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ording to foreign law, or, in certain international cases, according to our law—of course, the judge must proceed accordingly.

II. If our law does not give such a determination, an attempt must be made to find and establish it from the spirit of our law and from its general principles and the nature of the legal relation. For these are the considerations according to which the judge must proceed generally in the case of gaps in the law of his state.

III. When, however, no decision on the subject can be deduced from these considerations, then the general principle enters into play that, in the case of doubt, the judge must apply the law of his state also to the international relation.

What is said under II and III is, however, what Savigny has challenged. In these cases he wishes to answer the question according to what he considers best from the legislative viewpoint; for he claims that, if, with regard to such relations, our law gives no express rule on whether the judge should apply to them the domestic or the foreign law, the legal relation would have to be evaluated according to its inner needs and be adjudicated according to the law of the place to which

it belongs and is subject by its nature (Savigny, *System VIII*, 27 et. seq., 108 et. seq. [Savigny, *Conflict of Laws*, § 348, p. 27, § 360, p. 89 in 1869 transl.], Schmid, *op. cit.* p. 27). This, however, is merely a legislative principle which the legislator should follow as much as possible. Savigny has not tried to prove that our positive law prescribes this principle to the judge as norm of decision. Or should it be assumed that, because the principle is, legislatively, the right one, it is, likewise, in accord with the sense of our positive law? What matters is not in which country the seat of the relation is located according to the nature of the matter, but where this seat is under the provisions of our positive law; whether our law assumes for certain relations that the seat of the relation involved is presumed to be in a third country, and, therefore, that the relation should be judged according to the laws of that country. But to the extent that our laws have no express determination for that question, it must be resolved according to the considerations stated under II and III. The principle of territoriality of the Middle Ages, which is the basis for subsequent developments of the law, leads to the same conclusion.

KUWAIT: DEVELOPMENT FROM A SEMITRIBAL, SEMICOLONIAL SOCIETY TO DEMOCRACY AND SOVEREIGNTY

This article relates, in a rather general manner, the story of a society which has emerged in little over one decade, without revolution or violence, from a semitribal, semicolonial society to one enjoying full sovereignty, democratic rule, and one of the most stable regimes in the Arab World. Some readers might think that the object in writing it is to paint a one-sided picture of the conditions presently prevailing in Kuwait. Far from this; the author is not unaware of the shortcomings that now exist in Kuwait and that are likely to persist for some years. Most of these shortcomings are due to inexperience and shortage of properly trained personnel.

A good starting point for this account is the 1899 Anglo-Kuwaiti Treaty,¹

¹ See 11 C. U. Aitchison, *Treaties, Engagements and Sanads*. (5th Ed., 1929) 262.

which in brief promised the then Ruler of Kuwait (and his successors in office) protection from outside aggression and non-interference in Kuwait's internal affairs. In consideration thereof the treaty prohibited the Ruler from establishing diplomatic relations with any other foreign power and from alienating any part of his territories to any other foreign state or foreign national without the prior consent of the British government. As a result of this treaty the British government took charge of all matters pertaining to foreign affairs, and the British Representative in Kuwait became in effect the Ruler's Minister of Foreign Affairs. This same treaty led, in time, to the setting up in Kuwait, in 1925, of the British Jurisdiction, quite separate from, but running side by side with the National Jurisdiction. It may be contended by some that as the treaty contained no provision relating to extraterritorial jurisdiction and as the treaty guaranteed noninterference in the internal affairs of Kuwait, the setting up of the British Jurisdiction would be a violation of the express provisions of the treaty. The short answer to this is that the jurisdiction was established with the approval of the Ruler.

First, a brief account may be given of the National Jurisdiction. This embraced all Kuwaiti citizens, nationals of Independent Arab States, nationals of Iran, and citizens of British-protected States in the Persian Gulf. The first contact of the author with this jurisdiction occurred in 1954 upon his appointment as the Registrar of the British Court in Kuwait. At that time this jurisdiction was relatively semitribal: except in personal status matters, which were and still are governed by Islamic Law, there were no written laws, no procedure, and no defined courts. It is true that in theory the *Majellah* (the Ottoman Civil Code, based on Islamic Law)² was the law of the land but in practice the law was the conscience of the official dispensing justice. It is also true that there was then what was known as the Courts Department but at the same time various other departments had their own separate little "Courts." The Police Department for example tried all persons arrested by members of its force and hardly ever bothered to refer them to the Courts. The Public Security Department did the same with persons arrested by members of its force. The same was true of the Customs Department and the Municipality Department; both had their own separate little "Courts."

The British Jurisdiction embraced all other persons in the State. In fact these "other persons" consisted in the main of British subjects, citizens of all nations of the British Commonwealth, mainly Indians and Pakistanis, citizens of the United States, and the few Greek, German, and Italian citizens who came to Kuwait with the oil boom. In rough figures, this Jurisdiction embraced about 30,000 persons (as compared to 250,000 subject to the National Jurisdiction). The British Jurisdiction was administered on English lines. The laws and procedure applied were based on English principles, and the courts functioned like an English court in England, the main difference being the absence of the jury system in Kuwait.

² "Majellah" in Arabic literally means magazine. The only English translation of this work known to the author is by C. A. Hooper, under the title *Civil Code of Palestine and Trans-Jordan*.

The difference between the two jurisdictions was substantial, and yet in many cases they had to work together and did so for many years. This occurred in what were known as mixed cases, that is, cases in which the parties did not belong to the same jurisdiction. In such cases, the nationality of the defendant, not of the plaintiff, determined the court competent to hear the case. In a commercial dispute between a Kuwaiti merchant and an American businessman, if it was the Kuwaiti who took the matter to court, the case went for determination before the British Court; on the other hand, if it was the American who first went to court, the case went before the National Court. Similarly in criminal matters, the court to whose jurisdiction the accused was subject was always the one competent to try the accused for the particular offense, not the court of the complainant.

At the hearing of such cases, an official representing the plaintiff's or complainant's jurisdiction would always attend. The purpose was to ensure that the plaintiff or complainant (who was, so to speak, a stranger to the jurisdiction hearing the case) had a fair chance of presenting his case.

The existence of these two completely separate jurisdictions within one territory naturally led to many interesting legal problems in matters relating to the exercise of jurisdiction, conflict of laws, and other matters. It also resulted in some cases of hardship, as may be illustrated by examples. What is the position of a person having a dual nationality, for example, Lebanese and British? When in Kuwait, will such a person be subject to the National Jurisdiction, the British, or both? How did the British Court or the National Court secure the attendance of witnesses who were not subject to their jurisdiction? In "mixed cases" what law applied? It should be explained that the Kuwait Order, 1953,³ which regulates the exercise of the British Jurisdiction, was silent on all these matters. It may also be of interest to note that these matters are not of mere historical interest. Although Kuwait has now rid itself of this duality in jurisdiction, the same situation still prevails in Bahrain, Qatar, and the Trucial States on the Persian Gulf. The British and National Jurisdictions in these States still run side by side, but in different channels.

The first problem, i.e., that of dual nationality, was resolved in accordance with current diplomatic practice by virtue of which no person may, in a country of which he is a citizen, claim the privilege (if any) of being at the same time a foreigner in such country. In the case under discussion, the person in question when in the Lebanon is, for all intents and purposes, a Lebanese national and none else; his British nationality does not count there. Armed by this practice and the wording of the Kuwait Order, the British courts found no difficulty in rejecting the claim of such persons to be subject to their jurisdiction. The relevant wording in the Kuwait Order was as follows:-

"The powers conferred by this Order shall extend to the persons and matters following:-

³ See Persian Gulf Gazette, issued by H.M. Stationery Office, London, Supplement No. 1 of 1953, page 99.

(1) (i) All persons except the following:—”⁴

There followed a list of the categories of persons excepted, one of which was the nationals of Independent Arab States.

Once a person was a national of an independent Arab State he was automatically “excepted” from the British Jurisdiction regardless of his other nationality. The analogy between this interpretation and diplomatic practice is that both Kuwait and Lebanon are part of the Arab World: a citizen of the one is more or less at home in the other. Therefore to subject the Lebanese national to the Kuwait National Jurisdiction was the natural thing to do.

Another interesting legal problem which was constantly present concerned the power to subpoena witnesses. In almost all cases some of the witnesses required by either the plaintiff or defendant would be persons subject to the other jurisdiction, the court dealing with the dispute lacking the power to enforce their attendance. During the early life of the duality of jurisdiction each party was left to his own resources; it was more or less his concern to bring the witnesses he needed. The ineffectiveness of and injustice inherent in such a practice is not difficult to comprehend. The problem was therefore resolved by the gradual development of a practice by which the attendance of such a witness could be secured by a mere request addressed to the court to which he was subject, not by the issue of a writ of summons.

Cases of hardship arose in mixed cases because of two factors:—

(a) Lack of jurisdiction on the part of the British Court to entertain a cross claim (as distinct from a counterclaim) against a person not subject to its jurisdiction. If K (a Kuwait citizen) sued B (a British subject) the latter could not, in the same suit, bring a cross claim in order to settle, once and for all, all outstanding matters between the two parties; in such a case B had to file in respect of the cross claim a fresh suit in the National Court, a completely different forum. It should be mentioned here that this restriction was intentional; otherwise, it was argued, the jurisdiction of the British Courts would be indirectly extended beyond the limits permitted under the Kuwait Order.

(b) Lack of uniformity in the principles pertaining to conflict of laws in either jurisdiction. In a commercial transaction concluded in Kuwait between a Kuwaiti national and a British subject, what law should govern their contractual relationship, the English law or the Kuwait law? In theory the courts of Kuwait (whether belonging to the Kuwait National or British system) should reach the same conclusion on this point. In practice however, a great deal depended on which of the parties first decided to have recourse to litigation, since each court simply applied the law with which it was familiar. In the British court English law was applied even if the national law was found to be the proper law of the contract, simply because it was difficult, if not impossible, to find what that law was. The National court, on

⁴ Section 8 of the Kuwait Order in Council, 1953.

the other hand, was simply unequipped to look into these legal niceties; it applied Islamic law, or rather its own interpretation thereof, which in practice was the local custom.

Prior to the development of the oil industry in Kuwait, the British Jurisdiction was hardly noticeable. The number of persons subject thereto was so small that it was hardly ever exercised. (In fact prior to 1947 there was not a single trained British judge in the whole of the Persian Gulf Area; thereafter until 1954 there was only one, stationed in Bahrain. Kuwait did not have its separate legally trained judicial officer until 1954.) In some ways the jurisdiction was rather convenient to the Kuwait authorities. Since Kuwait was then a semitribal society and a purely Islamic one, the authorities were relieved to leave the odd matters involving Christians or Hindus for the British jurisdiction. In early days the only foreigners in the country were a few American missionaries and Indian nurses.

With the development of the oil industry, however, the position changed. The development attracted a great number of foreigners, Arab and non-Arab (they now total about one half of the population of Kuwait). This great number of foreigners brought the British Jurisdiction into the limelight:

First, because of the increase in number of non-Arab foreigners the activities of the jurisdiction increased considerably and its courts operated full time. To give an idea of the increase, the number of cases heard in the British Court in 1953 was four; by 1955 the number exceeded two hundred.

Second, there were the expatriate Arabs who in the main came from countries with fairly advanced judicial systems. Although not subject to the British Jurisdiction, their attention focused on it. Some of them saw its advantages and wished to belong to it rather than be left to the tender mercies of the arbitrary National Jurisdiction. Others resented it on nationalistic grounds and saw in it a luxury for a privileged class of foreigners.

The development of the oil industry also brought with it great wealth; this in turn brought education, the radio, the press, and the aeroplane, and Kuwait came into constant contact with the rest of the Arab and Western Worlds. The natural outcome of this was, of course, sophistication and political consciousness in Kuwait.

All this contributed to make the British Jurisdiction unpopular and finally it fell under attack from all quarters:

(a) There were the younger generation, Shaikhs and reformists or nationalists who, being educated and well travelled, felt uneasy about the British Jurisdiction whose existence was a daily reminder of protection and semicolonialism. This group felt uneasy about the National Jurisdiction as well for its many shortcomings, and wanted to see the whole set-up reorganised.

(b) There was the merchant class whose members were quite contented with the national system, under which they occupied a rather

privileged position. This class resented the British Jurisdiction because they felt that it was too weak and rather ineffective as against the sharp adventurous foreigner. It is hardly necessary to explain how impotent an exacting judicial system can be, at least for some time, as against professional crooks. The United States has one of the best examples, namely, the "Causa Nostra." They also resented this jurisdiction because they were not given within it a privileged position and because it brought with it principles foreign to them and not to their liking. One of these principles was the one dealing with contracts in restraint of trade.

(c) There were certain persons in high authority who resented the fact that they were unable in their own country to punish, say, an Indian domestic servant or an American businessman in the same way as they would an Arab national.

Despite this many-sided pressure, the British government felt that it could not give up its jurisdiction before some sort of a modern national legal system was set up in Kuwait, with written laws, a prescribed procedure, and a trained judiciary. This was explained to the Kuwait authorities who proved to be most understanding.

In 1959 one of the most prominent jurists in Egypt, Dr. Sanhoury, was commissioned by the Kuwait government to modernize and bring up to date the Kuwait legal system, or rather to introduce a new legal system. Soon thereafter the British government made a declaration to the effect that as soon as modern Kuwait courts were set up and functioning, the British Jurisdiction would be retroceded. This declaration proved to be most encouraging to the Kuwait authorities. In the space of one year, a skeleton legal system based on Western principles was enacted and published, and by the end of 1960 about 30 trained judges and public prosecutors were recruited from Egypt, Syria, and Jordan. (Kuwait itself unfortunately still has too few professional men.)

This energetic action on the part of the Kuwait authorities led to the promulgation by the British Parliament of the Kuwait (Repealing) Order, 1961.⁵ By virtue of this enactment which came into force on July 1, 1961, all British courts operating in Kuwait were closed and all laws in force in those courts were repealed, with the proviso, however, that such repeal "shall not affect their past operation or the validity or invalidity of anything done or suffered under them. . . ." By virtue of the same legislation "any proceedings . . . pending at that date before those Courts shall be remitted to the Courts of the Ruler of Kuwait at the stage they have then reached, and the records of such cases shall be handed over to the said Ruler's Courts."

One may wonder how the new judicial system is functioning. The new system which is based on the Egyptian system which, in turn, is based on the French system, is of course a great improvement on the old national one. However, it still leaves much to be desired, not because of the lack of ability or integrity of the judiciary but mainly because

⁵ See Persian Gulf Gazette, Supplement No. 33, page 3.

of the circumstances under which the system was conceived. As indicated, it did not develop as a natural growth from either of the two systems previously in existence; it was borrowed from the outside and implanted in a very short time. This wholesale and hasty introduction of a new legal system with unfamiliar and rather complicated principles led, naturally to a species of "indigestion" which resulted in hostility on the part of various sections of the community. The clerical and administrative staff in the courts had great difficulty in coping with the day-to-day work which arose from the introduction of the system. The police resented the introduction of the public prosecutor's office and more particularly the exclusive power given to this office to investigate felonies; they regarded this as a serious trespass on their hitherto uncontested powers. The need for an adequate number of qualified lawyers became pressing but it was simply impossible to satisfy it. Another shortcoming of the new system is the short term of office of members of the judiciary. The majority of the judiciary have come from Egypt for a term of two years, which seems most wasteful. Taking into account the time that a judge needs to become acquainted with a new place, a partially new judicial system, and a new mentality, or rather mentalities (Kuwait is one of the most cosmopolitan states in the world!) and the fact that four months of that term are normally spent on annual vacations, it should not be difficult to understand the low rate of productivity of the new courts, an ever-present complaint on the part of the public. It may be apprehended that this low rate of productivity is bound to persist until Kuwait builds up a "permanent" judiciary, or doubles the number of its present one, which by normal standards is already adequately staffed. A third handicap in the system is that the judges are not concerned with the execution of the judgments rendered by them; these are left to be executed by the "Execution Department," whose officers are in position, if they wish, to render a perfectly good judgment valueless to the judgment creditor.

As indicated above, the British Jurisdiction was an outcome of the 1899 Treaty.⁶ The attack on that jurisdiction was therefore bound to focus attention on the Treaty; in fact all the younger elements, in attacking the British Jurisdiction, had their eyes on the Treaty itself, or rather its political aspect. Accordingly, discussions for the revision or repeal of the Treaty moved at the same speed as those dealing with the British Jurisdiction. From these latter discussions, it became obvious to all concerned that the 1899 Treaty was out of date and unacceptable to Kuwait public opinion, which had become conscious of the rather strong and special position that their country occupied in the Arab world, and indeed the world at large.

Accordingly on June 19, 1961, a new Treaty of Friendship⁷ was signed between Kuwait and Britain under which the 1899 Treaty was abrogated; that same day was declared as the Kuwait National Day.

Immediately upon the repeal of the 1899 Treaty, General Qassim, then

⁶ *Supra*, note 1.

⁷ See Supplement to "Kuwait al-Yaum" (the official gazette of the State of Kuwait) No. 331 of the 19th of June, 1961.

the President of Iraq, made public his territorial claim to the State of Kuwait. General Qassim based this claim on the fact that during the Ottoman regime Kuwait constituted, in theory, part of the Liwa (district) of Basra. (This is old history now. Iraq has since recognised Kuwait as a fully sovereign state.)⁸

Kuwait resented Qassim's claim and was prepared to defend its newly-won independence and territorial integrity by any and all means. This was true not only of the Government, but of all sections of the people. In fact the Kuwait government and people were never more united on any issue. As a first step towards this end Kuwait strove to assert its international identity. The Kuwait authorities therefore looked naturally to two organisations: the Arab League and the United Nations.

The admission of Kuwait to the former was easy: Qassim's regime in Iraq was the most detested in the Middle East and no one, whether an Arab nationalist or otherwise, wanted to see this regime spreading an inch outside Iraq. In fact everybody in the Arab World wanted it removed from Iraq itself.

There was great satisfaction in Kuwait over its admission as a fully sovereign state in the Arab League. Soon after that diplomatic victory, Kuwait established what is known as the Kuwait Arab Development Fund.⁹ The object of this Fund is the financing of development projects in other Arab countries. Originally the capital of this fund was £50 million or \$140 million. Early in 1963 the capital of this fund was doubled.¹⁰ This fund has already made substantial loans to Algeria, the Sudan, Jordan, Tunisia, and the United Arab Republic.

Whether this fund was established in gratitude for the political support given to Kuwait by the Arab States or otherwise, is immaterial. The fact is that it was done and that Kuwait was the first oil-producing Arab country to do so. This no doubt shows maturity on the part of the Kuwait authorities. It is to their credit that they realize that it is unwise or unfair for one to live in an isolated oasis surrounded by hungry and thirsty neighbors.

Admission to the United Nations did not prove so easy, entirely because of the use of the veto by Russia.¹¹ In justification, Russia accepted Iraq's allegations that Kuwait was no more than an autocracy with a puppet government propped up by British arms. However, it was common knowledge that the use of this veto was only a friendly gesture towards President Qassim who was at that time flirting with the Iraqi Communist Party. It is interesting to note that as soon as the regime of Qassim fell and the anti-Communist Baathists took over power, Russia withdrew her veto and Kuwait was admitted to the United Nations. This occurred on May 14, 1963.¹²

⁸ See Decree No. 35 in the Supplement to "Kuwait al-Yaum" 360 of January 7, 1962.

⁹ See Decree No. 35 in the Supplement to "Kuwait al-Yaum" 360, 7.1.62.

¹⁰ See Law No. 9/1963 in Supplement to "Kuwait al-Yaum" 423, 14.IV.63.

¹¹ See Official Record of 985th Security Council Meeting on 30.XI.61.

¹² See the 3-Monthly Economic Review of the Economist Intelligence Unit, No. 14 of June 1963, page 13.

The use of the Russian veto proved, in the writer's opinion, to be healthy for Kuwait. It expedited the introduction of democratic institutions. Anxious to rebut the Iraqi and Russian allegations, the Ruler of Kuwait set in motion the machinery for the confirmation of his position and that of his government through popular elections and this, in turn, set in motion the machinery for the introduction of constitutional government.

Kuwait was rather fortunate to have at this time this particular Ruler, Shaikh Abdulla al-Salim As-Sabah. With a different person things might not have run so smoothly. The Ruler had no reason to fear either free elections or the Western conception of democracy. His door had always been open to any citizen. And on all important issues he always consulted the heads of the Kuwaiti families. Moreover, unlike nearly all hereditary rulers in the Arab World, he did not treat the state's revenue as his personal property. Ever since his succession to power, he has declared and acted as though that revenue was held by him in trust for his people. I am sure that few have neither read nor heard about the 100% free medical and educational services that exist in Kuwait, and the generous national assistance and old age pensions payable to Kuwaitis, and about the huge sums of money that are being spent annually on the development, modernization, and industrialization of Kuwait.

At the end of 1961, that is more or less contemporaneously with the Russian veto, free elections for a Constituent Assembly were held.¹³ The use of the word free is intentional: the elections were in fact as free as anywhere in the Western World, and there was no attempt on the part of the authorities to influence their outcome. As a result of this step, a small but effective minority of the young nationalists or Reformists was elected.

The Constituent Assembly was a legislative body whose main duty was to prepare within one year a Constitution for modern Kuwait. A draft Constitution was prepared in due course, and when it leaked to the Press, all foreign observers felt that it was too advanced for Kuwait and thought that the leak presumably was a political manoeuvre by the Reformists to tie the Government's hand. It was also thought by these observers that the Constitution would be toned down considerably by either the authorities or the Ruler himself. In fact all proved to be wrong. The leakage was the result of an honest mistake, not a political manoeuvre; and when the draft was presented to the Ruler for signature, not one word was altered.

It may well be asked why foreign observers thought the Constitution to be too advanced and might prove unacceptable to the Kuwait authorities. The reason is the startling difference between the form of government prevailing in Kuwait up to then, and the form of government envisaged under the Constitution. Up to that time the authority of the Ruler was in both theory and practice absolute and no one could question his word; all government departments were headed by members of the ruling family and only members of this family qualified to head these departments;

¹³ See Law No. 25 of 1961 "Kuwait al-Yaum" No. 343, 10.IX.61.

their authority in these departments was for all practical purposes also unquestionable.

Under the present Constitution,¹⁴ however, the Ruler is in effect a Constitutional monarch; and the authority of the other members of the ruling family who occupy ministerial posts is no more than that of an ordinary Minister in a Western democracy. This has been achieved by the introduction of the well-known parliamentary procedure known as the "vote of no confidence." Under Article 101 of the Constitution, "if the National Assembly withdraws its confidence from a minister he shall be considered as having retired from his post." It is interesting to note in this connection that this power is exercisable only against the individual Minister, not against the Government as a collective body.

The Kuwait Constitution, which is based on the "separation and co-operation" of powers, the Executive, Legislative, and Judiciary, was signed by the Ruler on November 11, 1962. But it did not come into force until January 29, 1963. The intervening period was used to prepare for elections in the National Assembly.¹⁵ Under the Constitution the legislative power is vested in this Assembly which consists of 50 elected members plus those Ministers, if any, who are appointed from outside the Assembly. Any male Kuwaiti who is not less than 21 years of age is eligible to vote and any male Kuwaiti who is literate and not less than 30 years of age is eligible for nomination as a candidate to the National Assembly.

Having reviewed the factors that have expedited the establishment of democratic rule in Kuwait and the steps through which this process has passed, this paper may be brought to a close by an appreciation of how this infant democracy seems to be actually progressing.

The elections for the National Assembly seemed to satisfy most except, of course, the unsuccessful candidates. The young nationalists who won 12 seats were delighted: this, they felt, was a good start. The Government were also pleased because they had secured, quite freely, over 75% of the elected seats. And all well-wishers of Kuwait were pleased; Kuwait, they felt, was now assured of a stable and popular system of government for many years to come: the young nationalists or Reformists are not too strong to cause a dangerous showdown with the government, but strong enough to keep that government on its toes.

The government formed after these elections had four Ministers (out of a total of sixteen) who were not members of the ruling family. This number has already grown to eight, occupying the portfolios of Justice, Public Health, Commerce, Social Affairs and Labor, Electricity and Water, Telecommunications, Awqaf (Religious Trusts), and Cabinet Affairs. The latter is the Premier's right-hand man on all affairs of state.¹⁶

The Kuwait National Assembly is in its second year now. Common

¹⁴ See "Kuwait al-Yaum" Special Issue of November 12, 1962.

¹⁵ See Decree No. 7 of 1963, "Kuwait al-Yaum" 404, 25.XI.62.

¹⁶ See Amiri Decrees in "Kuwait al-Yaum" 469, 15.III.64 and 472, 5.IV.64.

sense, reason, and moderation seem to be the keynotes. Everyone seems anxious that this experiment in democracy should work and work well too, a most welcome development in a region like the Middle East.

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PROSPECTIVE OVERRULING OF COURT DECISIONS IN GERMANY AND THE UNITED STATES

In common law countries, the holdings of prior judicial decisions have the rank of "law"; hence, a decision overruling a previous case changes the "law" retroactively, unless the overruling were to be limited to an announcement that the disapproved precedent would not be followed in future cases. That a similar problem can arise even in a codified legal system where, in theory, courts do not make "law," is instructively shown by a recent German case.

The case involved a malpractice action against an architect. The legal classification of a contract, by which an architect undertakes to erect a building, has been in doubt under German law for some time. Early cases held that such an arrangement was a contract to render services (*Dienstvertrag*) within the meaning of §§ 611-630 of the Civil Code.¹ In a 1959 decision, however, the Federal Court indicated that, usually, §§ 631-651 of the Civil Code should govern.² The latter sections regulate contracts, by which an entrepreneur (*Unternehmer*) promises to produce or manufacture certain goods or to bring about certain results (*Werkvertrag*).³

One of the differences in the Code's provisions governing the two types of contracts relates to the statute of limitations: claims for damages arising out of a contract classified as a "*Werkvertrag*" are subject to short periods of limitation pursuant to § 638 of the Civil Code;⁴ on the other hand, the regular statute of limitations of 30 years⁵ applies to the "*Dienstvertrag*."

In the case mentioned above, defendant pleaded the short statute of limitations of § 638, which, if applicable, would bar the suit. In reply, plaintiff invoked the Introductory Law to the Civil Code, which contains provisions governing the transition from the pre-Code law to the Code. Specifically, plaintiff referred to Art. 169, par. 2, of the Introductory Law concerning changes in the period of limitations: if the limitation provided by the Code is shorter than in the prior law, then the shorter period would begin to

¹ RGZ 86, 75; 137, 83; JW 36, 3116. See Glaser, "Architekt und Bauherr," MDR 58, 637.

² NJW 1960, 431 (Judgment of the Federal Court of November 26, 1959. This is the court of last resort in the German judicial hierarchy, except in constitutional cases. The case did not involve the statute of limitations.)

³ § 631 BGB.

⁴ Claims based on defective workmanship must be brought within six months; if such claim relates to work performed on real property or on buildings, the period of limitation is one or five years, respectively.

⁵ § 195 BGB.