary heir. In addition, it is possible for a secondary heir as well to be appointed for some certain events. It may be under certain or uncertain event that the position of the primary heir is terminated. For example, maybe a husband appoints his wife as his heir until her remarriage, or until her death, and from then on Bor, if B should be dead, C. In comparison, with common law, this is also possible whereby legal situations may be created very similar to the future interests and expectancies. In this respect, will become the instrument of creating such interests. There cannot be any future created through *inter vivas* transaction. Yet, there is a possibility of a legal transaction whereby it would reflect in testamentary form and kind of similar to *inter vivas* transaction. The "pacts of inheritance."

In order to give example under common law system, Party A may be in an agreement with party B, and may appoint B or C as his heir. This is more than a contract by which A would undertake to make such and such a will. The agreement is the will, which is irrevocable without the other party's consent. There is possibility for both parties to such pacts of inheritance to collectively make dispositions as to their collective estates. It possible for such reciprocal "pacts of inheritance" to be combined in one document with an agreement in which future or present spouses fix their respective rights in each other's property. Such "pacts of matrimony and inheritance" fulfill the functions of an English marriage settlement. In comparing the civil law system with common law system, it can be found out that while an English marriage settlement will refer to Blackacre or Whiteacre, the German document refers to the respective estates as entireties, and only indirectly will it affect the individual pieces of land belonging to the parties at the time of their deaths. In addition, there must be provision made by the law concerning anyone who has interest to exempt a particular thing from the general fate of his estate. One may desire his estate to go to A; Blackacre, however, to B. He may decide to make his purpose to have effect through the mean of a legacy. However, there is a difference between a common law devise and the modem civil law legacy. Under common law system, if a man devises Blackacre to B, immediately he dies, the ownership titles passes

to the heir (Party B). While civil system in Germany, title passes to the heir; all B acquires is a claim against the heir, which can be defeated through the heir's conveying the land to a third party. Then B has nothing more than a claim for damages against the heir.[106]

Additional, with the use of a special type of legacy, it is possible for a testor to grant his hair to convey Blackacre to B, and that, after B's death, B's heir shall convey it to C. With the use of *legatumfideicommissarium,* there is nothing that can be created except claims in *personam* against the person charged with their execution. Modem German law has created a way at which the "future legatee" may protect his claim against defeat by adverse dispositions of the primary legatee. He may give public notification by entering upon the warning to the land register. The present owner is not denied of the right to transfer the title to third persons but he can only give them a title, which is defeasible upon the maturity of the claim of the "future legatee" The rule of creating future interests concerning estate came as a consequence of that peculiar attitude of the civil law which has made its theoretical expression through the distinction made between law of property and law of succession. In this respect, law of property looks to single objects and their transfer *inter vivas.* The law of succession on the hand regulates succession upon death, which is known as universal succession that succession of entire estate to a persorı.ï‴

.In the classical common law system, the application of universal succession is only effective in personal property that is, it is applicable only to part of a deceased person's property, which ecclesiastical courts in England in charge of it and their rules are based on civil law and not on common law ideas. While these courts are working on the principle that a deceased man's personal estate are passed to his personal representative

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[106] MATTHEOU E, Real Property Law - European University Institute http://webcache.googleusercontent.com/searchq=cache:Nszoh, p. 3

[107] Jesper M. Paasch (2011). Classification ofreal property rights: A comparative study of real property rights in Germany, Ireland, the Netherlands and Sweden KTH Architecture and The Built Environment, p.5

as an entirety, the common law courts are treating each piece of land separately as different unit. Under civil law, rights that are regarded as analogous to dower and curtesy refer only to the estate as a whole that is to those objects that belong to the estate at the moment of the precedent spouse's death. But under common law, the rights of the surviving spouse can be defeated by alienation *inter vivas.* It as a result of this general policy that future interests can be created only with respect to an estate as a whole as well as through testamentary transactions. Additionally, during the late sixteenth and seventeenth centuries, when inventive English lawyers responded to the desires of the English landed aristocracy by the invention of the "family settlement, it was found out that as a result of this continental lawyers developed *fideicommissafâmiliarum* for the same purpose. This institution became an instrument of testamentary or *inter vivas* using for settling piece of land with its fixtures and appurtenances (usually a large manor) in order to make it inalienable, indivisible, un-mortgageable, and exempt from execution, and subject to inheritance by primogeniture or some other system of entailed succession. Usually, provisions were made to cater for all possible eventualities and contingencies, so that the rights would not only be analogous to reversions but also vested and contingent remainders and even to powers of appointment.[108]

Another method at which the fate of a particular object can be fixed and not as a part.Pf ~: an estate has been retained in all civil law countries. A piece of land can be made the subject-matter of a usufruct for life in all these countries. This interest is similar to the common law estate for life. With.the use of transaction *inter vivas* or testamentary, it is possible for the owner to create a usufruct for a certain person and also dispose the right if ownership that is retained by him. This interest in many ways resembles a reversion. Both the right of the usufructuary and the reversion are not considered as an estate. The usufruct is regarded to be servitude, which can be defined as a combination of extensive easements and profits in the land of another. The reversion is not the same as future

[108]Rheinstein, Max (1936) "Some Fundamental Differences in Real Property Ideas of the "Civil Law" and the Common Law Systems," University of Chicago Law Review: Vol. 3: Iss. 4, Article 4, p.7-8

interest but it states the rights incident to ownership which are not vested in the usufructuary and not incompatible with the latter's rights.[109]

In comparative analysis of real property law under English law and Civil law system, attention should be paid on the principle of simplicity of the system of rights in rem most in particular in the absence of equities. Simplicity of the substantive law of real property is considered to be indispensable when looking at the proper functioning of the most effective device developed for securing the stability of land transactions in the system of land register that is adopted in few civil law countries such as Germany, Austria, Switzerland, and the Scandinavian countries. In these countries registration of title is compulsory. There is a record for every piece of land and there cannot be any vivid transaction without registration. However, the introduction of a system of compulsory registration of title is no easy task is shown by the experiences of France, England, and the United States. Though it faced with many challenges in countries for example in England where by compulsory land registration was confessedly prevented by the conveyancing branch of the legal profession. But its significance cannot be underrated. It prevented the necessity of title insurance because of the great security and stability it affords for transactions in land, an object regarded in the civil law countries as the most important end of the rules of the law of real property. This policy has been carried out most consistently in Germany.[110]

5.2 Other Real Property Rights in IraqLCivil Code

5.2.1 Tassaruf

The regime of law governing and defining the legal institution of the *tassaruf* is considered to be one of the symbols of Middle Eastern aspects of the Iraqi Civil Code. The origins of this property right are rooted in Iraq's unique legal history. It is a traditional system of property rights that originated from Ottoman theory whereby the

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[109] William Tetley (1999). Mixed jurisdictions : common law vs civil law (codified and uncodified). http://www. unidroit.org/ english/publications/review /articles/19, p.6

[110] Rheinstein, Max (1936) "Some Fundamental Differences in Real Property Ideas of the "Civil Law" and the Common Law Systems,"University of Chicago Law Review: Vol. 3: Iss. 4, Article 4, p.11-12

land is owned by the state and right was granted to the cultivator that is supposed to work on the land and this is referred to as a *tassaruf* Iraqi law grants the holder of a tassaru/extraordinary power over the property subject to the right. According to the Iraqi Civil Code, A person that has a *tassaruf* in miri land (government-owned land) is entitled to enjoy the land and its accessories; he can build agricultural buildings or grow crops, plant vineyards, and tress, build houses, shops, factories for agricultural purposes. No person may exploit miri land that is subject to another's right of *tassaruf* Any encroachment on land that is subject to another's right *oftassaruf* renders the offending party liable for damages. Every citizen of the country is entitled to get permission of the government, take possession of uncultivated miri .Iand in areas in which it is deemed legally permissible. The *tassaruf* may be alienated, leased, or encumbered by a mortgage.[111]

5.2.2 Musataha

Musataha is a "surface right" in an immovable that grants the rights to its holder to build on the land of another.[112] Any construction built by the holder of this right is officially owned by the builder and absent an agreement to the contrary, may be alienated or encumbered as long as the action does not affect the owner the of the land.[113] The right of *musataha* may be likewise alienated. The rights might be considered valid for a particular period of time probably not exceeds 50 years. In a situation, whereby there is no period of time specified in the contract, both party to the contract have the right to terminate it after is given and three years pass.[114] The *musataha* is not extinguished by the alienation of the building before expiration of the term.[115] However, upon the termination of the contract, the ownership of the buildings and other constructions are transferred to the landowner. The landowner must then pay for their value unless there is

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[111] Dan E. Stigall (2008). A Closer Look at Iraqi Property and Tort Law. Louisiana Law Review, Vol 68, Number 3, p.34-37

[112] IRAQI Cry.CODE art. 1266. (Nicola H. Karam trans., 1990).

[113] IRAQI Cry.CODE art. 1269. (Nicola H. Karam trans., 1990)

[114] IRAQI Cry.CODE art.1267(1). (Nicola H. Karam trans., 1990)

[115] *Id.* art. 1270.

an agreement otherwise. This type of property rights is desirable in a situation whereby someone is interested to build on another's property without purchasing or owning it and where no agricultural development is contemplated.

5.2.3 Mugharassa

Under Iraqi Civil Code, *mugharassa* is defined as a contract in which one person gives his or her land to another to plant it with certain specified trees and tends them for a certain period of time.[116] Upon the termination of the contract at the end of a specified term, the trees and land or just the trees will become their common property. The owner is expected to deliver to the cultivator of the land free of any occupancy. The cultivator, unless it has been agreed otherwise, shall then complete the planting within five years from the commencement of the contract. On the failure of the cultivator to complete the contract, the owner has the right to rescind the contract and claim damages. A *mugharassa* is not terminated by the death of either party, but passes to their heirs. This type of property rights could be found useful for a landowner who wishes to exploit treeless land but find it difficult to find the resources to plant trees or the skills and experience to effectively cultivate trees.[117]

5.1.4 Al Musaqat

According to *Mejelle, al musaqat* is defined as a kind of partnership in which trees are found by one, cultivated by another, and that the fruit produced is shared between them. The Iraqi Civil Code adopts this Ottoman legal device, stating that *"al musaqat* is a contract whereby someone get trees and suppose to share the fruits after planting the trees with the person that gave him the trees. This particular right may be for a term, but if it is not set for a term, it shall apply to the fruit produced during that year. In a situation whereby the contracting parties specified a period of time for the trees to grow fruit and they share the fruits within this period, the contract is considered to be valid. A contract of al *musaqat* is terminated by the expiration of its term. The *al musaqat* is not

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116/d. art. 8.

[117] Dan E. Stigall (2008). A Closer Look at Iraqi Property and Tort Law. Louisiana Law Review, Vol 68, Number 3, p.39

terminated by the death of the owner of the trees, nor is it terminated by the death of the cultivator.[118]

5.2.5 Al Muzara'a

This is defined as a contract fat farming whereby the landowner and the cultivator agree to share the resulting crop. Though, it originated from Ottoman theory but the Iraqi Civil Code contains a more elaborate set of rules governing this property right than its Ottoman predecessor. According to the Iraqi Code, at the completion of this contract, the cultivator's share must be designated as common property. The landowner is responsible for the supervision of exploitation of the property, subject to agreement by the parties. The cultivator is responsible for the expenses of the agricultural work, maintenance of the crop, harvesting and preserving the crop, and repair of the tools and minor repairs of agricultural buildings. If the term of the contract has expired before the crop has ripened, then the crop will be left in the field until it has ripened. In such a circumstance, the cultivator must pay rent for the area of the land occupied by his share of the crop. A contract for *al muzara 'a* is not rescinded by the death of the owner of the land or the cultivator because it is inheritable.[119]

5.2.6 Shuf a (Preemption)

This notion is a direct influence from Islamic law. It represents the automatic rights of the first refusal that is granted to individuals who may have an interest in who owns certain property, such as other co-owners or the owners of adjacent property. It represents the limitation on the right to transfer property but only the right to transfer that is considered to be acceptable whereby the interest of the other property owners is involved. *Shufa(pre-emption)* does set a barrier in Islamic law upon the free disposal of milk land. The Iraqi Civil Code defines preemption as a right to appropriate an immovable that has been sold for the purchase price and expenses. This right is given to

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[118]Crosby KT .(2010)The United States and Iraq: Plant Patent Protection and Saving Seed. WashingtonUniversityGlobalStudiesLawReview• Volume 9, Issue 3, p.527

[119]Nader A (2015). Iran's Role in Iraq: Room for Cooperation? RAND Corporation, http://www.rand.org!pubs/perspectives/PE_151.html, p.4

the co-owner of a jointly owned immovable or the owner of a joint servitude over an immovable. The right of preemption under the Iraqi Civil Code is indivisible.[120]

[120] Dan E. Stigall (2008). A Closer Look at Iraqi Property and Tort Law.Louisiana Law Review, Vol 68, Number 3, p.43-45.

CONCLUSION

Real property and real estate are two sides of a single coin as it has been explained in the first chapter of this dissertation. The term real property is always referred to as land and everything that is permanent in nature including structures and minerals. Formation of real property contract includes ownership and sales of real property as well as different kind of legal relationships between the owners of real estate. Most commonly the state always owns the land within its territory because the state is-supreme and sovereign with law-making body (legislature) over the issue of land. Attempt has been made to discuss the historical evolution of real property both in English law of Britain, continental civil law as well as Iraqi civil law. It was found out that all the main concepts ofreal property were invented by Roman law ranging from ownership over possession of land to limited interest in land such as servitudes and mortgages. The research finds out that the reform that took place in the property legislation of 1925, which is named to be the Birkenhead legislation constitutes the backbone behind the English common law system.

Generally, the project finds out that virtually all the concepts of real property under English law are also found under Civil law (Iraqi civil code). They are similar in meaning with each other in spite of the fact that the practice of English common law system is different in many countries as well as the practice of civil law system. It is difficult to classify the countries that practicing civil law system to be the same due to different ways at which they operate. But all the terms and concepts of real property contract under English common law system can as well be found in civil law system with similar meaning but few changes in their practicability. This project examines the comparison of real property under British and Iraqi law and also in continental civil law system in order to know the distinguishing features of real property contract under the both systems of laws but found them to be similar with each other. Lastly, the projects examine the concept of real property under Iraqi civil code, which is the standard as continental civil code system and found it similar with English common law system. The

basic features of real property contract under English law that cannot be found in civil law system are the importance of trusts, settlement and overreaching, which have been explained in the first chapter. These constitute sharp distinctions between the English common law and Iraqi civil law system. The existence of codification under civil law as well constitutes difference between civil law and common law system. All other concepts of real property under English common law are also found in continental civil law as well as Iraqi civil code system maybe as the same name or different name but similar meaning and lightly different in practice.

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